THE CONFRONTATION OVER IRAN'S NUCLEAR PROGRAMME: NATURE, SCOPE, AND LEGALITY

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To my Dad, Mum, and Wife

ABSTRACT

The international nuclear proliferation regime generally and the Nuclear Non-Proliferation Treaty (NPT) in particular were created to prevent nuclear war and promote global security. However, it can be argued that the NPT has become as much a political instrument by which major states advance their national interests as a legal document that determines and regulates the rights and obligations of states, especially with regard to nuclear energy.

Seen against that background, this thesis seeks to provide a legal analysis of the NPT. This analysis is carried out with regard to confrontation over Iran's nuclear programme, where both sides to the dispute – the coalition and Iran – have used international legal argumentations when attempting to legitimize their positions and actions.

Therefore, this thesis begins by providing introduction and literature reviews. It discusses the trajectories of the Iran-coalition negotiations and the necessity of rapprochement with Iran. This discussion begins with a brief historical review of Iran's nuclear programme and its nuclear ambitions. Then, it attempts to answer this project's research questions by providing legal interpretation of the NPT's principles and scrutinizing its text and scope according to the interpretive rules of Article 31 and 32 of the Vienna Convention of Law of Treaties. It does so from the standpoint of doctrinal legal research, employing qualitative approaches to analyse law in the specific area of the nuclear non-proliferation regime. The discussion highlights weaknesses and omissions within the NPT, divergences in interpreting the legal scope of the principles of the NPT and the absence of agreed legal standards and mechanisms that are applicable to nuclear proliferation disputes. The thesis then moves on, through Chapters 5-8, to discuss Iran's compliance with the NPT's obligations and the responses of the coalition to Iran's nuclear activities.

It is strongly recommended that states should engage in discussions on establishing a new nuclear proliferation treaty that cover the gaps in the existing NPT. It also indicates the necessity for establishing legal standards and mechanisms under which the states concerned can determine nuclear non-compliance and what the non-compliant state must do to satisfy its nuclear obligations.

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- ICTY Appeals Chamber Decision on the *Tadic* Jurisdictional Motion, Prosecutor v. *Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, case No: IT-94-1-AR72, 2 October 1995.
- *Kadi* and *Al Barakaat* v Council of the European Union and Commission of the European communities, C-402/05 P; C-415/05 P [2008] ECR I-0000 ('Kadi and Al Barakaat').
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- Territorial Dispute (Libyan Arab Jamahiriya/Chad), 03 February 1994, Judgment, ICJ Reports 1994.
- Western Sahara, Advisory Opinion, 1.C.J. Reports 1975, p. 12.

ABBREVIATIONS

ABM	Anti-Ballistic Missile
AEOI	Atomic Energy Organisation of Iran
ARSIWA	Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral International Treaty
BOG	Board of Governors
BWC	Biological Weapons Convention
CARICOM	Caribbean Community
CIA	American Intelligence Agency
CIA	Central Intelligence Agency
CISADA	Comprehensive Iran Sanctions, Accountability, and Divestment Act
CNS	James Martin Centre for Nonproliferation Studies
CSA	Comprehensive Safeguards Agreement
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CWC	Chemical Weapons Convention
DOD	The US Department of Defense
DPRK	North Korea
ENDC	The Eighteen-Nation Disarmament Committee
EU-3	France, German, and United Kingdom
FEP	Fuel Enrichment Plant
FFEP	Fordow Fuel Enrichment Plant
GATS	General Agreement on trade and Services
GATT	General Agreement on Tariff and Trade
GCC	Gulf Cooperation Council
HEU	Highly Enriched Uranium
ICAN	International Campaign to Abolish Nuclear Weapons
ICBM	Intercontinental Ballistic Missile
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

INF	Intermediate Range Nuclear Forces Treaty
IRGC	Islamic Revolutionary Guards Corps
ISA	Iran sanctions Act
ISA	Iran Sanctions Act of 1996
JPA	Joint Plan Action
LOW	Launch-On-Warning
MI5	Military Intelligence, Section 5 or the British Secret Service Agency
NAC	New Agenda Coalition
NCRI	National Council of Resistance of Iran
NPT	Nuclear Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
NSTRI	Nuclear Science & Technology Research Institute
NWS	Nuclear Weapons States
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean
P5	Five Permanent Member of the Security Council
P5+1	Five Permanent Member of the Security Council + Germany
PFEP	Pilot Fuel Enrichment Plant
PMD	Possible Military Dimensions
SLC	State-Level Concept
START	Strategic Arms Reduction Treaty
TNRC	Tehran Nuclear Research Centre
TRR	Tehran Research Reactor
UE	European Union
UF6	Uranium Hexafluoride
UK	United Kingdom
UNGA	United Nations General Assembly
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSC	United Nations Security Council
USA	United States of America
USSR	The Soviet Union
VCDNP	Vienna Centre for Disarmament & Non-Proliferation

VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WMD	Weapons of Mass of Destruction
WTO	World Trade Organization

Chapter One: Introduction

This study has arisen from a discourse about the Nuclear Non-Proliferation Treaty (NPT) -- the treaty that is the core of the international nuclear non-proliferation regime.[1] From a legal point of view, this study seeks to analyse and critically reflect on the principles and objectives of this treaty with particular reference to the historic and continuing circumstances surrounding the Iranian nuclear case. It argues that the current NPT is no longer fit for purpose and is incapable of dealing with challenges that already exist or are likely to occur in the future. Therefore, there is an urgent need for the international community to become involved in discussions about creating a New Nuclear Non-proliferation Treaty (NNPT).

This introductory chapter provides a preamble to this thesis, discusses the central aim of this project inquiry, outlines the research questions and methodology employed, and provides an overview of the structure of this study.

1.1. Preamble

The threat posed by the proliferation and potential use of nuclear weapons has been central to the international community's concerns since the creation and first deployment of these weapons against Japan in 1945. In order to regulate the use of these weapons and in its efforts to eliminate them, the international community has established many international, multilateral and bilateral treaties and agreements.[2]

[1] The international nuclear non-proliferation regime is collectively comprised of international treaties and agreements in the field of nuclear proliferation and disarmament; Steven E Miller, 'Nuclear Collisions: Discord, Reform & the Nuclear Non-proliferation Regime' in Steven E Miller, *Nuclear Collisions: Discord, Reform & the Nuclear Non-proliferation Regime*, Essay by Steven E Miller Responses by Wael Al-Assad, Jayantha Dhanapala, C. Raja Mohan, and Ta Minh Tuan (American Academy of Arts and Sciences 2012) 6.

[2] Such as Outer Space Treaty (1967), Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, with the precise finding place (1971), Anti-Ballistic Missile Treaty (1972) or (ABM) Treaty, Strategic Arms Limitation Treaty: SALT (I) 1972 and SALT (II) 1979, Intermediate Range Nuclear Forces (INF) Treaty (1987), Comprehensive Test Ban Treaty (CTBT), Strategic Arms Reduction Treaty (START I) 1991, (START II) 1993, Strategic Offensive Reduction Treaty (SORT, 2002), Regional Nuclear Weapons Free Zones (NWFZs).

The NPT is the core of this regime. Established in 1968 and coming into force in 1970, it has three legal norms which are known as the three pillars of the treaty.[3] These are: the nuclear non-proliferation obligation,[4] the nuclear disarmament obligation[5] and the right to access nuclear energy technologies for peaceful purposes.[6] In general, the treaty is about regulating the use of nuclear energy and eliminating nuclear weapons by preventing further proliferation and achieving nuclear disarmament.[7] In other words, this treaty is intended to regulate the dual-use of nuclear energy.[8]

Nuclear energy is the most powerful energy source available on Earth and is seen in many quarters as offering extraordinary and remarkable benefits. However, besides the inherent safety problems, the danger of this energy emanates from its multi-use capabilities. Unarguably, this energy can be used for peaceful purposes in the fields of medicine, heat, electricity and technology; but it is also used for military purposes in relation to making nuclear bombs and arming nuclear missiles.[9] It is always possible, therefore, that the act of obtaining nuclear technologies and facilities for peaceful purposes could be the first step towards developing nuclear weapons, since precisely the same technologies and facilities are involved.[10]

This concern has made the Iranian nuclear programme the subject of intensive inspections, discussions and international negotiations for many years. However, this concern took on new intensity in 2002 when the National Council of Resistance of Iran (NCRI) revealed that the Iranian government had achieved

[3] Chamundeeswari Kuppuswamy, 'Is the Nuclear Non-Proliferation Treaty Shaking at its Foundation? Stock Taking after the 2005 NPT Review Conference' (2006) 11 (1) Journal of Conflict & Security Law 141, 141.

[4] NPT, Art. I, II, and III.

[5] NPT, Art. VI.

[6] NPT, Art. IV.

[7] Kuppuswamy (n 3) 141.

[8] Daniel H Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (OUP 2011) 34.

[9] For an excellent illustration see; Joseph Cirincione, *Bomb scare: The History and Future of Nuclear* Weapons (Columbia university Press 2008) 1-14; Lawrence Scheinman, 'Article IV of the NPT: Background, Problems, some Prospects' (Sweden 7 June 2004) WMD Commission <http://www.wmdcommission.org/files/No5.pdf> accessed 20 April 2015.

[10] Joseph M Siracusa, *Nuclear Weapons: A Very Short Introduction* (OUP 2008) 3-10.

advanced development at two sites – Natanz and Arak – which could both be regarded as being designed to produce materials for nuclear bombs.[11]

Since then, Iran has faced intensive scrutiny, with on-site inspections of its nuclear facilities and activities by the International Atomic Energy Agency (IAEA). Although the Agency has been given wide access to the Iranian nuclear sites,[12] it refused and rejected Iran's explanation and the evidence that it provided in order to justify its nuclear activities.[13] In addition, it has reported Iran several times as being noncompliant with its nuclear obligations under its Safeguards Agreement with the IAEA and the NPT.[14]

The most notable report issued by the Agency was in November 2011. In this report, the Agency presented detailed information indicating that Iran had carried out 'activities that are relevant to the development of a nuclear explosive device'.[15] The allegations contained in this sharply worded report are known as Possible Military Dimensions (PMD) of Iran's nuclear programme.[16] Ironically, the data in this report were collected not first hand, but from third party sources, particularly from national intelligence agencies.[17]

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[11] Sharon Squassoni, 'Iran's Nuclear Programme: Recent Developments' in Milton M Schwartz (ed), *Iran: Political Issues, Nuclear Capabilities, and Missile Range* (Nova Sciences Publishers 2006) 63.

[12] Peter Jenkins, 'Reading the Runes in the Latest Report on Iran's Nuclear Program' (20 February 2015) Lobelog Foreign Policy <http://www.lobelog.com/reading-the-runes-in-the-latest-report-on-irans-nuclear-program/> accessed 20 February 2015.

[13] Mohammed Sahimi, 'Has Iran Violated its Nuclear Safeguards Obligations' (Public Broadcasting Service 27 Sep 2009) <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2009/09/has-iran-violated-its-nuclear-safeguards-obligations.html#ixzz25PsV9P2t> accessed 09 December 2012; Daniel H Joyner, 'Iran and the bomb: The legal standards of the IAEA' (30 October 2012) Bulletin of the Atomic Scientists <http://thebulletin.org/iran-and-bomb-legal-standards-iaea-0> accessed 24 February 2015.

[14] Many reports and resolutions were issued by the IAEA in regards to Iran's nuclear programme. For further details of IAEA reports, see; IAEA, 'IAEA and Iran – IAEA Reports' <https://www.iaea.org/newscenter/focus/iran/iaea-and-iran-iaea-reports> accessed 26 May 2015. For further information on IAEA resolutions, see; IAEA, 'IAEA and Iran – IAEA Resolutions' <https://www.iaea.org/newscenter/focus/iran/iaea-and-iran-iaea-resolutions> accessed 26 May 2015.

[15] IAEA, GOV/2011/65, 08 November 2011, para 43.

[16] ibid Section G and the Annex.

[17] ibid Annex para 13;Yousaf Butt, 'Eight Ways You're Wrong About Iran's Nuclear Program' (17 January 2014) The National Interest <http://nationalinterest.org/commentary/eight-ways-

The confrontation over Iran's nuclear programme increasingly and rapidly deteriorated to involve the United Nations Security Council (UNSC) and many states, particularly China, France, Germany, Russia, the United States of America (USA), and the United Kingdom (UK). This group of states and international organizations has formed a coalition and is the main player in negotiating with Iran regarding its nuclear programme.[18]

The involvement of the coalition was due to the transfer of Iran's nuclear dossier to the UNSC by the IAEA in 2006 on the grounds of Iran's failures and breaches of its international nuclear obligations.[19]

Transferring the Iranian nuclear dossier to the UNSC was a legal method of allowing the UNSC to take the appropriate measures against Iran[20] in order to contain and change Iran's nuclear behaviour. Thus, the UNSC, under the authority of maintaining international peace and security that is coded in Chapter VII of the United Nations Charter (UNC), adopted its first resolution with regards to Iran in 2006. This resolution obliges Iran to comply with all IAEA requests, otherwise its non-compliance would lead the Council to use its legal mandates of Article 41 and impose sanctions if it deemed them necessary.[21]

For its part, Iran has insisted, and still insists, that its nuclear programme is for peaceful purposes only and that there is no intention to possess or develop a nuclear arsenal.[22] In line with that position, it argues that its nuclear activities are

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youre-wrong-about-irans-nuclear-program-9723?page=3> accessed 05 February 2014; Gareth Porter, 'The Iran Nuclear "Alleged Studies" Documents: The Evidence of Fraud' (Volume XVII, Number 4, Winter 2010) Middle East Policy Centre <http://mepc.org/journal/middle-east-policy-archives/iran-nuclear-alleged-studies-documents?print> accessed 26 February 2015; George Jahn, 'UN nuke Agency's Iran probe driven by US-led intel' (24 May 2013) AP The Big Story <http://bigstory.ap.org/article/un-nuke-Agencys-iran-probe-driven-us-led-intel> accessed 02 February 2015.

[18] For the sake of clarification, instead of naming all the states and organisations that were involved in the negotiations with Iran at any particular stage, the researcher will refer to this group as 'the coalition' unless there is a need to name a particular state or organization.

[19] IAEA, GOV/2006/14, 04 February 2006, para (g).

[20] ibid para (g).

[21] UNSC, S/RES/1696, 31 July 2006, para 8.

[22] IAEA, INFCIRC/873, 17 March 2015, para 1.

within the legal limits of its international nuclear obligations and the scope of its safeguard agreements.[23]

Iranian insistence and its non-compliance with the UNSC's demands has led the latter to use its mandates under Article 41 and impose target sanctions aimed at limiting the capability of the Iranian government to further its nuclear programme.[24]

In implementing these resolutions, many states, collectively through international organizations such as the European Union (EU) and individually as in the case of the USA, have adopted intensive autonomous sanctions and measures against Iran.[25] The objective was to coerce Iran into halting its nuclear activities, specifically uranium enrichment, the nuclear fuel cycle, and Research and Development (R&D) activities.[26]

It may be argued that these sanctions and measures have exceeded the legal limits and its proposed targets.[27] Generally, they might have partly achieved their aims of isolating Iran and inflicting some damage to its economy.[28]

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[23] ibid.

[24] These resolutions are: UNSC, S/RES/1696 (2006), S/RES/1737 (2006), S/RES/1747 (2007), S/RES/1803 (2008), S/RES/1835 (2008), S/RES/1929 (2010), S/RES/1984 (2011), S/RES/2049 (2012), S/RES/2105 (2013), S/RES/2159 (2014), and S/RES/2231(2015).

[25] US Department of States, 'Fact Sheet: Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA)' (23 May 2011) USA Department of State <http://www.state.gov/e/eb/esc/iransanctions/docs/160710.htm#> accessed 09 October 2013; EU, EU Res 2012/35/CFSP (23 January 2012); Joy Gordon, 'Crippling Iran: The U.N. Security Council and the Tactic of Deliberate Ambiguity' (2013) 44 Georgetown Journal of International Law 973 982-83.

[26] This objective can be distilled from the IAEA and UNSC reports and resolutions; see (n 14 and 24).

[27] Pierre-Emmanuel Dupont, 'Compliance with Treaties in the Context of Nuclear Non-proliferation: Assessing Claims in the Case of Iran' (Summer 2014) 19 (2) Journal of Conflict and Security Law 161; Daniel H Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (09 Sep2011) Jurist <http://jurist.org/forum/2011/11/dan-joyner-iaea-report.php> accessed 08 Jun 2015.

[28] Glenn Geenwald, 'Iran sanctions now causing food insecurity, mass suffering' (07 October 2012) The Guardian <http://www.theguardian.com/commentisfree/2012/oct/07/iran-santions-suffering> accessed 08 October 2013; Mohammed Younis 'Iranians Feel Bite of Sanctions, Blame USA, Not Own Leaders: Most support nuclear program despite sanctions' (07 February 2013) Gallup <http://www.gallup.com/poll/160358/iranians-feel-bite-sanctions-blame-not-own-leaders.aspx> accessed 09 April 2015; Max Fisher, 'New Poll: Iranians Mostly Blame the USA for Sanctions, Still Want a Nuclear Program' (08 February 2013) The Washington Post <http://www.washingtonpost.com/blogs/worldviews/wp/2013/02/08/new-poll-iranians-mostly-blame-the-u-s-for-sanctions-still-want-a-nuclear-program/> accessed 10 October 2013.

However, they have not succeeded in forcing Iran to halt its nuclear activities.[29] Rather, it could be argued that they have encouraged it to accelerate these activities and increase its nuclear enrichment percentages and uranium stockpile as an assertion of its legal rights under international law.[30]

Alongside these coercive policies, there have been considerable diplomatic activities taking place to try to achieve a breakthrough in the Iranian nuclear impasse and find a peaceful solution. Negotiations with Iran were initially launched by the 'EU-3' (France, Germany and the UK) in 2003,[31] and they were still running up to the date of writing this thesis. At some stage in these negotiations, China, Russia, and the USA joined the negotiations to become what is called 'P5+1'.[32] The negotiations are centred on the requirement that Iran suspends all its nuclear activities, particularly uranium enrichment and the fuel cycle, in order to ease the imposed sanctions and measures.[33]

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[29] Jasmine Ramsey, 'Iran's Nuclear Activities Go on despite Sanctions' (27 March 2013) Lobe Log Foreign Policy <http://www.lobelog.com/irans-nuclear-activities-go-on-despite-sanctions/> accessed 24 November 2013; Hossein Mousavian, 'It was Not Sanctions that Brought Iran to the Table' (19 November 2013) Financial Times <http://www.ft.com/cms/s/0/8d9631f4-510c-11e3-b499-00144feabdc0.html#axzz2orksz1pt> accessed 19 November 2013; Trita Parsi, 'No, Sanctions Didn't Force Iran to Make a Deal' (14 may 2014) Foreign Policy <http://foreignpolicy.com/2014/05/14/no-sanctions-didnt-force-iran-to-make-a-deal/> accessed 07 April 2015; Farideh Farhi, 'NIAC Report Reveals Disconnect Between Iran Sanctions Goals and Results' (28 March 2013) Lobe Log Foreign Policy <http://www.lobelog.com/niac-report-reveals-disconnect-between-iran-sanctions-goals-and-results/ > accessed 24 November 2013.

[30] Gorden Friedrichs, *Smart Security Council? Analysing the Effectiveness of Targeted Sanctions* (Anchor Academic Publishing 2013); Marina Mancini, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI) Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015; Marco Roscini, in a Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI) Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015; Linos-Alexander Siciliano, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OXP 2010); Mikael Eriksson, *Targeting Peace: Understanding UN and EU Targeted Sanctions* (Ashgate Publishing Limited 2011).

[31] Marco Overhaus, 'Analysis: European Diplomacy and the Conflict over Iran's Nuclear Program' (19 July 2007) Deutsche-Aussenpolitik <http://www.deutsche-aussenpolitik.de/resources/dossiers/iran06/Dossier-Iran-Introduction.pdf> accessed 28 October 2008.

[32] Michael Singh, 'Iran Nuclear Talks: A Brief History and the Road Ahead' (No 15, October 2013) The Washington Institute for Near East Policy, Policy Note; Monika Tocha, 'The EU and Iran's Nuclear Programme: Testing the Limits of Coercive Diplomacy' (2009) EU Diplomacy Paper <http://aei.pitt.edu/10143/1/EDP_1_2009_Tocha.pdf> accessed 03 May 2015.

[33] Paul K Kerr, 'Iran Nuclear Programme: Status' (17 October 2012) Congressional Research Service <https://www.fas.org/sgp/crs/nuke/RL34544.pdf> accessed 20 June 2014.

1.2. Aim

Dealing with the production of nuclear weapons and nuclear energy is one of the most complicated issues facing the international community. The complexity stems from three main elements: the world's difficulty in managing, organising, and containing the usages of nuclear energy due to its likely applications in the civilian and military fields;[34] the dual applications that trigger the desire of nations to obtain this energy for internal and external boosting of their influence and for security;[35] and the deficiencies and omissions in the rules of the international nuclear non-proliferation regime to prevent the proliferation of nuclear weapons.[36]

Iran, like many other states, wishes to develop nuclear technologies. However, regardless of its motives, the situation with regards to Iranian nuclear capabilities is widely regarded as difficult to understand.[37] This difficulty derives from various aspects that are related to failures in the applicable rules of law; and at certain stages, to the policies of the states involved in the process.

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[34] Elli Louka, *Nuclear Weapons, Justice and the Law* (Edward Elgar 2011); Hina Pandey, 'atoms for Peace: Balancing the Promotion of Nuclear Energy and Non-Proliferation' (Summer 2011) 6 (2) Air Power Journal 25; Yael Ronen, *The Iran Nuclear Issue* (Hart 2010); Barry B Brook, 'Why We Should Say *Yes* to Nuclear Power' in Ian Lowe, and Barry B Brook (eds), *Why vs Why: Nuclear power* (Pantera Press Pty Ltd 2010).

[35] Etel Solingen, *Nuclear Logics Contrasting Paths in East Asia & the Middle East* (Princeton University Press 2007); Saira Khan, *Nuclear Weapons and Conflict Transformation: the Case of India and Pakistan* (Routledge 2009); Kurt M Campbell, 'Reconsidering a Nuclear Future: Why Countries Might Cross Over to the Other Side' in Kurt M Campbell, Robert J Einhorn, and Mitchell B Reiss (eds), *The Nuclear Tipping Point: Why states Reconsider their Nuclear Choices* (Brookings Institution Press 2004); Scott D Sagan, 'Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb' in Michael E Brown, Owen R Cote Jr, Sean M Lynn-Jones, and Steven E Miller (eds), *New Global Dangers Changing Dimensions of International Security* (the MIT Press 2004).

[36] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass destruction* (OUP 2009); John Burroughs, 'The Legal Framework for Non-Use and Elimination of Nuclear Weapons' (February 2006) Lawyers' Committee on Nuclear Policy <http://lcnp.org/disarmament/Gpeacebrfpaper.pdf> accessed 25 June 2009.

[37] Patrick Disney, 'Kicking the Hornets' Nets: Iran's Nuclear Ambivalence and the West's Counterproductive Non-proliferation Policies' (12 June 2012) 19 (2) Non-proliferation Review 159; Clifton W Sherrill, 'Why Iran wants the bomb and what it means for US Policy' (March 2012) 19 (1) Non-proliferation Review 31; Volker Perthes, 'Ambition and Fear: Iran's Foreign Policy and Nuclear Programme' (June-July 2010) 52 (3) Survival 95; Shahram Chubin, 'Understanding Iran's Nuclear Ambitions' in Patrick M Cronin, (ed), *Double Trouble: Iran and North Korea as Challenges to International Security* (Praeger security International) 2008.

Against this background, therefore, the central aim of this research inquiry is to investigate and examine the NPT with regards to Iran's nuclear case and to deduce effective remedies with regards to the international nuclear non-proliferation regime. This aim will be discussed in the context of three problematic aspects: first, the weaknesses and omissions within the NPT; second, the divergence in interpreting the legal scope of the rules of the NPT; and third, the absence of an agreed legal standard and mechanisms that are applicable with regards to any nuclear proliferation disputes.

1.2.1. The Omissions and Weaknesses of the NPT

An in-depth examination of the NPT's capability means searching for weaknesses in the treaty in order to determine which mechanisms should be adopted to strengthen the implementation of its normative rules and to establish new rules of law that would close the gaps and address the omissions of the existing nuclear non-proliferation regime.

The first indication of its weaknesses is that the treaty recognises two different parties: Nuclear Weapons States (NWSs) and Non-Nuclear Weapons States (NNWSs). This distinction emanates from Article IX (3) of the NPT in which a NWS is defined as 'one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967'.[38] Any state that does not qualify under this definition is regarded as a non-nuclear weapons state.

From this standpoint, then, it has to be asked how the NPT would deal with a NNWS or another state which is not party to the NPT that later became a possessor of nuclear weapons. This supposition is very likely and can be seen in the cases of India, Israel, Pakistan, and North Korea; all these states are documented as possessing nuclear weapons [39] and are not party to the NPT.[40]

[38] NPT, Art. IX(3).

[39] Rajiv Nayan, 'The NPT and India: Accommodating the Exceptions' in Rajiv Nayan (ed), *The Nuclear Non-Proliferation Treaty and India* (Routledge 2013); Benjamin Habib, 'North Korea's Nuclear Weapons Programme and the Maintenance of the Songun System' (March 2011) 24 (1) The Pacific Review 43; Victor D Cha, 'North Korea's Weapons of Mass destruction: Badges, Shield, or Swords?' (Summer 2002) 117 (2) political Sciences Quarterly 209.

[40] Sverre Lodgaard, 'Making the non-proliferation regime universal: asking non-parties to behave "as if" they were members' (2006) The Weapons of Mass Destruction Commission

Equally, under the intensive international pressure on Iran to forego its nuclear activities and comply with its nuclear obligations, this state might decide to withdraw from the NPT and thereby be free from any legal obligations. In that case, Iran could build up its nuclear weapons after it had obtained all the necessary technologies and information through legal channels.

Thus, should states falling into this category be listed in the portion of the table devoted to the NNWSs or in the portion comprising NWSs? The ambiguity in classifying these states is due, on the one hand, to their being NWSs because they have or might be likely to have nuclear weapons in their military arsenals and, on the other hand, because they are not, from a legal point of view, NWSs according to Article IX (3).

The absence of clear-cut criteria by which to define NWSs and NNWSs forms a central problem for the international nuclear non-proliferation regime. This absence undoubtedly affects the universality and credibility of the regime as some states are not committed to its legal obligations. In addition, it also threatens the stability of international peace and security as the existence of nuclear weapons in the military arsenals of some states would spur other states' ambitions to seek nuclear weapons in order to secure their own national security and interests.[41]

Moreover, the recognition of two different types of parties within the NPT has an impact on the legal character and nature of the treaty. As a matter of law, this recognition gives the treaty the character of a contract treaty, since it discriminates and imposes reciprocal obligations and rights on two different categorised parties.[42] Consequently, this recognition imposes obligations and rights that are only applied to its member states. In practice, this means that the obligations and rights of the NPT are not applicable to states that have decided

<http://www.blixassociates.com/wp-content/uploads/2011/03/No7.pdf> accessed 14 August 2014.

[41] Cirincione (n 9); Gawdat Bahgat, 'Nuclear Proliferation: The Islamic Republic of Iran' (2006) 7 (2) International Studies Perspectives 124.

[42] It was a temporary contract until 1995; however, it became an indefinite contract after the extension of the treaty indefinitely in 1995; Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law, and Practice* (CUP 2013).

to stay outside the treaty or withdraw from it.[43] This fact leads to a current concern of the international community, which is that the NPT's provisions do not apply to non-state actors.[44] With the phenomenon of globalization, there are significant concerns about the spread of nuclear technologies to non-state actors such as terrorist groups, non-governmental companies or private businesses that do research and carry out activities related to nuclear energy.[45]

Another problematic legal issue within the NPT's structure is related to the ambiguity and omissions in determining the scope of its normative rules.[46] It is clear that the status quo of the NPT deals with nuclear proliferation from one state to another,[47] nuclear disarmament,[48] and nuclear energy for peaceful purposes.[49] However, with regards to the non-proliferation obligation, the treaty omitted to deal with vertical proliferation. This is despite the NWSs claiming that they have been committed to their obligations by decreasing their nuclear weapons stockpiles as a result of implementing bilateral and multilateral arms

[43] Peter Crail, 'Implementing the UN Security Council Resolution 1540 A Risk-based Approach' (2006) 13 (2) Nonproliferation Review 35; Oliver Meier, 'The US-India Nuclear Deal: The End of Universal Non-Proliferation Efforts?' (2006) IPG 28 <http://library.fes.de/pdf-files/id/ipg/03930.pdf> accessed 05 June 2014; Braun Chaim, and Christopher F Chyba, 'Proliferation ring: New Challenge to the Nuclear Non-Proliferation regime' (Fall 2004) 29 (2) International Security 5.

[44] David S Jonas, 'Significant Ambiguity in the NPT: Continuing Issue' (2011) 40 (37) Georgia Journal of International and Comparative Law 37; Mathew Bunn, 'Securing the Bomb 2007' (September 2007) NTI <http://www.nti.org/media/pdfs/securing-the-bomb-2007-fullreport.pdf?_=1322767524> accessed 10 February 2015; Meier (n 43).

[45] These concerns led the UNSC to adopt its long awaited resolution 1540 on 28 April 2004, under which the UNSC requests all states to refrain from providing or supporting nuclear technologies to non-state actors; UN, UNSC Res S/RES/1540, para 2. In view of the importance of its subject, the legal mandates of this resolution have been expanded until 2021 by UNSC resolution 1977; UN, UNSC Res S/RES/1977, 20 April 2011, para 2. For further details and discussions on this resolution, see; Georges Abi-saab, 'The Security Council as Legislator and as Executive in its Fight against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy' in Rüdiger Wolfrum, and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008); Masahiko Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2008) 13 (3) Journal of Conflict and Security Law 303.

[46] Nathan E Busch and Daniel H Joyner (eds), *Combating Weapons of Mass Destruction: the Future of International Nonproliferation Policy* (University of Georgia Press 2009); Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 36).

[47] NPT, Art. I and II.

[48] NPT, Art. VI.

[49] NPT, Art. IV.

control agreements.[50] Yet they are still developing and increasing the sophistication of their current nuclear weapons.[51] There is no provision to deal with vertical nuclear proliferation, which relates to developing and enhancing existing nuclear weapons.[52]

Additionally, vertical proliferation is inconsistent with the nuclear disarmament obligations of Article VI of the treaty,[53] which obliges all states to reach general and complete nuclear disarmament.[54] The core omission of the NPT in this regard is that there is no specific timeframe laid down whereby the NWSs should achieve such disarmament.[55] That omission gives NWSs the ability to procrastinate in achieving nuclear disarmament.

Last but not least is the question of the right to use nuclear energy for peaceful purposes under Article IV.[56] This article, which is the most controversial one within the treaty, does not provide clarification or legal limitations as to what

[50] Pirson C Hindawi, 'The Controversial Impact of WMD Coercive Arms Control on International Peace and Security: Lessons from the Iraqi and Iranian Cases' (2011) 16 (3) Journal of Conflict and Security Law 417; Shannon N Kile, 'Nuclear Arms Control and Non-Proliferation' in SIPRI Yearbook 2009.

[51] Yousaf Butt, 'Radioactive Decay: We Cannot Rely on Vietnam-Era Treaty to Stop Nuclear Proliferation' (19 December 2013) Foreign Policy <http://www.foreignpolicy.com/articles/2012/12/18/radioactive_decay?page=full> accessed 08 January 2014; Matthew Harries, 'Britain and France as Nuclear Partners' (February-March 2012) 54 (1).

[52] Alexander Kmentt, 'How Divergent Views on Nuclear Disarmament Threaten the NPT' (December 2013) Arms Control Association <http://www.armscontrol.org/act/2013_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT> accessed February 2014; Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 36).

[53] Jonathan L Black-Branch, and Dieter Fleck, 'Nuclear Weapons, Non-Proliferation, and Disarmament: A Comprehensive Audit of Relevant Legal Issues and International Concerns' in Jonathan L Black-Branch, and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law*, (Vol 1, Springer 2014); Christopher G Weeramantry, 'Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice' (May 2009) Lawyers' Committee on Nuclear Policy <http://lcnp.org/disarmament/2009.05.ICJbooklet.pdf> accessed 09 October 2013; John Carlson, 'challenges to the Nuclear Non-Proliferation regime, and Implication for Nuclear disarmament' (08 September 2008) Presentation to representatives of UN Missions at the Australian Mission, New York <http://www.dfat.gov.au/asno/publications/challenges.html> accessed 27 December 2011.

[54] NPT, Art. VI.

[55] Black-Branch (n 53); Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 8); Steven E Miller, 'Proliferation, Disarmament, and the Future of the Non-Proliferation Treaty' in Morten Bremer Maerli, and Sverre Lodgaard (eds), *Nuclear Proliferation and International Security* (Routledge 2010).

[56] NPT, Art. IV.

extent states can assist each other in developing nuclear technologies. The term "fullest possible exchange" which is contained in Article IV is very wide and many definitions are possible.[57] Most importantly, this provision does not determine whether states outside the treaty can freely enjoy full access to nuclear technologies and assistance or not. Such assistance, which has been seen in the US-India case,[58] allows states outside the treaty to be in a better position than those states who have voluntarily signed the treaty and thus forego their nuclear weapons option.[59]

Against the above considerations, this study does not seek to rewrite nuclear law, but to clarify the status of the NPT in order to identify as consistently and as precisely as possible the legal criteria that correspond to current and future developments in the field of nuclear weapons proliferation. Therefore, this research attempts to analyse the NPT treaty in order to explore in further detail its omissions and discuss legal criteria and solutions to address these omissions.

1.2.2. Divergence between States in Interpreting the NPT

In addition to the omissions within the NPT, there is a lack of interpretive mechanisms to assist in defining the scope of its normative rules and to ensure the compliance of states with these rules.[60]

Indeed, the NPT has no interpretive criteria that could be implemented to clarify any ambiguity or conflict over the purposes and the objectives of the treaty in

[57] Robert Zarate, 'The NPT, IAEA Safeguards and Peaceful Nuclear Energy: An "Inalienable Right," But Precisely to What?' (January 2007, Revised Sep 2007) Non-proliferation Policy Education Centre <http://www.npolicy.org/article_file/The_NPT_IAEA_Safeguards_and_Peaceful_Nuclear_Energy.pdf> accessed 25 February 2012.

[58] Nayan (n 39); Leonard Weiss, 'India and the NPT' (March 2010) 34 (2) Strategic Analysis <http://iis-db.stanford.edu/pubs/22901/Weiss_India_and_the_NPT.pdf> accessed 17 December 2011.

[59] Mary Beth Nikitin, 'North Korea's Nuclear Weapons: Technical Issues' (February 12, 2013) Congressional Research Service <http://fpc.state.gov/documents/organization/205212.pdf> accessed 03 April 2013; George Perkovich, 'Faulty Promises: The USA-India Nuclear Deal' (September 2005) Carnegie Endowment for International Peace <http://carnegieendowment.org/files/PO21.Perkovich.pdf> accessed 23 June 2009.

[60] Miller, 'Nuclear Collisions: Discord, Reform & the Nuclear Non-proliferation Regime' (n 1); Paul K Kerr, Mary B Nikitin, and Amy F Woolf, '2010 Non-Proliferation Treaty (NPT) Review conference: Key Issues and Implications' (3 May 2010) Congressional Research Service <http://www.fas.org/sgp/crs/nuke/R41216.pdf> accessed 20 December 2011.

question.[61] The lack of interpretive mechanisms, as this research demonstrates, has created a lacuna between states in interpreting their obligations and rights under the treaty.[62] In practical terms, this absence gives the member states, specifically the NWSs, some room to manipulate and interpret its principles in a manner which is far removed from its legal meaning, but is well suited to their national interests.[63] Indeed, the treaty has become a political instrument to exercise some pressure on states who are adversaries, rather than a legal document determining rights and obligations. This has created an unbalanced situation in interpreting the norms of the treaty, which has implications for implementation of the treaty.[64]

The divergence between states in understanding their obligations and rights under the NPT have led some to wonder what legal interpretive method should be applied in this regard. Therefore, in the context of interpreting the treaty, this research aims to investigate whether this treaty forms a special international treaty requiring special interpretative mechanisms or whether there are no differences between this treaty and other treaties where the general interpretive rules are applied.

1.2.3. The Absence of Legal Standards and Mechanisms Applied to International Approaches in Dealing with Nuclear Cases

The absence of agreed legal standards or mechanisms in dealing with nuclear cases can be demonstrated through analysing and examining Iran. It may be argued that Iran has set a precedent in terms of how the omissions in the

[61] Nigel D White, 'Interpretation of Non-Proliferation Treaties' in Daniel H Joyner, and Marco Roscini, *Non-Proliferation Law as A Special Regime: A Contribution to a Fragmentation Theory in International Law* (CUP 2012); Norman A Wulf, 'Misinterpreting the NPT: Interpreting the Nuclear Non-Proliferation Treaty' (September 2011) Arms Control <http://www.armscontrol.org/2011_09/Misinterpreting_the_NPT#WulfBio> accessed 15 December 2011.

[62] Flynt Leverett, 'the Iranian Nuclear Issue, the End of the American Century, and The Future of International Order' (2013) 2 (2) Penn State Journal of Law & International Affairs 237; Daniel H Joyner, 'Iran's Nuclear Program and International Law' (2013) 2 (2) Penn State Journal of Law & International Affairs 237.

[63] Richard Butler AC, 'NPT: A Pillar of Global Governance' (2013) 2 (2) Penn State Journal of Law & International Affairs 237.

[64] ibid; Joyner (n 58).

international nuclear regime can give the major powers scope to manipulate the rules of the regime and relate the implementation of these to their national policies and interests.

Since the revelation of Iran's nuclear facilities in Natanz and Arak in 2002, the IAEA's Board of Governors (BOG) has demanded that Iran suspend all its nuclear activities and actively cooperate with the IAEA to ensure compliance with its Safeguards Agreements obligations.[65] The BOG put Iran under a positive obligation to show a level of cooperation in clearing up all the outstanding issues related to its nuclear programme, mainly to prove that there are no undeclared nuclear materials. In other words, Iran is under a positive obligation to negate the allegations made against it. However, the level of cooperation that the BOG demands is not clear. There is nothing in the statute of the IAEA which gives any indication of the expected level of cooperation or any standard which determines such cooperation.

Undoubtedly, the core feature of the argument between the coalition and Iran is not over its right to possess and benefit from nuclear energy;[66] rather, it is over the possession and carrying out of uranium enrichment and fuel cycle activities by Iran on its territory.[67] As noted above, as of the time of writing this thesis, negotiations between Iran and the P5+1 are still running.[68] There is the potential to reach a final agreement between the parties probably in the fourth quarter of

[65] footnote (n 14).

[66] Jonathan Tirone, 'Iran's Nuclear Program' (20 April 2015) Bloomberg View <http://www.bloombergview.com/quicktake/irans-uranium-enrichment> accessed 20 April 2015; Peter Crail, 'Secret Iranian Enrichment Facility Revealed' (October 2009) Arms Control <http://www.armscontrol.org/act/2009_10/Iran> accessed 18 December 2012.

[67] Daniel H Joyner, 'Does Iran Have a Legal Right to Enrich Uranium? Yes' (21 November 2013) Iranian Diplomacy <http://www.irdiplomacy.ir/en/page/1924877/Does+Iran+Have+a+Legal+Right+to+Enrich+Uranium+Yes..html> accessed 21 April 2015; Paul K Kerr, 'Iran's Nuclear Programme: Tehran's Compliance with International Obligations' (28 April 2014) Congressional Research Service <http://fas.org/sgp/crs/nuke/R40094.pdf> accessed 06 June 2014.

[68] To follow the latest developments in Iran's nuclear case; see, for example, The Guardian, BBC, and Reuters websites. However, it is important to mention that this research will follow the developments that occurred in the first quarter of the year 2015. The Guardian, 'Timeline on Iran's Nuclear Programme' <http://www.nytimes.com/interactive/2014/11/20/world/middleeast/Iran-nuclear-timeline.html?_r=0#/#time243_10489> accessed 22 June 2015.

2015.[69] The negotiations on this final agreement are based on the Joint Plan of Action (JPOA) agreed by the parties in November 2013.[70] From a joint statement between Iran and the P5+1 released on 2 July 2015,[71] we can discern the features of the potential final agreement. These features are significant limits on the Iranian civil nuclear programme and an enhanced inspections regime by the IAEA, in return for which the enforced sanctions and measures will be lifted.[72]

Reaching the final agreement will be a historic development. However, it is still not clear why Iran would dismantle the sensitive components of its nuclear programme and dramatically reduce its stockpiles of uranium and other advanced nuclear materials given that states such as Germany, Japan, and Canada can stockpile as much uranium as they wish without their nuclear capacities or motivations being called into question. If the right to enrich uranium is a sovereign right[73] guaranteed by the NPT to all states and if no one can seize this right, what is the legal basis on which the coalition has based its demands? It can also be asked why Iran should not have full access to nuclear technologies or can do so only under very strict conditions, while states such as Canada and Japan can enjoy full use of these technologies with fewer restrictions and scrutiny.

Investigating and analysing the allegations and evidence in the Iran-coalition confrontation reveals that this confrontation is unlike other nuclear disputes. Indeed, the coalition has shown doubts over Iran's nuclear programme that are

[69] BBC, 'Iran nuclear talks deadline extended until November' BBC News (19 July 2015) <http://www.bbc.co.uk/news/world-middle-east-28381608> accessed 20 July 2015.

[70] European Union External Action, 'Joint Plan of Action' (24 November 2013) <http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf> accessed 19 May 2015.

[71] Reuters, 'Joint statement being finalised at Iran nuclear talks' Reuters News (02 April 2015) <http://uk.reuters.com/article/2015/04/02/uk-iran-nuclear-zarif-mogherini-idUKKBN0MT1TU20150402> accessed 19 May 2015; BBC, 'Iran nuclear talks: 'Framework' deal agreed' BBC News (03 April 2015) <http://www.bbc.co.uk/news/world-middle-east-32166814> accessed 19 May 2015.

[72] USA Department of State, 'Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program' (02 April 2015) <http://www.state.gov/r/pa/prs/ps/2015/04/240170.htm> accessed 19 May 2015.

[73] Anguel Anastassov, 'The Sovereignty Right to Peaceful Use of Nuclear Energy and International Environmental Law' in Jonathan L Black-Branch, and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law* (Vol 1, Springer 2014).

qualitatively different to those shown towards other states who possess very advanced nuclear programmes,[74] such as India, Israel, or Pakistan.[75] It is true that these states are not members of the NPT; however, their nuclear arsenals constitute a danger to international peace and security. Another example of double standards in dealing with nuclear issues is Japan, which is an NPT signatory state. It has recently changed its domestic law to provide it with the flexibility and legal foundation to build nuclear weapons if the need arises.[76] These changes and developments have not provoked the concerns of the international community over whether the Japanese government would eventuality use its stockpiled highly enriched uranium to build its nuclear weapons arsenal.

[74] Tabassum Zakaria and Mark Hosenball, 'Intel shows Iran nuclear threat not imminent' (23 March 2012) Reuters <http://www.reuters.com/article/2012/03/23/us-iran-usa-nuclear-idUSBRE82M0G020120323> accessed 11 February 2015; Robert Kelley, 'Nuclear Arms Charge Against Iran Is No Slam Dunk: Robert Kelley' (10 January 2012) Bloom Berg View <http://www.bloombergview.com/articles/2012-01-11/iran-nuclear-weapons-charge-is-no-slam-dunk-commentary-by-robert-kelley> accessed 13 February 2015; Stephen Lendman, 'Illegitimate Sanctions on Iran' (03 August 2012) War is a Crime <http://warisacrime.org/content/illegitimate-sanctions-iran#comment-251504> accessed 10 October 2013.

[75] A very recent study shows that Israel had stocked up approximately 115KG of military plutonium by the end of 2014 and 165 nuclear warheads; David Albright, 'Israel's Military Plutonium Inventory' (19 November 2015) Institution for Sciences and International Security <http://www.isis-online.org/uploads/isis-reports/documents/Israel_Military_Plutonium_Stock_November_19_2015_Final.pdf> accessed 20 November 2015; Peter Jenkins, 'Will the World Blame Iran if Nuclear Talks Fail' (29 October 2014) Lobelog Foreign Policy <http://lobelog.com/will-the-world-blame-iran-if-nuclear-talks-fail/?utm_content=buffer775e1> accessed 25 June 2015; Paul R Pillar, 'Israel's Nuclear Weapons: Widely Suspected Unmentionables' (03 September 2014) The National Interests <http://nationalinterest.org/blog/paul-pillar/israels-widely-suspected-unmentionables-11191> accessed 25 June 2015; Walter Pincus, 'Another nation blazed the trail for Iran in developing a nuclear program' (09 March 2015) The Washington Post <https://www.washingtonpost.com/world/national-security/another-nation-blazed-the-trail-for-iran-in-developing-a-nuclear-program/2015/03/09/0222ec28-c41c-11e4-ad5c-3b8ce89f1b89_story.html> 25 June 2015.

[76] Japan has very sophisticated nuclear technologies including uranium enrichment and fuel reprocessing which produce plutonium and enriched uranium, and rockets that are technically indistinguishable from Ballistic missiles. 10 tons of fissile plutonium can be converted to nuclear weapons-grades to produce 1000 nuclear weapons. As of 2011, Japan has 30.1 tons of fissile plutonium; Chester Dawson, 'In Japan, Provocative Case for Staying Nuclear' (28 October 2011) The Wall Street Journal <http://www.wsj.com/articles/SB10001424052970203658804576638392537430156> accessed 03 February 2015; NTI, 'Revisions to Japanese Atomic Law Cause Worry Over Possible Weapons Aim' (22 June 2012) Nuclear Threat Initiative reports <http://www.nti.org/gsn/article/revisions-japanese-atomic-law-spark-concern-about-possible-weapon-development/> accessed 03 February 2015; Takuya Suzuki, 'Seoul getting jumpy about Tokyo's national security push' (17 July 2012) Asahi Shimbun <http://ajw.asahi.com/article/asia/korean_peninsula/AJ201207170063> accessed 03 February 2015.

Within the above context, the coercive approaches adopted to contain Iran's nuclear programme, the standards that have been used by the coalition for assessing Iran's compliance with its nuclear obligations and the evidence used to support their accusations raise concerns about the credibility of the coalition, in particular the IAEA as a specialist international organization from handling nuclear cases.[77]

Moreover, it is possible to question the extent to which targeted sanctions and measures are effective in resolving nuclear proliferation cases. It seems that targeted sanctions and measures are not the proper and appropriate solutions to resolve complex and sensitive cases such as nuclear proliferation disputes, where national policies and interests are likely to play a major role in determining the character of the dispute. This complexity makes it necessary to consider establishing effective mechanisms that could avoid coercive solutions in the first place.

In summary, the problem for the current research is that the NPT clearly suffers from weaknesses and omissions that challenge its existence and legitimacy. The NPT's normative status and framework is inherently limited and insufficient to accomplish its objectives, with a lack of interpretive mechanisms within the NPT that would support the implementation of the treaty. It seems that these deficiencies and omissions have made this particular nuclear confrontation go beyond legal boundaries, becoming instead a game of political influence between the parties to the confrontation.[78] This is clear from the trajectory of Iran's nuclear case and its impact.

Therefore, despite the fact that this project focuses on Iran's nuclear case, it is argued that this thesis contributes more generally to scholarship about legal

[77] Tariq Rauf and Robert Kelley, 'Nuclear verification in Iran' (September 2014) Arms Control Association <http://legacy.armscontrol.org/act/2014_09/Features/Nuclear-Verification-in-Iran> accessed 06 February 2015; Statement by the Head of the Delegation of the Russian Federation, Ambassador-At-Large, Grigory Berdennikov, at the Symposium on the International Safeguards: Linking Strategy, Implementation and People, (20-24 October 2014).

[78] Flynt Leverett, and Hillary Mann Leverett, 'America's Lead Iran Negotiator Misrepresents USA Policy (and International Law) to Congress' Going to Tehran (03 November 2013) <http://goingtotehran.com/americas-lead-iran-negotiator-misrepresents-u-s-policy-and-international-law-to-congress> accessed 15 April 2015; Butler (n 63) 273.

frameworks in the field of nuclear proliferation. In a manner commensurate with the inquiry, it is also argued that this research contributes to the process of paving the way for the international community to adopt a new international treaty under which this community would accomplish its target of creating a nuclear weapon-free world. This line of argument contrasts with established views that the new treaty should be based on fundamental legal principles that would close the gaps in the current NPT. Rather, the NNPT should fundamentally acquire the character of a law-making treaty that establishes principles applicable to all states without discrimination between NWSs and NNWSs and that also addresses state and non-state actors. In addition, it should insist on prohibiting the possession and use of nuclear weapons due to their uncontrolled destructive power and the threat that they pose to humanity.

1.3. Research Questions

The above discussion has shown that the confrontation between Iran and the coalition over the former's nuclear programme has for many years been one of the key security cases that concern the international community. As a result of its nuclear programme, Iran has been under intense international pressure to either suspend activities such as nuclear enrichment or to do so purely under tightly controlled conditions. Iran has incurred accusations of breaching its international nuclear obligations from the IAEA. These accusations have been supported by sanctions adopted by the UNSC and by measures adopted individually by concerned states. However, the precise nature and legal basis of this confrontation remain unclear.

Three questions that stem from this discussion are:

Question 1:

What are the legal omissions, complications, and controversies surrounding the interpretation and implementation of the NPT?

Question 2:

Can it be said - taking into account the answers to question (1) – that the Iranian government has violated obligations that follow on from the rules of the NPT, in particular Articles I, II, III, IV?

Question 3:

Taking into account the absence of legal standards and mechanisms in dealing with nuclear proliferation cases, to what extent have geopolitical considerations and national security interests and policies affected the legal position of the stakeholders?

1.4. Methodology

As noted above, the aim of this study is to analyse and examine the nature and scope of the NPT with regards to the Iran-coalition dispute over the Iranian nuclear programme. To address this aim, the following study concerns itself with doctrinal legal research, since it asks what the law is in a particular area,[79] namely, the nuclear non-proliferation regime.

This dissertation has a hermeneutic and explanatory nature. The principle underpinning adoption of this method is that the aims of this dissertation are to clarify and rectify the law on nuclear non-proliferation by a distinctive mode of qualitative analysis based on authoritative texts. Therefore, the dissertation is targeted exclusively at "black-letter law"[80] rather than sociological research in which the researcher adopts techniques which look at the role and impact of the law in practice.[81]

[79] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9; Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui, (eds) *Research Methods for Law* (Edinburgh University Press 2007) 19.

[80] The term 'black letter' refers to research about the law included in legislation and case law. The term originated from the name of the Gothic type which continues to be used for law texts; Nigel J Duncan and Terry Hutchinson, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 (1) Deakin Law Review 83 n 42.

[81] Mike McConville, and Wing Hong Chui, 'Introduction and over View' Mike McConville and Wing Hong Chui, (eds) *Research Methods for Law* (Edinburgh University Press 2007) 3.

Therefore, the research concentrates on exploring the pure legal meaning and scope of the principles of the NPT by focusing on the case of the Iranian nuclear programme. In carrying out this task, this study relies principally upon qualitative research tools. These help in evaluating the legal scope and limitations of the rules of the regime, in identifying the omissions and weaknesses of it and in establishing and gaining insights into suitable mechanisms to remedy and address these omissions and weaknesses. In addition, this methodology can provide detailed perspectives of states' behaviour and status in dealing with nuclear proliferation cases, thereby ensuring a more comprehensive understanding of the key elements in preventing future nuclear proliferation.

The primary strategy of this thesis is to employ a case study approach, centred on the Iran-coalition dispute over the Iranian nuclear programme. This strategy involves analysis of the rules of the international nuclear non-proliferation regime, specifically the NPT. In the domain of nuclear non-proliferation law, apart from the opinion of the ICJ of the threat or use of nuclear weapons, it is hard to find legal subsidiary documents that help in determining the meaning of the principles of the law. We have mostly states' interpretations and debates between scholars.[82] Therefore, a part of this research's strategy is to investigate the understanding and implementation of these principles by member states. The importance of this strategy is to produce insights into the diverse causes of the Iran-coalition confrontation that might have applicability to other potential nuclear disputes.

In doing so, this project premises its interpretation and analysis on the interpretation tools of the Vienna Convention of the Law of Treaties (VCLT) particularly Articles 31 and 32.[83] The normative implementation of these rules is guided by the requirements that were elaborated by the International Law Commission, [84] and are as explained by Gardiner, [85] Fitzmaurice, [86]

[82] White (n 61) 88.

[83] VCLT, Art. 31 and 32.

[84] In particular, the requirement stated in the commentaries on the draft of the VCLT in 1966; UN, Report of the Commission to the General Assembly, *Yearbook of International Law* Commission, Vol II (1966) 218-23.

Orakhelashvili,[87] and Joyner.[88] Below, this study shows how the principles of these articles are implemented in relation to the research questions.

1.4.1. The General Interpretive Rules under the VCLT

According to Article 84(1) of VCLT this treaty entered into force in 1980. This convention was created as a main legal instrument to regulate treaties concluded between states and in written form.[89] Thus, the functional legal scope of this convention is limited only to a treaty between states. For more clarification, according to Article 5,[90] the provisions of VCLT are applicable on a treaty concluded between states; a treaty considered as constituent instrument of an international organization, or a treaty concluded within the organisation without affects or prejudices the rules of the organisation. This means that it is not applied on the oral agreements and treaties concluded between states and international organisations.[91]

Briefly, the VCLT contains provisions that are related to the definition and how to make a treaty,[92] and how these treaties should be amended,[93] interpreted, and terminated.[94] Its provisions have no retroactive power according to Article 4.[95] Due to the residual character of its rules,[96] it only applied on treaties concluded after the entry into force of this convention,[97] unless a particular treaty or its

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[85] Richard Gardiner, *Treaty Interpretation* (2nd, OUP 2015).

[86] Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (OUP 2014) 178-82.

[87] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OPU 2008).

[88] Joyner (n 8).

[89] Frank A Engelen, *Interpretation of Tax Treaties under International Law* (IBFD 2004) 43.

[90] VCLT, Art.5.

[91] Fitzmaurice (n 86) 169.

[92] It governs most important issues such as the authority to conclude treaties, accession, signature, ratification, acceptance and approval; VCLT, Art. 7, 8, 14, 15,

[93] VCLT, Art. 39-41

[94] VCLT, Art. 54-9

[95] VCLT, Art. 4.

[96] Fitzmaurice (n 86) 169.

[97] VCLT, Art. 4.

parties or their intentions provide otherwise.[98] However, the reservations of Article 4, in fact, indicate to that only its provisions of those acquired the character of customary international law could be applied in retroactive power.[99] There are certain provisions of the convention were probably within the body of customary international law by the time of its entry into force, such as reservations and modifications of treaties. Other certain provisions have obtained the character on customary international law such as the general interpretive rules.[100]

The general interpretive rules of the VCLT have become rules of customary international law and are applied on all treaties regardless their nature or subject matters.[101] In fact, there was a discussion on whether these rules should distinguish between law-making treaty and other types of treaty. However, it was decided that there is no necessary for such distinguish. This attitude was confirmed by the ICJ in its advisory opinion on the use or threat of nuclear weapons. The court said that the constituent instrument of international organization is a multilateral treaty to which the well-established rules of treaty interpretation apply.[102] This indicates that these rules are applied on all types of treaty including law-making treaty.

The topic of rules of interpretation was first dealt with it in the third report of ILC by Sir Humphrey Waldock. This report did not contain any provision on the subject. It only indicated to a reference to general international law rules governing the interpretation of treaties in the context of the *pacta sunt servanda,*[103] which is coded in Article 26 of VCLT.

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[98] Fitzmaurice (n 86) 169.

[99] VCLT, Art. 3(b) and (c).

[100] The customary international law status has been reaffirmed in several judgements of the International Court of Justice. Latest judgement was in the *Kasikili/Sedudu Island* case, also it was in *Libya/Chad* case, and *Oil Platforms* case. Alan Boyle, 'Reflections of the Treaty as a Law-Making Instrument' in Alexander Orakhelashvili and Sarah Williams (eds.), *40 Years of the Vienna conventions on the Law of Treaties* (British Institute of International and Comparative Law 2010) 2.

[101] Engelen, (n 89) 46.

[102] ICJ Reports 1996, 74-5.

[103] Gardiner (n 85) 75-6; Engelen (89) 59.

The general interpretive rules are coded in articles 31-33 of VCLT. Clearly, Article 33 provides the interpretive methods in the case when a treaty has been authenticated in two or more languages.[104] Article 31 contains the general rules of interpretation, and Article 32 provides supplementary means of interpretation. Thus, Articles 31 and 32 constitute general principles and supply reasonable delineation of treaty interpretations. They precisely state the elements that interpreters should invoke when interpreting a treaty. They clearly set out the principles regarding whether, how, and when these elements should be applied. Therefore, this research will focus and use Article 31 and 32 as interpretive methods in interpreting the NPT.

1.4.1.1. The General Interpretive Rules under Article 31 of the VCLT

The purpose of interpreting a treaty is to 'establish the meaning of the text that the parties intended it to have "in relation to circumstances with reference to which the question of interpretation has arisen."'[105]

Fitzmaurice,[106] quoting from the ILC's Rapporteur Sir Gerald Fitzmaurice 1951, articulates that interpretation might be guided by comprehensive set of interpretive principles: (1) textuality which means that the treaties should be interpreted as it stand on the basis of their actual text; (2) , nature and ordinary meaning which means that words and phrases contained in the treaties are to be given their normal nature and meaning, (3) integration which means that a treaty should be interpreted in a holistic approach; (4) effectiveness which means the treaties are interpreted with reference to their declared objects and purposes; (5) subsequent practices which means that recourse may be had to subsequent practice of signatory states relating to the treaty, and contemporaneity which means treaties must interpreted in accordance with linguistic usage current at the time when the treaties were included.

[104] VCLT, Art. 33.

[105] Fitzmaurice (n 86) 178.

[106] ibid.

Gardiner[107] demonstrates that Article 31 of the VCLT provides that treaties should be interpreted in a process of progressive encirclement of the following rules: treaty interpretation should be accomplished in good faith between states, in the ordinary plain meaning of the treaty, within the context of the terms contained in the treaty and in the light of its purposes and objectives. Put in a different way, the provisions of Article 31 indicate that treaties should be interpreted in good faith in according with ordinary meaning; the provisions of treaties should be given their ordinary meaning; and the ordinary meaning to given is to be determined not in isolation, but in the context of the treaty and in the light of its objective and purposes. The context of a treaty shall comprise agreements and instruments adopted in connection with conclusion of the treaty,[108] and any subsequent agreement or practice established regarding the interpretation of the treaty or the application of its provisions.[109] This illustrates that the most important elements of Article 31regarding treaty interpretation are: (1) good faith, (2) text, (3) context, and (4) object and purposes.

Gardiner,[110] argues that the good faith element differs from the other elements of Article 31 in that it applies to the whole process of a treaty interpretation rather than solely to the meaning of particular words or phrase within it.

It is clear, also, that Article 31 clearly considers the text of the treaty as the main source of its interpretation and somewhat permits resorting to the context of the treaty, its purposes, and subsequent practices as a form of mitigation.[111] Therefore, it has been argued that these rules give preference to objective over subjective interpretation.[112] In contrast, Gardiner[113] sees these rules as a compromise between objective and subjective interpretations because these rules arguably cover the major schools of interpretation, namely the textualism or

[107] Gardiner (n 85) 154.

[108] VCLT, Art.31(2)(a)(b).

[109] VCLT, Art. 31(3)(a)(b).

[110] Gardiner (n 85) 148.

[111] Helmut Philipp Aust, Alejandro Rodiles, and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' [2014] 27 Leiden Journal of International Law 75, 80.

[112] ibid 80.

[113] Gardiner, (n 85) 156.

ordinary meaning school of thought, teleology or object and purpose school of thought, and intentionalism or the subjective school of thought.[114]

Last but not least, the reference to context in Article 31 plays role in identifying the materials which is to be taken into account as forming context. Thus, the context of a treaty means any instrument related to the conclusion of the treaty, as well as the preamble of the treaty, annex, any agreement or instrument that was made between parties to the treaty with regard to the implementation are permitted under Article 31.[115] Moreover, the inclusion of the reference of object and purposes within the VCLT is so as to shed light on the terms actually used in their context, rather than introduce an alternative option for finding the meaning.[116]

Provisions of Article 31 do not assert any specific or sequential order in implementing these elements; rather, it makes all these elements related to each other.[117] The component of this article must be used to close in on the proper meaning of terms of a treaty. They should be carried out using a holistic method [118] or integrated approach which means that the treaty is to be interpreted as whole; no chapter or part can be interpreted out of context. In this context, Gardiner[119] comments that these rules are to be applied together, not in bite. For this reason, Article 31 is described as the (singular) 'general rules'.

4.1.1.2. Interpretive Supplementary Means under Article 32 of the VCLT

The VCLT did not neglect the *travaux preparatiores* or preparatory works of a treaty as supplementary means. Despite this, the VCLT is very clear about their

[114] Aust et al, (n 111) 81.

[115] Gardiner (n 85) 177.

[116] ibid 192.

[117] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 (3) The European Journal of International Law 605, 620; Dirk M Breokhuijsen, 'A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model?' (2013) 67 (9) Bulletin for International Taxation 3.

[118] Campbell McLachlan, 'The Principle of Systemic Integration and the Article 31(3)(C) of the Vienna Convention' [April 2005] 54 International & Comparative Law Quarterly 279, 290; Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 8).

[119] Gardiner (n 85) 161.

usage as interpretive sources; the use and importance of such sources are controversial, subject to question, and are an example of the difficulties that face treaty interpreters.

What Article 32 means by supplementary sources is any part or instrument involved in the conclusion of the treaty such as the preparatory works, official states, and circumstances surrounding the conclusion of the treaty.[120] According to this article, resorting to supplementary sources is only justified in two cases. The first case is to confirm the legal meaning that has already been determined by implementing the rules of article 31 of the VCLT. The second case is when the implementation of article 31 rules has led to an ambiguous, obscure, or unreasonable legal meaning of the provision in question. This means that article 32 implies that resorting to supplementary sources is not applicable until and only when the treaty's interpreters reach ambiguity in their analysis or an unreasonable legal meaning.[121] It is permitted in order to establish a general understanding of the state parties on the legal meaning and purposes of the treaty.

Therefore, we can simply conclude that the use of supplementary sources is not unrestricted or unconditional. Rather, it is conditioned by ascertaining two elements. First, the rules of article 32 are applicable only after the failure of the rules of Article 31 to clarify the legal meaning of the treaty. This means that the implementation of Article 31 rules is due and prior to the implementation of the rules of Article 32 rules. There is thus a hierarchy and sequence between article 31 and 32 rules.[122] The starting point of the treaty's interpretation is the text of the treaty.[123] This trend was confirmed by the WTO in its reports about the case of the Import Prohibition of Certain Shrimp and Shrimp Products. It stated that

[120] What consists as supplementary sources is list by the ICJ judgement of Territorial Dispute (Libyan Arab Jamahiriya/Chad), 03 February 1994, Judgment, ICJ Reports 1994, Page 19, para 41.

[121] Diane A Desierto, 'Necessity and "Supplementary Means of Interpretation" for Non-Precluded Measures in Bilateral Investment treaties' (2010) 31 (3) University of Pennsylvania Journal of International Law 827, 829.

[122] Van Damme (n 111) 620.

[123] Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2012) 480.

'a treaty interpreter must begin with and focus upon the text of the particular provision to be interpreted. It is in the words constituting that provision; read in their context, that the object and purpose of the 'state parties to the treaty' must first be sought'.[124]

The second element is that the interpreters can resort to and use only statements and circumstances that serve the clarification of the legal meaning of a treaty.[125] This means that interpreters should pay attention to the concept of holism, which implies that interpreters should not be selective in choosing their supplementary means. Basically, they should analyse and consider all statements and circumstances that reflect states' understanding and also show the proposed object and purposes of the treaty that were claimed by states through the preparatory work.[126]

Following the above analysis, to reach a correct interpretation and clear legal meaning of the NPT, the interpretation of this treaty should be carried out according to the above general interpretive rules which are coded in Articles of 31 and 32 of the VCLT.

Accordingly, in interpreting the provisions of the NPT this project considers its text, context, and object and purposes. This approach is in harmony with Orakhelashvili's emphasis on 'presumption against redundancy'.[127] According to this term, every provision in the treaty should be given meaning and effect as possessing its own independent meaning.[128] Joyner, in his book on interpreting the NPT, advocated "holistic interpretation".[129] This term means that the three pillars of the NPT constitute the object and purpose of the treaty. He reached this conclusion on the basis that the 'text, context, and object and purpose correspond to well established textual, systemic and teleological methodologies

[124] WT/DS58/AB/R, (21 November 2001), para 114. United States - Import Prohibition of Certain Shrimp and Shrimp Products case.

[125] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 8) 25.

[126] Desierto (n 121) 828-30.

[127] Orakhelashvili (n 87) 422.

[128] ibid 422.

[129] Joyner (n 8) 21.

of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties'.[130]

In the case of unclear or ambiguous meanings within the provisions of the treaty, the research implements the rules of Article 32 of the VCLT which allow the interpreter of the treaty to resort to the *travaux preparatoires* of the treaty, either to confirm the ordinary meaning emanating from the general interpretation rules; or in the case where the general rules leave the meaning of the provisions obscure, ambiguous, or lead to absurd or unreasonable results.[131]

When the *travaux preparatoires* are silent on a particular issue, this silence cannot be taken to imply that states intended to give the issue in question limited scope. Rather, the states may have felt that the textual construction of the treaty is clear enough, or they may have felt the implicit meaning did not need to be articulated. Thus, the preparatory works are treated as supplementary sources of interpretation; thereby seeking to avoid using pre- diagnosis in the approach to interpreting the treaty. For example, Article VI of the NPT obligates NWSs to achieve complete and general nuclear disarmament;[132] however, the provision itself and the preparatory works did not explicitly consider a specific framework to achieve this goal. This does not mean that there is no legally binding obligation on the NWSs; rather, it means that there is an obligation that should be respected and implemented by NWSs.

In fact, the preparatory works of any treaty are important to some extent, as they demonstrate the common understanding of the parties. Therefore, this project discusses the preparatory works of the NPT, making particular use of the work of Shaker.[133] The importance of this work is that Shaker has being a member of the Egyptian delegation to the Conference of the Eighteen-Nation Committee on Disarmament (ENDC) in Geneva during the crucial period of negotiating the NPT between 1965-1968, and later as a participant in the 1975 NPT Review

[130] ibid 23.

[131] VCLT, Art. 31.

[132] NPT, Art. VI.

[133] Mohammed I Shaker, *The Nuclear Non Proliferation Treaty: Origin and Implementation 1959-1979*, Vol 1, (Oceana Publication 1980).

Conference. It also provides significant numbers of states' views that elaborate their positions and understanding of the provisions of the treaty and their scope.

The principles that result from the implementation of the above strategy are used as guided normative principles in carrying out the analysis of this research. These principles are; first of all, that the NPT is not a special treaty in terms of interpretation. It does not differ from other international treaties. This means that the general interpretative rules, particularly those that are coded in Articles 31 and 32 of VCLT, should be applied in interpreting the NPT. Secondly, the NPT's text, principles, and object and purposes cannot be treated as irrelevant. Thus, its provisions should be interpreted and implemented as they exist, not as they should be. Thirdly, the treaty was created to prevent nuclear war and to keep people secure.

According to these principles, the presumption on which this research premises its interpretation is that each provision of the NPT has its own legal weight and, collectively with all the other provisions of the treaty, each reflects the object and purposes of the treaty, which are generally to prevent nuclear war and provide security. In other words, the rights and obligations coded within the NPT form legal binding provisions imposed on two different categorised groups of states (NWSs and NNWSs). The greater the degree of commitment to these provisions from all parties, the more likely it is that the purposes of the treaty will be achieved. Isolating or prioritising one provision at the expense of another extends the gap between the parties to the treaty in interpreting and implementing the treaty, and therefore destabilises international peace and security. This is because preventing nuclear war cannot be achieved only by preventing nuclear weapons proliferation. Rather, it will be achieved by total nuclear disarmament and facilitating the use of nuclear technologies for peaceful purposes to convince states to forgo possessing nuclear weapons.

The reasons for adopting this presumption in this research are that it is reasonable, profound and persuasive in interpreting the NPT. In fact, it reflects the proper ordinary meaning of the treaty and its object and purposes.

This presumption will be seen in light of defining the NPT's scope, nature and object and purposes. In this sense, it has been used to help scrutinise and examine the scope, legitimacy, and nature of the different possible readings of the three principles of the NPT. This does not mean accepting a literalist method in analysing the principles; rather, this dissertation has adopted the viewpoint of the International Law Commission (ILC) that it is important to avoid 'an interpretation beyond what is expressed or necessarily to be implied in the terms of the treaty'.[134]

The principal method of qualitative data collection for this study is a review of primary documentation, examining all legal documents that relate to the interpretation of the NPT.[135] The study gives significant weight to the interpretations of the provisions given by the signatory states. These interpretations are highly important because they primarily reflect states' understanding of their obligations under the NPT. Whenever relevant, the study extrapolates from the states' understanding and practices in order to determine the appropriate criteria that would be utilized to address potential differences in obligations and rights with regards to Iran. Lesser weighting has been given to international conference reports and scholars' observations and assessments, albeit without treating such views as having legal authority.[136]

The data were collected from well-established and known sources and scholars, within the framework and field of the subject of the thesis. This procedure has been followed in order to increase the credibility and validity of the thesis. However, due to the empirical nature of the collected data, given that this research deals with issues which were unfolding at the time of writing, the availability of the data varied and was sometimes difficult to find, so some lesser-known internet sources were used for the sake of further and deeper understanding of the issues in question.

[134] ICL, Draft Article on the Law of Treaties with Commentaries (1966) ILC YB (Vol II), Commentary to Arts 27 and 28 [6] 219.

[135] Duncan and Hutchinson (n 80) 116-18.

[136] Dobinson and Johns (n 79) 28-9.

Thus, the authoritative or primary sources are treaties; international law rules; the decisions of international organizations such as UNGA, UNSC, and the ICJ; statutes, such as the IAEA statute, and the decision of international courts and tribunals such as the ICJ. In order to widen the understanding of the primary sources used, reference has been made to textbooks, jurisprudence, literature reviews and legal journals, authoritative opinions, and academic works as secondary sources.

This dissertation does not contain any primary interviews. This is primarily because this research is based on a "black-letter law" approach which means that this research concentrates on the nature of the law, not what the law is in action.[137] Its aim is to collate and analyse the legal provisions of the NPT. This requires a focus on the primary sources and in-depth textual analysis of the provisions of the treaty. The aim of this operation is to gain initial insights and ideas about the research problems and to determine variables associated with those problems.[138] Interviews can be useful when it is necessary to gain empirical understanding of how the provisions of the NPT and its legal proceedings impact on its members. Therefore, the research overlooks the sociological and political implications. This does not mean that political considerations and discussions will always be marginal to this thesis; rather, they can be used to some certain extent to fill the gaps in understanding of the motivations behind the behaviour and interpretations of states.

For the sake of clarification, one must note that there are NGOs and social components that affect the subject of this project. There have, for example, been many campaigns by non-governmental organizations and non-state actors, such as the International Campaign to Abolish Nuclear Weapons (ICAN),[139] the James Martin Centre for Non-proliferation Studies (CNS);[140] and the Vienna

[137] ibid 19.

[138] Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville, and Wing Hong Chui, (eds) *Research Methods for Law* (Edinburgh University Press 2007) 50.

[139] International Campaign to Abolish Nuclear Weapons, <http://www.icanw.org/> accessed 20 April 2015.

[140] Centre for Non-proliferation Studies, <http://www.nonproliferation.org/> accessed 20 April 2015.

Centre for Disarmament & Non-Proliferation (VCDNP).[141] This project is focused on inter-state disputes which are about the rules of international law and how they are interpreted and implemented by those states. However, while relevant, this dissertation has perforce excluded the involvement of non-state or civil society actors due to logistic and resource constraints. Therefore, the attention of the researcher remains directed towards international law rules, inter-state disputes and how they are interpreted and implemented by states.

Following on from the above, this project carefully reviews the data and compares the text segment with other legal text segments that have the same features and decides whether they reflect the same concept. By using this comparative method, the study refines the nature and scope of the NPT, identifies the omissions and weaknesses, and establishes new mechanisms to remedy any omissions.[142]

This study focuses on the interpretation and implementation of the principles of the NPT by the NWSs and by the NNWSs. By implementing this approach, the study can clearly determine the areas of divergence between these two groups of states in interpreting their legal obligations. Furthermore, it elaborates and uncovers, by carrying out a comparison between their nuclear trends and experiences, the degree of consensus or diversity on the meaning of their legal obligations.

This comparative method seeks to understand each particular interaction of states in cases of nuclear proliferation. Separately, each chapter presents a different set of conflicting arguments of the involved states on the issues that are dealt with within each chapter. This is carried out by in-depth analysis of a theme or description of each state's postures and behaviour, which are embodied in its national policies, official positions and statements. This process is conducted using a standard framework of investigation, comparison and analysis of Iran's nuclear case and other nuclear cases. The questions of this analytical

[141] Vienna Centre for Disarmament and Non-Proliferation, <http://vcdnp.org/> accessed 20 April 2015.

[142] Duncan and Hutchinson (n 80) 102-06.

framework, which are applied throughout all the chapters of the study, are designed to facilitate such a comparative analysis.

For further clarification, it is again stressed that the outcomes of the negotiations between Iran and the P5+1 were not yet determined at the time of writing this thesis. There were intensive efforts to reach a final deal with Iran by June 2015. These developments added complexity to the data collection process, so to ensure clarity, the legal materials and statements that are used in this thesis were taken from the period up to and including the first quarter of the year 2015.

Finally, the author has tried, as much as possible, to carry out this project in an objective manner. However, the author accepts that certain legal conclusions might be influenced by his own personal and political opinions. Inevitably, therefore, evaluating and assessing the author's interpretation will be the role of other legal experts and scholars.

1.5. Structure of the Research

This dissertation contains nine chapters. In brief outline, chapters one and two provide the introduction and literature review respectively, while chapter three focuses on Iran's nuclear programme by providing a historical review of its establishment, an examination of Iran's nuclear ambitions, and a discussion on the trajectory of the Iran-coalition negotiations and the need for rapprochement with Iran. Chapter four answers the first question of this project which relates to the interpretation of the NPT. The thesis then moves on to answer questions two and three, with reference to Iran. Chapters five, sex, and seven are devoted to answering question two which is about Iran's compliance with its international nuclear obligations, and chapter eight addresses question three which is about the coalition's response to Iran's nuclear activities. Finally, chapter ten contains the conclusion to this dissertation.

Considering these chapters in greater detail, the current chapter has provided the background to the thesis aim, the questions of this project, and the methodologies that this research applied in order to answer these questions.

Chapter two aims to provide a critical review of the relevant existing literature on the legal situation relating to the Iranian nuclear problem and to identify the weaknesses which that literature reveals and that this research attempts to address. It also seeks to establish a framework within which to provide evidence that may help in explaining the findings and contribution of this thesis. In doing so, this chapter starts by providing a brief background to the context of the study. Then, it critically analyses the existing research and study related to the interpretation of the NPT.

Chapter three focuses on the trajectory of the Iran-coalition negotiations and how developments in the region dictate the need for rapprochement with Iran. It provides a historical background of Iran's nuclear programme. It presents a picture of the political factors and motivations that have occurred concomitantly with the establishment of Iran's nuclear programme up to the date of writing this thesis. It addresses the question of whether or not Iran has intentions to build its own nuclear weapons: if not, then what is the logic and what are the incentives that drive Iran's nuclear decisions? The chapter then examines to what extent the coalition's policies towards Iran's nuclear programme have helped to contain its nuclear programme and how these polices should further evolve. It provides a review of the trajectory of the negotiations between the parties from 2003 up to July 2015. Then, the chapter discusses what lessons can be extracted from the course of these negotiations. It moves on to analyse the reasons behind the need to approach Iran.

Chapter four, which is about the legal nature, scope and interpretation of the NPT. In doing so, firstly, it focuses on how states interpret and understand their obligations under the NPT. Therefore, it primarily provides the interpretations of the NPT provided by states and, to a lesser extent, the observations and analysis of scholars and experts in the nuclear proliferation field. After this, the chapter contains a legal analysis of the treaty with reference to the general interpretation rules coded in Articles 31 and 32 of the VCLT.

Chapter five applies an analytical lens to investigate the Possible Military Dimensions (PMD) of Iran's nuclear programme. This investigation aims to highlight states' commitment to their obligations under Articles I and II of the

NPT and to see to what extent these two articles have effectively responded to the current challenges. Thus, this Chapter provides a legal interpretation of the two principles coded in Articles I and II of the NPT and their omissions and weaknesses. It investigates the credibility of the PMD accusations against Iran and the quality of the legal evidence.

Chapter six deals with the credibility of the IAEA's actions when dealing with Iran. It aims to provide a legal understanding of the scope of the IAEA mandates under Article III of the NPT. To do so, this chapter addresses questions on the scope of the legal qualifications of the Agency under its statute, and whether, in dealing with Iran's nuclear dossier, it has breached its legal mandates under its statutes and Article III of the NPT. Therefore, this chapter analyses the legal mandates of Article III of the NPT which sets up the relationship between the Agency and its members and obliges states to sign up to monitoring and verification agreements with the Agency. Then, the chapter proceeds to review the Agency's legal authority under its statute and critically analyses this authority. Finally, it discusses the Agency's approach to Iran's nuclear case and whether it has been *ultra vires* its mandates.

Chapter seven focuses on the right of all states, including Iran, to access nuclear technologies for peaceful purposes. This right is coded in Article IV of the NPT. This chapter discusses the idea that this Article constitutes a loophole in the NPT. The reason for this is that the same nuclear technologies can be used for military and civilian purposes. Accordingly, this chapter directs questions on whether the possession of uranium enrichment and nuclear fuel cycle facilities are prohibited by international law and specifically under the NPT; and also questions as to the scope and legal limitations of states' nuclear assistance permitted under Article IV. The chapter begins by providing an explanation of the scope and the extent to which nuclear energy can be used for both peaceful and military purposes. Subsequently, it reviews and analyses the stance of various governments regarding Article IV of the NPT. The chapter then proceeds to the next step which is a legal analysis of the nature and the scope of Article IV. Finally, it examines Iran's nuclear activities in the context of Article

IV and investigates how the NWSs, particularly the USA, have approached and dealt with Iran in reference to its right to access nuclear technologies.

Chapter eight examines the legality of the methods that have been adopted and implemented by the coalition in order to resolve the Iranian nuclear dilemma. This is based on answering several questions about the legal effects of the resolutions adopted by the UNSC, the legality of the targeted sanctions and measures imposed individually by states and the effectiveness and efficiency of these approaches in containing the Iranian nuclear programme. The chapter conducts a review and legal analysis of the resolutions adopted by the UNSC regarding Iran's nuclear programme. It then investigates the legality of the autonomous sanctions and measures adopted unilaterally by states, specifically by the USA and the European Union respectively. Subsequently, the chapter evaluates the effectiveness and sufficiency of the coalition's approaches in changing the nuclear behaviour of the Iranian government.

The results and findings from these chapters are presented in the Conclusion (Chapter nine), which summarizes the key themes of the thesis. It concludes that the NPT has omissions and weaknesses that mean that it is not fully capable of responding to the new challenges. Accordingly, this dissertation recommends that the international community should involve itself in discussions that would lead to the establishment of a NNPT that would effectively close the identified gaps in the existing treaty. In addition, this thesis concludes that it is necessary to create legal standards and mechanisms that would provide a new lens through which decision-makers could judge the best approaches to deal with nuclear proliferation cases and thereby contribute to the development of an international nuclear non-proliferation regime that can meet the likely challenges of the future. This necessity is clear from the observed trajectory of the Iran-coalition confrontation which, as this project argues, is a political dispute and one in which the struggle for influence has been legitimised in order to gain international support.

2. Context and Literature Review

2.1. Introduction

The aims of this chapter are to provide a critical review of the relevant existing literature on the legal situation relating to the Iranian nuclear problem and to identify the weaknesses which that literature reveals and that this research attempts to address. It also seeks to establish a framework within which to provide evidence that may help in explaining the findings and contribution of this research. In doing so, this chapter starts by providing a brief background of the context of the study. Then, it critically analyses the existing research and studies related to the interoperation of the NPT. Finally, it concludes that the NPT is not a special treaty that requires special interpretive tools to reach the right legal scope and meaning.

2.2. Context

Although the International Court of Justice (ICJ) has issued its advisory opinion on the threat or use of nuclear weapons,[1] this opinion is the only official legal interpretation that deals with nuclear weapons' proliferation and the NPT interpretation. Apart from this opinion, we have only individual states' statements and practices which reflect their understanding and interpretations of the principles of the NPT, conferences and reports and some interpretations by scholars and legal experts.[2]

The absence of interpretive mechanisms within the NPT and the rareness of legal and judicial institutions delivering a legal interpretation of the NPT due to the sensitivity of the case and its correlation with the national security of states,[3]

[1] ICJ, 'Legality of the Threat of Use of Nuclear Weapons' Advisory Opinion, I.C.J. reports Page 226, 08 July 1996, 269.

[2] Nigel D White, 'Interpretation of Non-Proliferation Treaties' in Daniel H Joyner and Marco Roscini (eds), *Non-Proliferation Law as A Special Regime a Contribution to a Fragmentation Theory in International Law* (CUP 2012).

[3] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass destruction* (OUP 2009).

have created a gap between states, particularly between Nuclear Weapons States (NWS) and Non-Nuclear Weapons States (NNWSs), with regard to defining the legal nature and scope of the rights and obligations of states under the NPT. Undoubtedly, the international policies and national interests of states have intensively become the basic normative factors deciding the legal framework of the NPT rather than resorting to legal imperative criteria.

The dominant interpretation adopted by NWSs is that the treaty was created to prevent nuclear proliferation. Accordingly, the obligation of non-proliferation is prioritized and privileged over the other obligations and rights.[4] With this understanding, NWSs clearly make the right to access nuclear technologies for peaceful purposes and nuclear disarmament obligations secondary or subsequent to the non-proliferation obligation and their accomplishments are conditioned by achieving nuclear non-proliferation.[5] In this context, these states do not recognize the right to access nuclear technologies of Article IV as a sovereign and inalienable right to all states and they adopt a very narrow understanding of the scope of this right. In addition, they do not recognize Article VI of the NPT, which requires NWSs to eliminate their nuclear arsenals, as a legal binding obligation imposed on them by the treaty.[6]

On the other hand, NNWSs see that the NPT's rights and obligations are mutual and should be implemented equally without discrimination between them.[7] From their perspective, they believe that they should be compensated for voluntary concession of their choice to possess nuclear weapons by granting them full access to nuclear technologies for peaceful purposes.

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[4] Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (OUP 2011) 36-41.

[5] Christopher A Ford, 'Nuclear Technology Rights and Wrongs: The Nonproliferation Treaty, Article IV, and Nonproliferation' in Henry SoKolski (ed), *Reviewing the Nuclear Nonproliferation Treaty,* (May 2010) <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB987.pdf> accessed 11 November 2011.

[6] Alexander Kmentt, 'How Divergent Views on Nuclear Disarmament Threaten the NPT' (December 2013) Arms Control Association <http://www.armscontrol.org/act/2013_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT> accessed February 2014; Ford, 'Nuclear Technology Rights and Wrongs' (n 6).

[7] For further details on the argumentation of the NNWS, see; Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (n 4); Richard Butler 'NPT: A Pillar of Global Governance' (2013) 2 (2) Penn State Journal of Law & International Affairs 273, 272-4; Rebecca Johnson, 'Rethinking the NPT's Role in Security: 2010 and Beyond' (2010) 68 (2) International Affair 429.

Thus, the states' interpretations have become somewhat distant from the legal interpretation of the norms of the NPT and their pure legal meaning. Rather, their interpretations embody and serve their own nuclear policies and status.[8] Clearly, the central argument between states is comprehensively centred on the legal implications that result from interpreting and implementing the NPT norms, insomuch as some nuclear activities of a state are rendered to be disputable and a violation of the NPT obligations.

For example, from the perspective of the NWSs, concealing nuclear activities from the International Atomic Energy Agency (IAEA), carrying out uranium enrichment and the nuclear fuel cycle, and non-compliance with the IAEA safeguard agreements and UNSC requests, are *per se* violations of the rules of the NPT in particular and international law in general.[9] On the other hand, the NNWSs contend that, although such activities can be seen as illegal activities and a failure of the states in question to fulfil their obligations, they do not constitute *per se* violations to the international nuclear obligations necessitating international interference; rather, they are illegal activities which can be cured by legal remedies.[10]

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[8] Hannelore Hoppe, 'Achievements and Challenges of the UN Disarmament Machinery' (16 June 2011) United Nations Office for Disarmament Affairs (UNODA) <http://www.un.org/disarmament/HomePage/HR/docs/2011/2011-06-16_HH_Bergen_conf_speech.pdf> accessed 29 June 2013; Alyn Ware, 'Taking the Bomb Back to the Court' (June 2006) Disarmament & Security Centre <http://www.disarmsecure.org/Taking_the_bomb_back_to_Court-June_5_2006.pdf> accessed 30 June 2009; John Burroughs, 'The Legal Framework for Non-Use and Elimination of Nuclear Weapons' (February 2006) Lawyers' Committee on Nuclear Policy <http://lcnp.org/disarmament/Gpeacebrfpaper.pdf> accessed 25 June 2009.

[9] David Albright, Olli Heinonen, and Orde Kittrie, 'Understanding the IAEA's Mandate in Iran: Avoiding Misinterpretations' (27 November 2012) Institution for Sciences and International Security (ISIS) <http://isisonline.org/uploads/isisreports/documents/Misinterpreting_the_IAEA_27Nov2012.pdf > accessed 18 February 2015; Christopher A Ford, 'Iran, Nonproliferation, and the IAEA: A Legal History' (November 2012) Hudson Institution <http://www.hudson.org/content/researchattachments/attachment/1077/ford--iraniaeapaper1112.pdf> accessed 13 May 2015; Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 (5) Vanderbilt Journal of Transnational Law 1393.

[10] Daniel H Joyner, 'Iran's Nuclear Program and international Law' (2013) 2 (2) Penn State Journal of Law & International Affairs 237; William O beeman, 'Does Iran Have the Right to Enrich Uranium? The Answer Is Yes' (31 October 2013) The Huffington Post <http://www.huffingtonpost.com/william-o-beeman/does-iran-have-the-right-_b_4181347.html> accessed 15 April 2015; Emmanuel P Dupont, 'Iran's (Non-)Compliance with its Non-Proliferation Obligations Revisited' (22 June 2013) Log of the European Journal of International

Although article 31 of the Vienna Convention of the Laws of Treaties (VCLT) does not provide clear guidance on how to use the primary interpretive tools, which implicitly indicates that interpreters have a margin of interpretive discretion, this discretion is not unlimited; rather, it is limited by the consent of states since they are the masters and creators of the treaty.[11] Quast Mertsch[12] argues that the degree of states' interpretive discretion depends on who carries out the interpretation and implementation of the treaty's provisions. If it is both parties to the treaty or a third party (such as an international court or tribunal), then one party to the treaty has little scope for interpretive discretion in relation to how the treaty should be interpreted. Consequently, the treaty in question is classified as having a rather high degree of binding force. Therefore, one party, such as the NWSs or NNWS in our case, cannot solely determine the nature and scope of the treaty. There must be consent of all parties to the treaty on the interpretation and implementation of the NPT, which so far is a disputable matter.

Undoubtedly, not only do states vary in their interpretation, but legal experts and scholars are similarly varied in their approaches to interpreting the rights and duties of signatory states under the NPT. These differences between scholars, probably due to a specific understanding, serve their states' agendas and lead to a range of different interpretive techniques. Therefore, there is a sort of fragmentation in their outcomes. Some of them give a narrow interpretation of the principle of the treaty, while others give the treaty different legal terminologies and interpret it in a wide manner.

2.3. Critical Analysis of Interpretive Approaches

Controversies over interpreting the NPT are largely due to omissions within the treaty. In fact, this is normal when it comes to determining the legal scope of a

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Law (EJIL) <http://www.ejiltalk.org/irans-non-compliance-with-its-non-proliferation-obligations-revisited/> accessed 20 February 2015.

[11] Tomoko Ishikawa, 'keeping Interpretation in Investment Treaty Arbitration 'on Track'' in Jean E Kalicki and Anna Joubin-Bert (eds), *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff 2015) 137-38.

[12] Annaliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Martinus Nijhoff 2012) 76.

treaty. This is because the language and text of laws are mostly ambiguous and need to be interpreted. Interpretation, therefore, is designed to clarify and give meaning to the provisions of the treaty.[13] Interpreters apply different methods of interpreting a treaty. Sir Gerald G Fitzmaurice stresses, as Gardiner[14] and Bos[15] note, that interpretive methods are categorized into three methods or schools: first, the 'intent' school, which relies on the intentions of state parties to determine the meaning of the treaty; secondly, the 'textualist' school, which aims to interpret the treaty principally by establishing the plain meaning of the text of the treaty in question; finally, there is the 'teleological' school, which attempts to interpret a treaty in the context of its text and the object and purposes of the treaty. Ris adds a fourth category which is called the New Haven school, which gives equal validity to the treaty and its preparatory works as interpretive sources.[16]

Generally, interpretations are affected by many factors and by the agenda of the interpreters; in particular, if these laws are related to national security, such as the nuclear non-proliferation regime.

The NPT is not like other international treaties, such as the human rights or trade treaties, where there are authoritative interpretation bodies.[17] Apart from the International Court of Justice (ICJ), opinion on the legality of the threat or use of nuclear weapons stems only from the text of the treaty, the practices of state members, and scholars' debates and arguments.[18] There is no interpretive authority or institution to carry out an interpretive role or legal monitoring of treaty implementation.

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[13] Richard Gardiner, *Treaty Interpretation* (2nd, OUP 2015) 26; Maarten Bos, 'Theory and Practice of Treaty Interpretation' (1980) 27 (1) Netherlands International Law Review 3, 15.

[14] ibid.

[15] ibid.

[16] Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 (1) Article 6 Boston College International and Comparative Law Review 111, 113-16; David Harris, *Cases and materials on International law* (7 edn, Sweet Maxwell 2010) 674; Malcolm N Shaw, *International Law* (7 edn, CUP 2014) 676-80.

[17] White, 'Interpretation of Non-Proliferation Treaties' (n 2) 88.

[18] Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (n 4).

Therefore, we have a very complex and debatable body of arguments in the context of interpreting the NPT. Some scholars, like Sokolski and Perkovich,[19] Wulf,[20] and Ford,[21] interpret this treaty in a very narrow manner basing their arguments on the assertion that the intentions of the state parties to the treaty were aimed at preventing nuclear proliferation. Accordingly, the treaty primarily serves to achieve this aim and other aims are secondary.

Other scholars, such as Joyner,[22] White,[23] Glennon,[24] and Williamson,[25] claim that the treaty should be interpreted in accordance with the general rules of treaty interpretation, which are coded in the VCLT. These scholars generally argue that the principles of the treaty represent legally binding rules without disproportionate prioritisation of one of the principles of the treaty over the other principles. However, despite the similarity in their interpretive methods and general conclusions, there are differences between them in the legal nature of the treaty, which eventually produces radically divergent results that affect the legitimacy of the principles of the treaty. For example, White[26] sees the NPT treaty as a social treaty in a contained constitutional document reflecting the structure of power that applied in 1945. Joyner[27] contends that the treaty is a contract treaty as it distinguishes between two different categorised parties

[19] Henry Sokolski and George Perkovich, 'It's Called Nonproliferation' in Henry SoKolski (ed), *Reviewing the Nuclear Nonproliferation Treaty* (May 2010) <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB987.pdf> accessed 11 Novmber 2011.

[20] Norman A Wulf, 'Misinterpreting the NPT' (30 August 2011) Arms control Association <https://www.armscontrol.org/2011_09/Misinterpreting_the_NPT> accessed 06 July 2014.

[21] Christopher A Ford, 'Misinterpreting the NPT' (30 September 2011) Hudson Institute <http://www.hudson.org/research/9046-misinterpreting-the-npt> accessed 06 January 2012. Also, for the same author see; 'Recipe for Success at the 2010 Review Conference' (28 April 2008) Statement of the United States Special Representative for Nuclear Non-proliferation, Opening Remarks to the 2008 NPT Preparatory Committee, Palais des Nations, Geneva <http://2001-2009.state.gov/t/isn/rls/rm/111190.htm> accessed 23 May 2015; and also for the same author, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' (November 2007) 14(3) Nonproliferation Review 401.

[22] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 36-41.

[23] White, 'Interpretation of Non-Proliferation Treaties' (n 2).

[24] Michael J Glennon, *The Fog of Law* (Woodrow Wilson Centre Press 2010).

[25] Richard L Williamson, 'Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses' (2003) 4 (1) Chinese Journal of International Law 59.

[26] White, 'Interpretation of Non-Proliferation Treaties' (n 2).

[27] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4).

(Nuclear Weapons States (NWSs) and Non-Nuclear Weapons States (NNWSs)). Consequently, the norms of contract law are in effect, particularly in terms of non-compliance and violating the conditions of the contract.

2.3.1. Narrow Interpretive Approaches

Narrow interpretive approaches are fundamentally based on the 'intent' school of thought. Ford[28] is one of those who adopted this approach. Ford, who has been the United States of America (USA) Special Representative[29] to events related to the NPT and its review conferences, explicitly provides in his statements legal interpretations of the principles of the NPT.

In his view, the treaty's prime purpose is to prevent nuclear proliferation. The other purposes of the treaty – the nuclear disarmament and peaceful uses – are subsidiary goals of the NPT and are conditioned to compliance with the obligations coded in Articles I, II, and III of the NPT[30] which are the core of the treaty.[31]

It is clear from the above quotation that Ford relies on the intent of states, which can be distilled from the historical negotiations and preparatory works of the NPT, as the primary source of his interpretation. The landmark result of his interpretation is that the nuclear non-proliferation obligation is disproportionately prioritized over the obligations of peaceful uses and nuclear disarmament.[32] This trend was adopted by the NWSs, at least until 2009,[33]as it falls in their favour.[34]

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[28] Ford (n 21).

[29] Ford is not only the official representative adopts the intent school of thought; rather, most of the USA representatives, such as Andrew K Semmel, John R Bolton, and Stephan G rademaker, have adopted the same approach; Joyner *interpreting the Nuclear Non-proliferation Treaty* (n 4).

[30] Ford, 'Debating Disarmament' (n 21).

[31] Ford, 'Recipe for Success at the 2010 Review Conference' (n 21).

[32] Ford (n 21).

[33] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4).

[34] The NWS interpretations might involve different terminologies but at their core they have same features and themes. For illustrations, see; H.E. Mr. Jean-François Dobelle Permanent Representative of France to the Conference on Disarmament, Head of the Delegation of France, to the second session of the 2008 NPT preparatory committee, 28 April 2008; Statement by

In accordance with Ford's narrow interpretation, Wulf[35] argues that, if a treaty should be interpreted by the plain meaning of its text according to the rules of the VCLT, then the title of the NPT reasonably assumes that the primary purpose of the treaty is nuclear non-proliferation. Basically, it seems that Wulf interprets the treaty on the basis of the textual school of thought. He clearly concentrates his interpretive tools on the title. He argues that since the creation of the treaty, somewhat inexplicably, the title was not updated to reflect broader purposes. In addition, there is no *quid pro quo* contractual relationship between the parties; rather, the words of Articles I and II and the link between compliance with these articles and the right to use nuclear energy for peaceful purposes clearly demonstrate that the treaty is about preventing nuclear weapons proliferation.

According to the rules of the VCLT, this is an incorrect way to interpret a treaty. The rules of the VCLT are very clear. These rules primarily give the interpretive primacy for the text, context, and object and purposes of the treaty. The historical negotiations are only used for confirming or clarifying the meaning of an ambiguous principle of the treaty. In addition, it seems that Ford relies on certain statements of the historical materials that serve his approach. Such a method constitutes a problematic legal issue as interpreters should involve all materials that establish a common understanding of the parties to the negotiations; they should not pick and choose only those materials that support their legal point of view.[36] He carried out his interpretative operations by using exclusively supplementary sources instead of applying the interpretive process coded in the VCLT.

Ambassador John Freeman, A Statement by Ambassador Jo Adamson to the Second Preparatory Committee for the Ninth Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 22 April 2013; A Statement by Pang Sen Head of the Chinese Delegation to the Second Preparatory Committee for the Ninth Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 22 April 2013.

[35] Wulf (n 20).

[36] Panos Merkouris, '"Third Party" Considerations and 'Corrective Interpretation' in the Interpretative Use of Travaux Préparatoires: Is it Fahrenheit 451 for Preparatory Work?' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff publisher 2010); Gardiner (n 13).

This does not mean that this research gives no legal weight to the historical negotiations. Rather, as Bos[37] claims, the text of the treaty indicates the intentions of the parties not the *Travaux preparatoires*. In addition, the rules of the VCLT are clear. Implicitly, they state that preparatory works are subsidiary interpretive means.

Narrow interpretation of the NPT, in fact, leads to the creation of a sort of legal disproportion in implementing and determining the scope of the rights and obligations of the treaty. It also unlawfully prejudices states' rights under the NPT and distorts the object and purposes of this treaty. For example, those scholars who link compliance with Articles I and II of the NPT with the right of Article IV contend that compliance with non-proliferation obligations and safeguarding agreements is a precondition to facilitate the right to use nuclear energy for peaceful purposes.[38] Such understanding, which will be discussed in further detail in chapter seven, can be seen in the case of Iran's nuclear programme. Moreover, Ford,[39] in defining the legal scope of Article VI of the NPT, challenged the opinion of the ICJ on the threat or use of nuclear weapons and stated that provisions of Article VI do not establish obligations on NWSs.

In this Advisory opinion, the ICJ unanimously adopted that 'there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in al1 its aspects under strict and effective international control'.[40] Ford claims that the term "pursue" in the text of Article VI does not comprise any legal obligation on the NWSs but to put forth efforts made in good

[37] Bos (n 13).

[38] James M Acton, 'Deterring Safeguards Violations' (2009) Carnegie Endowment for International Peace <http://www.carnegieendowment.org/files/acton_policy_outlook.pdf> accessed 25 Oct 2012; Albright et al (n 9); Christopher A Ford, 'Nuclear Technology Rights and Wrongs' (n 5); Paul K Kerr, 'Iran's Nuclear Programme: Tehran's Compliance with International Obligations' (28 April 2014) Congressional Research Service <http://fas.org/sgp/crs/nuke/R40094.pdf> accessed 06 June 2014.

[39] Ford, 'Debating Disarmament' (n 21).

[40] ICJ, 'Legality of the Threat of Use of Nuclear Weapons' Advisory Opinion, I.C.J. reports Page 226, 08 July 1996, para 105(F), 267.

faith towards nuclear disarmament.[41] From this perspective, therefore, the court's opinion is *ultra vires*.[42]

Roscini[43] shares the same point of view as Ford with regard to the obligation but in a slightly different manner. He argues that, although this obligation does not establish any legal obligation on state members, the term "pursue" goes beyond a duty merely to recognise obligation. His argument is premised on the *Lac Lanoux* arbitration which states that a state is in breach of its obligation to negotiate if it is responsible for 'an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.'[44] Accordingly, Roscini sees Article VI as establishing legal obligations to negotiate in good faith, but it not necessary to bring these negotiations to successful conclusion on a treaty with regard to complete and general nuclear disarmament.

In all fairness, Ford and Roscini are quite right on some aspects of their arguments. They are correct in contending that the ICJ opinion is brief. It occurs at the very end of the opinion, and is not directly linked to the question put before the court. It does not clearly explain the grounds for the ICJ interpretation.[45] However, reading the ICJ opinion, particularly paragraph 98, reveals that the court considered the question in the 'broader context.'[46] This clarification by the court gives some legitimacy for its opinion. In addition, it could be right that the court stretched the meaning of Article VI; however, limiting the scope of this article only to pursue efforts to negotiate on nuclear disarmament would not be in harmony with the object and purposes of the treaty.

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[41] ibid.

[42] ibid.

[43] Marco Roscini, 'The cases against the Nuclear Weapons states' (12 May 2015) 19 (10) American society of International Law <http://www.asil.org/insights/volume/19/issue/10/cases-against-nuclear-weapons-states> accessed 15 May 2015.

[44] *Lac Lanoux* Arbitration [1957] 12 RIAA 281 24 ILR 101 23.

[45] Ford, 'Debating Disarmament' (n 21); Roscini (n 42).

[46] ICJ, 'Legality of the Threat of Use of Nuclear Weapons' Advisory Opinion, I.C.J. reports Page 226, 08 July 1996, 269.

It worth mentioning that recently there have been cases brought before the ICJ against the NWSs on the basis of violation of Article VI of the NPT and customary international law. On 24 April 2014, the Republic of Marshall Island (RMI) submitted applications instituting proceedings against nine NWSs, namely, the five nuclear weapons states recognized by the NPT plus India, Israel, Pakistan, and North Korea. This case is well known as the Marshall Island case or by nuclear zero lawsuits.

The legal background of this case is that, as the MRI suffered for years due to USA nuclear tests near by the island, they brought all the nine NWSs before the highest international court claiming that these states are in violation of their nuclear obligations particularly nuclear disarmament obligations. Generally, the case was built up on the principle of *pacta sunt sevanda,* the bargain of the NPT must be kept.[47] The bargain, as it has been discussed before, is on that the NNWSs to not to acquire nuclear weapons and on the NWSs to negotiate to eliminate these weapons.

However, France, China, Israel, North Korea, Russia, and USA, declined to take any part in this case. So, only three states among the respondent group were left and have consented to the compulsory jurisdiction of the court, which are India, Pakistan, and UK.[48]

In the application against UK, MRI alleges that UK has failed 'to fulfil the obligations enriched in Article VI of the NPT and customary law'.[49] In particular, this application focused on 'the failure of the NPT nuclear-weapons states to keep their part of the strategic bargain and do what the Court *unanimously* called for in its advisory opinion.

[47] ICJ, 'Application instituting proceedings against the United Kingdom submitted on 24 April 2014 by the Republic of Marshall Island to the International Court of Justice' (24 April 2014) ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), <http://www.icj-cij.org/docket/files/160/18296.pdf> accessed 09 November 2016, para 1, 3.

[48] According to the statute of the ICJ, the court's jurisdiction in contentious cases is based on the consent of the states to the disputes; ICJ statute, Art. 36.

[49] ICJ (n 47) para 2, 3.

Accordingly, the UK is in (i) continuing engagement in material efforts to develop its nuclear arsenal; (ii) continuing adoption of the policy of indefinitely maintaining and extending its nuclear system; (iii) opposing negotiations on nuclear disarmament.[50] Therefore, in summary, the UK has breached and continues to breach its (i) nuclear disarmament obligations under Article VI of the NPT;[51] (ii) its obligation of cessation of the nuclear arms race at early date under the same Article;[52] (iii) its obligations under customary international law with regard to nuclear disarmament and cessation of nuclear arms race;[53] (iv) its legal duty to perform its legal obligations under the NPT and customary law in good faith.[54]

With regard to India and Pakistan, as these two states are not signatory states to the NPT, they cannot be in violation of the principles of the NPT. Therefore, MRI argues that these two states have failed to fulfil the obligations of customary international law with respect to cessation on nuclear arms race at an early date and nuclear disarmament enriched in Article IV of the NPT and declared by the court.[55] From the legal perspectives of the MRI's case, the obligations of Article VI go beyond mere obligation of conduct – to pursue in good faith negotiations on nuclear disarmament - and actually to involve an obligation of results, such as to bring these negotiations to a conclusion on general and complete nuclear disarmament.[56] The declaration of the court in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that there exist obligations to achieve a precise result on nuclear disarmament was tantamount to declaring that the obligations of this Article is an obligation *erga omnes*.[57] Moreover, the obligations of cessation of the nuclear arms race stands on its own as customary international law obligation based on the very

[50] ibid para 106, 35.

[51] ibid para 104, 36.

[52] ibid para 107, 36.

[53] ibid para 109, 36

[54] ibid para 113, 37.

[55] ibid para 2, 3.

[56] ibid para 39, 17.

[57] Ibid para 39 and 40, 17.

widespread and representative participation of States in the NPT and is inherent in the customary international law obligation of nuclear disarmament'.[58] On this legal basis, MRI claims that India and Pakistan have and continue to breach (i) their obligations under customary international law, including specifically their obligation to pursue negotiations to cease nuclear arms race at an early date, as well as to pursue negotiations leading to nuclear disarmament in all its aspects under strict and effective of international control, and (ii) their obligations to perform their international legal obligations in good faith.[59]

In general and summary, the RMI in the three applications requests the ICJ to adjudge and declare that the three states mentioned above have (1) violated the provisions of Article VI of the NPT by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament; also, by qualitatively improving their arsenals of nuclear weaponry and breaching the obligation of cessation of nuclear arms race; (2) violated customary international law rules with respect to the same obligations that are mentioned earlier; and (3) failed to perform their international legal obligations in good faith.

In response, the UK in its pleading rejected MRI's accusations and claims that there is an international principle, which is coded in Article 43 of the International Law Commission's Articles on State Responsibility, that requires an injured State to "give notice of its claim" to the allegedly responsible State.[60] Such notice is a condition of the existence of a dispute.[61] The UK was surprised by the MRI's application and claim therein. The MRI has not, directly or indirectly, raised any issue, concern, or bilateral exchange with UK concerning

[58] ibid para 47, 19.

[59] ICJ, 'Application instituting proceedings against the Republic of India submitted on 24 April 2014 by the Republic of Marshall Island to the International Court of Justice' (24 April 2014) ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Republic of India), <http://www.icj-cij.org/docket/files/158/18292.pdf> accessed 09 November 2016, para 2, 3.

[60] ILC, Art. 34.

[61] This principle is reflected in Article 43 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. In addition, this principle was held by the Court to be a precondition to the existence of a dispute in both the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) and the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal).

nuclear disarmament efforts.[62] The lack of such notice meant the MRI's application 'came entirely out of blue and allegations to be manifestly unfounded on the merit'.[63] Therefore, the UK requested the Court to adjudge and declare that the claim brought by the MRI to be inadmissible and/or that the Court lacks jurisdiction to address the claim.[64] The preliminary objection of the UK are based on (a) MRI failing to give the UK any notice whatever of its claim; (b) the temporal restriction in the MRI's Optional Clause Declaration; (c) the UK's Optional Clause Declaration that excludes the ICJ's jurisdiction over any dispute in respect of which the other Party has accepted the compulsory jurisdiction of the Court only "for the purpose of the dispute"; and (d) the absence before the Court of other essential parties whose interests are directly and unavoidably engaged by the allegations advanced by the Marshall Islands.[65]

Pakistan has brought counterclaims against MRI in very similar approach to the UK, in addition arguing that there is no dispute between the states parties to the case. Pakistan claims that the court must decline to entertain the case on the basis that (i) this Application involves issues of Pakistan's national security which are essentially issues of exclusive domestic jurisdiction for which no other forum including ICJ is competent to discuss;[66] (ii) also, thast this case was brought in bad faith. The RMI is not acting with a sense of responsibility; otherwise, it would have, as a minimum, pursued some form of negotiation or consultation with Pakistan in respect of the alleged dispute before instituting these proceedings;[67] (iii) moreover, the RMI obtains a commercial benefit in permitting ballistic missile defence testing to be carried out on its territory to the present day, which prima facie demonstrates its duplicity and bad faith in

[62] ICJ, 'Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland' (15 June 2015) ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) <http://www.icj-cij.org/docket/files/160/18912.pdf> accessed 10 November 2016, para 2 and 3, 1-2.

[63] ibid para 5, 3.

[64] ibid para 114, 53.

[65] ibid para 113 (a, b, c, and d), 53.

[66] ICJ, 'Counter-Memorial of Pakistan: Jurisdiction and Admissibility' (1 December 2015) ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan) <http://www.icj-cij.org/docket/files/159/18920.pdf> accessed 10 November 2016, para 1.3(1), 5.

[67] ibid para 3.4(1), 12.

bringing these proceedings;[68] its claims are manifestly without legal merit or substance as it does not conform to the Rules of Court and ICJ Practice Directions and has not discharged the applicable burden of proof;[69] and, last but not least, the 1996 Advisory Opinion nowhere states that the obligation in Article VI of the NPT constitutes a general obligation, let alone that it is opposable erga omnes.[70] The RMI has not presented even prima facie evidence of the existence of such obligations. It is merely relying on non-binding resolutions of the UN General Assembly[71] and the Court's non-binding Advisory Opinion.[72]

India shares the similar views with the other respondents regarding the MRI's case. However, it adds that to pursue nuclear disarmament it is necessary for all nuclear weapons states to participate in the negotiations leading to a complete and general nuclear disarmament. India cannot be blamed for not complying with Article VI of the NPT when there is non-compliance with this obligation by the signatory states to the NPT for 45 years. Thus, it cannot be said that the obligations of this Article has acquired the status of customary international law.[73] Also, the non-participation of all NWSs made the court lack jurisdiction since the other indispensable Parties were not taking part in the proceedings.[74] Even, supposedly, the ICJ judged in favour of the MRI, its decision has no binding effect on any nuclear State other than India, which refuses to consent to the Court's jurisdiction since its judgment is binding only on the concerned Parties according to Article 59 of its statute. Therefore, a judgment directing India to undertake negotiations would be incapable of effective application.[75]

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[68] ibid para 3.4(4), 13.

[69] ibid para 1.3(5), 5.

[70] ibid para 2.3, 8.

[71] The UNGA adopted a resolution in following up the 1996 Advisory Opinion, UN, UNGA, A/52/38 O, (09 December 1997).

[72] ICJ, (n 66) para 2.3, 8.

[73] ICJ, 'Counter-Memorial of the Republic of India' (16 September 2015), ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India) <http://www.icj-cij.org/docket/files/158/18900.pdf> accessed 10 November 2016, para 93(iii), 41.

[74] ibid para 2, 1.

[75] ibid para 89, 38.

On 5 October 2016, the court passed its judgments regarding the three above cases. Its decisions are almost identical. Generally, the court determined that the existence of a dispute is a matter of substance, and not a question of form or procedure.[76] It says that the court must turn on an examination of the facts.[77] For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties. In so doing, 'it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content"'.[78] It is important that the evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court.[79] With this context, the conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges.[80] For these reasons, it decides to uphold the first preliminary objection to jurisdiction based on the absence of a dispute between the Parties; and consequently, it could not proceed to the merits of the case.[81]

The court decisions meant that the MRI has failed to establish that there was a legal dispute between the parties to the case. Therefore, the court could not proceed to the merit of the case as there was no objective awareness of the respondent states prior to the submission of the application before the court. So, the court, in fact, rejected the case due to the lack of formalistic requirements.

The President of the court, Judge Abraham,[82] in his declaration elaborated the court's understanding of the terms of "existence of dispute". He said that:

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[76] ICJ, 'Preliminary Objections' (05 October 2016), ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), <http://www.icj-cij.org/docket/files/160/19198.pdf> accessed 12 November 2016, para 38, 17.

[77] ibid para 39, 17.

[78] ibid.

[79] ibid para 41, 18.

[80] ibid para 40, 18.

[81] ibid para 59 (1) and (2).

[82] Ronny Abraham, 'Declaration of President Abraham' (05 October 2016), ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, <http://www.icj-cij.org/docket/files/159/19168.pdf> accessed 13 November 2016, 1.

First, the existence of a dispute between the parties to a case is not only a condition for the exercise of the Court's jurisdiction, but, more fundamentally, a condition for the very existence of that jurisdiction.

Second - and this proposition largely follows on from the previous one - in order to determine whether that condition has been met, the date to be referred to is not that on which the Court delivers its judgment, but the date of the institution of the proceedings, elements subsequent to this latter date possibly allowing to confirm the existence of the dispute, but not to establish it.

Finally, for the Court to find that a dispute exists between the parties on the relevant date, it is necessary for that dispute to have been revealed by exchanges between the parties - in whatever form - prior to that date, in circumstances such that each party was - or must have been - aware that the views of the other party were opposed to its own. In particular, the respondent must not discover the existence of a claim against it by the applicant in the document instituting proceedings; it has to have been informed of it beforehand.

Many scholars, including Tams[83] and Krisch,[84] have argued that the outcomes of the courts are controversial. Krisch notes that the court's decisions are novel not because this is the first time that the court dismissed an entire case of such ground, but also because it has expanded the interpretation on a "dispute" beyond its previous understanding.[85] Tams[86] in his comment on the same matter argued that the court's outcomes contain two controversial points: first that these outcomes have been carried out by narrow majority. Indeed, the decisions were taken, especially in the UK's case with an extremely narrow majority. After tied voting at 8-8, the matter was decided only on the President's casting vote[87] in

[83] Christian tams, 'No Dispute about Nuclear Weapons?' (06 October 2016) EJIL Talk, <http://www.ejiltalk.org/no-dispute-about-nuclear-weapons/> accessed 13 November 2016.

[84] Nico Krisch, 'Captuliation in The Hague: The Marshall Islands Cases' (10 October 2016) EJIL talk, <http://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/> accessed 13 November 2016.

[85] ibid.

[86] Tams (n 83).

[87] In the case of India, the court votes were nine to seven, and in case of Pakistan they were Ten to Six.

accordance with Article 55(2) of the ICJ Statute.[88] And second, this narrow majority was based on unusual legal ground which was no dispute between the parties.

According to Judge Abraham,[89] the court had adopted a flexible and pragmatic approach in implementing the condition of the "existence of dispute"; this was prior to 2011. In his opinion, the Court began to depart from this approach in its Judgment in the Georgia v. Russian Federation case, and that the Court always has the power to change course or overturn its jurisprudence if, exceptionally, it considers that there are compelling reasons to do so.

Judge Robinson[90] in his dissenting opinion says that this shift in the court's decision not welcome and it is a conspicuous aberration. He meant that the court should not depart from an established approach only to serve the interests of the whole of the international community and there are compelling conditions to do so.

It is not clear what the reasons behind this shift of the court thinking and adoption of a highly formalistic approach. This ambiguity was noticed and confirmed by the Judge Abraham.[91] Krisch,[92] suggests that a glance at the narrow majority of judges who voted in favour of the decision give us an indication. Six of these judges are nationals of NWSs (China, France, India, Russia, the UK, and the USA), the other two are nationals of Italy and Japan who are benefitting for the nuclear protection provided by USA. On the opposite side, all the other judges voted against the decision are nationals of NNWSs.

Indeed, in the opinion of the current author, it seems that the court tried to avoid engagement in sensitive cases such nuclear weapons. It seems that the court does

[88] ICJ Statute Art. 55(2).

[89] Abraham (n 82) para 4, 6, and 11, 1-2.

[90] Patrick Robison, 'Dissenting Opinion of Judge Robison' (05 October 2016) ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament <http://www.icj-cij.org/docket/files/159/19190.pdf> accessed 14 November 2016, para 61, 17.

[91] Abraham (n 82) para 12, 3.

[92] Krisch (83).

not want to take up the challenge and rule sensitive case, hiding its evasions behind formalistic requirement and lack of jurisdictions. However, in all events, such behaviour would impose an additional and unwarranted hurdle. It would prevent the court from playing the role envisaged for it as a standing body for the peaceful settlement of disputes and through this function, as an important contributor to the maintenance of international peace and security.[93]

With regard to the MRI's case it may be suggested that, as it seems that there is a rise of formalist reasoning in the ICJ, the MRI should instead bring the case before the court as a contentious case, it should work within an international forum that presents all states, such as the UNGA or Conference on Disarmament, with the opportunity to fashion a question on whether the principles of the NPT, particularly Article VI, have obtained the character of customary international law. This question should be sent to the court for its advisory opinion. This approach would avoid all potential jurisdictional and formalistic hurdles, and would establish a customary international law that allows the court to proceed on the merit of the nuclear disarmament cases with regard to all the nine nuclear weapons states.

In summary, this narrow interpretative approach is lacking in certain areas and is inconsistent in relation to the meaning, content, and structure of the treaty. Yet, it strikes at a more fundamental level at the system of international law, particularly the rules of the VCLT. Therefore, some scholars have interpreted the treaty in a wider manner relying on the legal nature of the treaty.

2.3.2. Naturalistic Interpretation of the NPT

Bos[94] asserts that the textual interpretative method has dominated other methods. The naturalistic interpretative approach is essentially based on the textual method or the teleological school of thought where the text, context, and object and purposes of the treaty are the main elements in interpreting a treaty. These elements are implemented in accordance with the interpretive rules of the VCLT. Despite the similarity in the approach implemented by scholars, the

[93] Ibid 17.

[94] Bos (n 13).

results obtained vary slightly due to differences in how they see the treaty as a legal document. Consequently, these differences lead to differences with regards to the scope, obligatory force of the NPT principles, and the rules of law governing the disputes that would result from non-compliance with these principles.

Glennon, for example,[95] emphasizes that, alongside the plain meaning of the text of the provision of the NPT, the purposes of the treaty and the practices of states are key elements in interpreting the treaty. He argues that the NPT should be considered as a constitutional treaty. This is because it is an international treaty at the core of political order and the international legal regime. In addition, it has the IAEA as an institutional element assisting in, developing and implementing the treaty.

Based on very similar explanations and reasoning as Glennon, Williamson[96] sees the NPT as a law-making treaty, the reason being that international treaties, including the NPT, may function as constitutions that establish the framework of the legal order, institute the norms of conduct and establish the legal relationship between contractors. They are likely to be close to the domestic law that establishes normative rules of general applicability. Therefore, the NPT is a law-making treaty as it contains normative rules regulating the dual-uses of nuclear energy and it has an institution, which is the IAEA, intrusively intervening due to the complexity of nuclear energy in order to ensure the comprehensive implementation of the principles of the NPT. The weakness of this argument is that the IAEA was established before the creation of the NPT and it is exclusively meant to detect any diversion of the declared nuclear material from peaceful to military uses. It has no legal mandate to monitor the implementation of the NPT rules and the compliance of states with these rules, otherwise its activities are outlawed.[97]

[95] Glennon (n 24) 136–139.

[96] Williamson (n 25) 65-7.

[97] Joyner, 'Iran's Nuclear Program and International Law' (n 10); Yousaf Butt, 'Why Is the IAEA Getting Iran Wrong?' (14 November 2014) <http://nationalinterest.org/feature/why-the-iaea-getting-iran-wrong-11673?page=2> accessed 25 February 2015.

White[98] argues that the VCLT interpretive rules provide the proper 'list of ingredients' of interpretative techniques - the textual, purposive and subjective.'[99] He stresses that there is no difference between the interpretive tools that are used in interpreting non-proliferation treaties with those that are used in interpreting other treaties, such as international human rights treaties or international trade treaties. The variation in interpretative tools is explicable on the basis of the nature of the treaties, meaning whether the treaty in question is considered contractual,[100] law-making or constitutional.[101] In other words, the results obtained from implementing these rules do not depend on the subject of the treaty, nor are they context-specific; rather, they depend on the type of treaty. In his opinion, 'the more constitutional a treaty is the more contextual and less textual the interpretive method becomes.'[102]

In the context of interpreting the NPT, White argues that the so-called 'Grand Bargain' of the NPT does not clearly indicate whether this is meant in a bilateral contractual, social contractual or constitutional sense. However, it is clear that this Grand Bargain is based on distinguishing who are the responsible states of the international community - states who would not use nuclear weapons unjustifiably – compared to other states who are unable or unwilling to bear this burden. To put it another way, the treaty is premised on distinguishing between those states who have the power and exercise it and those who are subject to this power. This bargain gives the treaty a contractual nature. However, precisely, it goes beyond an ordinary contract treaty. It is a social contract treaty[103] embodied in a constitutional document whereby one of the groups of the parties, which is

[98] White 'Interpretation of Non-Proliferation Treaties' (n 2).

[99] Nigel D White, *Advance Introduction to International Conflict and Security Law* (Edward Elgar 2014).

[100] Contract treaty, or *traite contracts,* is an agreement between states that creates particular mutual obligations between signatory states; Jan Klabbers, *International Law* (CUP 2013) 17.

[101] Law-making treaty, or *traite-lois,* is agreement between states that creates obligations which can continue as law, with no consideration given between states in exchange for their obligations; Klabbers (n 100) 17.

[102] White, 'Interpretation of Non-Proliferation Treaties' (n 2) 87.

[103] Zetterquist explains social contract theory by it is about explaining the political obligations of the parties by resorting to a voluntary agreement set out these obligations. So the consent of the parties to the social contract constitutes the foundation of the political obligations. Any political power emerges from a social contract must be rest of the consent of the parties; Ola Zetterquist, 'A European Social Contract?' [2012] Scandinavian Studies International Law 321 324.

the NWSs, has the right to possess nuclear weapons and the other group, the NNWSs, does not. Thus, White stresses that the NPT should be seen in the context of those treaties that establish grand bargains between members, and bind the broader international community. He specifically referred to the United Nations Charter (UNC).[104] The UNC establishes a grand bargain between the five permanent members of the United Nations Security Council (P5) and the rest of the UN members. This grand bargain is based on inequality in terms of the P5 acting as the police of the world and having the right of veto. It is no coincidence that the P5 of the UNC are the same states who are NWSs in the NPT. The inequality of the UNC is extended to the grand bargain of the NPT by imposing a type of exchange of rights and duties between NWSs and NNWSs. Therefore, the NPT is a social contact treaty contained in a constitutional document.[105]

In the same manner, Joyner,[106] in his remarkable book *Interpreting the Nuclear Non-proliferation Treaty*, possibly delivers the best legal interpretation of the principles of the NPT. In this book, he applies the interpretive rules of the VCLT. These rules, according to him, imply that the treaty should be interpreted in accordance with the plain meaning to be given to its provisions in their context and in the light of the treaty's object and purposes. The context of these provisions means that the interpreter should consider each provision of the treaty as having a particular role and place among other provisions and also as having meaning informed by the meaning of the other provisions and by the structure of the treaty. Put differently, the core of Joyner's interpretive methodology is based on the holistic concept. The holistic concept means that the text of the treaty combined with its object and purposes, the intentions of the parties, and subsequent agreements to the treaty, form the primarily legal interpretive norms. This corresponds with Fitzmaurice[107] who stresses that these norms, which are

[104] White, 'Interpretation of Non-Proliferation Treaties' (n 2) 105.

[105] For further details on the differences between contractual and constitutional concepts; see, Heidrun Abromeit, and Tanja Hitzel-Cassagnes, 'Constitutional Change and Contractual Revision: Principles and Procedures' [1999] 5 European Law Journal 23 34.

[106] Joyner *Interpreting the Nuclear Non-proliferation Treaty* (n 4).

[107] Malgosia A Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (OUP 2014).

coded in article 31, should be taken into account in a holistic approach without any separation or sequence. Waibel[108] confirms that Article 31 of the VCLT does not define how much legal weight should be given to each interpretive norm coded within it. This contrasts with Article 32 which clearly states that preparatory works are supplementary sources.

From Joyner's perspective, the NPT is based on the Grand Bargain between NWSs and NNWSs. This Grand Bargain is premised on a sort of exchange in rights and duties between the two different types of categorised parties. These reciprocal obligations give the treaty a contractual character. As this research agrees with Joyner, the NPT should thus be interpreted in a contractual manner. He compares the NPT with other international treaties that regulate the use of weapons of mass destruction (WMD), such as the Chemical Weapons Convention (CWC) and the Biological Weapons Convention (BWC). These treaties are law-making treaties as there is no exchange in rights and duties between members in the manner that the NPT provides. They code universal prohibitions on possessing, developing, and proliferating certain weapons and their related technologies. They are very similar to domestic law whose rules equally bind members without any special considerations. Thus, Joyner concludes that the NPT is a contract treaty aimed at regulating the dual-use of nuclear energy.

Joyner's interpretation was criticized by White.[109] The latter contends that, under the contractual approach, it is easy to conclude from reading the three pillars of the NPT that the obligation of nuclear non-proliferation is coded in a firmer manner than the other obligations. Nevertheless, the constitutional approach is more practical in reaffirming the meaning of the NPT. Depending primarily on the text and object and purposes, the constitutional approach is also concerned with changes in the states' understanding of their obligations in regards to the treaty. The text of the treaty is applied and developed on a regular basis. What the state members believe to be the interpretation of a principle

[108] Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22 (2) The European Journal of International Law 571, 574.

[109] White, 'Interpretation of Non-Proliferation Treaties' (n 2)

today is much more important than what they thought it meant when the treaty was drafted.[110] This understanding is analogised with the opinion of Judge Alvarez in the Second Admission case. In that case Judge Alvarez stated that it 'treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it'.[111]

Therefore, the constitutional approach can open up the way to use the subsequent agreements and practices of states in a practical manner as sources of interpreting and reaffirming the meaning of the NPT.

This above assertion is in harmony with Dworkin's[112] interpretative method, which argues that, in order to reach the right and acceptable answer in interpreting a treaty, the interpreter should take into account the rules, principles, and object and purposes that are contained within the treaty, the norms and normative rules of international law, and the practices of the parties that amount to interpretation.

In fact, there is no issue with using the states' practices and subsequent agreements as sources of interpretation across all scholars including Joyner. Perhaps, as Jacobs[113] discusses, states' practices may not only interpret the language of a treaty, but it also, in certain cases, can lead to an amendment of the textual meaning. However, these sources have a legally problematic issue which is that there are no mechanisms that can be used to specify the legal nature of a practice.[114] There are no clear criteria that determine whether a pattern of behaviour among states can be considered as a valid subsequent practice, which can then be used as foundation in determining the meaning and scope of the states' legal obligations. The lack of such mechanisms creates

[110] ibid 95.

[111] ICJ Reports 1950 18.

[112] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

[113] Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation' (1969) 18 (2) International and Comparative Law Quarterly 318, 332.

[114] Christopher Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?' (2011) 3 (2) Goettingen Journal of International Law 617.

anarchy in international law. Indeed, this gap gives states, specifically the dominant states, the capability to obfuscate their legal obligations, notably when these obligations are related to their national policies and security.

The differences in the nature of the treaty have led scholars to argue over the scope of the treaty. To illustrate this, Tsagourias and White[115] stress that the treaty is not there to prohibit the ownership of nuclear weapons; rather, it is to limit their proliferation. They claim that the NPT is unlike the other international non-proliferation treaties, such as the BWC and CWC. The latter treaties prohibit the possession and usage of those types of weapons. However, the NPT gives legitimacy to the ownership of nuclear weapons in the hands of the NWSs; rather, it prohibits the proliferation of these weapons outside the club of the NWSs. Accordingly, the possession of nuclear weapons by the NWSs is legitimate and this legitimacy is enhanced by the treaty itself.

On the other hand, Daniel[116] stresses that the NPT is about regulating the dual-use of nuclear energy applications. With this understanding, the three principles of the NPT are binding to all states whether they are NWSs or NNWSs. Any other reading of these principles, such as Ford's interpretation, are incompatible with the NPT's legal scope as they disturb the balance and equality between these principles.

Daniel's approach is in harmony with the interpretation by Shaker.[117] In his analysis, Shaker demonstrates that the NPT is not only about preventing nuclear weapons in other states; rather, it was negotiated within a contractual framework on specific purpose which is regulating the dual-use of nuclear energy and its technologies. His interpretation was founded on the basis of the five principles of the United Nations General Assembly (UNGA) resolution 2028(XX). By reviewing a wide range of preparatory works of the NPT, he argues that the obligations imposed on the NNWSs should be met on the other side by

[115] Nicolas Tsagourias, and Nigel D White, *Collective security: Theory, Law and Practice* (CUP 2013).

[116] Joyner *Interpreting the Nuclear Non-proliferation Treaty* (n 4).

[117] Mohammed I Shaker, *The Nuclear Non Proliferation Treaty: Origin and Implementation 1959-1979* (Vol 1, Oceana Publication 1980).

significant obligations imposed on the NWS. Accordingly, the NPT interpretation reveals that the treaty goes beyond the Irish resolution, which is seen as "godfather" of the treaty and establishes acceptable mutual rights and obligations of the NWS and NNWS, and becomes an international treaty to regulate dangerous uses of the destructive power of nuclear energy.[118]

It is clear that the treaty was intended to address the dangers of nuclear weapons and the devastation of nuclear war.[119] The preamble to the treaty fully established these objectives. Obviously, the treaty did not limit itself to one obligation, specifically the non-proliferation obligation. Rather, it covers nuclear disarmament and the right to use nuclear energy for peaceful purposes as obligations for all states.

2.4. Conclusion

The rules of the VCLT are still the key elements in interpreting treaties. In fact, to date, these rules have shown sufficient flexibility in defining and determining the legal limitations and interpretation of international obligations regardless of the subject of these treaties.

In terms of the interpretation of the NPT, it seems that scholars have tried to use various types of descriptive terms to determine what the NPT is about. The readers should not be confused by the terms used. The fact that the treaty has been described as a contract, social contact, or law-making treaty cannot be seen in any way as attempts to categorise the NPT; rather, these are efforts to express the structure of the treaty.

Overall, it is clear that the treaty is not really a special treaty in terms of its interpretation. Put another way, regardless of the fact that it is the most complicated legal document in the area of WMD, this treaty does not differ from

[118] For full history of NPT negotiations. See; ibid 3-26; also, George Bunn, *Arms Control by Committee: Managing Negotiations with the Russians* (Stanford University Press 1992) 59-65; Robert Fred Mozley, *The Politics and Technology of Nuclear Proliferation* (University of Washington Press 1998) 142; Henry D Sokolski, *Best of Intentions: America's Campaign against Strategic Weapons Proliferation* (Praeger Publisher 2001) 41.

[119] Mason Willrich, 'The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics' [1968] 77 Yale Law Journal 1447, 1449.

any other international treaties. It does not require any special interpretive mechanisms or tools. Any interpretation of the rules of international law should be accepted by all the states involved. This is because states are both the creators and the subjects of these rules.

3. Nuclear Negotiations and the Necessity of Rapprochement with Iran

3.1. Introduction

Iran's procurement of advanced and sophisticated nuclear technologies and knowledge has concerned the international community and has raised questions as to how to contain Iran's nuclear programme and its related activities. Although Iran provided assurances on the peaceful nature of its nuclear programme, the international community and, in particular, the coalition, has not been satisfied or convinced that this programme has no military dimensions. Their concerns are that Iran is obtaining nuclear technologies, facilities, and knowledge which are capable of producing a nuclear fuel cycle and highly enriched uranium which are essential in producing nuclear weapons. Put in another way, Iran is among the "threshold states"[1] which means it physically possesses the materials and technologies to build a nuclear arsenal. Such material and technologies make its nuclear decisions dependent on the political will of the Iranian government.

The coalition states have therefore been involved in long term negotiations with Iran with respect to determining what possible compromises may exist that would contain Iran's nuclear programme and ambitions. These negotiations date back to 2003 after the discovery of secret nuclear sites in Iran.[2] They have broken down on numerous occasions due to the divergence between the parties in their understanding of their rights and obligations under the Nuclear Non-Proliferation Treaty (NPT). Above all, the Iran-coalition confrontation overlaps with security disputes and diverging interests within the region.

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[1] Gary Samore (ed), 'Decoding the Iran Nuclear Deal: Key Questions, Points of Divergence, Pros and Cons, Pending Legislation, and Essential Facts' (April 2015) Belfer Centre for Science and International Affairs, Harvard Kennedy School <http://belfercenter.ksg.harvard.edu/publication/25234/decoding_the_iran_nuclear_deal.html> accessed 03 May 2015, 55.

[2] Kenneth Katzman and Paul K Kerr, 'Iran Nuclear Agreement' (15 December 2015) Congressional Research Service <https://fas.org/sgp/crs/nuke/R43333.pdf> accessed 16 December 2015, 2-3.

This chapter focuses on the trajectories of the Iran-coalition negotiations and how developments in the region impose the need for rapprochement with Iran. It examines to what extent the coalition's policies towards Iran's nuclear programme have helped in containing its nuclear programme and how these polices should further evolve. In doing so, this chapter begins with providing a historical review of the Iranian nuclear programme, its major developments and elements up to the date of writing this research. It discusses Iran's nuclear logic and ambitions. The subsequent section sheds light on the trajectory of the negotiations between the parties since 2003 up to July 2015 which has passed through several turning points following the opening of the negotiations in 2003; escalating impediments since 2006; and a more recent impetus to reach a nuclear deal between the parties. Then, the chapter discusses what lessons can be extracted from the course of these negotiations. It then analyses the reasons behind the need to approach Iran. Finally, it concludes that that Iran has no desire to possess nuclear weapons at least in the near future. However, what Iran has done is develop its nuclear capability in order to improve its nuclear breakthrough options without facing any serious objections from the world. Reaching a final diplomatic comprehensive nuclear agreement between Iran and the coalition is the best and the only way to contain Iran's nuclear programme.

3.2. Iran's Nuclear Motivations and Ambitions

Iranian ambitions to gain nuclear energy are not new. They stem from decades of solid relations between Iran and the West, especially under the Shah, and also from cooperation with the Abdul Qauder Khan network.[3] This cooperation and assistance have provided Iran with the knowledge and capabilities to develop considerable nuclear infrastructure and to train competent scientists in this field.[4]

[3] Abdul Qauder Khan is regarded as the father of Pakistan's nuclear weapons programme. Also, he is well known as the leading nuclear black market dealer. He has sold nuclear technologies, information, and design to many states including Iran, Libya and North Korea. Sara Kutchesfahani, 'Case Study the Khan Network' in James E Doyle (ed), *Nuclear Safeguard, Security, and Non-Proliferation* (Elsevier 2011) 561-66.

[4] Mustafa Kibaroglu, 'Iran's Nuclear Ambitions from a Historical Perspective and the Attitude of the west' (2007) 43 (2) Middle Eastern Studies 223, 224; Robert J Reardon, *Containing Iran: Strategies for Addressing the Iranian Nuclear Challenge* (Rand Corporation 2012) 10.

3.2.1. A Historical Review of Iran's Nuclear Programme

Thus, this programme has passed through many different stages since it was established. These stages are: under the Shah of Iran Mohammed Rezza Pahlavi. At that time, the American policy towards Iran was primarily to bring Iran into the international fold and prevent the Russian hegemony in the region.[5] In doing that, the United States of America (USA) transformed Iran from an occupied backward country to having a policing role in the Middle East.[6] The American administrations of President Harry Truman and his successor Dwight Eisenhower proposed to provide Iran with economic and technical assistance. This included nuclear science technologies, military aid to strengthen the Shah's regime and measures to reinforce the army's loyalty to the Shah.[7] Thus, the roots of the Iranian nuclear programme were planted by American administrations in the late 1950s when the US-Iranian interrelationship was strong.

The Islamic Revolution of 1979 which started on 1 February 1979 dramatically changed the domestic and foreign characteristics of Iranian politics.[8] The arrival of the Imam Ayatollah Khomeini, from exile to the highest authority in Iran, effectively froze all kinds of foreign assistance in the nuclear field.[9] The Imam's rejection of the foreign assistance was premised on various concepts, mainly refusing the dependency on foreign technologies[10] and western assistance, which is contrary to Islamic teaching.[11] In addition, the nuclear programme was

[5] Kibaroglu (4) 224. For more details and analysis of the relationship between Iran and USA; see, Kenneth M Pollack, *The Persian Puzzle: The Conflict between Iran and America* (Random House 2004).

[6] Sharon Squassoni, 'Iran's Nuclear Programme: Recent Developments' in Milton M Schwartz (ed), *Iran: Political Issues, Nuclear Capabilities, and Missile Range*, (Nova Sciences Publishers 2006) 62.

[7] Anthony H Cordesman, and Khalid R Al-Rodhan, 'Iranian Nuclear Weapons: Uncertain Nature of Iran's Nuclear Weapons' (12 April 2006) Centre for Strategic and International Studies (CSIS) <http://csis.org/files/media/csis/pubs/060412_iran_uncertainty.pdf> accessed 06 June 2014, 20.

[8] Ray Takeyh, *Hidden Iran: Paradox and Power in Islamic Republic* (Turnaround Distributor 2007).

[9] Kasra Naji, *Ahmadinejad the Secret History of Iran's Radical Leader* (Tauris 2008) 116.

[10] Kibaroglu (n 4) 234.

[11] Reardon (n 4) 11.

regarded as uneconomical and a waste of money, especially for Iran, since it had a high percentage of reserved oil.[12] Not only the Imam rejected the foreign assistance, but also, the western states were disinterested in dealing with the new Iranian government and suspended all agreements signed with Iran including nuclear assistance.[13]

The revelation of a secretive nuclear programme in 2002 was a turning point in the Iranian nuclear case.[14] This is because on 14 August 2002, the National Council of Resistance of Iran (NCRI) revealed that Iran was carrying out clandestine development of sensitive nuclear technologies at two sites: an uranium enrichment site in Natanz, which is a uranium enrichment facility and at the Arak site, which is a heavy water production facility.[15] September 2003 saw the beginnings of the worsening and escalation of the relationship between Iran and the coalition.[16] In that month, the International Atomic Energy Agency (IAEA) adopted a resolution against Iran in which it expressed its grave concerns that Iran had 'not enabled the IAEA to provide the assurances required by Member States that all nuclear material in Iran is declared and submitted to Agency safeguards and that there are no undeclared nuclear activities'.[17] However, it also revealed its concerns about four developments that had occurred recently in the Iranian nuclear programme. At this stage, with the escalation of tension between Iran and the IAEA, the USA was anxious and uneasy about Iran's nuclear development and uranium enrichment facilities. Consequently, it demanded that Iran halt its nuclear programme and asked the Board of Governors of the IAEA to refer Iran's nuclear programme file to the United Nations Security Council (UNSC), in order to take punitive actions against Iran.[18] The Iranian government protested against American claims and

[12] Naji (n 9) 116.

[13] Reardon (n 4).

[14] Squassoni (n 6).

[15] Paul K Kerr, 'Iran Nuclear Programme: Status' (17 October 2012) Congressional Research Service <https://www.fas.org/sgp/crs/nuke/RL34544.pdf> accessed 20 June 2014, 5.

[16] IAEA, GOV/2003/69, (12 September 2003).

[17] ibid para I.

[18] Muhammad Sahimi, 'Atoms for Peace' [21 July 2013] 10 The Cairo Review of Global Affairs 60.

argued that it did not have any plans to produce or acquire nuclear weapons and that all its nuclear plants were for civilian and peaceful use.[19] The Board of Governors then voted on referring Iran's nuclear dossier to UNSC on 4th February 2006.[20] In this year, the UNSC adopted two resolutions against Iran. The first resolution demanded that Iran should suspend its nuclear activities to rebuild faith in its relationship with the IAEA.[21] The second was adopted in response to Iran's failure to comply with the first resolution and imposed sanctions against Iran.[22]

Lastly, the extraction and development of the programme from 2006 up to the date of writing this thesis, where Iran's nuclear programme have faced escalations from both sides (Iran and the coalition).[23] Many resolutions and sanctions adopted against Iran in order to reaffirm that Iran must take the steps required by the IAEA Board of Governors, notably a suspension of its uranium enrichment activities. However, these resolutions and sanctions had not fixed Iran's case, but rather it made Iran more obstinate about its nuclear programme and go further in its nuclear programme. This situation held up until 2014 when the new Iranian president, Mr. Hassan Rouhani, was elected. In his period the Iranian nuclear programme initially entered into a new phase. After negotiation with the P5+1 (the Five Permanent member of the UNSC and Germany), it agreed on an Action Plan, that Iran would slow its nuclear work and reduce its 20% enriched uranium stockpile.[24]

3.2.2. Motivations Behind Iran's Nuclear Decisions

[19] Mark Fitzpatrick, 'Is Iran's Nuclear Capability Inevitable' in Patrick M Cronin (ed), *Double Trouble: Iran and North Korea as Challenges to International Security* (Praeger Security International 2008) 29.

[20] IAEA, 'Report on Iran Nuclear Safeguards Sent to Agency´s Board' (28 February 2006) News Centre <https://www.iaea.org/newscenter/news/report-iran-nuclear-safeguards-sent-agency%C2%B4s-board-0> accessed 09 June 2014.

[21] UNSC, S/RES/1696, (31 July 2006).

[22] UNSC, S/RES/1737, (23 December 2006).

[23] Paul K Kerr, 'Iran's Nuclear Programme: Tehran's Compliance with International Obligations' (28 April 2014) Congressional Research Service <http://fas.org/sgp/crs/nuke/R40094.pdf> accessed 06 June 2014, 5.

[24] For full details about the suspension of Iran's nuclear activities as part of the Action Plan, see; IAEA, GOV/ INF/2014/1, (20 January 2014), 1.

According to Cirincione,[25] a state's decision to possess or build its nuclear weaponry programme is based on complex international and internal factors. These factors include the nature of political policies and international relations of the state or national security motivation; the desire to increase its influence, prestige, and state's symbol and identity or norms motivation; the desires of domestic political parties to acquire nuclear powers; its military capacity and capability to protect its sovereignty, independence, and national interests. Political and security factors play a more significant role in nuclear decisions than any other factors, such as technical or economic factors.[26] A state could somehow overcome technical or financial obstacles, but it could not ignore national security or political alerts. However, any nuclear decision whether to obtain or refrain from having nuclear weapons cannot be deeply understood by a single motivation. Rather, it should be considered that there is a combination of many factors which differ from case to case and from time to time.[27]

Iranian nuclear decisions, through all these decades, have been influenced by different factors, most notably the security containment of the region, the political strategies and ideology of the regime and the technical capabilities and materials which are available for use by the country.[28] All these factors have interacted in a way that makes Iran's nuclear decisions more difficult to predict. Although the external threat and destabilization of the region have probably influenced Iran's nuclear decisions,[29] it is very difficult to detect its real nuclear motivation and its ambitions, due to the changing context of the motivations

[25] Joseph Cirincione, *Bomb scare: The History and Future of Nuclear Weapons* (Columbia university Press 2008) 50; Saira Khan, *Nuclear Weapons and Conflict Transformation the Case of India and Pakistan* (Routledge 2009) 27.

[26] Gawdat Bahgat, 'Nuclear Proliferation: The Islamic Republic of Iran' (2006) 7 (2) International Studies Perspectives 124, 126.

[27] Sometimes it is difficult to determine these factors due to the sensitive nature of such cases and the lack of official sources; Braun Chaim, and Christopher F Chyba, 'Proliferation ring: New Challenge to the Nuclear Non-Proliferation regime' (Fall 2004) 29 (2) International Security 5, 22; Jacques E C Hymans, *Achieving Nuclear Ambitions: Scientists, Politicians, and Proliferation* (CUP 2012) 4-7.

[28] Reardon (n 4) 65.

[29] Shashank Joshi, *The Permanent Crisis: Iran's Nuclear Trajectory* (Routledge 2012) 16-20.

themselves, changes in the characters and the players and the factors associated with the programme since its establishment.[30]

A rational examination of the negative and positive dimensions of its nuclear policies in the context of the regime's interests suggests that the Iranian nuclear programme has become an essential instrument for the regime to implement and boost its status both internally and externally.[31] Thus, the Iranian regime could want to deter pre-emptive strikes by some states that deny its nuclear rights, to balance the existence of nuclear weapons in the region and protect its symbols and ideologies and increase its hegemony, or to use them as pressure points to ease the negative impacts of international sanctions and measures.[32]

From the security model perspective, Iran needs sufficient powers to protect its interests and achieve its ambitions. Nuclear capability might provide these powers. Certainly, nuclear power gives Iran a defence against regional or international threats and offensive means that allow Iran to implement its internal and international policies.[33]

Iran itself is surrounded by 15 other states,[34] some that possess nuclear arms, and others that either benefit from the nuclear umbrella of NATO such as Turkey, or who are very close allies of the USA who host US troops on their territories, such as Saudi Arabia. In this geographical and security environment,

[30] Tamer Mahboub, *Iran's Nuclear Motivations: Nuclear Ambiguity* (Lap Lambert Academic Publishing 2014); Shahram Chubin, 'Understanding Iran's Nuclear Ambitions' in Patrick M Cronin (ed), *Double Trouble: Iran and North Korea as Challenges to International Security* (Praeger Security International 2008) 9.

[31] Reardon (n 4) 202-3.

[32] Fitzpatrick (n 19) 6; Etel Solingen, *Nuclear Logics Contrasting Paths in East Asia & the Middle East* (UK, Princeton University Press, 2007) 165.

[33] Clifton W Sherrill, 'Why Iran wants The Bomb and what it Means for US Policy' (2012) 19 (1) Nonproliferation Review 31, 34-5.

[34] These states are Afghanistan, Armenia, Azerbaijan, Bahrain, Iraq, Kazakhstan, Kuwait, Oman, Pakistan, Qatar, Russia, Saudi Arabia, Turkey, Turkmenistan, and the Arab Emirates. Turkey is a state member of NATO and has secured itself under the NATO nuclear umbrella. Pakistan is a nuclear power state which surrounds Iran from the East. The Arab countries have established strong defence policies with the USA and have allowed USA troops to use their territories as bases and starting points to all the USA operations in the region. In addition, there is a standing territorial dispute between Iran and the United Arab Emirates over three islands (the Greater Tunb, Lesser Tunb, and Abu Mussa); James A Russell (eds), *Proliferation of Weapons of Mass Destruction in the Middle East: Directions and Policy Options in the New Century* (Palgrave 2006) 55.

Iran feels insecure and threatened by the increasing nuclear capabilities of several states surrounding it.[35]

However, the security environment and its developments do not sufficiently explain the motivations behind Iran's nuclear programme. Indeed, in the early years of its nuclear programme, there was no direct threat to Iran's security. Mostly, Iran's main concerns were over the nuclear weapons of Pakistan.[36] In that period, the USA and its allies did not constitute any threat to Iran. Rather, Iran was the most favoured nation in the region for USA.

Even after the Islamic revolution, Iran's concerns about the security context were not clear. During the 1980s and 1990s, the real regional threats to Iran were the Baathist regime in Iraq and the Taliban in Afghanistan.[37] The war with Iraq significantly spurred Iran's interests in developing nuclear capabilities.[38] That violent war, which lasted for nearly eight years, saw the Iraqi regime widely use chemical weapons, which compelled the Iranians to accept a ceasefire.[39] Hashemi Rafsanjani clearly stated that the war with Iraq made clear how weapons of mass of destruction are very decisive.[40]

For their part, the Taliban in Afghanistan does not pose a credible threat to Iran because they suffer from a lack of expertise, have an economic deficit and are subject to non-recognition by the entire international community. Furthermore, the Taliban is an ideological group, rather than a military one.[41]

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[35] Joseph Cirincione, Jon B Wolfsthal, and Miriam Rajkumar, *Deadly Arsenals: Tracking Weapons of Mass Destruction* (Carnegie Endowment for International Peace 2005) 298.

[36] Reardon (n 4) 67.

[37] Thomas Juneau, 'Iran and the Problems of Strategic Analysis' in Soushiant Zanganehpour and Wade L Huntley (eds), 'Iran in the World: The Nuclear Crisis in Context' (2008) Liu Institute for Global Issues <http://www.ligi.ubc.ca/sites/liu/files/Publications/Iran_in_the_World.pdf> accessed 05 November 2010, 109.

[38] Kamran Taremi, 'Beyond the Axis of Evil: Ballistic Missiles in Iran's Military Thinking' (2005) 36 (93) Security Dialogue 93, 96.

[39] Cirincione at el, (n 187) 298.

[40] Solingen (n 32) 166.

[41] Barnett Rubin and Sara Batmanglich, 'The USA and Iran in Afghanistan: Policy Gone Awry' (October 2008) MIT Centre for International Studies <http://web.mit.edu/cis/editorspick_rubin08_audit.html> accessed 15 November 2010.

It could be said that the invasion by the USA of Iraq and Afghanistan had removed the main threats to Iran's security, but, in fact, it had redefined Iran's security concerns by creating a new adversary and further challenges. The new external threat in this period was the existence of USA troops in the region, which gave the USA great influence over the region's economic, political and strategic spheres.[42]

Indeed, the USA consistently showed its hostility to the Iranian Islamic regime and its desire for regime change. This American behaviour and its interference in the region caused Iran to seek some sort of deterrent, especially after it was included in the "axis of evil" list and talks about changing the Iranian regime.[43] This had made Iran consider ways to protect the regime's existence and prevent the USA from launching a forcible regime change. Its conventional weapons arsenal would be limited in resisting any direct attack against or on its territory.[44] Thus a nuclear capacity, with possibly a small nuclear arsenal, could provide the means to protect the regime.[45]

Yet, despite this line of argument, the USA did not constitute a real threat that would trigger the Iranian ambition to go nuclear. There was no imminent pressure from the USA that really threatened the survival of the Iranian regime. Thus, the reasons for Iran's nuclear decisions in that period and even afterwards are very ambiguous and misleading. There was no intention by the USA to involve itself in a new war in the region.[46] The troubles that the USA had faced in its wars in Afghanistan and Iraq had diverted US attention away from Iran. This changed when the nuclear programme of Iran became an international

[42] Reardon (n 4) 69.

[43] Mojtaba Mahdavi 'Iranian Nuclear Ambitions and Political Reform' in Soushiant Zanganehpour and Wade L Huntley (eds), *Iran in the World: The Nuclear Crisis in Context* (2008) Liu Institute for Global Issues <http://www.ligi.ubc.ca/sites/liu/files/Publications/Iran_in_the_World.pdf> accessed 05 November 2010, 94; Morton Bremer Moerli and Sverre Lodgaard, *Nuclear Proliferation and International Security* (Routledge 2007) 105.

[44] Jason J Blackstock and Manjana Milkoreit, 'Understanding the Iranian Nuclear Equation' [2007] 18 Journal of Public and International Affairs 12.

[45] Kibaroglu (n 4) 238.

[46] Sherrill (n 33) 39.

crisis and a challenge to U.S policies.[47] Additionally, if the American threat was imminent, the intentions of the Iranian decision-makers would have been to protect their survival by developing nuclear weapons. Therefore, Iran would not have voluntarily suspended all its nuclear activities and would not have acquiesced to a tougher safeguards agreement in 2003.[48]

The relationship between Iran and Israel must be considered and counted, as it constitutes an important incentive to the Iranian nuclear calculations.[49] It is worth pointing out that, during the Shah's period of rule, the relationship with Israel was built on widespread security cooperation.[50]

Israel's undeclared nuclear weapons could have motivated Iran to develop nuclear capabilities. The Iranian Deputy-President, Ayatollah Mohajerani, declared in 1991 that because Israel had nuclear capabilities, Muslim states should also be armed with the same capabilities.[51] Thus, by taking over power in Iran, the Islamic revolution cut off the previous relationship with Israel and shifted it into one of enmity.

Nevertheless, Israeli nuclear weapons and its posture towards Iran do not provide a sufficient explanation for Iranian nuclear policies. First of all, Israel had developed its nuclear arsenal long before the relationship with Iran turned sour because of the Islamic revolution.[52] This indicates that Iran was not concerned about Israeli nuclear weapons. This was confirmed by an Iranian official saying that the Iranian regime is not 'inordinately concerned about Israel's nuclear monopoly'.[53] In fact, Iran offered Israel a deal to work

[47] Reardon (n 4) 69.

[48] Blackstock and Milkoreit (n 44) 14.

[49] William Schneider Jr. 'Missile Defence as an Instrument of Non-Proliferation Policy' in Robin Ranger, *David G Wiencek, and* Jeremy Stocker (eds), *International Missile Defence? Opportunities, Challenges and Implications for Europe* (Whitehall Paper 55, Royal United Institute for Defence Studies 2002) 72.

[50] Solingen (n 32) 165.

[51] Gary Sick, Iran's Nuclear Programme: Is there a Negotiative' in Steven L Spiegel, Jennifer Kibbe, and Elizabeth G Mathews, *The Dynamics of Middle East Nuclear Proliferation* (The Edwin Mellen Press 2001) 136.

[52] Reardon (n 4) 71.

[53] Solingen (n 32) 167.

cooperatively on developing a missile that would be capable of delivering nuclear warheads.[54] In addition, the Israeli nuclear arsenal benefits Iran in a way since the latter rhetorically uses it as evidence of the double standard of the international community in dealing with nuclear cases in its confrontation over its nuclear programme.[55]

From the above discussion, deeply adversarial relationships and national security concerns play a significant role in Iran's initial nuclear decisions. However, it does not identify the real motivation of Iran's insistence on implementing its vague nuclear policy. Iran, apart from during the war with Iraq, was not really under an imminent threat or danger from its neighbouring states. Therefore, domestic legitimacy and ideological motivations have somehow contributed to the implementation of its nuclear policy.

Certainly, nuclear power can be used to support domestic policies such as advocating the elite within the state, determining the framework of the national agenda, or achieving specific objectives such as justifying the economic deficit,[56] Iran's insistence on its nuclear programme might be triggered by ideological and domestic legitimacy motives. The Islamic regime might use its nuclear programme as an instrument to implement its ideology and expand its psychological effects over its people and across the regime.[57]

Indeed, the radical Iranian regime faces international denial about its ideology and strategy.[58] Consequently, the regime perceived that insisting on its nuclear policy would support its survival and hold over power. So, it has used the nuclear programme to unify all its political factions and stabilize its society by

[54] In the 1970s, before the Islamic revolution, the Iranian Minister of War Hasan Toufanian expressed, through his visit to Moshe Dayan the Israeli Foreign Minister, enthusiastic interest in exchanging military and security skills and experiences, with the possibility of becoming involved in developing nuclear weapons (Jericho Missile II); ibid 167.

[55] Reardon (n 4) 70.

[56] Wade L Huntley, 'The Context of Iranian Nuclear Aims' in Soushiant Zanganehpour and Wade L Huntley (eds), 'Iran in the World: The Nuclear Crisis in Context' (2008) Liu Institute for Global Issues <http://www.ligi.ubc.ca/sites/liu/files/Publications/Iran_in_the_World.pdf> accessed 05 November 2010, 4.

[57] Reardon (n 4) 75.

[58] Michael Donovan, 'Iran's Bomb: A Crisis Deferred?' (2005) 29 (2) Fletcher Forum of World Affairs 27, 34.

nationalizing the nuclear programme and linking it to national pride and sovereignty.[59]

President Ahmadinejad skilfully succeeded in making the nuclear matter a nationalist and populist matter.[60] He stated that 'the Iranian people, because of its past culture, its past civilisation, its intelligent youth, its human and material potential, has the capacity to quickly become an invincible global power. This will happen as soon as it achieves advanced technologies'.[61] The elite of the Islamic regime renders Iran as a victim of the double-standard or nuclear hypotheses of the international community in dealing with nuclear cases.[62] They present the nuclear case to the public as discriminatory[63] and a denial of Iran's sovereign right to fully enrich uranium as coded in the NPT.[64] Added to this, the regime presents the nuclear programme as a legitimate challenge to the existence of Israel's nuclear weapons and to American imperialism to gain not only the Iranian people and institutions' support, but also to gain support from Sunni states around the world.[65]

With regard to national pride and scientific status, Ayatollah Ali Khamenei, the Supreme Religious Leader, declared that 'Iran has the potential to become a world leader in science in fifty years and hold-up their nuclear programme as a symbol of scientific and technological powers'.[66] Accordingly, he links the nuclear programme to Iranian national pride and its sovereignty rights. In addition, the regime associates the nuclear programme with the expectations of a

[59] Chubin (n 30) 50; ibid 34.

[60] Abdual-Kader Albaloushi, *The Legality of Weapons of Mass Destruction According to the Rules of International Law* (Al-Halabi 2007) 89.

[61] Solingen (n 32) 169.

[62] Joshi (n 29) 21; Chubin (n 30) 50.

[63] Ted Galen Carpenter and Jessica Ashooh, 'A View to a Coup?' [March/April 2007] 88 The National Interest 62, 65; Mohamed A El-Khawas, 'Iran's Nuclear Controversy: Prospects for a Diplomatic Solution' [fall 2005] 16 (4) Mediterranean Quarterly 20, 32.

[64] Donovan (n 58) 34.

[65] Reardon (n 4) 205-6.

[66] Solingen (n 32) 169.

modern state, independence from foreign influence, and the kudos of possessing sophisticated technologies.[67]

In summary, despite the complexity of the Iranian political structure and the ramifications of its decision-making processes,[68] all Iranian political institutions support the development of its nuclear programme and its possession of a full nuclear fuel-cycle capacity[69] although there are differences between them on the price and cost of their government's nuclear policy.[70] Moreover, the nuclear programme has been used by the elite of the regime to implement its policies and ideologies, to draw the Iranian people's attention away from the regime's defects and imperfections by leading them to focus on the development of the nuclear dispute with the coalition,[71] to build a stronger relationship with the Shias across the region and to gain support from Sunni states. Consequently, it contributes to the regime's survival.

Still, the development of a nuclear programme to support domestic policies is a controversial matter. This is because, even for civilian purposes, such programmes are unnecessary to stabilize the society within a state and to implement the ideology and policies of the regime. There are many states that feel they are better off without nuclear weapons and thus have dismantled their nuclear programmes.[72] In addition, despite strong public support for the Iranian

[67] Blackstock and Milkoreit (n 44) 14.

[68] Reardon (n 4) 205.

[69] Patrick Disney, 'Kicking the Hornets' Nets: Iran's Nuclear Ambivalence and the West's Counterproductive Nonproliferation Policies' (12 June 2012) 19 (2) Nonproliferation Review 159.

[70] For example, pragmatists consider the nuclear issue as a move toward normalization and as a bargaining card to leverage in its negotiations with the international community, specifically with the USA in securing Iran's rightful interests, while the hard-liners regard the nuclear issue as a counterbalance that will force the international community to recognize Iran's power and accept it as an influential state in international affairs; see, Chubin (n 30) 50; Bahgat (n 18) 133; Donovan (n 58) 34.

[71] James Devine, 'Iranian Nuclear Motivations: Domestic and International Interactions' in Soushiant Zanganehpour and Wade L Huntley (eds), 'Iran in the World: The Nuclear Crisis in Context' (2008) Liu Institute for Global Issues <http://www.ligi.ubc.ca/sites/liu/files/Publications/Iran_in_the_World.pdf> accessed 05 November 2010, 87.

[72] Ariel E Levite, 'Never Say Never Again: Nuclear Reversal Revisited' in Michael E Brown, Owen R Cote Jr, Sean M Lynn-Jones, and Steven E Miller (eds), *New Global Dangers Changing Dimensions of International Security* (the MIT Press 2004) 61-3.

nuclear programme, this public does not push for the acquisition of nuclear weapons, nor does it accept a limitation on Iran's nuclear rights.[73]

3.2.3. The Nuclear Ambitions of Iran

In reality, then, there is insufficient evidence that Iran possesses or seeks to develop nuclear weapons.[74] This issue has been about suspicion of a military dimension in its nuclear programme.[75] So, it could be said that the nuclear weapons programme is not vital or very desirable for Iran. Despite the way that it is represented externally, it can be argued that the Iranian regime is a rational regime that has adopted, for more than three decades, pragmatic foreign policies.[76] It puts its survival at the highest priority and this would prevent it from acting in a suicidal fashion. The regime is aware that its decision to develop nuclear weapons puts its survival at stake and diminishes the internal and external security of the state.[77]

This perception is fuelled by many factors. First, the regime is apprehensive about the nuclear weapons race in the region and if it should decide to build its own nuclear arsenal.[78] Egypt and Saudi Arabia have already shown their desire to possess their own nuclear programme.[79] Iran's nuclear weapons programme could be a trigger for these states to seek nuclear weapons, or make some sort of mutual defence agreement with nuclear states to balance Iran's nuclear power,[80] which in all cases would threaten Iran's security. Secondly, Iran would face aggressive reactions from particular states or from the whole international

[73] Reardon (n 4) 206.

[74] Kenneth Katzman, 'Iran: USA Concerns and Policy Responses' (25 July 2014) Congressional Research Service <http://fas.org/sgp/crs/mideast/RL32048.pdf> accessed 25 July 2014, 21.

[75] IAEA, GOV/2013/56, 14 November 2013, para 52 and 65; Flynt Leverett, 'The Iranian Nuclear Issue, the End of the American Century, and the Future of International Order' (2013) 2 (2) Penn State Journal of Law & International Affairs 253.

[76] Reardon (n 4) 216.

[77] Leverett (n 75).

[78] Reardon (n 4) 219.

[79] Sherrill (n 33) 34.

[80] Helen Copper, 'Converging Interests May Lead to Cooperation between Israel and Gulf States' (13 March 2014) International New York Times News <http://www.nytimes.com/2014/04/01/world/middleeast/converging-interests-may-lead-to-cooperation-between-israel-and-gulf-states.html> accessed 14 June 2014.

community acting through the United Nations (UN), aiming to break Iran's nuclear weapons capability. Already there have been talks between states, in particular the USA and Israel, on launching air strikes against Iran's nuclear facilities.[81] Iran is aware and afraid of having the same scenario as in the Iraq war when the USA attacked the Iraqi nuclear sites[82] or when Israel struck the Syrian nuclear project at Al-Kibar city.[83] Thirdly, by deciding to go nuclear and build a nuclear arsenal, the regime might isolate itself and be forced to accept more intensive and harsh international sanctions. Iran is already suffering tough international sanctions, imposed by the UN, USA, and the European Union (EU).[84] If these sanctions stay in place, Iran would face difficulties in obtaining the necessary equipment to continue building its nuclear weapons.[85] Fourthly, despite its recent nuclear expansion and development, Iran still faces obstacles to building a nuclear weapon, including a deficiency in its natural resources and technical knowledge and the non-readiness of its nuclear war head delivery system.[86]

Overall, therefore, a decision to develop nuclear weapons in Iran is in harmony with the regime's rationale and ideologies. This conclusion can be deduced from the statements of Iranian officials. Despite the differences between the Iranian political factions, Iranian officials have declared, on many occasions, that they are not interested in nuclear weapons and their nuclear programme is for civilian and peaceful purposes.

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[81] Mahboub (30) 63.

[82] BBC, 'Report concludes no WMD in Iraq' (07 October 2004) BBC News <http://news.bbc.co.uk/1/hi/3718150.stm> accessed 14 June 2014. In fact, as an attempt to back the Iranians up in their war against Iraq, Israel on 07 June 1981 launched a military strike against Iraq's nuclear site in Baghdad; BBC, 'Saddam's Iraq: Key events' BBC News <http://news.bbc.co.uk/1/shared/spl/hi/middle_east/02/iraq_events/html/israeli_bombing.stm> accessed 14 June 2014.

[83] BBC, 'IAEA: Syria site bombed by Israel 'was likely nuclear' (24 May 2011) BBC News <http://www.bbc.co.uk/news/world-middle-east-13530945> accessed 14 June 2014.

[84] The sanctions and measures imposed on Iran will be discussed in further detail in Chapter 9. However, since discovering the nuclear development in Iran, the EU, UN, and the USA have adopted sanctions against Iran in an effort to contain its nuclear programme.

[85] Reardon (n 4) 69.

[86] Iran has recently advanced its missile and delivery system, but it is still not able to delivery nuclear war heads. It might need a year or more to be able to do so; ibid 157-8.

In an interview, the current Iranian president, Hassan Rouhani, said that 'under no circumstances would we seek any weapons of mass destruction, including nuclear weapons, nor will we ever'. He added 'we have never pursued or sought a nuclear bomb and we are not going to do so. We are solely seeking peaceful nuclear technology'.[87] The previous Iranian president, Ahmadinejad, who represents the hard-line faction,[88] said that 'they are saying that Iran is seeking the atomic bomb, but they should know... we do not need a bomb. Rather, we will act thoughtfully and with logic'.[89] The supreme leader, Khamenei, and his predecessor Khomenei, adopted a religious decree (fatwa) that possessing nuclear weapons is not consistent with the ideology and teaching of Islam.[90] He said that 'the production, possession, use or threat of use of nuclear weapons is illegitimate, futile, harmful, dangerous and prohibited as a great sin'.[91]

These statements by Iranian politicians and clerics are not just mere rhetoric. If they were, Iran would have armed itself with chemical weapons and used them against Iraq, at the time when it was subjected to an Iraqi chemical attack. However, because Khomeini forbade the use of chemical weapons, Iran did not arm itself with such weapons.[92] Later on, the Iranian clerics expanded this prohibition to include nuclear weapons as these are not consistent with their ideology and Islamic teachings.

It is unlikely that Iran has ambitions to acquire physical nuclear weapons. However, its nuclear processes have demonstrated that Iran has worked steadily on building sufficient nuclear infrastructure which would allow it to build nuclear weapons in a short time period if it decided it needed to. This was

[87] The Guardian,' Hassan Rouhani: Iran will never seek to build nuclear weapons' (19 September 2013) The Guardian New <http://www.theguardian.com/world/2013/sep/19/iran-nuclear-weapons-rouhani> accessed 14 June 2014.

[88] Reardon (n 4) 226.

[89] BBC, 'Iran Does Not Need Nuclear Weapons, Says Ahmadinejad' (08 November 2011) BBC News <http://www.bbc.co.uk/news/world-middle-east-15637539> accessed 14 June 2014.

[90] Katzman (n 74) 21.

[91] Nick Cumming-Bruce, 'Iran Calls Nuclear Arms Production a 'Great Sin'' (28 February 2012) International New York Times <http://www.nytimes.com/2012/02/29/world/middleeast/iran-calls-for-negotiations-on-treaty-banning-nuclear-weapons.html> accessed 14 June 2014.

[92] Leverett (n 75) 254.

exactly what was expressed by the Iranian president Khatami, in September 2003, that his country does not 'need atomic bombs and based on our religious teaching we will not pursue them...but at the same time, we want to be strong and that means having knowledge and technology'.[93]

Accordingly, the intentions that drive Iranian nuclear decisions are not to develop or possess nuclear weapons. Rather, Iran's nuclear ambitions are to gain knowledge of the nuclear technologies, scientists and every related factor that would rapidly give it sufficient capacity to build nuclear weapons if a decision was made to do so. In other words, Iran has adopted the strategy of "know-how" or "nuclear hedging"[94] in its nuclear approach. This policy means that Iran would possess the primary and main capability to produce nuclear weapons but without physically building them.[95]

This nuclear approach would boost Iran's interests in many different contexts. Firstly, Iran is developing its nuclear programme to the maximum level within the legal requirements under international law, particularly under the international non-proliferation regime. Thus, it keeps Iran's nuclear programme legitimate and within international legal requirements.[96] Secondly and most importantly, regardless of the fact that the nuclear programme has many economic[97] and security advantages, this programme would enhance Iran's political position in the region and around the world. It would boost the Iranian government with external and internal coercive powers that could be used to maintain its regime and impose its foreign policy.[98] All of this has more political advantages for the regime than military usage. Certainly, the nuclear programme has given Iran a privileged position to influence political aspirations in the

[93] Semira N Nikou, 'time Line of Iran's Nuclear Activities' The United States Institute of Peace, < http://iranprimer.usip.org/resource/timeline-irans-nuclear-activities> accessed 06 June 2014.

[94] This policy means knowing how to produce sufficient nuclear weapons-grade material and build a nuclear bomb in a short time once the political institution decides to do so; Levite (n 72) 88.

[95] Disney (n 69).

[96] Reardon (n 4) 158.

[97] Leverett (n 75) 254.

[98] Sherrill (n 33) 36.

region.[99] With this influence, Iran has managed to compel the coalition, in particular America, to sit down around the negotiating table and confer on sensitive strategic questions. In addition, although they are not in favour of Iran's nuclear power, most states perceive this programme as a provocation and a challenge to the USA's and Israel's policies.[100] Accordingly, Iran's nuclear behaviour has more political dimensions than military.

3.3. Necessity of Rapprochement with Iran

The aims of the negotiations between Iran and the coalition are to halt its nuclear enrichment activities and contain its nuclear programme. The coalition believes that Iran's break-out time is very short and crucial. The breakout time means the time that Iran or any other state needs to produce sufficient nuclear weapons grades. Therefore, the coalition has followed two different paths towards containing Iran's nuclear programme. Essentially, the coalition has adopted the carrot and stick approach. It has adopted and imposed sanctions and measures against Iran targeting its nuclear capability with possibility of using force against its facilities. It has also been involved in diplomatic solutions by negotiating with Iran to reach a possible compromise.

3.3.1. Trajectories of Nuclear Negotiations with Iran

Not all states of the coalition were involved in the negotiations from the first day. At the beginning, the American government refused to sit down at the negotiating table with the Iranian government, leaving this task to the European states.[101] In the early stages of the negotiations, France, Germany and the United Kingdom, who are known as the EU-3, led the negotiations with Iran. Later on, in 2006, China, USA, and Russia joined the negotiations to form what is called the P5+1. Thus, it can be said that the negotiations with Iran have had three turning points: first, the early negotiations between Iran and the EU-3 where the

[99] Iran has been involved in supporting some regional governments, movements and parties in Syria, Egypt, Palestine, Hezbollah in Lebanon and the Shiites in Iraq, in attempting to overturn the balance of power in the region; Katzman (n 74) 33-40.

[100] Leverett (n 75) 255.

[101] John Bolton, *Surrender is Not an Option: Defending America at the United Nations* (Threshold Editions 2007) 131-32.

parties have reached several agreements between 2003 and 2005 in order to contain Iran nuclear programme.[102] However, the events[103] in 2005 were the beginning of severe escalation of differences between Iran and the coalition.[104]

The second turning point was the breakdown of the negotiations and Iran's resumption of uranium enrichment activities in 2006 which led to it being referred to the UNSC. Although there was some evidence that Iran was not involved in nuclear weaponry programme,[105] the IAEA complicated and escalated the situation with Iran by accusing it of non-compliance with its safeguards agreement with a threat to send its case to the UNSC.[106] In response to these pressures, Iran resumed its nuclear activities. Such an atmosphere led the negotiations to reach a deadlock, to the imposition of sanctions by the coalition,[107] and to the referral of Iran to the UNSC[108] on the basis of 'many failures and breaches of its obligations'.[109] The negotiations between the parties stagnated during the period between 2010 and early 2013 due to new obstacles that came in the way of reaching any deal. These obstacles included, importantly, discovery of the secret nuclear site near Qom city which is the Fordow site and the authorisation of sophisticated cyber warfare against Iran's nuclear facilities by the USA[110] and its ally Israel, known as Stuxnet.[111] Up to

[102] Iran and the EU-3 issued a joint statement on 21st of October 2003, Brussels Agreement in February 2004, and Paris Agreement; Bernd Kaussler, *Iran's Nuclear Diplomacy: Power Politics and Conflict Resolution* (Routledge 2014) 95; Seyyed Hossein Mousavian, *Iran-Europe Relations: Challenges and Opportunities* (Routledge 2008).

[103] Such as the resumption of the enrichment activities at the Esfahan reactor, the coalition threatening Iran to use force against it as part of a strategy of regime change and Iran's decision to possibly suspend its voluntarily implementation of the additional protocol; Nikou (n 93).

[104] Ali Bali, 'The US and the Iranian Nuclear Impasse' (2006) 36 (241) Middle East Report 602, 612-13.

[105] A report by the IAEA inspectors confirmed that the HEU found in Iran was not enriched in Iran, while Iran claimed that those traces of HEU arrived with contaminated parts imported from abroad. Also, a report by the CIA issued in July 2005 confirmed that Iran needs at least ten years to develop a nuclear weapon. This finding was confirmed by British and Israeli intelligence agencies; ibid 12.

[106] IAEA, GOV/2006/14, 04 February 2006.

[107] USA Department of Treasury Office of foreign Assets Control, Executive Order 13382.

[108] IAEA (n 106), para 2.

[109] These failures constitute non-compliance in the context of Article XII.C of the Agency's Statute; IAEA, GOV/205/77, 09 September 2005, para 1.

[110] The report disclosed that President Obama wanted to finish what his predecessor, George W Bush, began in 2010; Peter Beaumont and Nick Hopkins, 'US was key player in cyber-attacks

2013, it seems that the coalition has retained the carrot and stick approach to the Iranian nuclear dilemma. Efforts to reach a diplomatic solution for Iran's nuclear dilemma have faced deadlock and stagnation in the last decade. Many proposals to build confidence between the coalition and Iran have failed. During the last decade, the coalition kept imposing sanctions as bargaining cards, while keeping the channels of diplomacy open along with the threat of a strike against Iran.[112] This year brought about a détente between the parties due to developments in the Middle East.

Third turning point was the desire to negotiate and reach a diplomatic solution. By the time of the arrival of the new Iranian President Hassan Rouhani, in June 2013, there were more cooperative and positive talks taking place based on mutual deliberation and arguments.[113] These changes paved the way for the agreement of 24 November 2013, which was framed by the Iranian and American governments and later approved by the P5+1.

After several rounds of talks and negotiations, the parties reached an agreement that would last for six months, with the possibility of renewing it for up to an additional six months, while the parties were seeking a final agreement.[114] This agreement was called the "Joint Plan of Action (JPA)".

The most important features of this agreement were: Iran will keep half of its 20% enriched uranium stockpiles and the other half should be diluted to other forms that are difficult to enrich further and Iran will keep enriching uranium up

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on Iran's nuclear programme' (01 June 2012) BBC News <http://www.theguardian.com/world/2012/jun/01/obama-sped-up-cyberattack-iran> accessed 09 June 2014.

[111] Jonathan Fildes, 'Stuxnet Worm 'Targeted High-Value Iranian Assets'' (23 September 2010) BBC News <http://www.bbc.co.uk/news/technology-11388018> accessed 09 June 2014.

[112] Sverre Lodgaard 'Nuclear Diplomacy: The Case of Iran' in Pernille Rieker and Henrik Thune (eds.), *Dialogue and Conflict Resolution: Potential and Limits Potential and Limits* (Ashgate 2015) 109.

[113] ibid 103.

[114] BBC, 'Iran agrees to curb nuclear activity at Geneva talks' (24 November 2013) BBC News <http://www.bbc.co.uk/news/world-middle-east-25074729> accessed 13 June 2014.

to 5% but not higher.[115] The agreement did not clearly recognize Iran's right to enrich uranium, but it indicated that the final comprehensive agreement 'would involve a mutually defined enrichment programme with practical limits and transparency measures to ensure the peaceful nature of the programme'.[116] On the other side, the P5+1 vowed to not adopt any further sanctions against Iran and relieve the international sanctions and provide economic and humanitarian support.[117]

In January 2014, the P5+1 and Iran announced the implementation of the JPA. The parties had kept the meeting and negotiations running in the hope of reaching a final agreement. After completing the six months, the parties decided to extend the implementation of the JPA up to November 2014.[118]

There were a few major, critical matters between the parties that prevented them from reaching a final agreement by the end of November 2014. These matters related to the features and number of centrifuges that Iran could keep its possession of nuclear fuel cycle technologies, the safeguards agreement with the IAEA and the mandatory inspections to be carried out by the Agency, the extent of allowable nuclear Research and Development (R&D), the deadline for removing sanctions imposed on Iran and the duration of the agreement itself.[119] Despite all these matters, the parties again decided to extend the negotiations on the same terms as the JPA as there had been some improvement and progress on the outstanding matters; this was agreed in order to reach a political agreement by March 2015 and then complete the technical annex by June 2015.[120]

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[115] Kenneth Katzman, Paul K Kerr and Mary Beth D Nikitin, 'Iran: Interim Nuclear Agreement and Talks on a Comprehensive Accord' (26 November 2014) Congressional Research Service <http://www.parstimes.com/history/crs_nuclear_nov_14.pdf> accessed 24 June 2016, 5-9.

[116] For further detail on the JPA, see; BBC, 'Iran Agrees to Curb Nuclear Activity at Geneva Talks' (24 November 2013) BBC News <http://www.bbc.co.uk/news/world-middle-east-25074729> accessed 13 June 2014.

[117] Iran Nuclear Energy, 'Negotiation' <http://nuclearenergy.ir/negotiations/#prettyPhoto> accessed 08 June 2014.

[118] Kelsey Davenport, 'History of Official Proposals on the Iranian Nuclear Issue' (November 2013) Arms Control Association <http://www.armscontrol.org/factsheets/Iran_Nuclear_Proposals> accessed 29 July 2013

[119] Katzman et al, (n 115) 5-9.

[120] Davenport (n 118) 2013.

However, up to the point when this Chapter was written, a comprehensive agreement between Iran and the P5+1 had not yet been reached.

3.3.2. Lessons learned from P5+1-Iran Talks

From the above narrative, we can extract some significant lessons that could help in validating the further discussions contained in this research.

Generally, the international community and specifically the coalition, does not deny Iran's right, or that of any other non-nuclear states, to enjoy the peaceful applications of nuclear energy. Their concerns are about the possession of nuclear fuel cycle facilities and the extent of the state's capability and capacity to enrich uranium and carry out related activities. The concerns are in place because such possession is a possible indication of nuclear weapons proliferation.

On the Iranian side, this state has managed to keep its nuclear infrastructure without the need to dismantle any part of it. Instead, it has kept its capability to enrich uranium even if this will be at the lowest percentage under the possible future final agreement. Also, it has succeeded in keeping its enriched uranium stockpile without needing to send it out of the country despite all the international pressure to do so. Most importantly, Iran has proved that mutual respect and negotiated solutions are the best way to resolve international threats of sanctions.

It can be said, then, that reaching a diplomatic solution between Iran and the coalition did not come from nowhere. Rather, it derives from the overlapping mutual interests between specifically the USA and Iran.[121] Before 2013, any approach towards a negotiated solution was discouraged; only sanctions were applied backed by the possibility of military action against Iran. However, with the Arab Spring and other developments in the region, the nature of the game has changed. The parties have ostensibly limited their struggles and negotiations on the nuclear case. However, the main trigger to this progress was overlapping national policies and the interests of the parties in other domains. Put another

[121] Lodgaard (n 112) 10.

way, to achieve those national policies and interests, playing down the nuclear issue and reaching a diplomatic solution was important to all parties. The changes in the international affairs of the region indicate that the balance of power in the Middle East has shifted to the balance of influence or a game of soft power which makes rapprochement with Iran the only option left to the coalition.

3.3.3. The Need for the Coalition to Approach Iran

Since the 1979 Islamic revolution, the USA has seen the Iranian regime as a challenge to its hegemony and policies in the area and, therefore, it has confronted Iran with its allies from a hostile perspective and using aggressive political policies.[122] The USA categorised the Iranian regime as a "rogue state" or as part of an "axis of evil" and it has implemented several policies aimed at changing or containing it.[123] With regard to Iran's nuclear programme, the USA and its allies have used this programme as a pretext to gather the international community together against Iran and impose tougher sanctions.[124]

Of course, the Americans and their allies' attitudes were counter to Iran's national interests, policies and ambitions. As a result, they have made Iran's attitude become relentless and resistant to the international will. However, recently, this hostile relationship has notably altered in favour of Iran. This is due, firstly, to the fact that the coalition began to believe that having a nuclear

[122] Hillary Mann Leverett, 'How Precipitous a Decline? USA-Iranian Relations and the Transition from American Primacy' (2013) 2 (2) Penn State Journal of Law & International Affairs 237, 331.

[123] The Washington Post, 'Text of President Bush's 2002 State of the Union Address' (29 January 2002) The Washington Post <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm> accessed 13 June 2014. There are many statements from American officials which show support or indicate that the USA stands with those who seek to change the regime, see; Katzman (n 79) 57-58.

[124] The USA has adopted a policy of keeping unity with the P-5 and its allies in order to impose even tougher sanctions and isolate Iran. By using this approach, the USA wants to increase the Iranian costs and undermine it in all respects, both internally and internationally; Lynn E. Davis, Jeffrey Martini, Alireza Nader, Dalia Dassa Kaye, James T Quinlivan, and Paul Steinberg, *Iran's Nuclear Future: Critical USA Policy Choices* (Rand 2011) 69-70; Mathew Kroenig, 'Force or Friendship? Explaining Great Power Nonproliferation Policy' in Neil Narang, Eril Gartzke, and Mathew Kroenig, *Nonproliferation Policy and Nuclear Posture: Causes and Consequences for the Spread of Nuclear Weapons* (Routldge 2016) 38-40; Sima Baidya, 'Probing Samrt Power Paradigm in US-Iran Relationship' in M. Saleem Kidwai, *US Policy Towards the Muslim World: Focus on Post 9/11 Period* (University Press of America 2010).

deal with Iran and leaving this state to enjoy nuclear energy but with international monitoring was better than refusing Iran's nuclear rights and driving it to violate all its international nuclear obligations and become a Nuclear Weapons State (NWS).[125] Secondly, the coalition has had no alternative but to find diplomatic solutions after the failure of sanctions and other measures to prevent Iran from going ahead and expanding its nuclear programme to a point of no return[126] and also, after the Americans and their allies have shown reluctance to use military force against Iran.[127] Thirdly, the Iranian regime has proven its ability to survive despite the pressures imposed on it. Over the past few years, the regime has succeeded in building better relations with anti-western states which has given it credibility in the area at the expense of the USA.[128] The regime has managed to benefit from the decline of American power in the region. Indeed, recently, the USA has significantly collapsed and lost some of its credibility in the Middle East due to its unjust approach and the policies it has implemented regionally or internationally.[129] These failures have eroded America's international position and its legitimacy and have also eroded the image of the Americans as reliable allies. The decline of America in the region has altered the balance of power in the Middle East. USA power is fading,[130] which opens the door for other powers, such as Iran, to rise up.[131] This

[125] Michael Singh, 'Iran Nuclear Talks: A Brief History and the Road Ahead' (15 October 2013) The Washington Institute for Near East Policy, Policy Note, 2.

[126] Farideh Farhi, 'NIAC Report Reveals Disconnect between Iran Sanctions' Goals and Results' (28 March 2013) Lobe Log Foreign Policy http://www.lobelog.com/niac-report-reveals-disconnect-between-iran-sanctions-goals-and-results/> accessed 24 November 2013.

[127] Kenneth Katzman (n 79) 51.

[128] Jasmine Ramsey, 'Iran's Nuclear Activities Go on despite Sanctions' (27 March 2013) Lobe Log Foreign Policy <http://www.lobelog.com/irans-nuclear-activities-go-on-despite-sanctions/> accessed 24 November 2013.

[129] Clear examples of the failures of the USA are the conflicts in Iraq and Afghanistan, the Arab Spring, the intervention in Libya, the Russian invasion of Crimea, and the case of the detention centre at Guantanamo Bay; Fawaz A Gerges, *Obama and the Middle East: The End of America's Moment?* (Routledge 2012); Andrew J Bacevich, 'Not So Different After All' in Andrew J Bacevich (ed), *The Short American Century: A Postmotem* (Harvard University Press 2012) 238; Francis Shor, 'War in the Era of Declining USA Global Hegemony' [2010] 2 Journal of Critical Globalisation Studies 65.

[130] Joseph S Nye, 'The Decline of America's Soft Power: Why Washington Should Worry' (May-June 2004) 83 (3) Foreign Affairs 16 19-22.

[131] Kayhan Barzegar, 'The Balance of Power in the Persian Gulf: An Iranian View' (Fall 2010) XVII (3) Middle East Policy 74, 78.

alteration has essentially changed the game in the Middle East from a game of classic power or military power to a balance of influence.[132]

Indeed, USA power in the era of Obama is different from that under the Bush administration and that of his predecessor Clinton, in terms of its strategic position, in its international permutations and in its economic and internal units. In the post-Cold War era, the USA has sought a dominant position to legitimize its foreign policy.[133] Certainly, the USA has managed to have conventional military power in a very critical area such as the Middle East.[134] This military power has provided the Americans with a unique position at the regional and global level. With this position, the USA has assumed itself to be responsible for maintaining the security and order in the area and, in addition, it has guaranteed for itself control over the flow of oil and natural gas, on which the economies of the World depend.[135] This ability and unique capability has given the USA extraordinary economic and political power to enforce its foreign policy in different parts of the world.

However, the classic balance of power that has been implemented by the USA is no longer workable in the Middle East. Looking at the world map, particularly before the events of 11th of September 2001, we cannot avoid the conclusion that the Middle East was divided between pro-American governments, such as Egypt and Turkey; potential pro-American governments, such as Syria and Libya; and those opposing the Americans, such as Iran, Saudi Arabia and Iraq (Saddam Hussain's) regime.[136]

Today the view is totally different. The area is facing the repercussions of the Arab Spring, political changes and the election of new governments in Egypt, Tunisia and Libya, and the rise of new influential and robust governmental power in countries such as Iran and Turkey.[137] Most of these states are seeking

[132] Leverett (n 75) 255.

[133] ibid 241.

[134] Barzegar (n 131) 89-90.

[135] Katzman (n 79) 54; Flynt Leverett (n 75) 245.

[136] ibid 246.

[137] Reardon (n 4) 73.

to build their own independent foreign policy and influence, neither in the manner of pro or anti American states.[138]

This new map and circumstances in the area have decreased the USA's political and strategic positions.[139] In fact, this situation has not been created by the Middle Eastern states, but rather it has been ascribed to USA mistakes in this crucial region.[140] For many decades, the American government has not clearly defined its interests and targets in the region and has not legitimized its existence by balancing the rising powers in the area.[141] Instead, it has identified some states in the region as "rogue states" and has enforced its political and strategic policies in a form that serves only its allied states. Such an approach has deeply damaged the strategic position of the USA in the Middle East and has posed a major challenge to its foreign policy not only in the region, but also at the global level. In addition, it has given other powers in the region the chance to increase their dominance. The USA, with its military power, cannot be the maker of the policies and order in the region anymore; rather, the balance of

[138] To illustrate this point, the current Turkish government publically showed its rejection of the USA and EU leadership of world affairs; Ivan Krastev and Mark Leonard, 'New World Order: The Balance of Soft Power and the Rise of Herbivorous Powers' (24 October 2007) Europeans Council on Foreign Relations <http://www.cls-sofia.org/uploads/files/ecfr-paper-mark-ivan-oct-2007.pdf> accessed 15 June 2013, 3. The USA on 17th August 2010 threatened Turkey by obstructing the selling of USA drone aircrafts because of its position toward Iran and Israel. In addition, Turkey with Brazil, in June 2010, voted against the UNSC resolution of a new package of economic sanctions against Iran, Aljazeera, 'US Threat on Turkey Arms Sales' (17 August 2010) <http://www.aljazeera.com/news/europe/2010/08/20108164425178581.html> accessed 15 June 2013. Egypt switched from being an American-aligned to a self-determining country. It is not very clear so far what their foreign policies look like, but what is obvious is that any new government will listen less to America; for example, on the 27th of August 2013, the Egyptian government opposed the foreign military strike by Western countries, including the USA against Syria in response to the alleged use of chemical weapons; Ahram Online, 'Egypt Rejects Military Intervention in Syria' (27 August 2013) <http://english.ahram.org.eg/NewsContent/1/64/80081/Egypt/Politics-/Egypt-rejects-military-intervention-in-Syria.aspx> accessed 30 August 2013. For more discussion regarding the changes in the Western States' foreign policies; see, Chas W Freeman, Jr., William B Quandt, John Duke Anthony and Marwan Muasher, 'USA Grand Strategy in the Middle East: Is There One?' (2013) XX (1) Middle East Policy Journal <http://www.mepc.org/journal/middle-east-policy-archives/us-grand-strategy-middle-east-there-one> accessed 22 September 2013.

[139] Kayhan Barzegar, 'Iran's Perception of the USA Policy towards the Region' in Abbas Maleki and John Tirman (eds), *USA-Iran Misperceptions: A Dialogue* (Bloomsbury 2014) 96-8.

[140] Leverett (n 75) 246.

[141] Mann Leverett (n 122) 330.

influence should be the main key to monopolizing the area and changing the behaviour of other states. [142]

Therefore, the classic balance of power that depends on the military capacity of states is incapable of maintaining stability and order in a crucial region such as the Middle East. Rather, the balance of influence, or soft power,[143] is a more appropriate method to stabilize the region. The issue is not how many sources of powers a state has, but rather, to what extent this state is able to influence other states to do what it wants them to do.[144] This is the difference between hard power and soft power; whereas the first gains influence through direct involvement in a dispute and using sources of power such as military force or inducement, soft power gains influence through implementing a variety of policies and strategies that are attractive to other nations.[145]

The Iranian government has managed to take advantage of USA's mistakes and has evolved counter-American strategies over the last few decades. Iran has adopted a soft power strategy to achieve its ambition of dominance and to pre-empt the power of the USA in the region.[146] Since the Islamic revolution in 1979, Iran has been carving out coherent strategies that consolidate its domestic order and mobilize international support in safeguarding its interests.[147] Iran has been very pragmatic in its regional and international relationships.[148] Notably, it

[142] Michael C Hudson, 'Geopolitical Shifts: Asia Rising, America Declining in the Middle East' in Nele Lenze and Charlotte Schriwer (eds.), *Converging Regions: Global Perspectives on Asia and the Middle East* (Ashgate 2014); Heather S Gregg, 'US Relations with Islamic Group in the Middle East' in Robert E Looney (ed.) *Handbook of US-Middle East Relations: Formative Factors and Regional Perspective* (Routledge 2014); Carola McGiffert, *Chinese Soft Power and Its Implications for the United States: Competition and Cooperation in the Developing World* (2009).

[143] Lodgaard (n 112) 104.

[144] Nye (n 130) 21.

[145] Giulio M Gallarotti, *Cosmopolitan Power in International Relations: A Synthesis of Realism, Neoliberalism, and Constructivism* (CUP 2010) 23.

[146] Leverett (n 75) 249.

[147] Mann Leverett (n 122) 329-33.

[148] The Iranian government has been pragmatic and rational in its relationships with its neighbours and international partners, such as Afghanistan, Syria, Iraq, Asia, Russia, and China, while fostering a strategic and ideologically competitive position to USA foreign policy; Volker Perthes, 'Ambition and Fear: Iran's Foreign policy and Nuclear Programme' [June-July 2010] 52 (3) Survival 95 98; Alan Salehzadeh, 'Iran's Domestic and foreign Policies' (2013) Working Paper Series 4 No 49 National Defence University 19.

has developed its military power, it supports Hezbollah in Lebanon and Hamas and the Islamic Palestinian Jihad and it holds policies and agendas against extremists and terrorists groups.[149] All these facts have helped Iran to survive under international pressure and have better relationships and a stronger position with its neighbours.

Thus, in these circumstances, the coalition, and particularly the USA, has found it necessary to approach Iran. The USA-Iranian rapprochement could be explained by two presumptions; first, either that the USA wants to redeem its hegemony policy and its negative impact on the USA's reputation and political position, or this government is testing its capability to modify its foreign policy towards the Middle East to more realistic and fruitful channels.[150]

It seems that there is awareness of the need to realign the relationship with Iran. The key player states perceive that any achievements in the region cannot happen without involving Iran who has really succeeded in making itself a vital player in drawing a new power map in the region. They believe that approaching Iran is not only in to the benefit of this state, but it is also to the benefit of the whole international community.[151] Therefore, in order to save their foreign policies, strategies and stabilization of the region, these states have recognised that it is fundamental to adopt a different approach in dealing with Iran's nuclear case. The new approach is based on accepting the Iranian political order and showing respect for its national interests, recognizing Iran's right to enrich uranium and carry out related activities under the IAEA safeguards,[152] realising that using military force would achieve nothing but destruction and that only

[149] Anthony H Cordesman and Adam C Seitz, *Iranian Weapons of Mass Destruction: The Birth of a Regional Nuclear Arms Race?* (Greenwood Publishing Group 2009) 32.

[150] Mann Leverett (n 122) 328.

[151] Nader Entessar and Kaveh L Afrasiabi, Iran Nuclear Negotiations: Accord and Détente since the Geneva Agreement of 2013 (Rowman and Littlefield 2015).

[152] Thomas Juneau, *Squandered Opportunity: Neoclassical Realism and Iranian Foreign Policy* (Stanford University Press 2015) 216.

diplomatic solutions can help them to achieve their goals and finally, relieving the sanctions and measures which were previously imposed.[153]

Therefore, diplomatic solutions to the confrontation between Iran and coalition have not yet been abandoned. Rather, the coalition and Iran now rely on these sorts of solutions more than at any time before. The best example of this fact are the efforts that the P5+1 and Iran have made to push forward overstrained negotiations after a couple of missed deadlines[154] in order to reach a final deal by the end of 2015 as expected despite the remaining problematic issues between the parties.[155]

3.4. Conclusion

The Iranian government undoubtedly implements vague and unpredictable nuclear policies. However, Iranian ambitions to develop and physically possess nuclear weapons are unlikely at least in the near future.

What is inevitable is that Iran will keep developing its nuclear infrastructure to acquire the necessary elements to build a nuclear arsenal if needed. Iran will pick up and collect whatever it needs in terms of information, technologies, and scientists, to build a nuclear weapon when there is a potential or imminent threat to its security. The insecurity due to the continuing existence of nuclear weapons has provoked Iran to take all the steps and measures that are essential to adjust the balance of power and protect its existence.

Thus, Iran's nuclear programme presents a long-term problematic issue rather than a short-term dilemma. The Iranian leaders will not abandon their nuclear programme. It is unlikely that they would concede their right to enrich uranium, the fuel cycle, and other related activities as long as they face denial and refusal from the international community. Therefore, resolving the dilemma requires effective tools and measures to be overcome. There is still time to contain the

[153] Burhanettin Duran and Nuh Yilmaz, 'Islam, Models and the Middle East: The New Balance of Power following the Arab Spring' (Winter 2013) VXIII (4) Perception 139 141-42.

[154] Katzman et al, (n 115) 15.

[155] Entessar and Afrasiabi (n 151).

Iranian nuclear programme, especially since the Iranian government has shown some flexibility in its nuclear direction.

Rapprochement with Iran is the key element in resolving this dilemma. Approaching Iran with a final comprehensive nuclear agreement in order to contain its nuclear programme is the most practical and useful method.

Reaching such a deal with Iran would not only be difficult from the coalition side due to the coalition's interests and policies, but it would also be rejected from the Iranian side. There are some Iranian hardliners who would reject or refuse any deal that would build a diplomatic relationship with the western states. The final agreement, therefore, might not go through as these hardliners might consider it to be a slippery slope and a normalization of diplomatic relations between the U.S. and Iran, to which they are opposed. But for their opposition, they should know that achieving the final deal would improve the Iranian economy, boost public confidence and open doors to attract international investment in Iran. A possible final agreement would mean that Iran keeps carrying out its uranium enrichment and fuel cycle capacities under certain conditions and a further level of verification and inspections by the IAEA. This is affirmed in the preamble of the JPA which states that the 'comprehensive solution would enable Iran to fully enjoy its nuclear energy for peaceful purposes under the relevant articles of the NPT in conformity with its obligations therein'.[156]

The disagreements and anxiety over the NPT obligations emanated from the absence of a clear interpretation of these obligations. Such divergence between states would upset the dynamic of the regime, its legal frameworks, and its credibility, which are already degraded. Thus, the next chapter of this research discusses and analyses the different concepts that states apply in interpreting the rights and obligations of the NPT, within the context of Iran's nuclear case.

[156] IAEA, INFCIRC/856, 29 November 2013, 1.

4. The Legal Interpretation of the NPT

4.1. Introduction

The Nuclear Non-Proliferation Treaty (NPT) is at the core of the international nuclear non-proliferation regime which aims to contain and prevent the use and spread of nuclear weapons. The treaty was created in 1969 and became international law in 1970. By 2014, nearly every state had signed the NPT treaty, except India, Pakistan and Israel. North Korea had signed the treaty but withdrew from it in 2003.

There is a consensus between all states and scholars that this treaty has three main pillars, or what are called the "grand bargain", which are nuclear non-proliferation obligations that are coded in articles I and II; the right to peaceful use of nuclear energy that is coded in Article IV; and a nuclear disarmament obligation which is coded in Article VI. However, these pillars are debatable between state members in terms of their legal nature and scopes. These debates are due to differentiations between state members in reading and interpreting the principles of the treaty.

Certainly, states do differ interpreting their international legal rights and obligations. This difference is due to the divergence of interpretive methodologies applied by states.[1]

Therefore, this chapter seeks to determine the legal nature and interpretation of the NPT with reference to the interpretive methods that are coded in Articles 31 and 32 of the Vienna Convention on Law of Treaties (VCLT). It begins by providing the individual states' stance in relation to the three pillars of the NPT. It primarily provides statements presented by states to the official meetings held regarding the NPT. Statements are very important sources as they reflect each state's understanding and stance regarding their obligations under the NPT. The

[1] Flynt Leverett, 'the Iranian Nuclear Issue, the End of the American Century, and the Future of International Order' (2013) 2 (2) Penn State Journal of Law & International Affairs 237, 255.

chapter then analyses the NPT by reference to Articles 31 and 32 of the VCLT. It concludes that the NPT, or any other international treaty, should be interpreted within its context, objective and purposes. The treaty is an international agreement that has reciprocal obligations imposed on all its members in order to prevent nuclear war and secure the people.

4.2. States' Interpretations of the NPT Obligations

The disputes between major and other states and developing states about the influence in the regions and imposition of their international policies, extends to the interpretation of the rules of international law.[2] Each party to the dispute has a different understanding about the meaning of the law and how the rules of this law should be interpreted. These divergent views are clearly illustrated in the dispute between NWSs and NNWSs over their obligations to the NPT.

The disagreements between states about the understanding and interpretation of the NPT are demonstrated in their official statements and postures at international congregations. Their contentions not only consisted of accusing other parties of non-compliance with their obligations under the NPT. Rather, the dispute has become about how the principles of the NPT should be implemented and what the legal frontiers of these principles should be. According to Joyner,[3] this incongruity between states over their nuclear rights and obligations, specifically over prioritization of the terms of the NPT, was clear in the period between 2003 and 2008. After this period, however, there were some changes in the positions of NWSs toward a rebalance of the three principles of the NPT; however, with imposing limitations and restrictions on the right to use nuclear energy for peaceful purposes.

4.2.1. The Positions of NWSs with Regard to the NPT Obligations

Although the NPT has three pillars, the NWSs have adopted a position that, the nuclear non-proliferation obligation is prioritized over the other pillars. They have made this obligation the central or primary objective of the treaty and give

[2] Leverett (n 1) 255-56.

[3] Daniel H Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (OUP 2011) 42-43.

less status or weight to the other obligations. For illustration, the Russian delegate's[4] case to the NPT Preparatory Committee in 2008 was that nuclear proliferation is the first challenge of the treaty that should be dealt with. In his statement, the delegate stated that the treaty is the cornerstone of today's international security and therefore, his government is convinced that the emerging nuclear non-proliferation challenges and problems must be addressed first of all within the NPT framework.

Similarly, the Head of the American delegation, Christopher Ford,[5] contended that the concept of the three pillars of the NPT is a rhetorical phrase. He described the non-proliferation obligation as 'the overarching principle of the NPT and the foundation upon which the objectives of peaceful uses and disarmament rest'. So, the treaty will achieve its objectives 'by accomplishing its core non-proliferation purpose'.[6] He based his conclusion on the United Nations General Assembly (UNGA) resolution which sets up the mandates for the Eighteen-Nation Disarmament Committee (ENDC) negotiations.[7] These mandates were to negotiate a treaty to prevent nuclear proliferation. Negotiation about nuclear disarmament was something to be addressed later. Accordingly, Ford rejected the existence of equal reciprocal obligations between states embodied in the three pillars of the NPT. Rather, he viewed the non-proliferation obligation as the main purpose of the NPT. The other pillars, which are disarmament and peaceful uses, have a secondary status and could be achieved within the context of achieving nuclear non-proliferation.

[4] Statement by H. E. Ambassador Anatoly Antonov, Head of the Delegation of the Russian Federation at the Second Session of the Preparatory Committee for the 2010 Review Conference of the Party to the Treaty on the Non-Proliferation of Nuclear weapons 28 April 2008, Geneva 2.

[5] Christopher Ford, 'Misinterpreting the NPT' (30 September 2011) Hudson Institute <http://www.hudson.org/research/9046-misinterpreting-the-npt> accessed 06 January 2012.

[6] Christopher A Ford, 'Recipe for Success at the 2010 Review Conference' (28 April 2008) Statement of the United States Special Representative for Nuclear Non-proliferation, Opening Remarks to the 2008 NPT Preparatory Committee, Palais des Nations, Geneva <http://2001-2009.state.gov/t/isn/rls/rm/111190.htm> accessed 23 May 2015.

[7] Ford, 'Misinterpreting the NPT' (n 6).

A similar manner, John Freeman[8] the British ambassador to the 2005 NPT Review Conference, categorizes the nuclear non-proliferation obligations as *primus inter pares* (first between equal). He said at the outset that 'we recognise the need for balanced implementation of the Treaty and we support progress in all its areas, as our record demonstrates. However, we believe that progress in non-proliferation is important in its own right'.

However, the positions of the NWSs regarding the three Pillars of the NPT, particularly in the United States of America (USA), have shown significant changes since 2009. Generally, there is more commitment to the three principles of the NPT with some restrictions to the scope and legal limitations of these principles, in particular the right to use nuclear energy for peaceful purposes.

A speech by President Obama made in Prague 2009 was the first turning point in the American nuclear postures. In his statement, Obama[9] discussed certain steps that would lead to a world without nuclear weapons. These steps, if fully implemented, would bring the USA closer to its nuclear obligations, particularly nuclear disarmament and they might be considered progressive changes in the American nuclear posture which was based on the vital role of nuclear weapons in its national security strategies.[10] However, despite this fact, the American government indirectly imposes some restrictions on the right to use nuclear energy. This restriction was embodied in the creation of an international fuel bank to supply states with enriched uranium was for their nuclear plants for peaceful purposes. This means that Obama intended to the application of some limitations on the nuclear fuel cycle and uranium enrichment activities upon a state seeking nuclear energy without increasing the risks of nuclear proliferation.

After Obama's speech, most of the NWSs have centred their interests and nuclear policies on the same concept. The British delegation called for all states

[8] Statement by H. E. John Freeman, Head of the UK delegation to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, 05 May 2005, New York.

[9] Barak Obama, 'Remarks by President Barak Obama' The White House Office of Press Secretary (Prague, 5 April 2009) available at: < http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/>, accessed 11 July 2014.

[10] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 123.

to work together to enhance the three pillars of the NPT to make the treaty remain fit for purpose and to continue to bring benefits to all states. However, with regard to the peaceful uses of nuclear energy, he said that his country supported all efforts to establish the effectiveness of the International Atomic Energy Agency's (IAEA) safeguards regime and multi-national approaches to the nuclear fuel cycle.[11]

The American delegate to the 2013 Preparatory Committee states that the USA 'acknowledges its special responsibility to work toward nuclear disarmament and to help create the conditions for a world without nuclear weapons'. Jon Kerry reaffirmed that each pillar of the NPT was an essential ingredient in full embodiment of the treaty. Thus, all states should support full implementation.[12] He reaffirmed that his country 'has called for new frameworks for civil nuclear cooperation' and his government 'supports the establishment of an IAEA fuel bank and related measures to assure nuclear fuel supply which contributes to the Treaty's non-proliferation goals'.[13]

Similarly, the Russian delegate stated that his government always support the achievements of the principles of the NPT, in particular, the promotion of the uses of nuclear energy for peaceful purposes. This is, of course, on the basis of compliance with the NPT commitments on the non-diversion of nuclear materials to military purposes.[14] Before the 2015 NPT conference Uliyanov[15] reaffirmed that his government was convinced that the equilibrium between the three main pillars of the NPT remained a pledge of the treaty's viability in the

[11] Statement by H. E. Jo Adamson to the Second Preparatory committee for Ninth Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, 22 April 2013, Geneva.

[12] Statement by John Kerry Secretary of State at the 2015 Nuclear Non-proliferation Treaty Review Conference, United Nations, 27 April 2015.

[13] Statement by Thomas Countryman, Assistant Secretary for International Security and Nonproliferation, Department of State, United States of America, General Debate at Second Session of the Preparatory Committee, 2015 Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 22 April 2013.

[14] Statement by H. E. Mikhail I Ulyanov, the Head of Delegation of Russian Federation, at the Second Session of the Preparatory Committee for the 2015 Review Conference of the Party to the Treaty on the Non-Proliferation of Nuclear weapons 22 April 2013, Geneva.

[15] Statement by Mikhail I Uliyanov, Acting Head of the Delegation of the Russian Federation at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 27 April 2015.

future. Russia was willing to cooperate closely with all interested parties in establishing an up-to-date, sustainable and safe architecture of international cooperation in the field of nuclear energy. Clearly, it seems that Russia preferred to create international nuclear cooperation rather than admit the right of states to possess their own nuclear technologies.

Germany, which is a state that possesses nuclear energy for peaceful purposes without possessing nuclear weapons, has a similar approach to the Russian government. In his statement to the 2015 NPT conference Michael Biontion mentioned that maintaining nuclear security is a complex task and a serious challenge. Therefore, the German government supported a nuclear security project within a framework of international partnership. There is a necessity to underline the importance of a sustainable and effective global nuclear security architecture that would encourage cooperation between states.[16]

The Five Permanent of the United Nations Security Council (P5), which are the only recognized NWSs by the NPT, affirm that they are committed to strengthening the implementation of the three principles of the NPT as complementary aims and should be pursued all together with equal determination across the three pillars by all states. 'We strongly support measures to assure access to nuclear fuel, such as the IAEA Low Enriched Uranium Reserve in the Russian Federation, the American Assured Fuel Supply, and the UK Assurance of Supply of Enrichment Services. We note the importance of establishing the IAEA low-enriched uranium (LEU) bank. These contributions promote achievement of sustainable development and energy security goals and benefit all NPT States Parties'.[17]

Following on from the above statements, it is certainly clear that most of the NWSs have shifted their positions from a position of prioritizing the nuclear non-proliferation obligations over other obligations to a position where the three

[16] Statement by Ambassador Michael Biontion Permanent Representative of Germany to the Conference on Disarmament to the Treaty on the on Non-Proliferation of Nuclear Weapons, 04 May 2015.

[17] Statement by the People's Republic of China, France, The Russian Federation, the United Kingdom of Great Britain and North Ireland, and the United States of America to the to the Treaty on the on Non-Proliferation of Nuclear Weapons, 30 April 2015.

pillars are essential ingredients on the full embodiment of the NPT. This is remarkable in terms of achieving the goals of the NPT. However, obviously, the NWSs do not support the right to full access to nuclear energy of the NNWSs. Rather, they are inclined to restrict this right by establishing international nuclear cooperation and an international nuclear bank that would reduce the risks of potential nuclear proliferation. These restrictions, they believe, would not only prevent NNWSs from building their own nuclear fuel cycle and uranium enrichment capability, but it would also contribute to and enhance the NPT treaty, since NNWSs would then be able to source its nuclear fuel from this multi-lateral enrichment facility.

Whatever the reasons behind their interpretations of the NPT principles, the NWSs' positions towards the NPT principles are misleading as they detract from the legal scope of the NPT. Moreover, they run counter to the positions of the NNWSs.

4.2.2. The Positions of NNWSs[18] toward the NPT Obligations

The NWS' stance towards the three pillars of the NPT is in stark contrast to that of the NNWSs, particularly the positions of the developing countries. These states, in fact, view the three pillars as of equal merit and believe they must be implemented in a balanced manner.

The Association of Southeast Asian Nations (ASEAN) shares the aspiration of a world without nuclear weapons. Ultimately, the only way to achieve this goal is not merely to focus on preventing any further spread of nuclear weapons, but also to work hard to accomplish their total elimination. Therefore, all states must simultaneously pursue full implementation of the goals set forth by the NPT.[19]

[18] It is difficult to provide the positions of all or most of the NNWSs due to the large number of these states. Therefore, this Chapter instead of providing individual statement, it will provide statements of groups, collations, movements, communities, or leagues, where states are gathered and present their reading and interpretations of the NPT obligations in collective statements. In doing so, the chapter will cover the positions of the most of the NNWSs with regards to the NPT obligations.

[19] Statement by H.E. U Kyaw Tin Permanent Representative of the Republic of the Union of Myanmar to the United Nations in New York on behalf of the Member States of the Association

On behalf of the Non-Aligned States Movement (NAM) to the 2015 NPT Review Conference, Iran criticized the non-accountable, discriminatory and double-standard approach of some states in implementing the provision of the treaty. It argues that the objectives of the treaty have not been implemented in 'a balanced manner and the rights of NNWSs are not realized in parallel with fulfilment of their non-proliferation obligations under the treaty'.[20] With this statement, Iran asserted that the NWSs have not been committed to their nuclear disarmament referring to the nuclear sharing issue and the nuclear assistance provided by NWSs to NNWSs that not a party to the NPT treaty. Non-compliance of NWSs to their obligations runs counter to the core role of the treaty in accomplishing nuclear proliferation and nuclear disarmament, and grants the benefits of nuclear energy to all states. Non-discriminatory and a balanced implementation is essential for maintaining the credibility of the treaty and promoting international peace and security. Accordingly, these states understand that the obligations of the NPT are integral and must all be fully implemented to achieve the desired goals of the treaty.

The Bahraini representative, on behalf of the state members of The League of Arab States, also indicated the non-compliance of the NWSs to their nuclear disarmament obligations. He asserts that the only way to avoid a nuclear war is by abolishing these weapons from the military arsenals of the NWSs. He reaffirmed that the future credibility of the NPT is based on the balanced implementation of the three pillars of the treaty, and achieving the universality of the treaty.[21]

On behalf of the fourteen member states of the Caribbean Community (CARICOM), the representative of Jamaica said that selective approaches which urgently prioritize nuclear proliferation obligations and pay scant regard to the

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of Southeast Asian Nations (ASEAN) at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons New York, 28 April 2015.

[20] Statement by H. E. Dr. Javad Zarif Minister of Foreign Affairs of the Islamic Republic of Iran before the 2015 NPT Review Conference on behalf of the Non-Aligned Movement States parties to the Treaty on the on Non-Proliferation of Nuclear Weapons, 27 April 2015.

[21] Statement of H.E. Mr. Jamal Fares Alrowaiei, Permanent Representative of the Kingdom of Bahrain to the United Nations at the 2015 NPT Review Conference on behalf of the Non-Aligned Movement States parties to the Treaty on the on Non-Proliferation of Nuclear Weapons, 27 April 2015.

other obligations merely serve to weaken the treaty. All states must stop ignoring this reality which at the end lead only to undermining the efficacy of the treaty. The CARICOM countries reaffirm the urgent need to preserve the indispensable role of the treaty as the core of the global nuclear disarmament and non-proliferation regime, which require full implementation of the treaty in all its aspects.[22]

Ambassador Higgie, on behalf of the New Agenda Coalition (NAC), emphasized that the countries of the NAC are committed to the three pillars of the NPT. Despite the fact that some positive developments achieved since 2010,[23] particularly in limiting horizontal nuclear proliferation, the nuclear disarmament obligation still remains unfulfilled. The NAC believed that all states so far have not brought to a 'closer to negotiations in good faith to conclude a complete and general nuclear disarmament as is required by Article VI of the treaty'. To date, the NWSs are reluctant to implement their obligation with regard to disarmament. This reluctance is clearly understood as attempts to defend the development and modernization of nuclear weapons. States cannot afford any more the selective approaches to the implementation of the three principles of the NPT. These selective approaches weaken the principles of the treaty, reinforce inequalities under the treaty and undermine its credibility.[24]

In the statement of the Vienna Group of Ten,[25] the representative emphasised that his state members understand that the NPT had played a major role in enhancing international confidence and cooperation in the peaceful uses of

[22] Statement by H. E. Mr. E. Courtenay Rattray Permanent Representative of Jamaica to the United Nations on Behalf of the Caribbean Community (CARICOM) at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons New York, 28 April 2015.

[23] These developments include the implementation of New Start Treaty between U.S.A and Russia, the acceptance of the 13 practical steps of the 2000 NPT conference as efforts to implement Article VI of the NPT, agree and sign the protocol to Central Asia Nuclear Weapons Free Zone, and the launch of an International Partnership for Nuclear Disarmament Verification; Statement by H. E. dell Higgie Ambassador for Disarmament and Permanent Representative of New Zealand to the Conference on Disarmament on Behalf of the New Agenda Coalition at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons New York, 28 April 2015.

[24] ibid.

[25] This group includes Australia, Austria, Canada, Denmark, Finland, Hungary, Ireland, the Netherlands, New Zealand, Norway and Sweden.

nuclear energy. It had been noticed that slow progress in fulfilling the obligations of nuclear disarmament and the lack of universality have had the net effect of undermining confidence in the Treaty itself. Full enforcement of the NPT obligations remained essential to facilitate the use of nuclear energy for peaceful purposes which have faced a growing range of areas, such as human health, water management, agriculture and environmental protection. Therefore, it is very important to recognise equal and mutual implementation of the three pillars.[26]

The Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL) commended on non-compliance with the obligations of the NPT and the importance of the commitment to these obligations. It said 'we should avoid the pessimistic or cynical thought of assuming that the NPT is here to stay and that the world is not going to end if we fail. In fact, we are here to avoid that final disaster'.[27] This 2015 NPT Review Conference was seen as having the responsibility to make a decision to ensure compliance with all NPT obligations.

On behalf of 156 states, at the 2015 NPR Review Conference Sebastian Knurz[28] addressed the catastrophic humanitarian consequences of using nuclear weapons and the necessity to abolish these weapons. He argues that these weapons are indiscriminate in nature and have immense uncontrollable destructive capability which causes unacceptable humanitarian consequences. They have implications for our environments, economies, socioeconomic development, and for human survival and the health of future generations. In the interests of humanity, these weapons should never be used under any circumstances. The only way to guarantee their non-use is to complete their total elimination. All states have a

[26] Statement by Mr. Richard Mathews Director Nuclear Policy Department of Foreign Affairs and Trade, Australia on Behalf of the Vienna Group of Ten at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons New York, 28 April 2015.

[27] Statement by Ambassador Luiz Filipe de Macedo Soares Secretary-General of OPANAL to the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons New York, 30 April 2015.

[28] Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered by H.E. Sebastian Kurz Federal Minister for Europe, Integration and Foreign Affairs of Austria to the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 30 April 2015.

responsibility to prevent their vertical and horizontal proliferation, which could be done by fully implementing the objectives of the NPT.

Following on from the above statements, explicitly, the states' delegations reaffirmed the equality and mutuality of the NPT obligations. They rejected the idea of discrimination or prioritizing one obligation at the expense of the others. Rather, they emphasise the equal and balanced implementation of the principles of the treaty without discrimination or restrictions.

In conclusion, after reviewing the positions of the NWSs and NNWSs with regard to the NPT obligations, it seems clear that there are differences in their approaches according to how states read and interpret these obligations.

4.3. The Legal Interpretation of the NPT

Full understanding of the NPT is very crucial in order to clarify its legal meaning and the contents of its provisions. However, the process of this understanding should be independent of the influence of non-law issues. This means that states or interpreters should give the legal meaning for that law as it was meant by the crafters of the law who gained their authorities from states as sovereign international individuals. Their interpretation should not be influenced or adjusted to serve national policies and interests.

In this context, states cannot interpret the three pillars of the treaty individually and analyse them separately in one way or another to serve their national interests or their international nuclear posture. Rather, states should consider the whole treaty as one unit which has aims and objectives that can be determined by analysing the plain text of the treaty. As Joyner argues, states or interpreters should emphasise the significance of the text of the treaty, the interdependence of its provisions, and, independently, on political policies and national strategies.

McLachlan stresses that international treaties, their scope, limitations and existence are a part of and subject to the rules of international law. With this inherent nature, they must be applied and interpreted according to the general interpretive rules of law, particularly in cases where there is ambiguity in the

provision of a treaty, and that treaty itself has no express interpretive means or tools. Therefore, the NPT interpretation should be carried out in accordance with the general interpretive rules of international law that are coded in Article 31and 32 of VCLT.

The general interpretive rules of the VCLT implies that the NPT should be interpreted in good faith according to the plain meaning of its text in the context of its terms and structure and in light of its object and purposes.

As the starting point in interpreting the NPT is its text, reviewing this text provides that Article VIII (3) cites that states should hold a conference every five years after signing the treaty. The aim of these conferences is to review the purposes of the treaty which are cited in the preamble to the treaty.[29] This means that the object and purposes of the treaty are to be found in its preamble.[30] Nigel[31] argues that a preamble outlining the purposes of the treaty is examined in order to aid an understanding of the particular provisions and, therefore, the preamble of the NPT is the best starting point from which to progress its interpretation.

In fact, the preamble to the treaty generally compromises a set of recitals. These recitals commonly include motivations, aims, objectives and considerations that suggest the intentions of the parties to the treaty.[32] Judge Weeramantary, in his dissenting opinion on the case concerning Arbitral Award of 31 July 1989, described the preamble to the treaty as 'a principal and natural source' from which indications can be gathered of a treaty's objectives and purposes even though the preamble does not contain substantive provisions.[33]

[29] NPT, Art. VIII(3).

[30] Defence Committee, 'The Future of the UK's Strategic Nuclear Deterrent: The White Paper' (2006-07) Great Britain Parliament House of Commons, Ninth Report Vol. II, 161.

[31] Nigel D White, 'Interpretation of Non-Proliferation Treaties' in Daniel H Joyner, and Marco Roscini, *Non-Proliferation Law as A Special Regime a Contribution to a Fragmentation Theory in International Law* (CUP 2012) 94.

[32] We should be aware of that not all preambles to treaty are written in clear equal way, some of them could be written in a briefly or thoroughly way; Richard Gardiner, *Treaty Interpretation* (2nd, OUP 2015) 186.

[33] Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 12 November 1991, Diss. Op. of Weermanatary, ICJ Reports 1991 p. 53, at 142.

Thus, the preamble paragraphs to the NPT are of textual significance as they are part of the tools that could be used in identifying and determining the ordinary meaning of the terms that are coded in the substantive body of the treaty.[34] This does not mean that the 'preamble paragraphs' state the obligations of the treaty. Rather, it generally illustrates the objectives and purposes of the treaty and imposes interpretive commitments for the obligations that are cited in the substantive articles or in the annexes of the treaty.[35] In other words, the provisions of a treaty, which contain the treaty's obligations, are usually more precise and more determined than the preamble to the treaty. However, in the case of ambiguity over the meaning of those substantive provisions, the preamble to the treaty may provide proper tools for wider interpretation. As such, significant account should be taken of the fact that the operative preamble paragraphs of the NPT unequivocally establish the objectives and purposes of the treaty.

From this standpoint, the treaty states in its very first paragraph that 'considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war, is to take measures to safeguard the security of peoples'.[36] It is very clear from this quotation that the parties to the treaty were aware of the destructive power of nuclear weapons.

The context of the preamble exposes that, in order to achieve the above central goals, states should act collectively on three aspects. In relation to the first aspect, that of 'believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war',[37] all states should act 'in conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons'.[38] These quotations refer to the dangers of the spread of

[34] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 29.

[35] Gardiner (n 32) 186.

[36] NPT, Preamble, paragraph 1.

[37] ibid para 2.

[38] ibid para 3.

nuclear weapons and the necessity to regulate and prevent a wider proliferation. It demonstrates that the intentions of the state parties were to establish an international agreement for this purpose.

The second aspect was that states should 'achieve, at the earliest possible date, the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament'.[39] To this end, this target is achievable by urging all states to cooperate in the attainment of this objective.[40] Thus, those who drafted the NPT addressed the issue of nuclear disarmament and the risks of existing nuclear weapons in the world. It urgently calls upon all states to cooperate collectively about effective measures and create an international treaty that would lead to general and complete nuclear disarmament.

The preamble of the NPT devotes a larger space to the third aspect which is on the right of all states to use nuclear energy for peaceful purposes.[41] It stipulates that the beneficiary of this right is preconditioned by accepting and implementing the IAEA safeguards on peaceful nuclear activities.[42] Any research or development of any other nuclear energy application should be conducted 'within the framework of the International Atomic Energy Agency safeguards system regarding the principle of effectively safeguarding the flow of source and special fissionable materials, by the use of instruments and other techniques at certain strategic points'.[43]

It is clear that the negotiating states were mindful of the importance of nuclear energy and, therefore, they addressed this issue in their negotiations and concluded it in the preamble. They did not include in the preamble any condition or restriction on this right. Rather, it is granted to all states without discrimination and it should be regulated and applied in conformity with the measures and safeguards of the IAEA.

[39] ibid para 8.

[40] ibid para 9, 10, and 11.

[41] ibid para 7 and 8.

[42] ibid para 5.

[43] ibid para 6.

Following on from the above analysis, we can conclude that the preamble of the NPT deals with three principles which are nuclear proliferation, nuclear disarmament, and the right to use nuclear energy for peaceful purposes. The preamble to the NPT generally illustrates that the treaty is devised to regulate these three principles which together represent the dual-use of nuclear energy.

These three principles are reaffirmed in the substantive articles of the NPT. Including these principles in the preamble and in substantive articles demonstrate that the drafters of the treaty believed that regulating these principles was essential to prevent nuclear war and ensure security for the people. It seems that there was an implicit understanding that acting collectively only against nuclear proliferation would not be sufficient to achieve the goal of the treaty. Possessing nuclear weapons begets new nuclear weapons possessors,[44] and therefore, states must work hard to help pursue the goal of nuclear disarmament. Those states that achieve these targets will enjoy the right to peaceful use of nuclear energy, but the others will not. Accordingly, the objective and purpose of the treaty, as the preamble states, is to prevent nuclear war and safeguard security for people by regulating the dual-use of nuclear energy.

As mentioned earlier, the preamble paragraphs of the NPT may be used as a starting point to identify the general scope of the treaty, but, in accordance with Article 31 of the VCLT, one should simultaneously take into account the plain meaning of the text, in the context of its substantive articles and the structure, in light of its object and purposes.[45]

The substantive articles provide a broader view and signify the objectives and purposes of the treaty.[46] The logic of Article 31 is that the substantive articles should not be isolated or sequenced through the interpretation process. Rather, for the purposes of interpretation, the treaty's provisions should first be individually seen as legal clauses. Each one has its normative character and

[44] Gawdat Bahgat, 'Nuclear Proliferation: The Islamic Republic of Iran' (2006) 7 (2) International Studies Perspectives 124, 125.

[45] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 31.

[46] Gardiner (n 32) 197.

equality in terms of its legal binding force and consequences. Secondly, they should conjointly be seen as having an integral singularity which constitutes the legal norms and obligations of the treaty that serve the objectives and purposes of the treaty.[47] This approach is noted by Fitzmaurice and Merkouris who argue that all provisions of a treaty, or another instrument, must be viewed as being intended to have significance and as necessary to contain the intended meaning. The treaty as a whole and each of its provisions must be taken as intended to achieve some end. Any interpretation is incorrect and suspect if it does not render the required effects or would disable the text to achieve its objective.[48]

Accordingly, each provision of the NPT has its role and place among the other provisions of the treaty and is also a part of the whole normative aspect of the NPT.[49] In other words, the interpretive mechanism that should be implemented in order to clarify the pure legal meaning of the NPT is that each provision of the NPT has its own legal character and normative role among all other provisions, as well as a special meaning as part of the objective and purposes informed by the structure of the treaty.

Reading the whole text of the NPT reveals that Articles I, II, and III deal with nuclear proliferation. Articles IV and V deal with the use of nuclear energy for peaceful purposes. Article VI deals with nuclear disarmament. The rest of the NPT provisions, particularly Article VIII to XI, deal with procedural matters.

These divisions demonstrate that the treaty as whole is concerned with the three principles contained in the preamble which are proliferation, peaceful purposes and nuclear disarmament. Stating these principles in the substantive articles of the NPT makes them the three main separated legal norms of the NPT or what is be rather known as the three pillars of the treaty.

Thus, in accordance with the interpretive mechanism set up above, these three pillars complete each other and which unity embodying the objectives and purposes of the treaty. This means, on one hand, each provision has its legal

[47] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 29.

[48] ibid 180.

[49] ibid 26.

entity, legitimacy, and binding character. Under such character, non-compliance with this provision would be considered a violation of the legal commitments contained in this provision and necessitate taking measures against this violation. On the other hand, this legal character is located among the legal character of the other provisions to constitute holistically the overall normative feature of the NPT and represent the object and purposes of the treaty. These provisions cannot be isolated, prioritized, or give more legal weight in comparison to one another. Rather, they should be seen as one unit that serves to achieve the major goal of the NPT in preventing nuclear war and safeguarding the security of people. In other words, the three principles of the NPT are legally equal and binding to all states without discrimination. There is no preference between them; or restrictions that limit the scope of the rights and duties coded in these principles.

Therefore, it is quite illegal when states, particular the NWSs, put some restrictions or conditions on the implementation of the provisions of the NPT. It is not correct to interpret the treaty as a legal instrument that firstly and importantly aims to prevent nuclear proliferation on the basis that the intentions of the parties were directed to set up this aim as the primary one, and the other aims are secondary or subsequent to the first one.

Fitzmaurice and Merkouris[50] quoting from Koskenniemi observed that it is impossible to achieve interpretation on the basis of the parties' intentions 'since it is impossible to ascertain real, subjective party intents'. They note that the International Law Commission states that the key target of interpretation is to explore and clarify the legal meaning of the text of the treaty; it is not an investigation into the intentions of the parties.[51] Accordingly, the Commission presumes that the text of the treaty is a real expression of the parties' intentions. Thus, with regard to the interpretation of the NPT, the text of this treaty remains

[50] Malgosia Fitzmaurice and Panos Merkouris, 'Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' in Malgosia Fitzmuarce, Olufemi Elias, and Panos Merkouris (eds), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on, (martinus Nijhoff publisher 2010) 156.

[51] ibid.

the best and main resource from which to reach a pure correct legal interpretation.

Despite this fact, to ascertain the final meaning of the provisions of the NPT, a certain weight should be given to the preparatory works of the treaty as required by Article 32 of the VCLT. Under this Article, we should involve and review the related *travaux preparatoires* of the NPT, which are found in unilateral statements of the negotiating states on the meaning of particular provisions.[52] These *travaux preparatoires* combined with text should provide the framework of the treaty interpretation.[53] Reviewing these documents reveals that the intentions of the parties were to deal with all questions related to the regulation of the dual-use of nuclear energy in its full range and applications.[54] Their intentions were directed to create a treaty not only for regulating nuclear weapons proliferation[55] but also to underpin the three naturally interconnected and presumably legally equal principles[56] in order to avoid nuclear war.[57]

This compromise or reciprocity was deemed essential for accepting and adopting the treaty. The NPT would never have existed or been definitely expanded, if these three pillars had not been included and affirmed in the treaty. This was showed by the representative of the United Arab Republic, on behalf of the Eighteen Nations Disarmament Committee (ENDC), who stated that any intentional deal or treaty on nuclear non-proliferation 'should not be made on the assumption that it should give the 'Nuclear Powers' certain privileges at the

[52] White (n 31) 102.

[53] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 20.

[54] See statements were delivered by negotiating states on the NPT terms in the UNGA First Committee Meeting; UNGA, First committee 1579th Meeting (05 June 1968). For further discussions and the intentions of state parties to the NPT; see, Mohamed I Shaker, *The Nuclear Non Proliferation Treaty: Origin and Implementation 1959-1979* (Vol 1, Oceana Publication 1980); also, Joyner has analysed the preparatory works of the NPT and reached the same conclusion, ibid 28.

[55] White (n 31) 104.

[56] Lewis A Dunn, 'The NPT Assessing the Past, Building the Future' (2009)16 (2) Nonproliferation Review 143 158-60.

[57] White (n 31) 105.

expense of the 'Non-Nuclear Powers', because it would then be so one-sided an agreement which many, if not the majority, would hesitate to adhere to'.[58]

The above quotation indicates that the negotiating states were inclined to establish reciprocal obligations on the two different types of parties, which were the NWSs and NNWSs. These reciprocal obligations would equally serve the interests of all states without discrimination or giving one party a better position over another.

In summary, the implementation of the general interpretive rules coded in the VCLT provides a strong argument that the whole NPT treaty is about regulating the use of nuclear energy in all its aspects.[59] It contains set reciprocal obligations on two classified state parties; NWSs and NNWSs. Generally, these obligations are: (1) the NNWSs, under non-proliferation obligation Article II, are obligated not to involve or possess nuclear weapons. (2) The NWSs are obliged not to help or transfer nuclear weapons to NNWSs under Article I, and to achieve complete nuclear disarmament according to the disarmament obligation of Article VI. (3) Finally, all states without discrimination have the right to full access to nuclear technologies under article IV. All parties to the NPT are legally obliged to implement their obligations in order to achieve the major goal of preventing nuclear war and securing people's safety in a co-ordinated manner. There is no evidence, in its preamble, through all its provisions, and in its preparatory works, that supports drawing a conclusion that the treaty is exclusively and primarily focusing more on one provision than the others, or restricting its rights as some states assert. Saying something contrary to this would be illogical, inaccurate, and far from the pure legal meaning of the treaty and its context in the light of its object and purposes.

The debates between states on the interpretation of the NPT and its legal scope have raised questions on the extent to which states are obliged to implement their obligations. The legal nature of and compliance or non-compliance with the NPT obligations are controversial issues, which will be discussed below.

[58] This statement fell in the interests of many states which they insisted on the direction of Fahmy's statement, see; Shaker (n 54) 43-48.

[59] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 28.

4.4. The Legal and Obligatory Nature of the NPT

The above legal interpretation asserts that there are two categorized parties to the treaty who are obliged to fully implement reciprocal obligations. This implies that the NPT involves a *quid pro quo* relationship between the two categorized parties.[60] Originally, the genetic roots of this relationship go back to the Irish proposal[61] and, in fact, this became the foundation for the UNGA resolution XVI, adopted on 04 December 1961.[62] This resolution calls upon all states to secure the conclusion of an international agreement containing provisions that would oblige NWSs not to hand over control of nuclear weapons or transfer the necessary information to build such weapons to NNWSs as well as provisions that would oblige the NNWSs not to build or control nuclear weapons.[63]

After four years of negotiations, the UNGA adopted another resolution in 1965 which contains five guiding principles about how to negotiate an international treaty to prevent proliferation of nuclear weapons.[64] These five principles were to underpin the principles and obligations of the intended treaty which would later be called the NPT. The second principle of these five asserted that the intended treaty 'should embody an acceptable balance of mutual responsibilities and obligations from the nuclear and non-nuclear powers'.[65]

Accordingly, the NPT is simply described as a "grand bargain"[66] based on the consent of two categorised parties. This grand bargain suggests that there are reciprocal obligations or exchanges of rights and duties between these parties. In return for exchanging their rights and duties, the treaty establishes one right

[60] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 10-11.

[61] For full history of NPT negotiations see; Shaker (n 54) 3-26; also, George Bunn, *Arms Control by Committee: Managing Negotiations with the Russians* (Stanford University Press 1992) 59-65; Henry D Sokolski, *Best of Intentions: America's Campaign against Strategic Weapons Proliferation* (Praeger Publisher 2001) 41.

[62] UNGA, Res A/RES/1665(XVI), 04 December 1961.

[63] ibid para 1.

[64] UNGA, Res A/RES/2028(XX), 19 November 1965.

[65] ibid para 2 (b).

[66] White (n 31) 105.

which is the right to access nuclear technologies applicable to all states without discrimination. These obligations vary in terms of context, structure, object and aim according to the type of obliged party, whether they are NWSs or NNWSs. Therefore, the NPT is a contract treaty as it is based on a pact and has exchange rights and obligations in order to achieve mutual goal.[67] Categorizing the NPT as a contract treaty does not have a bearing upon the obligatory nature of its three principles *per se*; rather, it is because of its *quid pro quo* relationships.[68] The differentiation in responsibility and parties and, in addition, the reciprocity of its obligations give the NPT a different character from other treaties based on a contractual concept.

Indeed, the special character of the NPT makes it unlike other kinds of multilateral treaty, such as the Biological Weapons Convention (BWC) or the Chemical Weapons Convention (CWC) which, in legal terminology, are referred to as law-making treaties or *traite-loi*.[69]

Distinguishing between law-making and contract treaties affects neither the legally binding nature of its provisions and terms nor the interpretive rules implemented for the purposes of interpretation. However, it is an issue in terms of non-compliance or a material breach of the provisions of the treaty.

A violation of international obligations or a material breach[70] means that a state is acting in disconformity or incompatible manner with what is required by the provisions of the treaty.[71] There is a discrepancy between the rules of international law and the facts of the matter. It does not always involve material damages; rather, it involves legal or moral damages caused by violating an

[67] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law, and Practice* (CUP 2013) 86-88; Jan Klabbers, *International Law* (CUP 2013) 17.

[68] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 107) 66.

[69] White (n 31) 88.

[70] A material breach of a treaty is defined by Article 60 of VCLT as 'for the purposes of this article, consists in: (a) A repudiation of the treaty not sanctioned by the present Convention; or (b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty'; VCLT, Art. 60 (3).

[71] Mohammed M Gomaa *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff Publishers 1996) 63.

international obligation.[72] Such conduct of a state, according to Article 60 of the VCLT,[73] entitles the injured parties to suspend or terminate the entire treaty or part of it. However, a violation of a provision does not *ipso facto* put an end to the violated treaty, but within certain limitations it can become legal grounds for the parties to invoke suspension or termination of the treaty.[74] Moreover, only a breach of an essential and important provision is counted as a material breach that entitles the injured parties to take remedial measures.[75]

The main characteristic of law-making treaties is that these treaties set up rules or norms. These norms have no reciprocal character in their implementation; rather they are equally applicable to all members without discrimination.[76] To some extent, they are similar to national legislation that imposes legal obligations on all members equally, without consideration. A material breach or violation of a provision of a law-making treaty is necessary but not sufficient to suspend or terminate a treaty, unless the non-breaching parties to the treaty unanimously make an agreement to suspend totally or partially the operation or terminate the treaty;[77] attaining such agreement unanimously is difficult to achieve.[78]

In the case of contract treaties, such as the NPT, a violation of 'a provision essential to the accomplishment of the object or purpose of the treaty'[79] falls within the scope of Article 60 of the VCLT, and also invokes the law of state responsibility for a wrongful act.[80] Therefore, the remedy for that material breach is subject to the injured parties' choice in terminating or suspending the

[72] ibid 64.

[73] VCLT, Art. 60(2).

[74] Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed.), *International Law* (OUP 2014) 191.

[75] Malgosia Fitzmaurice, 'Material Breach of Treaty: Some Legal Issues' [2001] 6 Austrian Review of International and European Law 3, 4-5.

[76] Klabbers (n 67) 17.

[77] ibid 63.

[78] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 27.

[79] VCLT, Article 60(3)(b)

[80] Gomaa (n 71) 63.

treaty.[81] This is because a contract treaty is set up on a *quid pro quo* relationship. Any disturbance to this relationship strikes at the heart of the object and purposes of the treaty, and makes any one of the injured parties into a special affected party.[82]

Therefore, non-compliance with one of the three principles of the NPT is a violation of a provision essential to achieve the object and purposes of the treaty. It is considered an action that 'radically changes the position of every party with respect to the further performance of its obligations under the treaty'.[83] Consequently, this non-compliance is a qualification or entitlement for one party, or *fortiori* an entire categorized party to the NPT (e.g. NWSs and NNWSs) to invoke suspension or termination of the treaty as a remedy for that violation.[84] Therefore, this analysis strongly argues that the interpretation and claims of the NWSs are likely null and void and create legal grounds for the affected states, particularly the NNWSs, to suspend the implementation of their nuclear obligations until the violation is remedied or they agree to terminate the treaty's commitments.

4.5. Conclusion

This chapter has sought to provide a legal interpretation of the treaty. Given the absence of special interpretive rules within the NPT framework, the interpretive rules of the VCLT remain flexible and sufficient to resolve any dispute over the scope and obligatory nature of the principles of a treaty. This means that the NPT like any other international treaty does not need special interpretive rules.[85] It does not need require a social regime because of its subject matter, structure, or legal nature.

[81] Fitzmaurice, 'Material Breach of Treaty' (n 75) 4.

[82] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 108.

[83] VCLT, Article 60(2)(c)

[84] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 4) 108. Also, Yonen has reached the same conclusion; Yael Ronen, *The Iran Nuclear Issue* (Hart 2010).

[85] White (n 31) 117.

Generally, the objective of interpreting a treaty is to advance the aims of the treaty by producing outcomes under which it facilitates and clarifies the implementation of the treaty's provisions.[86] According to the VCLT rules, this chapter has argued that the NPT is a contract treaty in nature, created to prevent nuclear war and secure people's safety. In doing this, it argues that the three principles of the NPT oblige all state members, who are categorized into two groups, to implement the interconnected obligations and rights coded in these principles. These rights and obligations have an obligatory nature that is equally binding to all states.

Interpreting the NPT as a contract treaty does not mean that this chapter intended to focus on classifying the treaty. Rather, it focused on the treaty's purposes and obligatory nature. Regardless of whether or not the NPT is a contract, constitutional, or law-making treaty, this chapter signifies that the treaty's aim is to prevent nuclear war and that this will happen by fully implementing all its obligations and rights. In other words, the three principles of the treaty are legal instruments binding to all states. Any limitations or restrictions imposed by some states on the implementation of these principles would be illegal and in violation of these principles. Consequently, there are requirements to remedy legally this non-compliance and apply some sort of legal measure to correct the situation.

Indeed, after more than four decades, the provisions of the NPT are still not fully implemented. This indicates that the treaty has omissions and weaknesses in its structure which make achieving full implementation somewhat impossible. It also suggests that the treaty urgently needs amended to make it more workable in all its aspects. Or, as this research suggests, it seems that this treaty has become exhausted and there is a necessary for the international community to consider the creation of a new NPT that would cover the omissions of the existing NPT. This potential treaty should be law-making in nature and it should oblige all states without discrimination and without distinguishing between different groups of states.

[86] Gardiner (n 32) 190.

Thus, the subsequent chapters build on this understanding to disclose the omissions and weaknesses of the NPT by legally analyse of the scope and obligatory nature of the three principles of the NPT and the extent to which states are committed to their obligations. This analysis will be carried out with regard to Iran's nuclear programme, which next chapter focusing on the first obligation, namely the nuclear non-proliferation.

5. The Possible Military Dimensions File of Iran's Nuclear Programme

5.1. Introduction

Current nuclear proliferation concerns are different from those that existed in the Cold War era. During that period, the concerns were about vertical proliferation,[1] which means proliferation of nuclear weapons within the Nuclear Weapons States (NWSs) as a result of their increasing the number of nuclear weapons in their arsenals and enhancing their technical sophistication.[2] In those days, the secret of nuclear weapons was exclusive to NWSs. These days, the main concerns are about horizontal proliferation, which means proliferation of nuclear weapons amongst Non-Nuclear Weapons States (NNWSs) or even to non-state actors, such as international organizations or terrorist groups.[3]

Since its nuclear programme was revealed in 2002, Iran has been accused of breaching its international nuclear obligations, particularly those coded in Article II of the NPT that prohibits NNWSs from manufacturing or possessing nuclear weapons. These accusations were mainly centred on some nuclear-related activities that the International Atomic Energy Agency (IAEA) described as belonging to the 'possible military dimensions' (PMD) file. The IAEA has issued many reports in this regard.[4] The key report in which the Agency provides further details and deep analysis of PMD was issued in November 2011.[5] Since then, this file has predominated in the relationship between IAEA

[1] Ariel E Levite, 'Never Say Never Again Nuclear Reversal Revisited' (Winter 2002/ 2003) 27 (3) International security 59.

[2] Victor W Sidel and Barry S Levy, 'Proliferation of Nuclear Weapons: Opportunities for Control and Abolition' (September 2007) 97 (9) American Journal of Public Health 1589.

[3] Levite (n 1) 59.

[4] IAEA, GOV/2015/15, 19 February 2015; GOV/2014/58, 07 November 2014; GOV/2014/43, 05 September 2014; GOV/2014/28, 23 may 2014; GOV/2014/10, 20 February 2014; GOV/2013/56, 13 November 2013, GOV/2013/40, 28 August 2013; GOV/2013/27, 22 May 2013; GOV/2013/06, 21 February 2013; GOV/2012/55, 16 November 2012; GOV/2012/37, 30 August 2012; GOV/2012/23, 25 may 2012; GOV/2012/09, 24 February 2012; GOV/2011/65, 08 November 2011.

[5] IAEA, GOV/2011/65, 08 November 2011.

and Iran, and it has become one of the main matters on the negotiating table between the coalition and Iran.[6]

Debates about the PMD file centre on the divergence between the parties to the dispute in interpreting and determining the scope and legal meaning of the provisions coded in Articles I and II of the NPT. There is some misunderstanding of the relationship between these terms.[7] Certainly, there are some omissions in Articles I and II that make the treaty incapable of dealing with all types of nuclear proliferation.

The aim of this chapter is, therefore, to identify whether Iran's nuclear activities could be considered a breach of their nuclear non-proliferation obligations. In particular, it aims to investigate whether the PMD of Iran constitutes a potential nuclear proliferation. In addition, it intends to address the omissions of Articles I and II of the NPT by examining the scope and capability of these articles to deal with new potential nuclear challenges and the extent to which the NWSs are committed to them. To do so, this chapter will first conduct a legal analysis of Articles I and II in order to determine the omissions from these articles. This analysis will be carried out in accordance with the interpretive rules of Articles 31 and 32 of the Vienna Convention of Law of Treaties (VCLT). The chapter will then focus on the PMD in Iran's nuclear programme. It will review the allegations about PMD in Iran; examine the quality of these allegations and the evidence provided to support them, and will discuss and scrutinize the compliance of other states to non-proliferation obligations. The chapter concludes that Articles I and II constitute balanced obligations on both NWSs and NNWSs to prevent nuclear proliferation. Iran's nuclear activities including the PMD have not reached the level of violating its international nuclear obligation; rather, the PMD is just a political game created to manipulate public opinion to convince the public that it is Iran's ambition to be a NWS.

5.2. Legal Interpretation of Articles I and II of the NPT

[6] Nader Entessar and Kaveh L Afrasiabi, *Iran Nuclear Negotiations: Accord and Détente since the Geneva Agreement of 2013* (Rowman & Littlefield) 2015.

[7] T. V. Paul, 'The India US Nuclear Accord in Strategic Context' in Wade L Huntley and Karthika Sasikumar (eds), *Nuclear Cooperation with India: New Challenges, New Opportunities* (Simon Centre for Disarmament and Non-Proliferation Research 2006) 48.

The previous chapter concluded that the NPT is classified as *traite-contrat* that imposes obligations, which are fundamentally *quid pro quo* in nature, on two different categories of state - the NWS and the NNWS. One of the reciprocal obligations contained in the NPT is the nuclear non-proliferation obligation, which is coded in Articles I and II of the NPT.

According to Article 31 of the VCLT, the text of the provision is the best starting point in the process of interpreting the treaty. Reading the text of Articles I and II reveals that they exemplify two sides of the same coin which is nuclear non-proliferation obligation. One side (Article I) contains obligations directed to NWSs; and the other side (Article II) contains obligations directed to NNWSs.

This means that these two articles are applied to two different types of states, which are the NWSs and NNWSs. Basically, to identify which state qualifies as a NWS, the NPT provides a definition of this group of states in Article IX (3). This article provides the following definition of a NWS: 'for the purposes of this Treaty, a nuclear-weapon state is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967'.[8]

Accordingly, a state must meet certain conditions to qualify as a NWS. This condition is that it must have manufactured nuclear weapons or a nuclear explosive device, or have exploded nuclear weapons or a nuclear explosive device, prior to 1 January 1967. This condition applies to the USA, the Soviet Union and the United Kingdom, as the original NWSs that possessed nuclear weapons prior to 1967. China and France, which signed and ratified the NPT in 1992, were also recognised as NWSs as they manufactured carried out nuclear explosive devices before 1967. Only these five states are recognized as NWSs in accordance with Article IX (3) of the NPT. Under the jurisdiction of the NPT, any another state outside this group is categorized as a non-nuclear weapons state.

[8] NPT, Article IX (3).

This makes the treaty deficient to deal with issues that might occur in the future. Indeed, it would be incapable of dealing with cases where a state had manufactured nuclear weapons or exploded a nuclear device after 1967. This is very likely to be seen in the cases of Israel, India, Pakistan, and North Korea,[9] which have each manufactured or exploded nuclear weapons or explosive devices after January 1976.

There have been efforts to persuade these states to join the NPT.[10] However, these efforts are futile because these states see themselves as being in a better position with nuclear weapons.[11] Also, if these states decided to join the NPT, which category would they join? Would they join the NPT as NWSs? If so, then this would be an explicit violation of article IX (3) of the NPT as they obtained their nuclear weapons after 1967. Only if they succeeded in requesting an expansion of the definition of Article XI (3) of the NPT[12], would they be able to join the treaty as NNWSs. Under this hypothesis, this state must dismantle and abandon its nuclear arsenal and submit all its nuclear sites and technologies to the IAEA for monitoring and investigation. If it failed to do so, it would violate the NPT's Article II which prohibits the manufacturing or possessing of nuclear weapons by a NNWS, and also Article III which obliges NNWSs to submit all their nuclear technologies to the IAEA for monitoring to ensure there is no diversion of nuclear materials to use for military purposes.[13] In light of the current status of international affairs, it is very hard to see a state giving up its nuclear arsenal.[14] Distinguishing between two categorised sets of members by

[9] Israel has never admitted that it possesses nuclear weapons although no one doubts this fact. The other states have declared their nuclear weapons but they refuse to join the NPT to keep open the option of becoming NWSs; Thomas Graham and Keith A Hansen, *Preventing Catastrophe: The Use and Misuse of Intelligence in efforts to Halt the Proliferation of Weapons of Mass Destruction* (Stanford Security Studies 2009) 165.

[10] Mario Esteban Carranza, *South Asian Security and International Nuclear Order: Creating Robust Indo-Pakistan Nuclear Arms Control; Regime* (Ashgate 2009) 146; Rajiv Nayan, 'The NPT and India: Accommodating the Exceptions' in Rajiv Nayan (ed), *The Nuclear Non-Proliferation Treaty and India* (Routledge 2013).

[11] ibid 146.

[12] David S Jonas, 'Significant Ambiguity in the NPT: Continuing Issue' [2011] 40 (37) Georgia Journal of International and Comparative Law 37, 41.

[13] NPT, Art. III.

[14] Michael E Brown, 'The 'End' of Nuclear Arms Control' in Ivo H Daalder and Terry Terriff (eds), *Rethinking the Unthinkable New Direction for Nuclear Arms Control* (Routledge 2013) 54-5.

the NPT and the prevailing difficulties in categorising potential new members are issues that need urgent consideration.

Also, reading these two Articles reveals that due to the *quid pro quo* nature of the NPT, there are synallagmatic obligations imposed on both the NWSs and NNWSs, but there are asymmetric obligations which are imposed only on the NNWSs.

5.2.1. Synallagmatic Obligations of Articles I and II of the NPT

Article I is the first clause which obliges NWSs not to transfer, assist, and encourage in any way, or give control over nuclear weapons or nuclear explosive devices to any NNWS. Synallagmatically, Article II's first clause also obligates NNWSs not to receive nuclear weapons from any transferor, directly or indirectly, or have control over nuclear weapons or nuclear explosive devices.

It seems then, from citing these obligations, that the perceived objectives of these Articles were to constitute a comprehensive prohibition on manufacturing nuclear weapons or transferring them to NNWSs.[15] In addition; it seems that the treaty's drafters wished to prevent any possibility that would contribute to the proliferation of nuclear weapons. Therefore, both Articles assert the prohibition of NWSs' transferring to or giving NNWSs control of nuclear explosive devices that are capable of releasing nuclear energy.[16]

However, these two Articles and others elsewhere in the NPT, do not provide a clear definition or criteria that would determine what constitutes nuclear weapons or what are considered prohibited nuclear explosive devices.[17] There is no distinction between these two terms.[18] The phrases dealing with nuclear weapons and nuclear explosive devices are broad and not clearly defined. In fact, lack of any determination is one of the treaty's omissions.

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[15] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 11.

[16] Mohamed I Shaker, *The Nuclear Non Proliferation Treaty: Origin and Implementation 1959-1979* (Vol. 1, Oceana Publication 1980) 213.

[17] Matin Zuberi, 'The Nuclear Non-proliferation Regime' in Raja Menon (ed), *Weapons of Mass of Destruction: Options for India* (Sage Publications 2004) 83.

[18] David Willy (trs), *The Non-Proliferation of Nuclear Weapons* (St. Martin's Press 1971) 116.

In this respect, it is not problematic to determine what constitutes nuclear weapons because their physical structure, components, and proposed usages are characterized as weapons. By contrast, determining what constitutes nuclear explosive devices is more complex.[19]

So far, none of the NPT conferences has tried to provide precise definitions or set up defining criteria. However, nuclear weapons have been defined elsewhere. The term was first defined in the 1954 USA Atomic Energy Act. This act states that "atomic weapon" means any 'device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon prototype, or a weapon test device'.[20]

No such definition of nuclear weapons is provided by the NPT or even included as an annex to the treaty. The only point that can be concluded from its text is that the treaty distinguishes between nuclear weapons and nuclear explosive devices. This basically complicates the situation given that it is almost impossible to determine what are considered to be prohibited nuclear explosive devices. The complexity lies in the fact that these devices are not always used in manufacturing nuclear weapons; but they are also used for peaceful purposes.[21] In other words, nuclear explosive devices are potential nuclear weapons.[22] A nuclear explosive device can be used to destroy a place on earth or can be used to produce energy usable in civil engineering. The difference then can be solely the intent of the state.

Indeed, the text of the NPT does not clearly state whether transforming parts of nuclear weapons is prohibited under this treaty. It is hard to verify what may or may not be permitted under this treaty. For illustration, it is obvious that the

[19] For an excellent illustration, see Joseph Cirincione, *Bomb Scare: The History and Future of Nuclear Weapons* (CUP 2008) 1-14.

[20] Atomic Energy Act of 1954, Section 11 (d). very similar definition adopted by the Tlatelolco Treaty which is a Treaty for the Prohibition of Nuclear Weapons in Latin America; Tlatelolco Treaty, Art. 5.

[21] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 15) 12.

[22] Alva Myrdal, *The Game of Disarmament: How the United States and Russia Run the Arms Race* (University Press 1977) 213.

treaty prohibits the manufacture or delivery of completed nuclear weapons to NNWSs. It is less clear about the transformation of enriched uranium that could be used as nuclear weapons grade, the exchange of parts or means that are used for actuating or delivering nuclear weapons, or sharing the design information of how to build an atomic bomb that would be prohibited under the treaty.

In this context, Dean Rusk; the USA Secretary of State, said that 'the NPT deals only with what is prohibited, not with what is permitted'.[23] He continued by arguing that this treaty does not prohibit the transfer of nuclear delivery and actuating systems 'so long as such transfer does not involve bombs or warheads'.[24] It does not deal with associated consultations and planning on nuclear defence, so long as transformation of nuclear weapons would not give a hostile state control over them.[25]

William Foster; the USA chief negotiator, excluded uranium enrichment and stockpiling for peaceful uses and also the development of plutonium-fuelled power reactors from the list of prohibition under the NPT.[26]

Another omission that should be considered at this stage is that Articles I and II explicitly prohibit providing any assistance to NNWSs that would assist them in manufacturing or otherwise acquiring nuclear weapons or nuclear explosive devices or control over them. If we make the assumption that a state providing nuclear assistance is a nuclear supplier state; and the state that receives this assistance is a nuclear consumer state, this implies that nuclear cooperation and assistance could be categorised into four types of relationship. It should be emphasised that, in the context of nuclear assistance, this chapter discusses nuclear assistance for military purposes not for civilian purposes which is

[23] Zuberi (n 17) 81. Such an interpretation by Dean Rusk gives the treaty a permissive character rather than a prohibitive character. It seems that the reason for his interpretation was that his government deliberately omitted including a clear definition due to its desire to keep open the door to nuclear weapons co-operation with its allies; Shaker (n 16) 23.

[24] Zuberi (n 17) 81.

[25] Rebecca Johnson, 'Renewal of US-UK Nuclear Cooperation 'in Breach of NPT' say Eminent Lawyers' (July-August 2014) The Acronym Institution <http://www.acronym.org.uk/dd/dd78/78news02.htm> accessed 08 February 2015.

[26] Zuberi (n 17) 83.

allowed under Article IV of the NPT and which will be discussed in further detail in Chapter Eight.

Based on the assumption that the NWSs are the suppliers of nuclear assistance, there are two types of nuclear assistance. The first type is when the nuclear consumer state is a NNWS. Whether the non-nuclear state is a member of the NPT or not this type of assistance is prohibited under Articles I and II. This is because these two Articles clearly prohibit provision of nuclear assistance to NNWSs without distinguishing whether the consumer state is a member of the treaty or not. Otherwise, if these two Articles had allowed provision of military nuclear assistance to non-member states, it would have constituted an encouragement and could have induced states to not be treaty members.[27] Therefore, NWSs undertake not to transfer or assist any NNWSs in possessing or manufacturing nuclear weapons directly or indirectly through third party states or organisations.[28] The second type of assistance is when the nuclear consumer state is a NWS. Frankly speaking, it seems that this type of co-operation is completely permissible under the NPT. Nothing in this treaty indicates a prohibition of nuclear assistance between NWSs. Going through the preparatory works of the NPT leads to the conclusion that the NWSs were inclined to keep open the door of nuclear assistance in military situations should they need it.[29] However, this type of nuclear assistance is controversial. It seems that it is inconsistent with the purpose of the NPT which is to prevent nuclear war and secure people's safety. It also contradicts the obligations of NWSs to work towards nuclear disarmament, which is coded in Article VI of the NPT.[30]

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[27] Shaker (n 16) 257.

[28] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organisations* (OUP 2011) 117.

[29] This is illustrated by continued nuclear cooperation and assistance between NWSs. For example, nuclear cooperation between the UK and France for deterrence purposes; Bruno Tertrais, 'Entente Nucleaire: Options for UK-French Nuclear Cooperation' (June 2012) British American Security Information Council (BASIC) Discussion Paper 3, <http://www.basicint.org/sites/default/files/entente_nucleaire_basic_trident_commission.pdf> accessed 10 February 2015. Nuclear cooperation between China, the USA and the UK occurs in a very wide range of different fields; Shirley Kan and Mark Holt, 'USA-China Nuclear Cooperation Agreement' (06 September 2007) Congressional Research Service <http://fas.org/sgp/crs/row/RL33192.pdf> accessed 10 February 2015.

[30] Matthew Harries, 'Britain and France as Nuclear Partners' (February-March 2012) 54 (1) Survival 7 21.

Certainly, nuclear cooperation between NWSs would lead to their advancing their nuclear capacity and developing their capability to produce sophisticated nuclear weapons, which would be considered vertical nuclear proliferation.

The second assumption is based on the idea that the nuclear supplier is a NNWS. Under this assumption, there are two types of nuclear assistance. One occurs when the consumer state is a NWS. A NNWS can assist a NWS by supplying the latter with pure uranium, or by providing low enriched uranium which the recipient state re-enriches to be usable in a bomb, or by developing nuclear technologies or selling equipment which can be used in these technologies. It seems that this type of assistance is not prohibited. The prohibition is that NNWSs must 'not seek or receive any assistance', but it does not explicitly forbid those states from providing nuclear assistance to NWS. The NPT is not, in fact, very precise in this respect. It is unlike the Tlateloloc Treaty. The latter obliges all its contracting members 'to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapons'.[31] Accordingly, the Tlateloco treaty legally binds all its members, without distinguishing between states that have nuclear weapons or those that are without nuclear weapons, not to provide nuclear assistance to another state even if the potential recipient state is a NWS under the NPT.

The final type of military nuclear assistance is when the consumer state is a NNWS. There is no question about the illegality of such cooperation, if the recipient state is a party to the NPT. Clearly, according to Article II, this article binds all non-nuclear weapons state members not to possess or be involved in the process of manufacturing nuclear weapons. In fact, the problem occurs when that consumer state is a NNWS but is not a signatory state to the NPT, or it is a non-state actor such as a business or group. Although this case is a theoretical one, it constitutes a controversial argument and should be addressed. The controversy concerns the precision and specification of the terms in Article II.[32] In general, the NPT only addresses states and its obligations are only applicable

[31] Tletaloloc Treaty, Article 1 (2)

[32] Jonas (n 12) 48.

to state actors.[33] With the increased threat of possessing nuclear weapons by non-state actors such as terrorist groups,[34] nuclear assistance to these non-state actors is the greatest threat that concerns the international community these days.[35] The NPT does not contain any provisions to regulate nuclear proliferation within the private sector or among non-state actors.[36]

With this deficiency, indeed, the NPT will be incapable of dealing with the possibility of an organization or a group seeking to obtain nuclear weapons or explosive devices, especially with the increased demand for nuclear power and assistance from the existing global nuclear black market.[37] In addition, this gap and imperfection gives any state the opportunity to destabilize international peace and security by providing nuclear weapons or devices to non-state actors without being accused of breaching its international nuclear obligations under the NPT.[38]

In fact, the international community has been aware of and has been concerned about the transferring or obtaining of Weapons of Mass Destruction (WMD) by non-state actors, mainly terrorist groups. In response to these concerns, there were some efforts made by the community to close this gap.[39] These efforts culminated in the adoption of the United Nations Security Council (UNSC)

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[33] Peter Crail, 'Implementing the UN Security Council Resolution 1540 A Risk-based Approach' (2006) 13 (2) Nonproliferation Review 35, 36.

[34] Thilo Marauhn, 'Global Governance of Dual-Use Trade: The Contribution of International Law' in Oliver Meier (ed), *Technology Transfers and Non-Proliferation: Between Control and Cooperation* (Routledge 2014) 49; Jozef Goldblat, 'Ban on Nuclear-Weapon Proliferation in Light of International Law' in Morten B Moerli and Sverre Lodgaard, *Nuclear Proliferation and International Security* (Routledge 2007) 27.

[35] Jason D Ellis, 'The Best Defence: Counterproliferation and USA National Security' (2003) 26 (2) The Washington Quarterly 115; Nayan (n 10) 116; Cirincione (n 19) 89-95.

[36] Crail (n 33) 36.

[37] The NPT has already shown its insufficiency in dealing with nuclear assistance provided by global nuclear black markets such as the Khan nuclear network. Most of the recent nuclear proliferation cases, such as Libya, Iran, North Korea and others, have heavily relied on nuclear assistance from Khan networks; Cirincione (n 19) 64.

[38] Jonas (n 12) 42-45.

[39] Stefan Kirchner, 'Effective Law-Making in the Time of Global Crisis – A Role for International Organizations' [2010] 2 Goettingen Journal of International Law 267, 281; Stephan Talmon, 'The Security Council as a World Legislature' (2005) American Journal of International Law 175, 177-178; Erik Rosand, 'The Security Council as "Global Legislator"; Ultra Vires or Ultra Innovative' (2004) 28 (3) Fordham International Law Journal 542, 567.

resolution 1540. This resolution was adopted on the 28 April 2004.[40] The aim of this resolution is to prevent the proliferation of WMD to non-state actors by obliging all states to adopt sufficient measures to ensure effective control of sensitive materials and to preclude terrorist groups from possessing WMD.[41] Although this resolution attempts to close the gap of Article II, the absence of enforcement mechanisms to punish non-compliant states within its terms, leaves the gap in article II unclosed.[42]

After discussing the synallagmatic obligations of Articles I and II and analysing their omissions, the chapter moves on to discuss the asymmetric obligations of these two Articles.

5.2.2. Asymmetric Obligation of Article II of the NPT

The asymmetric obligation contained in Articles I and II is that the prohibition of manufacturing nuclear weapons is only imposed upon and obliges the NNWSs. This obligation states that the NNWSs must 'not possess, manufacture or seek or receive assistance in the manufacture of nuclear weapons or explosive devices.[43]

Neither Article I nor Article II nor the whole NPT expressly contains any prohibition of manufacturing nuclear weapons by the NWSs. Article I forbids NWSs from providing assistance or encouraging a NNWS to possess or build up its nuclear arsenal.[44] It does not, however, impose any obligation on these (the NWSs) states to stop, reduce, or not become involved in the production of nuclear weapons.

Probably the most remarkable omission in this context is that the term 'not to manufacture' is not clearly defined. The process of manufacturing nuclear

[40] UNSC, RES, S/RES/1540, 28 April 2004.

[41] ibid Para 1 and 2.

[42] Kate Deere, 'The Obligations of Nuclear-Weapon States Not to Transfer Nuclear Weapons and Devices (Article I NPT)' in in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law - Volume 1* (Springer 2014) 43.

[43] NPT, Art. II

[44] NPT, Art. I

weapons goes through a long chain of procedures and steps. The procedure to manufacture nuclear weapons contain, *enter alia*, the production of usable nuclear materials, the fabrication of components and research and development applicable to nuclear weapons' design.[45] The text of the treaty does not state unquestionably whether or not all nuclear weapons manufacturing processes are forbidden, or some of these activities may be excluded from prohibition.

The preparatory works of the NPT indicate that the negotiators were aware of the shortages in the definition of the term 'not to manufacture'. The Swiss representative to the NPT negotiations said, in his memorandum, that the term 'not to manufacture' does not cover some related nuclear activities when these processes are carried out for peaceful purposes.[46] Therefore, it is not very clear at what stage in the manufacturing procedure or at what step it is feasible and reasonable to apply the prohibition and this is so far undefined.[47] Japan has gone further and made public its reservations. It contended that nuclear development should not be forbidden.[48] In addition, the representative of West Germany stated that the research and transfer of information, material, and equipment should not be denied to the NNWSs merely on the ground of allegations.[49]

According to Article 31 of the VCLT, the term 'not to manufacture' should be interpreted according to the plain meaning of the term, the context and in accord with the purpose and objective of the treaty.

Dictionaries describe the plain meaning of 'to manufacture' as to fabricate or assemble, or make something from raw materials using machines and labour. Thus, the plain meaning of the term 'not to manufacture nuclear weapons' means not to build, fabricate, construct, or assemble the components of nuclear explosive devices. This definition was envisaged by the delegations negotiating

[45] James D Fry, *Legal Resolution of Nuclear Non-Proliferation Disputes* (Cambridge 2013) 349.

[46] Shaker (n 16) 250.

[47] Yury Yudin, 'Nuclear Energy and Non-Proliferation' in Andrea Goldthau, (ed), *The Handbook of Global Energy Policy* (Wiley-Blackwell 2013).

[48] Zuberi (n 17) 83.

[49] ibid 83.

the drafting of the NPT.[50] Joyner[51] noted that the American drafters distinguished between two different categories. The first category is the physical assembly of nuclear weapons components as the final step of the actual manufacture of nuclear weapons. The second is the preparation which takes place prior to the manufacture of nuclear weapons which could include carrying out research, design, conception, information and experiments that are related to nuclear weapons. According to the American draft, the first category is prohibited and the second is allowed. Eventually the negotiating states adopted the term 'manufacture' in its limited meaning.

Regardless of what the manufacturing term means, obliging NNWSs not to manufacture nuclear weapons without including the same prohibition for NWSs constitutes a loophole in the treaty. This omission does not harmonize with the NPT's objectives and purposes, and it contradicts the first principle of the UNGA resolution 2028, on which the negotiations for the NPT were based. That principle stated that: 'the treaty should be void of any loopholes that might permit nuclear and non-nuclear powers to proliferate, directly or indirectly, to nuclear weapons in any form'.[52] This principle neither solely indicates horizontal proliferation nor mentions vertical proliferation. Black-Branch[53] argues that it would rather that the obligation of non-proliferation should be imposed on to all states who are not members of the NPT and without discrimination between NWSs and NNWSs.

Indeed, allowing NWSs to maintain their right to produce and manufacture more sophisticated nuclear weapons leads to vertical nuclear proliferation and definitely fuels the inclination for horizontal proliferation. Thus, the NPT would fail in achieving its objective and purposes. India argued that horizontal nuclear proliferation was a consequence of vertical proliferation and not the cause of

[50] Yudin (n 47).

[51] Daniel H Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (09 Sep2011) Jurist <http://jurist.org/forum/2011/11/dan-joyner-iaea-report.php> accessed 08 Jun 2015.

[52] UNGA, RES/2028(XX), 19 November 1965, para 2 (a)

[53] Jonathan L Black-Branch and Dieter Fleck, 'Nuclear Weapons, Non-Proliferation, and Disarmament: A Comprehensive Audit of Relevant Legal Issues and International Concerns' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law, Volume I* (Springer 2014) 5.

'armament tension' in the world and 'Once the cause is remedied, the consequences are automatically eliminated'.[54] This interpretation is boosted by imposing an obligation on NWSs to reach a complete and general agreement on nuclear disarmament, as is stated in Article VI of the NPT.

In summary, the above analysis not only aims to provide a legal interpretation of the non-proliferation obligation coded in Articles I and II and draw attention to the flaws in these articles, but also demonstrates that the scope and legal frontiers of the non-proliferation obligation comprise weaknesses and omissions that would undermine the NPT capability in dealing with new international variables.[55] Certainly, this obligation creates problems[56]that urgently need to be revisited by the international community, especially as we have reached an era when technological transformations are very easy. This urgent need will be demonstrated by analysing the PMD of Iran's nuclear programme.

5.3. The Possible Military Dimensions (PMD) of Iran's Nuclear Programme.

The PMD of Iran's nuclear programme surfaces in the negotiations with the P5+1. In a recent report, the IAEA stated that 'the Agency remains concerned about the possible existence in Iran of undisclosed nuclear activities involving military related organizations, including those related to the development of a nuclear payload for a missile'.[57]

These allegations were not new and were first reported in 2002.[58] However, the focus on Iran's past nuclear related works has dramatically increased and dominated the negotiations between Iran and the P5+1, since the issue of the IAEA's report in November 2011. In this report, the Agency 'identified outstanding issues related to possible military dimensions to Iran's nuclear

[54] Shaker (n 16) 252.

[55] Black-Branch and Fleck (n 53) 5.

[56] Jonas (n 12) 42-45.

[57] IAEA (n 5) para 58.

[58] IAEA (n 5) para 38.

programme'.[59] In an Annex to this report, the IAEA provided a detailed analysis of information which 'comes from a wide variety of independent sources, including a number of Member States, from the Agency's own efforts, from information provided by Iran itself'.[60] This obtained information was assessed by the Agency to be overall credible'.[61]

Consistently, the Agency has shown its concerns about Iran's nuclear activities. It has repeatedly reported that it has obtained further information that corroborates the analysis in the Annex of its reports in 2011.[62] A few weeks before the final round of negotiations to reach a final agreement, between the P5+1 and Iran, the IAEA reported that Iran has not answered all questions that are related to its PMD.[63]

Accordingly, the Agency accuses Iran of carrying out some military nuclear-related activities. Iran has insisted and still insists that all this information was 'mere allegations and does not merit consideration'.[64] If these allegations were proved positive, then Iran has been involved in manufacturing nuclear weapons or explosive devices. This means that Iran has violated its obligations under Article II of the NPT.

5.3.1. The Legal Credibility of Evidence Related to the PMD Allegations

The Annex to the IAEA's report 2011 contained twelve questions related to the alleged illegal nuclear activities of Iran.[65] However, the IAEA inspectors narrowed the list of outstanding questions down to focus on certain questions that needed to be answered first. In its 2015 report, the Agency states that there

[59] IAEA (n 5) para 38.

[60] IAEA (n 5) Annex, 'Possible Military Dimensions to Iran's Nuclear Programme'.

[61] IAEA (n 5) para 42.

[62] IAEA (n 5) para 59.

[63] IAEA, GOV/2015/15, 19 February 2015, para 61.

[64] IAEA (n 63) para 60.

[65] These questions are on: programme management structures, procurement activities, nuclear material acquisitions, nuclear components for an explosive device, detonator development, initiation of high explosives and associated experiments, hydrodynamic experiments, modelling and calculations, neutron Initiators, conducting tests, Integration into a missile delivery vehicle, fuzzing, arming and firing systems; IAEA (n 5) 6-12.

are outstanding practical measures for which Iran needs to provide clear explanations. These explanations would enable the Agency to clarify the outstanding questions concerned with the initiation of high explosives, neutron transport calculations, and detonators development issue.[66]

5.3.1.1. Initiation of high explosives and associated experiments

The information provided to the Agency asserts that Iran, in 2003, initiated a 'large scale high explosive experiment conducted by Iran in the region of Marivan'.[67] This allegation refers to a large scale nuclear explosive experiment involving a hemispherical charge.[68] These activities of Iran fall in the frame of violation to its safeguarding agreement with the IAEA and to its obligations under Article II of the NPT.

Iran offered the Agency access to investigate and visit the Marivan location, where the explosive experiment may have taken place.[69] The Agency responded that it would discuss the Iranian offer, but in its provisional opinion the offer was not as straightforward as Iran suggested because it was not as simple as the Iranian official conveyed.[70] Eventually, the IAEA did not visit the Marivan region because, as Porter argues,[71] its concerns were focused on another site located at the Parchin Military base. In this location, as the IAEA 2011 report alleged, Iran had constructed a hydrodynamic testing of nuclear weapons designs.[72]

In the context of responding to the second request by the Agency to visit the Parchin site, the Permanent Representative of Iran to the IAE, Ali Asghar

[66] IAEA (n 63) para 61

[67] IAEA (n 5), Section C.6, para 43.

[68] ibid.

[69] Entessar and Afrasiabi (n 6) 84.

[70] Tariq Rauf and Robert Kelley, 'Assessing the IAEA 'Assessment' of "Possible Military Dimensions" of Iran's Nuclear Programme' (December 2015) Stockholm International Peace Research Institute <http://www.sipri.org/pdfs/final-assessment-iaea-december-2015> accessed 20 December 2015, 9.

[71] Gareth Porter, *Manufactured Crisis: The Untold Story of the Iran Nuclear Scare* (Just World Books 2013).

[72] IAEA (n 5) Section C.7.

Soltanieh, offered the IAEA delegation access to Marivan.[73] However, the IAEA again turned this offer down because the Parchin site has become the Agency's main concern.

The shared information that the Agency received about the Parchin site, which is a complex military site, suggested that Iran has carried out hydrodynamic experiments at this site. The experiment was conducted in a large explosive containment vessel or chamber inside a building at the Parchin site.[74] The Agency claimed that there was evidence of the experiments, but Iran has hidden them by paving a new road over a broad area where the alleged experiments were carried out.[75] The paving constructions were launched by Iran when the IAEA had requested access to that site for an investigation.[76] In its November 2014 report, the Agency has claimed that Iran's activities and construction at the Parchin site are 'likely to have further undermined the Agency's ability to conduct effective verification. It remains important for Iran to provide answers to the Agency's questions and access to the particular location in question'.[77] If this experiment and allegations were really conducted,[78] it would be considered a part of related activities to develop a nuclear weapon.[79]

5.3.1.2. Neutron Transport Calculations

Referring to a leaked graph[80] showing the power and energy resulting from a nuclear explosion, Iran was allegedly accused of carrying out modelling studies

[73] Gareth Porter, 'Details of Talks with IAEA Belie Charge Iran Refused Cooperation' (20 March 2012) Inter Press Service <http://www.ipsnews.net/2012/03/details-of-talks-with-iaea-belie-charge-iran-refused-cooperation/> accessed 12 February 2015.

[74] IAEA (n 5) para 49.

[75] Institution for Sciences and International Security, 'Iran Laying Asphalt at the Suspect Parchin Site' (22 May 2013) ISIS Reports <http://isis-online.org/isis-reports/detail/iran-laying-asphalt-at-the-suspect-parchin-site/8#images> accessed 01 February 2015.

[76] ibid.

[77] IAEA, GOV/2014/58, 07 Nov 2014, para 59.

[78] For a discussion of the credibility of the IAEA arguments and its evidence of PMD at the Parchin site, see; Robert Kelley, 'The Parchin Puzzle' (02 Dec 2014) Lobelog Foreign Policy <http://www.lobelog.com/the-parchin-puzzle/> accessed 02 February 2015.

[79] IAEA (n 5) para51.

[80] This graph shows two curves: one that plots energy versus time, and another that plots power output versus time, presumably from a fission device. However, these two curves do not correspond: If the energy curve is correct, then the peak power should be much lower - around

in 2008-2009.[81] According to experts, this graph demonstrates Iran's capability of building a nuclear weapon that would be triple the explosive force of the nuclear bomb used in War World II.[82] The graph was obtained from officials under the condition of not mentioning their names.[83]

In addition, the Agency alleged that it obtained information from states that Iran requested training courses about modelling and the calculation of neutrons.[84] It asked for this training in 1997 through its representative who had met with an official from a specialist institution based in one of the NWSs. In addition, there were papers related to the generation, measurement, and modelling of neutrons published by some Iranian scientists.[85] All these alleged studies are considered to be evidence of the past PMD of Iran.

5.3.1.3. Detonators Development Issue

Iran has allegedly been accused of involvement in the process of developing equipment suitable for firing detonators, which are known as "Exploding Bridge Wire Detonators" or "EBWs".[86] The information asserts that these developments were carried out during the period 2002–2003. These developments included 'fast functioning detonators, as safe alternatives to the type of detonator described for use in the nuclear device design'.[87] In addition, there were published papers showing proof that Iran had developed or acquired high voltage firing equipment. [88] According to the IAEA, research and information

300 million (3 x108) KT per second, instead of the currently stated 17 trillion (1.7 x1013) KT per second. As it is, the diagram features a nearly million-fold error; Glenn Greenwald, 'AP Believes it Found Evidence of Iran's Work on Nuclear Weapons' (28 November 2012) The Guardian <http://www.theguardian.com/commentisfree/2012/nov/28/ap-iran-nuclear-bomb> accessed 06 February 2015.

[81] IAEA (n 5) Section C.8.

[82] George Jahn, 'AP Exclusive: Graph suggests Iran working on bomb' (27 November 2012) AP the Big Story <http://bigstory.ap.org/article/ap-exclusive-graph-suggests-iran-working-bomb> accessed 06 February 2015.

[83] Greenwald (n 80).

[84] IAEA (n 5) Section C.8, para 53.

[85] ibid.

[86] ibid C.5, para 38.

[87] ibid.

[88] ibid Section C.5, para 39.

seeking in this field are integral elements needed to develop a nuclear explosive device.[89]

5.3.2. The Legal Credibility of the Allegations about Iran's PMD

The legal debates on the credibility of the evidence obtained against Iran's nuclear programme have not been examined so far by any professional judicial body, such as the ICJ. Rather, they have been circulated between the two parties to the dispute and scholars and experts in the fields of nuclear proliferation and law jurisprudence.

One of these experts is Mohamad ElBaradei,[90] the previous director of the Agency, who said that 'during my time at the Agency we haven't seen a shred of evidence that Iran has been building nuclear-weapons, facilities and using enriched materials'[…] 'I don't believe Iran is a clear and present danger. All I see is the hype about the threat posed by Iran'. Also, Robert Kelly,[91] who was a director at the IAEA, reported that 'the evidence, contained in a November report of the International Atomic Energy Agency, is sketchy and the way the data has been presented produces a sickly sense of déjà vu'.

Thus it seems, from the perspective of the experts, that the coalition has been exaggerating the evidence in dealing with Iran's PMD. In particular, the USA and its allies who have spent lots of efforts to present Iran's nuclear programme as as an international case related to international peace and security that it urgently and strictly needs respond.[92]

From the Iranian side, their officials claim that the media of the coalition and their official reports and conferences have generally worked hard to present the

[89] ibid Section C.5, para 40.

[90] Nima Shirazi, 'When Facts Become Opinion: Half-Truths, Non-Truths & the Phony Objectivity of the Associated Press' (20 January 2013) Wide Asleep American <http://www.wideasleepinamerica.com/2013/01/when-fact-becomes-opinion.html> accesed 13 Febrauart 2015.

[91] Robert Kelley, 'Nuclear Arms Charge against Iran Is No Slam Dunk: Robert Kelley' (10 January 2012) Bloom Berg View <http://www.bloombergview.com/articles/2012-01-11/iran-nuclear-weapons-charge-is-no-slam-dunk-commentary-by-robert-kelley> accessed 13 February 2015.

[92] Shirazi (n 90).

evidence related to Iran's PMD as being positively supported facts. Yet in reality, most of this evidence does not exist or lacks accuracy and credibility. Therefore, the Iranian government 'had no sign to prove that they are of Iranian origin and are contrary to such claim. The documents are full of mistakes and contain fake names with specific pronunciations, which only point towards a certain Member of the IAEA as their forger'.[93]

Indeed, the evidence that the Agency has provided is no more than information obtained from alleged study documents[94] and information received from some state members.[95] Russia was aware of the credibility of the information provided to the Agency. In the Symposium on International Safeguards, Russia asked the Agency a question related to its concerns. The question was to what extent the Agency knows whether or not it is being manipulated by the sources providing third-party information?[96] According to Hans Blix,[97] who is the head of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and former Director General of the IAEA, the Agency should be careful in collecting its evidence. It should be aware that there are distinctions between information and evidence. In his view, a professional Agency should ask questions before it gives its stamp of approval for any given data. Also, it must not base its conclusions on unverified information.

For illustration, in the context of inspecting the Marivan site and the refusal of the Agency to visit this site,[98] Porter[99] argues that the Agency rejected the

[93] IAEA, INFCIR/873, 17 March 2015, para 5.

[94] IAEA (n 5) Section B, para 12.

[95] This information includes: 'procurement information, information on international travel by individuals said to have been involved in the alleged activities, financial records, documents reflecting health and safety arrangements, and other documents demonstrating manufacturing techniques for certain high explosive components'; ibid para 13.

[96] Mark Hibbs, 'IAEA Safeguards Development and Russia's National Interest: Challenge and Respond' (22 November 2014) Carnegie Endowment for International Peace <http://carnegieendowment.org/2014/11/22/safeguards/hw7a> accessed 11 February 2015.

[97] Robert Kelley, 'Nuclear Watchdog Chief Accused of Pro-Western Bias over Iran' (22 March 2012) The Guardian <http://www.theguardian.com/world/2012/mar/22/nuclear-watchdog-iran-iaea> accessed 13 February 2015.

[98] Gareth Porter, 'Why Hasn't the IAEA Followed up Iran's Inspection Offer?' (06 December 2014) Lobe Log Foreign Policy <http://www.lobelog.com/why-hasnt-the-iaea-followed-up-irans-inspection-offer-marivan/> accessed 11 February 2015.

[99] ibid.

Iranian offer because the sources that provided the information about this site failed to identify where exactly the experiment had taken place. Some experts like Hibbs[100] argue the Agency turned down the Iranian offer because it felt it has been played and manoeuvred by Iran. It felt that if it did not accept the offer, Iran would claim that the Agency is not cooperating with it; and if it accepted the offer, and found nothing, Iran would win and close the case. The Agency did not really need to visit the Marivan site because, to his knowledge, 'no allegations have come forth that Iran used nuclear materials in any undeclared activity at Marivan'. Therefore, the Agency was more interested in visiting another site (Parchin), where there were stronger allegations suggesting that Iran used nuclear materials in undeclared activities.

It seems that Hibbs's commentary was far from an accurate assessment. First of all, his argument obviously gave the Iranian case a political character rather than a technical one. Hypothetically, even if Iran manipulated the Agency, the latter is still a technical Agency which works according to certain criteria to monitor and prove that there is no diversion of undeclared nuclear materials.[101] It is not a political Agency seeking a political victory with its adversary. In addition, his commentary is very wrong as it contrasts with the Agency's annex to its 2011 report. The annex did not state that there were nuclear materials used in undeclared activities; rather it stated that there was 'at least one large scale experiment in 2003 to initiate a high explosive charge in the form of a hemispherical shell'.[102] Thus, the annex is talking about an experiment of 'high explosives in conjunction with a multipoint initiation concept', which according to NWSs' information 'is used in some known nuclear explosive devices'.[103]

With regard to Parchin, this site was under the IAEA concerns and had been visited by the Agency twice in 2005.[104] It concluded that those visits 'did not

[100] Mark Hibbs, Amon's Move on 'Marivan' (17 December 2014) Arms Control Wonk <http://hibbs.armscontrolwonk.com/archive/2984/amanos-move-on-marivan#comments> accessed 13 February 2015.

[101] Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (n 51).

[102] IAEA (n 5) Section C.7, para 43.

[103] ibid Section C.7, para 42.

[104] ibid Section C.7, para 50.

uncover anything of relevance'.[105] It also promised not to go back to investigate the site again.[106] Thus, the Agency was familiar with this site and if there had been any experiments conducted at this site, it would have found out about them when the Agency visited this site in 2005. Moreover, the information in the annex was about a cylinder installed in the site that 'would be suitable for carrying out the type of experiments described in Paragraph 43 above'.[107] If the Agency really was handed information suggesting that there was a nuclear experiment carried out in the cylinder, it would have mentioned it in its reports. As Porter[108] discusses, the Agency has its legal specialists who carefully review and amend its reports. Thus, the absence of a clear statement in the annex about a nuclear experiment indicates that there was no nuclear experiment carried out in the cylinder at the Parchin site. Moreover, as for the Marivan site, the original providers of the information were unknown and did not give a specific location to the Agency. Therefore, the Agency relied on satellite images to investigate the allegations.[109] This suggests that there was no intelligence information on the experiment or its location. Furthermore, the allegation said the experiment was conducted in a chamber in a building.[110] However, there was no actual imagery for the alleged chamber or vessel where the nuclear explosive was contained. There was only a cartoon drawing that had been published in a newspaper.[111] Added to this, the fact is that such an experiment cannot be physically conducted in a container in a building next to a major highway. Rather, it should be carried out at an outdoor firing site.[112] In its latest report in 2015, the Agency reported that satellite imagery shows: 'the presence of vehicles, equipment and probable construction materials, but no further external changes to the buildings on the site'.[113] This indicates that, as mentioned above, the allegation that Iran carried

[105] ibid Section C.7, para 49.

[106] Kelley, 'The Parchin Puzzle' (n 78).

[107] IAEA (n 5) Section C.7, para 49.

[108] Porter, *Manufactured Crisis* (n 71) 258.

[109] IAEA (n 5) para 49.

[110] ibid Section C.7, para 50.

[111] Kelley 'The Parchin Puzzle' (n 78).

[112] Kelley 'Nuclear Watchdog Chief Accused of Pro-Western Bias over Iran' (n 97).

[113] IAEA (n 5) para 62.

out some construction activities at the Parchin site to undermine the Agency's capability to conduct effective verification lacks credibility.

Finally, with regard to the graph which refers to neutron modelling and calculation, there were many errors and ambiguities surrounding the evidence that the graph supplied.[114] From a legal perspective, such a document is insubstantial in many respects. First, its sources are unknown and it is not clear whether it is a real Iranian document or just a hoax.[115] Secondly, it contains obvious scientific errors. Even experts, who are concerned about Iran's PMD, suggest the graphic was not prepared by an expert nuclear scientist.[116]

The IAEA admitted that Iran had informed the Agency that it had developed the EBW's technologies before 2003-2004.[117] In 2008, Iran informed the IAEA that it had developed 'EBWs for civil and conventional military applications and had achieved a simultaneity of about one microsecond when firing two to three detonators together'.[118] As such, Iran was very open about its EBWs technologies. It is therefore very difficult to suspect Iran of developing the EBWs technologies for use in nuclear weapons.

It seems that the Agency based its allegations on the possibility of multi-use of these technologies. Although there is no known nuclear application for the EBWs, the Agency said that 'given their possible application in a nuclear explosive device…. Iran's development of such detonators and equipment is a matter of concern, particularly in connection with the possible use of the multipoint initiation system referred to below'.[119] So, the IAEA had allegedly

[114] David Albright, 'The AP Graphs: A Preliminary Discussion' (19 December 2012) Institute for Science and International Security (ISIS) <http://isis-online.org/uploads/isis-reports/documents/AP_Graphs_dec_19_2012.pdf> accessed 06 February 2015.

[115] Yousaf Butt and Ferenc Dalnoki-Veress, 'A Graphic Distraction' (05 February 2013) WMD Junction <http://wmdjunction.com/130205_graphic_distraction_iran_iaea.htm> accessed 06 February 2015.

[116] Gareth Porter, 'Iranian Bomb Graph Appears Adapted from One on Internet' (13 December 2012) Inter Press Service News <http://www.ipsnews.net/2012/12/iranian-bomb-graph-appears-adapted-from-one-on-internet/> accessed 06 February 2015.

[117] IAEA (n 5) Section C.5, para 39.

[118] ibid.

[119] ibid para 40.

accused Iran of developing a nuclear bomb on the basis of an assumption and the likelihood of using multi-use technologies in nuclear weapons without relying on specific evidence.[120]

Indeed, it is not only the Agency that exaggerates the Iranian PMD case, but also the media and press agencies, who are keen to publish whatever they hear, without necessarily seeking the origins and credibility of what they are publishing. As an illustration, according to intelligence and diplomatic sources, Reuters reported that a Swiss company had signed a contract with an Iranian company to supply tons of aluminium tubes which are used in the centrifuges of Iran's nuclear enrichment facilities.[121] It asserted, with little evidence, that the tubes would be used in developing Iran's nuclear weapons programme, as the tubes have no other use. It is very similar to a report published in 2003 that stated that Iraq had requested aluminium tubes to be used in uranium centrifuges.[122] However, based on the available evidence, the IAEA confirmed that 'Iraq's efforts to import aluminium tubes were not likely to have been related to the manufacture of centrifuges. Moreover, it was highly unlikely that Iraq could have achieved the considerable re-design needed to use them in a revived centrifuge programme'.[123]

Again, in early 2013, the media accused Iran of purchasing magnet rings from China about one year before,[124] in relation to which experts and USA

[120] Scott Peterson, 'Iran Nuclear Report: Why it May not be a Game-Changer after all' (09 November 2011) the Christian Science Monitor <http://www.csmonitor.com/World/Middle-East/2011/1109/Iran-nuclear-report-Why-it-may-not-be-a-game-changer-after-all> accessed 13 February 2015.

[121] Louis Charbonneau, 'Exclusive: Glencore Bartered with Firm Linked to Iran Nuclear Program' (01 May 2013) Reuters News <http://www.reuters.com/article/2013/03/01/us-iran-sanctions-glencore-idUSBRE92007C20130301> accessed 07 Jan 2015.

[122] The Washington Post, 'Text of President Bush's 2003 State of the Union Address' (28 Jan 2003) <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html> accessed 07 Jan 2015.

[123] Mohamed ElBaradei, 'The Status of Nuclear Inspections in Iraq: An Update' (07 March 2003) IAEA News Centre <http://www.iaea.org/newscenter/statements/status-nuclear-inspections-iraq-update> accessed 07 Jan 2015.

[124] Joby Warrick, 'Iranian Buying Spree Raises Concerns About Major Expansion of Nuclear Capacity' (13 February 2013) the Washington Post <http://www.washingtonpost.com/world/national-security/iranian-buying-spree-raises-concerns-about-major-expansion-of-nuclear-capacity/2013/02/13/2090805c-7537-11e2-8f84-3e4b513b1a13_story.html> accessed 07 February 2015.

intelligence insisted that these magnets have only one use, that is in gas centrifuges for uranium enrichment, indicating Iran's efforts to develop nuclear weapons.[125]

These magnets rings are not as described as only highly specialized parts used in gas centrifuges. Butt,[126] for example, suggests that they are also used daily in products such as loud-speakers, brushless motors and electronic products. Moreover, there was no evidence of the actual purchase of these magnets, only, as the purchase order shows,[127] a web-inquiry which could be fabricated by someone in Iran.[128] The purchase order does not show any date of payment, date of delivery, or date of credit, which are an essential part of a formal purchase order. The Iranian story is exactly the same as an earlier one concerning Iraq, which was accused of purchasing magnet rings for the same reason as Iran, to use them in gas centrifuges. After a long investigation, the IAEA concluded that Iraq had purchased twelve different designs of ring magnets, but none could be used directly for gas centrifuges. Thus: 'there is no indication, to date, that Iraq had imported magnets for use in a centrifuge enrichment programme'.[129]

It is easy to conclude that the allegations and the evidence about the past work of Iran's nuclear activities may well be unauthenticated, forged and contain numerous errors upon which any judicial body would be hesitant to rely. Thus it seems that holding such unauthenticated documents, which are supposedly issued by a professional Agency, raises questions as to whether Iran has violated its non-proliferation obligation and also whether the Agency handles the

[125] Wendy Frieman, *China, Arms Control, and Non-Proliferation* (Routledge 2013) 30.

[126] Yousaf Butt, 'Iran Centrifuge Magnet Story Technically Questionable' (20 February 2013) Bulletin of Atomic Scientists <http://thebulletin.org/iran-centrifuge-magnet-story-technically-questionable-0> accessed 10 February 2015.

[127] Copy of the purchase order can be found on the Website of the Institute for Science and International Security (ISIS); David Albright, 'Ring Magnets for IR-1 Centrifuges' (13 February 2013) ISIS <http://isis-online.org/uploads/isis-reports/documents/iran_ring_magnet_13Feb2013.pdf> accessed 07 February 2015.

[128] Jasmin Ramsey, 'Q&A on the Iranian Nuclear Crisis with Yousaf Butt' (20 March 2013) Lobelog Foreign Policy <http://www.lobelog.com/a-qa-on-the-iranian-nuclear-crisis-with-prof-yousaf-butt/> accessed 10 February 2015.

[129] ElBaradei (n 123).

compliance of states with their non-proliferation obligation in the same manner as it has handled Iran.

5.4. Compliance with the Obligations of Article I and II of the NPT

Undoubtedly, Iran has carried out some suspicious nuclear activities that may be related to developing nuclear weapons. However, so far, there is no sufficient evidence that Iran has breached its international nuclear obligations, specifically, under Article II of the NPT. The IAEA said that 'the Agency continues to verify the non-diversion of declared nuclear material at the nuclear facilities and LOFs declared by Iran under its Safeguards Agreement'.[130] As Iran has not fully co-operated with the Agency and with the non-compliance with safeguards agreement, 'the Agency is not in a position to provide credible assurances about the absence of undeclared nuclear material and activities in Iran, to therefore conclude that all nuclear material in Iran is for peaceful activities'.[131]

Blix[132] says that 'so far Iran has not violated NPT and there is no evidence, right now, that suggests Iran is producing nuclear weapons, […], however, no action can be justified on mere suspicions or intentions that may not exist'. In the same manner, the Russian President, Putin, said that he has no doubt that Iran is adhering to the rules and international obligations of nuclear non-proliferation: 'because there is no proof of the opposite'.[133] In the context of a military strike against Iran's nuclear programme, Russia said that there are nuclear materials in Iran which are: 'under the control of inspectors and specialists of the International Atomic Energy Agency. This nuclear material is not being shifted to military needs and this is officially confirmed by the IAEA'.[134]

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[130] IAEA (n 68) para 71.

[131] ibid.

[132] Shafaat Shahbandari, 'Iran's Nuke Threat is Overhyped: UN Official' (06 March 2013) the Gulf News < http://gulfnews.com/news/gulf/uae/environment/iran-s-nuke-threat-is-overhyped-un-official-1.1154727> accessed 07 Jan 2015

[133] Yuri Kochetkov/Pool, 'Russia's Putin Says Iran Nuclear Push is Peaceful' (11 June 2013) Reuters <http://in.reuters.com/article/2013/06/11/nuclear-iran-russia-idINDEE95A0E920130611> accessed 07 Jan 2015.

[134] Steve Gutterman, 'Russia warns against attacking Iran over nuclear fears' (06 Sep 2012) Reuters News<http://www.reuters.com/article/2012/09/06/us-nuclear-iran-russia-idUSBRE88507K20120906> accessed 07 Jan 2015.

Even the USA, which was the first state to oppose Iran's nuclear programme, said that it is sure that Iran halted its nuclear weapons programme in 2003.[135] The Director of USA intelligence, James Clapper, confirmed a high level of confidence that Iran has no nuclear weapons programme.[136] Most of the West's intelligence agencies, including the Israelis, agree on three basic facts about Iran's nuclear weapons programme; (1) Iran has no nuclear weapons, (2) it has not decided to build any and (3) it needs some time to be able to deliver a nuclear bomb.[137]

The IAEA report, of November 2011, which mainly raised questions about the PMD of Iran, stated that the nuclear weapons efforts of Iran were: 'abruptly stopped pursuant to a "halt order instruction" issued, in late 2003, by senior Iranian officials'.[138]

From the above statements, it is sufficient to say there is, at least at the moment, no nuclear weapons activities being carried out by Iran secretly or under the IAEA inspections.[139] Therefore there is no violation of Article II. That is because Article II prohibits NNWSs from developing, manufacturing, or possessing nuclear weapons, but not from carrying out some nuclear-related activities, such as research, design, or industrial capabilities that are naturally dual-use for peaceful and military purposes.[140] Involvement in such matters or mere allegations suggesting involvement in a nuclear weaponry programme is not recognised as violations of the NPT principles.[141] As Goldschmidt[142]

[135] Tabassum Zakaria and Mark Hosenball, 'Intel Shows Iran Nuclear Threat not Imminent' (23 March 2012) Reuters <http://www.reuters.com/article/2012/03/23/us-iran-usa-nuclear-idUSBRE82M0G020120323> accessed 11 February 2015.

[136] Butt (n 126).

[137] Zakaria and Hosenball (N 137).

[138] IAEA (n 5) para 23.

[139] Peter Jenkins, 'Reading the Runes in the Latest Report on Iran's Nuclear Program' (20 February 2015) Lobelog Foreign Policy <http://www.lobelog.com/reading-the-runes-in-the-latest-report-on-irans-nuclear-program/> accessed 20 February 2015

[140] Daniel H Joyner, 'Iran's Nuclear Program and international Law' (2013) 2 (2) Penn State Journal of Law & International Affairs 237.

[141] Michael Spies, 'Undeclared Nuclear Activities and Outstanding Issues: Clean Bill of Health?' (May 2006) Lawyers' Committee on Nuclear Policy <http://www.lcnp.org/disarmament/iran/undeclared.htm> accessed 06 February 2015, 2.

explains, there are clear and certain cases considered being violations of the NPT and non-compliance cases which require the UNSC's involvement to be resolved. These activities are: diversion of nuclear material from declared nuclear activities, or the failure to declare nuclear material required to be placed under safeguards; undeclared production of nuclear material; undeclared use of exempted nuclear material in a nuclear facility; obstruction of the activities of IAEA inspectors, interference with the operation of safeguards equipment, or prevention of the IAEA from carrying out its verification activities; starting the construction or modifying the design of a nuclear facility without informing the Agency.[143] Other nuclear activities which are not included in this list do not constitute *per se* non-compliance cases requiring UNSC involvement even if some cases are consistent with the safeguarding agreement. In other words, violating the NPT's principles differ from violating the safeguarding agreement principles.

This suggests that the coalition's accusations that Iran has intentions to acquire nuclear technologies that could be rapidly adapted to be used for military purposes[144] has no legal foundation as Iran's nuclear activities so far do not constitute *per se* violations of the NPT. Even though in some cases, as will be discussed in subsequent chapters, Iran violated its obligations under the safeguarding agreements with the IAEA, its activities remain within the legal framework of the NPT. However, it seems that, unfortunately, the coalition's accusations against Iran will continue to be considered violations of the NPT until the coalition decides to change its attitude towards Iran and becomes inclined to consider Iran's nuclear programme as a peaceful one.

Ironically, there are no official concerns or accusations addressed by the international community over the nuclear behaviour of some states that have advanced nuclear programmes. Certainly, there are no questions as to whether

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[142] Pierre Goldschmidt, 'Exposing Nuclear Non-compliance' (March-February 2009) 51 (1) Survival 143, 147-48.

[143] ibid 148.

[144] Leonard S Spector, 'Iran's Nuclear Smuggling Legacy: Finders Keppers? – Analysis' (19 November 2014) Eurasia Review <http://www.eurasiareview.com/19112014-irans-nuclear-smuggling-legacy-finders-keepers-analysis/> accessed 03 February 2015.

the nuclear attitude of these states is a material breach of the non-proliferation obligation. It seems that due to the domination of the NWSs, there is an international silence about whether these states are in breach of Article I of the NPT in cases where one of them has a nuclear agreement with another state that possesses nuclear weapons, but it is still outside the legal framework of the NPT.

To illustrate this, a controversial nuclear deal between the USA and India was signed in 2005. Instead of being condemned for producing and building up its nuclear arsenal, the Indian government were rewarded by the acceptance of its nuclear deal by most states around the world.[145] From a legal perspective, this agreement was a significant shift and inconsistent with the American Nuclear Non-proliferation Act 1978.[146] According to this Act, the USA should not cooperate in the nuclear field with states that have signed the NPT.[147] As such, the USA-India nuclear agreement was a clear violation of the Act. In addition, this deal is inconsistent with Article I of the NPT[148] because, although this deal is based on nuclear civilian cooperation, it is unclear to what extent this co-operation may in any way assist, encourage or induce the Indian government to develop a nuclear weaponry arsenal.

Clearly, the deal requires India to separate its nuclear civilian facilities from those of military facilities.[149] This separation implies that the military nuclear programme will be disentangled from the civilian one. This means any nuclear fuel, equipment, and technologies obtained by the Indian government as a

[145] This agreement was welcomed by the director of the IAEA Dr ElBaradei, France, and UK; BBC, 'Atomic Agency Hails US-India Deal' (02 March 2006) BBC News <http://news.bbc.co.uk/1/hi/world/south_asia/4768422.stm> accessed 05 Jan 2015.

[146] This Act aims to tighten and reshape the criteria of nuclear cooperation; Sharon Squassoni, 'Looking Back: The 1978 Nuclear Non-Proliferation Act' (Dec 2008) Arms Control Association <http://www.armscontrol.org/act/2008_12/lookingback_NP> accessed 05 Jan 2015.

[147] ibid.

[148] The NSG seeks to contribute to nuclear non-proliferation by authorising transfer of nuclear material and equipment to a recipient state only when the supplier states are satisfied that such a transfer would not contribute to nuclear weapons proliferation; NSG, 'About the NSG' NSG Nuclear Suppliers Group <http://www.nuclearsuppliersgroup.org/en/about-us> accessed 05 Jan 2015.

[149] K Subrahmanyam, 'India and the Nuclear Deal' (12 Dec 2005) The Times of India News <http://timesofindia.indiatimes.com/home/edit-page/India-and-the-nuclear-deal/articleshow/1327306.cms?curpg=2> accessed 05 Jan 2015.

consequence of implementing this deal should be used only for peaceful purposes. However, this deal might indirectly contribute to the development of the Indian nuclear arsenal or increase its ability to produce more nuclear weapons. Yet, under the structure of this deal, the production of fissile materials, specifically for nuclear weapons, is not restricted.[150] In addition, the Indian government refused to accept the IAEA's monitoring and safeguarding partly due to its nuclear fuel cycle programme.[151] These would allow the Indian government to use the gained nuclear fuel in its civilian nuclear programme, and deviates significantly its own national uranium resources to develop its nuclear military programme.[152] Moreover, there is no obligation within the deal which obliges India to sign the Comprehensive Test Ban Treaty (CTBT) which prohibits the Indian government from carrying out any nuclear explosion or weapon test.[153] Clearly, this deal is to sustain and expand nuclear energy without imposing any limitations on building and developing a nuclear arsenal.

By accepting this deal, the USA and its allies have indirectly assisted and supported India in developing a nuclear weapons programme. Therefore, they are in breach of their obligations under Article I which prohibits NWSs from directly or indirectly encouraging or assisting a state to manufacture nuclear weapons, whether the recipient state is a member of the NPT or not.[154] In addition, this agreement makes the NNWSs feel that non-signatory members are rewarded for not signing the NPT and for their violation of international nuclear obligations. Indeed, the NNWSs feel that they have, as NPT members, paid the highest price.[155] If a NNWS, such as Iran, was not a NPT signatory, it would be

[150] Carranza (n 12) 129.

[151] Carl Paddock, *India-US Nuclear Deal: Prospects and Implications* (Epitome Books 2009) 45.

[152] Darly G Kimball, 'Impact of the USA-Indian Nuclear Deal on India's Fissile Production Capacity' (26 July 2006) Arms Control Association <http://www.armscontrol.org/pressroom/2006/20060726_India_House_Debate> accessed 05 Jan 2015.

[153] Carranza (n 12) 129.

[154] Priya Pillai, 'India and the Nuclear Weapons Proliferation' in Bimal N. Patel, *India and International Law* (Vol 2, Martinus Nijhoff Publishers 2008) 128-29; Nayan (n 10) 78.

[155] Seyed Hossein Mousavian, 'Five Options for Iran's New President' [2013] 10 The Cairo Review of Global Affairs 68, 75.

free from all international nuclear obligations, and would not have legal liability for non-compliance with these obligations.[156]

The violation of non-proliferation obligations is not only limited to holding agreements which provide nuclear assistance to NNWSs. Rather, it also includes the attitudes of some states with advanced nuclear energy who show their desire to break through and become nuclear states.

Japan, for example, has been developing its nuclear programme for several decades. There can be no doubt about its nuclear capacity and ability to build nuclear weapons in a matter of weeks or months if the decision-makers chose to do so.[157]

In fact, there have always been heated debates in Japan regarding the scope of its nuclear programme and the role of the NPT. These debates raise questions regarding the norms which emphasize its nuclear policies. There is no consensus between the Japanese political parties on whether the principles of the treaty constitute the foundation of Japan's nuclear policy.[158] However, there is a general belief that the NPT plays a marginal role in Japanese nuclear policies.[159]

Legally, the Japanese nuclear programme should be devoted only to peaceful purposes. Article 2 of the Japanese original National Atomic Energy Act states that utilization of nuclear energy and its related activities, including development and research, 'shall be limited to peaceful purposes, shall aim at ensuring safety and shall be performed independently under democratic administration and the results obtained shall be made public so as to actively

[156] Paddock (n 151) 55.

[157] Japan has very sophisticated nuclear technologies including enrichment uranium and fuel reprocessing which produce plutonium and enrich uranium, and rockets that are technically distinguishable from Ballistic missiles; Jing-Dong Yuan, 'Chinese Perspectives on the US-Japan Security Alliance' in David Arase and Tsuneo Akaha, *The US-Japan Alliance: Balancing Soft and Hard Power in East Asia* (Routledge 2010) 92-3; Chester Dawson, 'In Japan, Provocative Case for Staying Nuclear' (28 October 2011) The Wall Street Journal <http://www.wsj.com/articles/SB10001424052970203658804576638392537430156> accessed 03 February 2015.

[158] Etel Solingen, *Nuclear Logics Contrasting Paths in East Asia & the Middle East* (Princeton University Press, 2007) 65.

[159] ibid 65.

contribute to international co-operation'.[160] However, the Japanese Government has amended this Act to include "national security" as an objective of the law.[161] The new amendment has faced some criticisms.[162] In order to reduce these concerns, later on it declared that it would always be committed to its "Three Noes Policy" which is not to possess, to manufacture, nor to produce nuclear weapons on its territory.[163] However, despite Japan's efforts to soften concerns about the new amendment, the "national security clause to the act", could be seen as a legal formulation under which the future Japanese government might legitimize nuclear weapons' production.[164]

It is not very clear whether the intention of Japan from this amendment is to create a legal cover for breaking through and producing nuclear weapons or if it will be committed to its current legal nuclear obligations.

However, reading through the lines of the statements of the Japanese officials, reveals that Japan has shown some desire and intention to manufacture nuclear weapons. The new 'ruling coalition' in the Japanese parliament, calls for nuclear arms for Japan.[165] This coalition is led by Mr Ishihara who said in an interview (in the context of potential threats to Japanese national security emerging from China and North Korea) that 'Japan should absolutely possess nuclear weapons'.[166] This is not the first time that Japanese government officials have

[160] Atomic Energy Basic Act (Act No.186 of 1955), Article 2.

[161] NTI, 'Revisions to Japanese Atomic Law Cause Worry over Possible Weapons Aim' (22 June 2012) Nuclear Threat Initiative reports <http://www.nti.org/gsn/article/revisions-japanese-atomic-law-spark-concern-about-possible-weapon-development/> accessed 03 February 2015.

[162] Ibid; see also, Takuya Suzuki, 'Seoul Getting Jumpy about Tokyo's National Security Push' (17 July 2012) Asahi Shimbun <http://ajw.asahi.com/article/asia/korean_peninsula/AJ201207170063> accessed 03 February 2015.

[163] Terry Mccarthy, 'Japan admits it can make atomic bomb' (18 June 1994) The Independent <http://www.independent.co.uk/news/world/japan-admits-it-can-make-atomic-bomb-1423293.html> accessed 03 February 2015.

[164] Dawson (n 157).

[165] Julian Ryall and Chris Irvine, 'Japan election winner fires early warning to China' (16 December 2012) The Telegraph <http://www.telegraph.co.uk/news/worldnews/asia/japan/9748518/Japan-election-winner-fires-early-warning-to-China.html> accessed 03 February 2015.

[166] Brian Fowler and Sachiko Sakamaki, 'Japan Should Possess Nuclear Weapons, Tokyo's Ishihara Says' (19 July 2011) Bloomberg <http://www.bloomberg.com/news/articles/2011-07-19/japan-should-have-nuclear-weapons-ishihara> accessed 03 February 2015.

mentioned their country's nuclear capability and ambitions. The former Defence Minister, Shigeru Ishiba, said that 'I don't think Japan needs to possess nuclear weapons but it's important to maintain our commercial reactors because it would allow us to produce a nuclear warhead in a short amount of time'.[167] In addition, the Prime Minister of Japan, Tsutomu Hata, in 1994, said that: 'it is certainly the case that Japan has the capability to possess nuclear weapons but has not made them'.[168]

Indeed, despite the fact that Japan has suffered from the destructive power of nuclear weapons, there are many reasons that might prompt Japan to rethink the scope of its nuclear programme. The USA-Japan security alliance, the possession of nuclear weapons by its neighbours (China and North Korea) and, in addition, the changes in international political affairs[169] are reasons which might not make Japan watch quietly with its arms folded. These reasons might trigger the Japanese ambition to become a nuclear weapons state. Then, to do so, it is envisaged that there is first a necessity to establish a legal foundation to justify its decision to become a nuclear weapons state.

Regardless of Japan's nuclear intentions, with its huge stockpile of plutonium and advanced nuclear technologies which are enough to build several nuclear bombs, the explicit statements of Japanese officials should trigger the international community's suspicions of Japan's nuclear ambitions. Rationally, with enough accumulated plutonium to make 5000 nuclear weapons,[170] Japan should be scrutinized and suspected. If the IAEA, as will be discussed in the next chapter, alleges that it has a legal mandate to investigate and assess the PMD of states, it should be looking into Japan's nuclear case. Unfortunately, there is no holistic study or analysis of Japan's nuclear activities or claims that Japan is a potential nuclear weapons state. There is no discussion inside the IAEA, UN or in any international forum in this regard. Again, this does not mean that Japan will definitely produce nuclear weapons, but rather, it is a step

[167] Dawson (n 157).

[168] Mccarthy (n 163).

[169] Yuan (n 157) 93.

[170] ibid.

paving the way for the potential production of nuclear weapons, and thus, increases concerns about a potential violation of its obligation under Article I of the NPT.

The above cases demonstrate that implementation of the obligations under Articles I and II of the NPT is a subjective matter. Their terms are applied to one case but not to others. The implementation of these terms are stipulated by the interests and agendas of some states. It seems that, if these states want a particular state to have nuclear weapons power, there will be no case to answer in relation to the violation of nuclear obligations. However, if they do not want that state to fully benefit from its rights under the NPT, they will be subjective and they will politicize the case. They will presume that the state in question has dangerous intentions. They will build up their allegations about those dangerous intentions and they will do their best to prove those dangerous intentions, through any possible available means, even if they have to resort to forged and fabricated evidence. In short, it is a political game of maliciously manipulating public opinion to convince it that a certain state (Iran) is vigorously moving towards becoming a NWS.

5.5. Conclusion

The analysis of non-proliferation obligations carried out in this chapter reveals that these obligations are legally binding and applicable not only to the NNWSs, but rather, they are binding to all states including NWSs and those states that are not NPT members. In fact, the NWSs should be legally more committed to this obligation than the NNWSs because the former states' nuclear arsenals entice others into nuclear proliferation. The international community, in the context of implementing the NPT's principles, should create effective legal standards and mechanisms in order to deal with nuclear proliferation cases. The legal standards should be applicable to all states without discrimination between NWSs, NNWSs, non-members to the NPT, and non-state actors. It should manage and sensitively regulate the implementation of nuclear non-proliferation in a manner that supports the objectives and purposes of the treaty. The mechanisms aim to close the gap and omissions contained in Articles I and II of the NPT. Most importantly, they should legally prohibit transformation of nuclear technologies

to states that are not members to the NPT or to non-state actors. These mechanisms should be based on the concept that non-compliance with these mechanisms constitutes a violation of the nuclear non-proliferation obligation and unduly impacts the implementation of the other principles of the NPT.

The omissions of Articles I and II and the absence of effective mechanisms have made the case of PMD in Iran's nuclear programme a subjective issue rather than a technically objective issue. It appears that Iran has, at the moment, no nuclear weapons. It is also clear that the coalition has based its allegations against Iran on tenuous, flimsy, and fabricated evidence. Therefore, the IAEA, experts and the media should be very careful about adopting a position for or against Iran's nuclear programme. They should professionally analyse the provided evidence before reaching their conclusions. Jumping into an unwarranted conclusion to serve propaganda is misleading of the facts and could lead to an unpleasant conclusion, especially if military action is contemplated.

For clarification, this research does not support a nuclear-armed Iran. Rather, it believes that the IAEA should scrutinize all its nuclear activities, as there are many suspicious and uncertain nuclear cases that must be resolved. Yet at the same time, the IAEA should avoid accepting any evidence as credible in order to make a worse- case scenario that Iran is building nuclear weapons. Otherwise, it will deal subjectively with the case bought before it. This leads to consideration of the legal scope of the IAEA mandates which is discussed in the following chapter.

6. The IAEA Legal Mandates and Iranian Nuclear Activities

6.1. Introduction

The previous chapter discussed the credibility of the allegations about Iran's nuclear programme, specifically, those allegations issued in the 2011[1] report of the International Atomic Energy Agency (IAEA), in which the Agency allegedly accused Iran of carrying out PMD-related activities.

Those allegations have created a dispute between Iran and the IAEA, not only on whether Iran has breached its nuclear international obligations, but also over the legal competence of the IAEA. Iran argues that the reports and resolutions of the Agency are illegal and unjustified.[2] From the Iranian perspective, the Agency did not stop at monitoring and verifying Iran's nuclear material as required under the safeguards agreement; rather, it has expanded its authority to verify some past activities and the correctness[3] and completeness[4] of Iran's nuclear declarations.[5] Put another way, it seems that the legal confrontation between Iran and the IAEA arises when the Agency veers from its institutional responsibility as international Agency for counting nuclear materials to try to take on a broader role of nuclear weapons' investigator, for which it has no legal mandate.[6]

Therefore, this chapter discusses whether the Agency, under its statutory mandates and under Article III of the Nuclear Non-Proliferation Treaty (NPT),

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[1] IAEA, GOV/2011/65, 08 November 2011.

[2] 'Communication dated 11 March 2015 Received from the Permanent Mission of the Islamic Republic of Iran Regarding the Report of the Director General on the Implementation of Safeguards in Iran', IAEA, INFCIRC/873, 17 March 2015, para C.

[3] It means that there is no absence of undeclared nuclear material and activities in Iran.

[4] It means that all nuclear materials in Iran are used for peaceful activities.

[5] Daniel H Joyner, 'Iran's Nuclear Programme and International Law' (2013) 2 (2) Pen State Journal of Law & International Affairs 282; for the same author; see, 'Iran and the bomb: The legal standards of the IAEA' (30 October 2012) Bulletin of the Atomic Scientists <http://thebulletin.org/iran-and-bomb-legal-standards-iaea-0> accessed 24 February 2015.

[6] Jack Garvey, *Nuclear Weapons Counterproliferation: A New Grand Bargain* (OUP 2013) 104.

is legally qualified to adopt findings and present reports addressing Iran's compliance with its nuclear legal obligations under the NPT and safeguards agreements. In doing so, this chapter starts by providing a legal interpretation of Article III of the NPT which sets up the relationship between the Agency and its members by imposing obligations on its members to conclude safeguarding agreements with the Agency. Then the chapter proceeds to review the Agency's legal authority under its statute. It reviews its legal mandates under the Comprehensive Safeguards Agreements (CSA), under the Additional Protocol, and State-Level Concept (SLC). The next section critically analyses these legal mandates before the chapter moves on to consider the Agency's legal mandates under Iran's CSA and how the Agency approaches Iran's nuclear case. Finally, it concludes that, certainly, the Agency has gone too far and worked beyond its legal limitations in implementing Iran's safeguards and that the IAEA reports regarding Iran's nuclear programme could be justified primarily by referring to political factors but not legal factors. These approaches to Iran's nuclear case affect the Agency's credibility and professionalism.

6.2. Interpretation of Article III of the NPT

Article III of the NPT provides mechanisms and tools to monitor and verify states' nuclear activities and declarations. These mechanisms are called the safeguards agreements with the IAEA responsible for their implementation.

The Agency was created in 1957 in response to the deep fears resulting from the discovery of nuclear energy and its dual-use for military and peaceful purposes.[7] It is an international entity independent from the NPT; it has its own statute and state memberships. Created more than ten years before the NPT, it exists to control and verify the use of nuclear energy. Later, a new primary role for the Agency was granted under Article III of the NPT, which is the only link between the treaty and the Agency.

There are controversial debates on the legal nature of provision 1 of Article III. On the one hand, it has been said that provision 1 of Article III contains an

[7] IAEA, 'History of the IAEA' <https://www.iaea.org/about/history> accessed 15 February 2015.

independent obligation on NNWSs. This obligation is that the NNWSs are obliged to sign and comply with their obligations under the safeguards agreements signed with the IAEA. Non-compliance with these safeguards agreements is considered a breach of the NPT's principles.[8] On the other hand, scholars such as Joyner[9] argue that interpretation of provision 1 reveals that this provision is an interdependent obligation consists of an operative legal term.

The implementation of interpretive methods adopted by this research, which are coded Articles 31 and 32 of the Vienna Convention of Laws of Treaties (VCLT), leads to the conclusion that this provision should be interpreted *inter alia* with provisions 2, 3, and 4 of Article III and the context of the NPT treaty.

Reading Article III as a whole reveals that the plain meaning is that this Article was created to provide a set of mechanisms to help verify compliance and implementation of the principles of the NPT coded in Articles I and II of the NPT.[10] These mechanisms comprise two different separate mechanisms: the safeguards agreements which are described in Provision 1[11] and the export control coded in provision 2.[12] Provision 3[13] of this Article provides details of the types of safeguards agreements that the NNWSs are required to sign with the IAEA. Provision 4[14] of the same Article requires these states to conclude agreements in accordance with the Statute of the IAEA.

Provision 4 states that the NNWSs 'shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article

[8] Gabriel Eugenio Andres, 'The Atomic International Energy Agency's Safeguards Agreement' [May 2008] 11 Int. Law: Rev, Colombia 87, 100, fn 45; Paul K Kerr, 'Iran's Nuclear Programme: Tehran's Compliance with International Obligations' (28 April 2014) Congressional Research Service <http://fas.org/sgp/crs/nuke/R40094.pdf> accessed 06 June 2014, 10.

[9] Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, (OUP 2011) 89.

[10] Mohamed I Shaker, 'The Non-Proliferation Treaty Regime' in Robert E Pendley and Joseph F Pilat, *Beyond 1995: The Future of the NPT Regime* (Plenum Press 2012) 9-10.

[11] NPT, Art III(1).

[12] NPT, Art III(2).

[13] NPT, Art III(3).

[14] NPT, Art III(4).

either individually or together with other States in accordance with the Statute'[15] of the IAEA'. Clearly, this provision sets up a legal obligation on the NNWSs to sign safeguards agreements with the IAEA and accept the imposition of its terms by the Agency to monitor and verify the implementation of the principles of the NPT.[16] In particular, the Agency is to ensure, as it was conceived and designed, that the declared nuclear materials are exclusively for civilian and peaceful uses.[17]

With such an interpretation, suffice to say that Article III of the NPT as a whole determines the extent of the relationship and authority of the IAEA with its members in implementing NPT obligations. Moreover, only Provision 4 contains an operative obligation on the NNWSs to sign safeguards agreements with the Agency as described in provisions 1, 2, and 3 of the Article.[18] As soon as a state has signed the safeguards agreements, it has automatically accepted that the IAEA will carry out its role as detailed in the IAEA statute.

6.3. The IAEA Authority According to its Statute

The roots of the IAEA's creation go back to the "Atoms for Peace"[19] plan of the American President Dwight Eisenhower.[20] The objective of this plan was to provide nuclear resources from NWSs to NNWSs under the control and monitoring of an international collective organization. The IAEA was originally

[15] ibid.

[16] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass destruction* (OUP 2009) 18.

[17] Masahiko Asada, 'The NPT and the Additional Protocol' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law*, Volume II - Verification and Compliance (Spring 2015) 97-100.

[18] Pierre-Emmanuel Dupont, 'Compliance with Treaties in the Context of Nuclear Non-proliferation: Assessing Claims in the Case of Iran' (Summer 2014) 19 (2) the Journal of Conflict and Security Law 161, 205.

[19] Benjamin Sanders, 'IAEA Safeguards and the NPT' [2004] 4 The 2005 NPT Review Conference, Disarmament Forum <http://www.unidir.org/files/publications/pdfs/the-2005-npt-review-conference-en-345.pdf> accessed 16 February 2015, 44.

[20] Hina Pandey, 'Atoms for Peace: Balancing the Promotion of Nuclear Energy and Non-Proliferation' (Summer 2011) 6 (2) Air Power Journal 25, 29.

created to fulfil this role.[21] Its objectives and the basic roles of the IAEA were constructed in its statute.

Article III of its statute states that all functions are endorsed to the Agency in order for it to be able to conduct its intended role.[22] The remarkable point of Article III is that Provision (A)(5) of this Article grants the Agency the authority to establish and administrate safeguards on the NNWSs' nuclear activities.[23] Accordingly, the role of the Agency as originally envisaged was to establish and administrate safeguards on nuclear fissionable materials, equipment, and facilities to enable the Agency to monitor and verify nuclear materials and prevent the use of these materials for military purposes.

The features of its safeguards and its rights and responsibilities are coded in Article XII of its statute. This Article comprises the main tasks of the Agency, which are to review the designs for nuclear facilities, request and submit reports, require states to maintain proper records of their nuclear activities, and send its inspectors into those states who have accepted to be under its safeguards.[24]

In the case of non-compliance with its safeguards, Article XII(C) provides the Agency with tools to call for non-compliant state to remedy the non-compliance.[25] These tools range from reporting the non-compliant state to IAEA members, the UNGA and the UNSC who might take some measures and impose sanctions against the state, to suspending or curtailing the assistance, privileges and membership of the violating state.[26]

The role of the Agency in its early days was modest as the supplier states for nuclear resources had conducted the monitoring and supervision of the transferred nuclear materials.[27] However, due to the increase in the number of

[21] IAEA, 'Atoms for Peace Speech' IAEA <http://www.iaea.org/About/atomsforpeace_speech.html> accessed 15 February 2015; ibid.

[22] IAEA Statute, Art. III.

[23] Ibid, Art. III(A)(5)

[24] IAEA Statute, Art. XII.

[25] IAEA Statute, Art. XII(C).

[26] ibid.

[27] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 16) 20.

recipient states, the NWSs became keener to push this assignment to the IAEA. In response to this shift, the Agency felt it necessary to create documentation that clarifies its principles and procedures in implementing its role as safeguards administrator and, in 1965 it created its first Comprehensive Safeguards Agreement document (CSA) better known as INFCIRC/66.[28]

6.3.1. Comprehensive Safeguards Agreements (CSA)

Pursuant to its authority under Article III(A)(5), the Agency came to a bilateral agreement with its members for the application of the safeguards. The first safeguards system was set out in document INFCIRC/66. This document is, in fact, designed to enable the Agency to supervise the transferring process of nuclear materials from NWSs to NNWSs and make sure that these materials will not be used in nuclear weapons' production.[29] It was not originally designed for or aimed at covering the nuclear fuel cycle process within a state.[30] It was also not, under the IAEA statute, a compulsory document to which states had to submit.[31]

However, since the signing of the NPT in 1968 and the expansion of the Agency's role, the latter envisaged the need for more comprehensive safeguards on transferred nuclear materials to NNWSs.[32] Therefore, by bringing the NPT into force, a link has been created between the implementation of the NPT and the role of the IAEA. This link is embodied in Article III of the NPT.

In 1972, the Agency established a new safeguards system which has three types of safeguards agreements: the Comprehensive Safeguards Agreement (CSA), the Specific-item Safeguards agreements, and the voluntary offer agreement.[33] They

[28] IAEA, INFCIRC/66, 03 December 1965; Sanders (n 19) 45.

[29] M D Edwards, 'Nuclear Non-Proliferation: Safeguards' (Jan 1984) 33 (1) International and Comparative Law Quarterly 1.

[30] Laura Rockwood, 'The IAEA and Safeguards' in Joseph E Pilat and Nathan E Busch (eds), *Routlegde Handbook of Nuclear Proliferation and Policy* (Routledge 2015) 143-44.

[31] Sanders (n 19) 11.

[32] ibid.

[33] IAEA, 'The Safeguards System of the International Atomic Energy Agency' IAEA <http://www.iaea.org/Safeguards/documents/safeg_system.pdf> accessed 15 February 2015, 2.

were designed to increase the Agency's ability to monitor and supervise the NNWSs in using nuclear materials and prevent the transformation of these materials into nuclear weapons.[34]

The CSA is set out in the INFCIRC/153(corr.) document, which was created in 1972.[35] In fact, this document sets out the principles on which the terms of the bilateral agreement between a state and the Agency should be grounded. Under the terms of the CSA and in accordance with Article III(1) of the NPT, the NNWSs should accept safeguards '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'.[36] It can also demand that NNWSs maintain records 'of accounting for and control of all nuclear material subject to Safeguards under the Agreement',[37] and provide the Agency 'with information concerning nuclear material subject to Safeguards under the Agreement and the features of facilities relevant to safeguarding such material'.[38] As the implementation of the Agency's role depends on the verification and inspection of nuclear sites, under the terms of the CSA, the NNWSs should provide access to the IAEA inspectors for routine inspections.[39]

The CSA document was designed in a manner that would reduce to 'a minimum the possible inconvenience and disturbance to the State and to the peaceful nuclear activities inspected',[40] and implemented in a new way to 'avoid hampering the economic and technological development';[41] and it intended to

[34] ibid.

[35] 'The Structure and Content of Agreement Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation on Nuclear Weapons' IAEA, INFCIRC/153 (Corr.), June 1972.

[36] ibid para 1.

[37] ibid para 7.

[38] ibid para 8.

[39] ibid para 9.

[40] Ibid.

[41] ibid para 4.

'avoid undue interference in the State's peaceful nuclear activities, and in particular in the operation of facilities'.[42]

For these reasons, in order to 'minimize the intrusiveness of Safeguards and the risk of industrial espionage',[43] the INFCIRC/153 document grants the Agency's inspectors rights of access to safeguarded facilities. However, this access was limited to agreed strategic points.[44] This means that the Agency's inspectors were not given full access to all parts of the safeguarded nuclear sites; rather they were limited to the agreed points.[45] Although Article 77 of the CSA provided the Agency with the authority to sign an agreement with a state to conduct a "special inspection" and, in addition, to obtain access to information or locations,[46] this idea was totally rejected by the NNWSs. In practice, this refusal made IAEA's inspectors feel unable to request special inspections, and in fact the Agency did not request them.[47]

In practice, due to some limitations in the INFCIRC/153 that contributed to its structure and methods of implementation,[48] in addition to the discovery of the Iraqi case,[49] there was a feeling within the IAEA that there was a need to review and strengthen its safeguards agreement.[50] Accordingly, the Agency adopted

[42] ibid.

[43] Sanders (n 19) 45.

[44] "Strategic point" means a location selected during examination of design information where, under normal conditions and when combined with the information from all "strategic points" taken together, the information necessary and sufficient for the implementation of safeguards measures is obtained and verified; a "strategic point" may include any location where key measurements related to material balance accountancy are made and where containment and surveillance measures are executed; IAEA (n 35) para 116.

[45] Michael D Rosenthal, Lisa L Saum-Manning, Frank Houck, and George Anzelon, 'Review of the Negotiation of the Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards' (January 2010) Volume I: Setting the Stage 1991-1996, Brookhaven National Laboratory <http://www.bnl.gov/isd/documents/71012.pdf> accessed 17 February 2015.

[46] IAEA (n 35) para 77

[47] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 16) 21.

[48] Rosenthal et al, (n 45) 2-5.

[49] Dupont, 'Compliance with Treaties in the Context of Nuclear Non-proliferation' (n 18) 176.

[50] Rosenthal et al, (n 45) 6.

more intensive safeguards in a form of "Additional Protocol" (AP)[51] to the standard CSA.[52]

6.3.2. Additional Protocol (AP)

Blix said 'lessons learned from our unique, wide ranging inspections in Iraq show us some ways the IAEA's safeguards inspection system should be given sharper teeth'.[53] These teeth were exemplified in enhancing the Agency's access to any location that might be, according to credible information, an undeclared nuclear site;[54] granting access to more information for third parties not only relying on state's declarations;[55] and giving access to the UNSC in cases of non-compliance.[56]

Thus, the AP was constituted to supplement the CSA and to help the Agency in verifying the correctness and completeness of states' declarations under the CSA.[57] Put in another way, as Hirsch described it, the AP is 'an effort to transform the IAEA inspectors from accountants to detectives'.[58] It enhances the authority of the Agency in two primary areas: first, the AP demands that states provide comprehensive information concerning certain activities, particularly the location of nuclear fuel cycle-related research and development activities, not only those 'involving nuclear material, but also those that do not involve nuclear material but might be used in the production of nuclear material'.[59] The aim of this expanded declaration is to give the Agency a complete view of the key parts and activities of the states' nuclear programmes and verify their

[51] IAEA, INFCIRC/540, 'Model of the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards' September 1997.

[52] Sanders (n 19) 45.

[53] Statement by IAEA Director General Hans Blix on IAEA Inspections in Iraq to the US Senate Foreign Relations Committee (23 October 1991) Federation of American Scientists <http://fas.org/news/un/iraq/iaea/dgsp1991n06.html> accessed 17 February 2015.

[54] IAEA, GC(XXXV)/OR.333, General Report, 08 January 1992, para 57.

[55] ibid para 56.

[56] ibid para 58.

[57] IAEA (n 33) 4.

[58] Theodore Hirsch, 'The IAEA Additional Protocol: What it is and Why it Matters' (Fall-Winter 2004) The Nonproliferation Review 140, 143.

[59] IAEA, (n 51) Art 2 (i).

correctness.[60] The second area is that it broadens the Agency's access to locations to verify states' nuclear declarations which is referred to as "Complementary access".[61] The goal of the expanded access is to provide the Agency with the right of access to undeclared locations for the limited purpose of carrying out location-specific environmental sampling in order to verify the nuclear completeness of the states.[62]

Thus, the AP 'equips the Agency with important new tools to verify the correctness and completeness of States' declarations under comprehensive Safeguards agreements'.[63] Along with the CSA, it was constructed to detect diversion of nuclear materials[64] in a timely manner or any change in information provided to the Agency[65] in order to strengthen the effectiveness and efficiency of the safeguards.[66]

However, despite the advantages that would be achieved by the AP, the AP and safeguards system as a whole is subject to criticism. The criticisms are that the AP is still a voluntary measure for the states that are members.[67] There is no legal obligation on states which make it compulsory to sign the AP. As Joyner[68] argues, the NNWSs may maintain only the standard CSA without signing the AP if they choose not to do so. This is because the AP is not a part of the fundamental NNWSs' safeguards obligations under NPT Article III(4). In this way, the AP is, and will be, dependent upon the cooperation and willingness of the states. In addition, because its implementation is limited to a specific location, items, or technologies, there are wide possibilities of severely

[60] Hirsch (n 58) 144.

[61] IAEA (n 51) Art. 4.

[62] ibid Art 5(c).

[63] IAEA (n 33) 4.

[64] IAEA (n 35) Para 28.

[65] ibid Para 49.

[66] ibid Preamble.

[67] Jack Caravelli, *Nuclear Insecurity: Understanding the Threat from Rogue Nations and Terrorists* (Praeger Security International 2008) 137.

[68] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 9) 36.

restricting the IAEA inspectors' conduct and activities by the state which is under investigation, while it is still fully complying with the terms of the AP.[69]

Therefore, in conditions of rapidly developing technologies with the new events, the secretariat of the IAEA has evolved a new concept which is called the State-Level Concept (SLC).

6.3.3. State-Level Concept (SLC)

In 2013, the Board of Governors (BOG) of the IAEA reviewed the Director General's report, which was entitled 'The Conceptualization and Development of Safeguards Implementation at the State Level',[70] about efforts to increase the effectiveness and efficiencies of the safeguards. The report contains a new approach to the implementation of the safeguards which is called the State-Level Concept.

The basic idea of the SLC is based on drawing a holistic picture of the entire nuclear programme of the state concerned. Accordingly, determining the state's compliance is not only based on specific-location investigations, but rather, it is based on analysing all aspects of the state's nuclear programme. These aspects include the history of the programme, the level of its nuclear technologies, and its nuclear behaviour and activities.[71] In doing so, the Agency relies on information collected from many different sources. The information could be sourced from the accused state itself,[72] from the IAEA safeguards' implementation[73] or from open sources[74] and third parties.[75] The assessment and

[69] Hirsch (58) 143-44.

[70] IAEA, GOV/2013/38, 12 August 2013.

[71] Rockwood, 'The IAEA and Safeguards' (n 30) 1.

[72] This information includes: reports, declarations, practical arrangements between the Agency and the concerned state, and voluntary information provided by the state; IAEA, 'Supplementary Document to the Report on The Conceptualization and Development of Safeguards Implementation at the State Level (GOV/2013/38)', IAEA, GOV/2014/41, 13 August 2014, para 137.

[73] ibid para 140, 141, and 142.

[74] Examples of open sources include government or operator information available in the public domain, scientific and technical information, patent databases, trade publications, individual company websites, world trade-related data and satellite imagery; ibid para 144.

evaluation of all of this information determines whether there is a need for follow-up, and if so, the nature of the appropriate follow-up actions that should be taken.[76]

The Agency stated in its resolution of 26 September 2014 that the SLC 'does not, and will not, entail the introduction of any additional rights or obligations on the part of either States or the Agency, nor does it involve any modification in the interpretation of existing rights and obligations'.[77] Practically, however, the Agency compares the outcomes of information collected from different types of sources with the nuclear declaration of the concerned state to determine the safeguards activities and provide a basis for drawing annual safeguards conclusions on whether or not the nuclear programme and activities of that state are for peaceful purposes.[78]

6.4. The Scope of the Legal Mandates of the IAEA under its Statute and the NPT

The legal mandates of the Agency and the legitimacy of its conduct and findings have been criticized and subjected to legal investigation. From the IAEA viewpoint, which is supported by some scholars and experts,[79] under the CSA, the Agency has the authority, nay is obliged, to assess and verify the correctness and completeness of nuclear declarations of safeguarded states. The Agency confirmed this interpretation and trend in its report. It states that the 'Agency has both the right and the obligation to verify the correctness and completeness of

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[75] Third party information refers to information provided by a State or other party (e.g. organizations, individuals), on a voluntary basis, relating to another State. It includes nuclear procurement related information and information collected through national means; ibid para 145.

[76] The follow-up action includes a clarification letter from the concerned state, conducting extra inspections or complementary access; IAEA, ibid para 147.

[77] IAEA, GC(58)/RES/14, 26 September 2014, para 24.

[78] IAEA (n 72) Section C 10, para 147.

[79] David Albright, Olli Heinonen, and Orde Kittrie, 'Understanding the IAEA's Mandate in Iran: Avoiding Misinterpretations' (27 November 2012) Institution for Sciences and International Security ISIS <http://isisonline.org/uploads/isisreports/documents/Misinterpreting_the_IAEA_27Nov2012.pdf > accessed 18 February 2015, 4; John Carlson, 'Defining Noncompliance: NPT Safeguards Agreements' (08 May 2009) Arms Control Today <http://www.armscontrol.org/act/2009_5/Carlson> accessed 16 February 2015.

States' declarations so that there is credible assurance of the non-diversion of nuclear material from declared activities and of the absence of undeclared nuclear activities'.[80] The Agency, in confirming this trend, relied on a broad interpretation of Paragraph 2 of the CSA.[81] This paragraph says that the CSA should provide the Agency the right and obligation to ensure that all safeguards are applied to all sources or special fissionable materials.[82] The BOG elucidated the Agency's approach by arguing that the 'scope of comprehensive Safeguards agreements was not limited to nuclear materials actually declared by a State, but included any material that is required to be declared'.[83]

Accordingly, the legal mandates of the Agency under the CSA, from the Agency's view point, are not only to verify when the nuclear declarations of the concerned state are correct (which means no diversion of nuclear material into military uses), but also to verify they are complete which means no undeclared nuclear activities.[84]

Worryingly, some experts, such as Laura Rockwood[85] who worked as the Head of Safeguards at the Legal Office at the IAEA, support the Agency's view and contend that even if a state, such as Iran, has not signed or ratified the AP, the Agency still has the right to conduct investigations for undeclared nuclear fissionable materials within the jurisdictions of the concerned state under only the terms of the CSA.

John Carlson[86] has gone further and argued that the language of Article III(1) of the NPT not only obligates NNWSs to sign safeguards agreements with the IAEA, but it also obliges those states to comply with the terms of the agreement.

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[80] IAEA (n 70) para 3.

[81] Rockwood, 'The IAEA and Safeguards' (n 30) 4; Albright et al, (n 79) 4.

[82] IAEA (N 35) Para 2.

[83] IAEA (n 33) 2.

[84] 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran' IAEA, GOV/2013/27, 22 May 2013, para 67, fn 67.

[85] Rockwood, 'The IAEA and Safeguards' (n 30) 3-4.

[86] Carlson (n 79).

Carlson and others[87] consider that non-compliance with safeguards agreements is a breach of Article III(1) of the NPT, which means a violation of Article III as a whole and possibly a violation of Article II of the NPT.

However, it seems that the Agency's interpretation and attitude are not legally justified. This is because that the Agency gives itself authority to broaden its legal mandates unilaterally which is a clear violation of its statutes and international law rules.[88] Indeed, reading the Agency's interpretation gives the impression that the Agency feels it can, unilaterally, in an autocratic fashion, change or expand the scope of its legal mandates under the safeguards agreement.[89] While there are all sorts of conduct and activities on the part of the BOG that indicate this possibility,[90] this is, in fact, impossible as a matter of law. Simply put, it means that the Agency could be the judge, jury, and interpreter in a case where it is a party.[91] Basically, it is an *ultra vires* act because it changes the terms and conditions of a unilateral agreement to which it is a party. In such a manner, it is clearly a violation of a long established principle in international law which is *pacta sunt servanda* (Treaty must be kept). This principle is coded in Article 26 of the VCLT,[92] whereby parties are required to observe and apply the stipulations of the treaty or agreement and they should abstain from any act or behaviour calculated to frustrate the aims and objectives of the agreement and thus obstruct the implementation of this agreement.[93]

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[87] Jensen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 (5) Vanderbilt Journal of Transnational Law 1393 1435; Kerr (n 8) 11; Carlson (n 79).

[88] Joyner, 'Iran's Nuclear Program and international Law' (n 5) 286-87.

[89] Pierre-Emmanuel Dupont, 'Iran's (Non-)Compliance with its Non-Proliferation Obligations Revisited' (22 June 2013) Log of the European Journal of International Law (EJIL) <http://www.ejiltalk.org/irans-non-compliance-with-its-non-proliferation-obligations-revisited/> accessed 20 February 2015.

[90] Laura Rockwood provides some cases as examples of the BOG's activities that suggest that the board has authority under the CSA; Laura Rockwood, 'The IAEA's State-Level Concept and the Law of Unintended Consequences' (28 August 2014) Arms Control Association <https://www.armscontrol.org/act/2014_09/Features/The-IAEAs-State-Level-Concept-and-the-Law-of-Unintended-Consequences> accessed 18 February 2015, 4.

[91] Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (n 9) 92.

[92] Article 26 states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith', VCLT, Art. 26.

[93] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 367.

In this context, as a matter of competence, the BOG cannot determine non-compliance of a state with safeguards agreements. There is a distinction between determination of non-compliance from a technical perspective and from a judicial perspective. These two kinds of determination are not equal. The technical determination is based on technical disclosure or reporting minor oversights,[94] but judicial non-compliance indicates a material breach of the terms of an agreement.[95]

Accordingly, the determination of a technical breach is not *per se* a determination of a breach of the CSA[96] since it is not a material breach of the agreement. The Agency, as a technical body, can conclude that there is non-compliance with the safeguards; if it does so, it can take one of the subsequent steps coded in Article XII.C.[97] Nevertheless it cannot, from a legal perspective, determine that there is a material breach of the safeguards agreements as it was not intended to act as a judicial body in determining a legal breach.[98] A material breach of an agreement is determined by a proper judicial body.[99] In fact, Article XVII of its statute states that the Agency should refer any case of legal implementation to a proper judicial forum such as the ICJ.[100] Therefore, the Agency cannot solely determine that a state is non-compliant with its safeguards agreements and impose or request member states to take measures against the concerned states.

Furthermore, Article III (1) of the NPT demands that NNWSs accept the CSA for 'the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices'.[101]

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[94] Pierre Goldschmidt, 'Exposing Nuclear Non-compliance, (Feb-Mar 2009) 51 (1) Survival 143, 143.

[95] Dupont, 'Iran's (Non-)Compliance with its Non-Proliferation Obligations Revisited' (n 89).

[96] ibid.

[97] IAEA (n 25).

[98] Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (n 9) 89.

[99] ibid 91.

[100] IAEA Statute, Art. XVII.

[101] NPT, Art III(1).

Thus, the technical objective of the CSA is the timely detection of the diversion of considerable quantities of nuclear material from civilian purposes to military purposes or for purposes unknown, and deterrence of such diversion by the risk of early detection.[102]

Therefore, the scope of the legal mandate of the Agency under the CSA is limited to verifying the fissionable nuclear materials within the territory of the state and monitoring the safeguards on those materials.[103] As Fischer[104] notes the Agency, under the terms of the CSA, cannot conduct investigations or request access to sites or technologies that are not declared by the concerned states as nuclear sites or materials. Its legal mandate does not stretch to verification and monitoring of a state's nuclear activities that are not directly related to fissionable materials even if it is likely that they are related to the development of nuclear bombs or any other nuclear explosive devices.[105] Otherwise, it is in violation of its rights and obligations agreed on in the CSA. Imagine the controversy, if the Agency, legally, had the authoritative power to broaden its legal mandates beyond what it states in the CSA, it would not have to be involved in negotiations to create a new phase of safeguards or adopt the AP or even the SLC.

Indeed, reviewing the AP negotiations illustrates that the debates were mostly about whether the IAEA needed additional legal authority to implement measures to increase the effectiveness and efficiency of the safeguards. For example, Germany perceived that the new measures would not be covered by the terms of the CSA and that there was a need to involve a bilateral agreement between the state concerned and the Agency.[106] The American delegation supported the German conclusion by contending that 'in order to secure

[102] IAEA (n 35) para 28.

[103] Dupont, 'Compliance with Treaties in the Context of Nuclear Non-proliferation' (n 18) 166-68.

[104] David Fischer, *History of the International Atomic Energy Agency: the first forty years* (IAEA 1997) 256.

[105] Daniel H Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (09 Sep2011) Jurist <http://jurist.org/forum/2011/11/dan-joyner-iaea-report.php> accessed 08 Jun 2015; Hirsch (n 58) 146.

[106] Rosenthal et al, (n 45) 8.

additional rights for the Agency, the Secretariat need to develop new protocols to existing safeguards agreements'.[107] Sudan, on behalf of the Group of 77, said that the new measures may go beyond the terms of the CSA and this needed complementary authority and further deliberations to define the new legal arrangement.[108] In response, the Secretariat of the IAEA said that the Agency 'would need additional authority based on a further legal instrument to be concluded with each state'.[109] These statements show that the authority of the Agency under the CSA was not to verify the correctness and completeness of each nuclear state's declarations. Rather, it needed an additional authority to do so.

What is important to mention here is that the adoption of the AP did not establish a new authority or provide new means of inspection for the IAEA.[110] Rather, it expanded its authority under the CSA to verify non-diversion of nuclear materials from civilian to military purposes. It is a complementary authority that provides complementary access to verify the correctness and completeness of nuclear declarations.[111] Arguing the contrary to this finding is against the political, if not the legal, facts of the AP.[112]

The complementary authority given under the AP suggests that the IAEA inspections are 'merely complementary to routine safeguards inspections, not alternatives to it'.[113] Put another way, this complementary authority has been given to grant the Agency access only to locations that either contain nuclear fissionable materials or materials that might be used to produce nuclear fissionable materials.[114] This complementary access should be given through an

[107] ibid.

[108] ibid 9.

[109] ibid 10.

[110] Michael Hertzberg, 'Shining a Brighter Light on Dark Places: Improving the IAEA's Use of Intelligence through Cooperation with NATO' (No Date) Centre for Strategic and International Studies <http://csis.org/files/publication/101221_Hertzberg_poni_essay.pdf> accessed 19 February 2015, 4.

[111] Rosenthal et al, (n 45) 11.

[112] ibid 11.

[113] Hirsch (n 58) 147.

[114] IAEA (n 59) Art. 4; ibid 147-49.

arrangement between the Agency and the safeguarded state,[115] and only to conduct certain activities that include collection of environmental samples, utilization of radiation detection, and application of seals.[116] Therefore, to say that the Agency can examine any site and facility they "deem suspect" or can assess possible military dimensions of a state's nuclear programme is quite wrong.[117]

Even with regard to the State-Level Concept (SLC), it does not add any new legal mandate to the authority of the Agency. The supplementary 'Document to the Report on The Conceptualization and Development of Safeguards Implementation at the State Level';[118] and the resolution GC(58)/RES/14,[119] state that the 'SLC is not a substitute for the Additional Protocol and is not designed as a means for the Agency to obtain from a State without an Additional Protocol the information and access provided for in the Additional Protocol'. It reaffirms that 'nuclear material accountancy and its verification in the field will remain at the core of safeguards implementation'.[120]

This means that the SLC is not meant to introduce additional rights and obligations on the state members and the Agency. Rather, the 'Safeguards-relevant information is only used for the purpose of Safeguards implementation pursuant to the Safeguards agreement in force with a particular State – and not beyond it'.[121]

From the perspective of this research, it seems that the SLC is just an attempt to revise the legal mandates of the Agency by making states believe that the Agency has full rights to inspect and assess not only the correctness but also the completeness of all its nuclear activities. Also, it attempts to make them believe

[115] ibid Art 7.

[116] ibid Art 6.

[117] Mitchell B Reiss and Ray Takeyh, 'Don't Get Suckered by Iran' (02 January 2014) Foreign Affairs <http://www.foreignaffairs.com/Articles/140620/mitchell-b-reiss-and-ray-takeyh/dont-get-suckered-by-iran> accessed 19 February 2015.

[118] IAEA (n72) para 13, fn 11.

[119] IAEA (n 77) para 24.

[120] IAEA (n 72) para 18.

[121] IAEA (n 77) para 24.

that the Agency expects full cooperation from them, otherwise they would be non-compliant.

Consequently, this concept would make the Agency a political instrument and its activities would be subject to the will of a certain number of states who dominate the Agency.[122] Certainly, in the absence of a universal form of verification, the technical objectives of the Safeguards may differ from State to State, depending on their nuclear capability and infrastructure, for example, their uranium enrichment capacity and nuclear fuel cycle and related activities.[123]

This gives the Agency the capacity to identify anything it wants to as a nuclear related activity. Arbitrarily, it can change and severely increase the safeguards on a particular state under the pretext of implementing proper checks to ensure there is non-diversion of nuclear materials. What makes it worse is that, in some cases, the verification requirements depend on information provided by third parties or from open sources. This makes the authenticity and origins of this information subject to deceit and forgery, and would make the safeguards prone to politicization.[124]

In summary, the Agency is not legally qualified to be a general watchdog for states' nuclear activities. The SLC and AP, in addition to the CSA, do not give the Agency a legal mandate to inspect or assess allegations of research and development on weaponization that are not related directly to nuclear fissionable materials. Its legal mandates were not intended to detect hidden nuclear weapons or clandestine weaponization or nuclear activities,[125] or to report where a state is violating its obligations under international law, the NPT, or even under the terms of the CSA.[126] As a technical international organization, it should still

[122] Statement by the Head of the Delegation of the Russian Federation, Ambassador-At-Large, Grigory Berdennikov, at the Symposium on the International Safeguards: Linking Strategy, Implementation and People, (20-24 October 2014) 3.

[123] IAEA (n 77) para 14.

[124] See (fn 123) 3.

[125] Mohamad I Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation' (2006) 321 Recueil des Cours 9, 79.

[126] Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (n 105).

focus on nuclear material not on weaponization.[127]Adopting the contrary position would give the Agency a much more expanded authority than it is given by its statute and safeguards agreements and it would shift the Agency from an independent technical international organization to a national investigation Agency controlled by certain states which dominate the Agency.

6.5. The Legal Validity of the IAEA Authority under the Iranian Safeguards Agreements

Since 2003, the IAEA has issued 51 reports and has adopted 12 resolutions with regard to Iran's nuclear programme.[128] To understand the scope of the Agency's authority and the validity of its conduct regarding the Iranian nuclear programme, it is necessary to determine, first of all, the legal sources for that authority. It is important to underline the accepted and applied safeguards agreement between the two parties.

6.5.1. Types of Signed Safeguards Agreements between Iran and the IAEA

Iran, as an NPT member and pursuant to Article III of that treaty, signed its CSA with the Agency in 1974.[129] Due to the generality of the CSA's rules, under Article 39 of Iran's CSA,[130] Iran and the Agency entered into negotiations on a subsidiary agreement in 1974.[131]

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[127] IAEA (n 72) para 63.

[128] IAEA, 'IAEA and Iran – IAEA Reports' (No Date) <https://www.iaea.org/newscenter/focus/iran/iaea-and-iran-iaea-reports> accessed 23 February 2015; IAEA, 'IAEA and Iran – IAEA Resolutions' (No Date) <https://www.iaea.org/newscenter/focus/iran/iaea-and-iran-iaea-resolutions> accessed 23 February 2015.

[129] 'The text of the agreement between Iran and the Agency for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons', INFCIRC/214, (13 December 1974).

[130] Article 39 states that 'the Government of Iran and the Agency shall make Subsidiary Arrangements which shall specify in detail, the extent necessary to permit the Agency to fulfil its responsibilities under this Agreement in an effective and efficient manner, how the procedures laid down in this Agreement are to be applied', ibid Art. 39.

[131] IAEA, 'Model Subsidiary Agreement Code 1-9' (12 March 1974) Online Version, <https://www.iaea.org/Safeguards/documents/Online_Version_SG-FM-1170_--_Model_Subsidiary_Arrangement_Code_1-9.pdf> accessed 21 February 2015.

In 1976, the two parties agreed on the terms of the Subsidiary Arrangements General Part of Iran's Safeguards Agreement with the IAEA.[132] This agreement became known as Code 3.1., under which Iran is obliged to inform the Agency about the existence of nuclear materials 'as early as possible, and in any event not later than 180 days prior to the start of constructions'.[133]

In 2003, after officially declaring Natanz nuclear site to the Agency, the Agency amended code 3.1 and requested Iran to sign it. Under the new modification, Iran must declare to the Agency the existence of preliminary design information on nuclear facilities 'as soon as the decision to construct or to authorize construction has been taken, whichever is earlier'.[134] Iran accepted the modified version, and voluntarily implemented it while it was waiting for ratification of the Iranian Parliament (the Majles).[135]

As a reaction to the Agency's decision to refer its nuclear dossier to the UNSC,[136] the Iranian government declared in 2007 that it would suspend voluntary implementation of Code 3.1., which had not yet ratified by the parliament, and that it would revert to implementation of the 1976 version of Code 3.1.[137]

Finally, in 2003, Iran signed the Additional Protocol with the Agency and stated that 'it is acting in accordance with the Protocol's provisions, pending the Protocol's formal entry into force'.[138] The voluntary implementation of the AP

[132] Iran Nuclear Energy, 'Legal Aspects' <http://nuclearenergy.ir/legal-aspects/> accessed 21 February 2015.

[133] IAEA (n 133) Code 3.1.5.

[134] Daniel H Joyner, 'The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?' (05 march 2010) Jurist <http://jurist.org/forumy/2010/03/qom-enrichment-facility-was-iran.php> accessed 19 February 2015.

[135] Iran Nuclear Energy (n 134).

[136] IAEA, GOV/2006/14, 04 February 2006, para 2.

[137] IAEA, GOV/2007/22, 23 May 2007, para 12; also, 'Communication dated 11 March 2015 Received from the Permanent Mission of the Islamic Republic of Iran Regarding the Report of the Director General on the Implementation of Safeguards in Iran'; IAEA, INFCIRC/873, 17 March 2015, para A.

[138] IAEA, 'Iran Signs Additional Protocol on Nuclear Safeguards' (18 December 2003) IAEA News Centre <https://www.iaea.org/newscenter/news/iran-signs-additional-protocol-nuclear-Safeguards> accessed 22 February 2015.

was also terminated by the Iranian government due to the transfer of its nuclear file to the UNSC.[139]

The above review demonstrates that the relationship between Iran and the IAEA is regulated only by the terms of the CSA. It shows that the Iranian government is not obliged under the terms of the AP or Code 3.1 as they have not been officially ratified in accordance with Iranian legal ratification procedures.

6.5.2. The Legal Scopes of the IAEA Authority under Iran's CSA

Following form above, the legal framework of the Agency in monitoring and verifying Iran's nuclear programme are stipulated mainly in the CSA. However, the Agency argues that Iran is obliged to implement all agreements signed by Iran including the Subsidiary Agreement code 3.1. The Agency based its argument on Article 39 of the CSA of Iran. It reported that, in accordance with Article 39 of Iran's CSA, 'agreed Subsidiary Arrangements cannot be modified unilaterally; nor is there a mechanism in the Safeguards Agreement for the suspension of provisions agreed to in Subsidiary Arrangements'.[140] This means that the Agency believes that Iran cannot modify or suspend any agreed Subsidiary Agreements and that it is obligated to fully implement them.

Thinking back to Article 39 of Iran's CSA, this Article states precisely that 'the Government of Iran and the Agency shall make Subsidiary Arrangements which shall specify in detail,[…], the Subsidiary Arrangements may be extended or changed by agreement between the Government of Iran and the Agency without amendment of this Agreement'.[141] Article 40 of Iran's CSA deals with the entry into effect of the subsidiary arrangements. It states that the 'Subsidiary Arrangements shall enter into force at the same time as, or as soon as possible after, the entry into force of this Agreement'.[142] Accordingly, this Article does

[139] ibid.

[140] IAEA, GOV/2007/22, 23 May 2007, para 14.

[141] IAEA (131) Art. 39.

[142] Article 40 fully states that 'Subsidiary Arrangements shall enter into force at the same time as, or as soon as possible after, the entry into force of this Agreement. The Government of Iran and the Agency shall make every effort to achieve their entry into force within ninety days of the entry into force of this Agreement; an extension of that period shall require agreement between the Government of Iran and the Agency. The Government of Iran shall provide the Agency

not specify specific procedures through which the entry into Subsidiary Agreements would be accomplished. It does not require the consent and ratification of the Iranian parliament as it is necessarily required by Article 25 to make the CSA effective and come into force. The latter Article indicates that the CSA is to come into force from the date of receiving a 'written notification that Iran's statutory and constitutional requirements for entry into force have been met'.[143] The Iranian constitution obliges the Iranian government to obtain the approval of the Islamic Consultative Assembly.[144] Thus, it is clear that, for the CSA to be effective, it must be ratified by the Iranian constitutional body; however, this ratification is not essential and it is not required for the Subsidiary Agreements to be effective. As Joyner[145] argues, the absence of specific procedures for entry into force of the subsidiary agreement is probative textual evidence that the Iranian government intended to regard the subsidiary agreement as not legally binding *per se*. More accurately, it wanted the subsidiary agreement to appear to be an understanding or guidelines, with a non-binding legal character between the parties.

Even if, supposedly, the subsidiary arrangement is a treaty or legally binding agreement, since Iran accepted the modified Code 3.1., Iran is obliged to implement all its terms. This acceptance is legally valid and gives all its legal effects as, generally, treaties are provisionally applied prior to their date of entry into force or before their ratification by the constitutive body of a state.[146]

However, according to Article 25 paragraph 2 of the VCLT, 'the provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is

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promptly with the information required for completing the Subsidiary Arrangements'; ibid Art. 40.

[143] ibid Art. 25.

[144] Article 77 of the Iranian constitution codes that 'International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly'.

[145] Joyner, 'The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?' (n 134).

[146] Sanja Dajić, 'Provisional Application of Treaties: Critical Assessment of the Rule and International Investment Awards' [2014] 12 Harmonisation of Serbian and Hungarian Law with the European Union Law 339, 340.

being applied provisionally of its intention not to become a party to the treaty'[147] if that treaty does not explicitly provide otherwise.

Iran made it clear in 2003 that it was voluntarily implementing this code. Again, in 2007, Iran notified the Agency that it would suspend the voluntary implementation of the subsidiary arrangement. Thus, Iran's provisional voluntary implementation of the subsidiary arrangement, although it gives legal effects,[148] does not mean that Iran is obliged to comply with this agreement and it cannot unilaterally terminate or suspend it.

Moreover, the same could be said regarding Iran's AP implementation. Iran, as a sovereign state, cannot be forced to implement international agreements or legal instruments. The AP, which is naturally a voluntary agreement,[149] cannot be mandatorily imposed on any sovereign state which chooses not to abide by it. As analysed earlier, Iran is obliged under Article III(4) of the NPT to conclude safeguards agreements with the Agency which is the CSA. Although there is a need to adopt and implement the AP as a confidence-building measure, suffice to say that, from a legal perspective, states are not required to agree to the AP with the Agency in order to meet their obligations under Article III of the NPT.[150] Therefore, it is not acceptable to claim that Iran is obligated to accept and implement the AP, and that, if it does otherwise, it breaches its obligations under Article III of the NPT.

Consequently, the legal relationship between Iran and the Agency is determined and regulated by Articles 1 and 2 of the CSA which constitute the main foundation for this relationship.

The basic legal undertaking on the Iranian side, according to Article 1 of the agreement, is to accept Safeguards on all source or special fissionable material

[147] VCLT, Art. 25(2).

[148] Andrew Michie, 'Provisional application of non-proliferation treaties', in Daniel H Joyner and Marco Roscini (eds) *Non-Proliferation Law as a Special Regime* (CUP 2014) 55.

[149] The report of the General Conference of the IAEA states that 'it is the sovereign decision of any State to conclude an additional protocol'; IAEA (n 77) para 13. But once it in force, the additional protocol is a legal obligation.

[150] Dupont, 'Compliance with Treaties in the Context of Nuclear Non-proliferation' (n 18) 204.

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.[151] On the side of the IAEA, Article 2 states 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.[152]

Accordingly, then, the legal authority of the Agency with Iran is limited to applying and monitoring the implementation of the safeguards on the fissionable material in all the Iranian peaceful nuclear activities within the Iranian jurisdiction. This legal authority is limited and directed only to examining whether fissionable nuclear materials are being diverted into materials that could be involved in military activities, not on all Iran's nuclear activities even if some of these activities may be related to the development of nuclear weapons but are not related to the diversion of fissionable materials. Otherwise, the Agency is acting illegally and its legal mandates become *ultra vires*.[153]

To illustrate this, when the Agency reports 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',[154] these investigations and findings are required and justified by the terms of Articles 1 and 2 of Iran's CSA and they constitute the only legal mandates that the Agency can apply to Iran's nuclear programme.[155]

However, when the Agency reports that it 'is not in a position to provide credible assurance about the absence of undeclared nuclear material and

[151] IAEA (n 131) Article 1.

[152] ibid.

[153] Julian Borger, 'Nuclear watchdog chief accused of pro-western bias over Iran' (22 March 2012) The Guardian <http://www.theguardian.com/world/2012/mar/22/nuclear-watchdog-iran-iaea> accessed 09 February 2015.

[154] For example, see; IAEA, GOV/2015/15, (19 February 2015), para 71; GOV/2014/58, (07 N0vember 2014), para 66; GOV/2013/56, (14 November 2013), para 65; GOV/2012/55, (16 November 2012), para 53.

[155] Joyner, 'Iran and the bomb' (n 5).

activities in Iran, and therefore to conclude that all nuclear material in Iran is in peaceful activities',[156] it acts beyond its legal mandates. The reason for this is that, as long as Iran has not ratified the AP and there is no legal obligation which forces Iran to conclude the AP, the Agency cannot investigate and verify Iran's correctness and completeness.[157] There are no terms included in Iran's CSA that allow the Agency to verify the correctness and completeness of Iran's nuclear activities. Until Iran ratifies its AP, the Agency's reports and actions in this regard are legally invalid.

Blix,[158] a former IAEA director general, said 'there is a distinction between information and evidence, and if you are a responsible Agency, you have to make sure that you ask questions and do not base conclusions on information that has not been verified'. So, when the Agency states that, on the basis of provided information, it 'remains concerned about the possible existence in Iran of undisclosed nuclear related activities involving military related organizations, including activities related to the development of a nuclear payload for a missile'[159] its statement is legally indeterminate and cannot be counted as being sufficient evidence of Iran's non-compliance. This is unfortunate because, first of all, the report relied, as confirmed by the Agency, on third party and open sources.[160] These sources might be untruthful. The Agency, as it is a technical body, should base its judgements on data provided from trusted sources.[161] In addition, the report states that the Agency had concerns about undisclosed related activities. Assumingly, even if such activities are being carried out by the Iranian government, the Agency has no legal authority to report these activities as non-compliant as long as they are not directly related to fissionable materials or associated facilities.[162] The Agency is not a watchdog or a

[156] See (fn 158).

[157] IAEA (139) para B.1.

[158] Borger (n 153).

[159] IAEA (n 156) para 58.

[160] ibid para 59.

[161] See (fn 123) 6.

[162] Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (n 105).

policeman of the international nuclear non-proliferation regime.[163] Therefore, in the absence of clear legal language that allows the Agency to behave in this way, the Agency would do better to mention its concerns, but not make a definite accusation, as there is no prohibitive or regulatory standard that the Agency can rely on in concluding the compliance or non-compliance of Iran.[164] Consequently, its credibility as an international organisation would be badly affected by the lack of legitimate foundation for its practices.[165]

6.6. The Examination of the IAEA Practices in the Implementation of Iran's CSA

As demonstrated above, in dealing with the Iranian nuclear case, the Agency has gone beyond its legal mandates. The Agency's approach to Iran's case has been different from any other nuclear cases with which it has dealt. Examining the Agency's practice with the Egyptian nuclear case, for example, reveals that the Agency has not gone beyond its legal mandates in relation to Egypt as it has done in assessing Iran's nuclear programme.

To illustrate this, in its report of 2005, the BOG highlighted some problematic issues related to clandestine past nuclear activities and materials in Egypt including uranium conversion experiments, uranium and thorium irradiation experiments and preparatory activities related to reprocessing.[166] Although Egypt has failed several times to report its nuclear activities,[167] the Agency, from the relevant nuclear materials accounting reports it has received, has been able to verify all declared nuclear material in Egypt.[168] Thus, it concluded that there was 'no indication of the diversion of declared nuclear material in Egypt'.

[163] Joyner, 'Iran and the bomb' (n 5).

[164] Joyner, 'Iran's Nuclear Program and the Legal Mandate of the IAEA' (n 105).

[165] Joyner, 'Iran and the bomb' (n 5).

[166] IAEA, GOV/2005/9, 'Implementation of the NPT Safeguards Agreement in the Arab Republic of Egypt' (14 February 2005), Section A, 1, 2, and 3.

[167] IAEA, 'Safeguards Statement for 2008' (No Date), para 44.

[168] IAEA (n 171) para 45.

Therefore, the Agency was able to conclude for Egypt that all declared nuclear material remained in peaceful activities'.[169]

The Agency did not mention its extended legal mandate under the CSA. It did not include the verification of completeness and correctness of the Egyptian nuclear declarations as it has claimed with Iran's nuclear case. It is clear, then, as Egypt only has a CSA in force which was signed in 1982,[170] the Agency's approaches to this case have been within the legal limitations of the Agency under the CSA of Egypt.

The Agency's approach to Iran's case could be influenced by many factors including the domination of the major states on IAEA activities and the institutional and functional weaknesses of the IAEA. It seems that major states have been involved in pressing the Agency to follow certain procedures in dealing with different cases and to accept or rely more intensively on information provided by independent sources and publish it as sufficient evidence because of the Iranian government's refusal to cooperate with the IAEA.[171]

Indeed, under the era of the current Director General, the Agency is different from the one that existed under his predecessor. In Elbaradie's era, the Agency received information about the PMD of Iran's nuclear programme. However, this Director did not pay great attention to the allegations about Iran's nuclear programme as there were no clear sources or chain of custody for the provided documentation, or date of issue or anything else that could establish its authenticity.[172] He sought a diplomatic solution for this case.[173]

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[169] ibid para 47.

[170] IAEA, 'Agreement Between the Arab Republic of Egypt and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons', INFCIRC/302, (01 July 1982).

[171] George Jahn, 'UN Nuke Agency's Iran Probe Driven by US-Led Intel' (24 May 2013) AP The Big Story <http://bigstory.ap.org/Article/un-nuke-Agencys-iran-probe-driven-us-led-intel> accessed 02 February 2015.

[172] Robert Kelley, 'Nuclear Arms Charge Against Iran Is No Slam Dunk: Robert Kelley' (10 January 2012) Bloom Berg View <http://www.bloombergview.com/Articles/2012-01-11/iran-nuclear-weapons-charge-is-no-slam-dunk-commentary-by-robert-kelley> accessed 13 February 2015.

However, the current Director-General, Amano, is following an approach which is in sharp contrast to that followed by his predecessor.[174] He has accepted documentation from adversarial sources to Iran[175] and surrounds himself by a few people who have the same attitude towards Iran, which has made the Agency echo the powerful states' positions in relation to the Iranian nuclear programme instead of being meticulous in implementing the CSA's terms and checking all evidence of the allegations about Iran's nuclear activities.[176]

What is worse is that the Agency has not worked in a professional manner in regard to Iran's nuclear case. The IAEA has claimed many times that Iran has not cooperated. In its 2015 report, the Agency stated that 'Iran has not provided explanations that enable the Agency to clarify the two outstanding practical measures, nor has it proposed any new practical measures in the next step of the Framework for Cooperation'.[177] To prove its readiness to co-operate and provide an explanation for all the questions concerned, Iran has requested all related evidence and documentation on which the allegations have been based.[178] However, the Agency has not submitted all the documents to Iran under the pretext that the Agency's policy of not handing over all the documentation was to force Iran to confess to its alleged nuclear activities.[179] In addition, the Agency received most of these documents electronically and it was not

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[173] Global Policy Forum, 'No Evidence Iran Building Nuclear Weapons' (28 October 2007) GPF <https://www.globalpolicy.org/component/content/Article/156/26469.html> accessed 25 February 2015.

[174] Mohammad Sahimi, 'Atoms for Peace' [21 July 2013] 10 The Cairo Review of Global Affairs 60, 72.

[175] Yousaf Butt, 'Why Is the IAEA Getting Iran Wrong?' (14 November 2014), <http://nationalinterest.org/feature/why-the-iaea-getting-iran-wrong-11673?page=2> accessed 25 February 2015.

[176] Tariq Rauf and Robert Kelley, 'Assessing the IAEA 'Assessment' of "Possible Military Dimensions" of Iran's Nuclear Programme' (December 2015) Stockholm International Peace Research Institute <http://www.sipri.org/pdfs/final-assessment-iaea-december-2015> accessed 20 December 2015, 3.

[177] IAEA, GOV/2015/15, (19 February 2015), para 73.

[178] Gareth Porter, 'Resolving Nuclear Arms Claims Hinges on Iran's Demand for Documents' (01 March 2014) Inter Press Service <http://www.ipsnews.net/2014/03/resolving-nuclear-arms-claims-hinges-irans-demand-documents/> accessed 23 February 2015.

[179] Rauf and Kelley, 'Assessing the IAEA 'Assessment'' (n 176); ibid.

authorised to provide copies to Iran.[180] All evidence against Iran was accepted at face value and then all efforts were made to pin the blame on Iran.[181] All other possible evidence in favour of Iran or which might provide an explanation which contrasted with the Agency's opinion was ignored.[182] The Agency explained its ignorance and refusal of Iran's documents by saying that these documents were too limited and they focused only on deficiencies in form and format. They dismissed the main allegations on the basis of "forged" documents and "fabricated" data.[183] However, in fact its ignorance was because there was only one accusation which was of Iran developing nuclear weapons.[184]

Russia sees that the Agency should share its information and evidence and that it should be ready to reveal in a public forum the sources of this information and defend its credibility.[185] As a matter of law, every state has the right to defend itself against any false or alleged accusation.[186] Thus, the Agency cannot simply accuse Iran without giving the state the chance to study all allegations and any related evidence. Otherwise, the credibility and legitimacy of the Agency's decisions will be badly affected.[187]

Moreover, recently the Agency's attitude and approach has been influenced by the powerful states. It seems that these states, through their financial and political influence, drive the agency in ways that serve their national interests. For example, the British official, Antony Phillipson, told the American official that it was important not to permit the Agency's work plan. He continued

[180] Nima Shirazi, 'When Fact Becomes Opinion' (26 January 2013) Foreign Policy Journal <http://www.foreignpolicyjournal.com/2013/01/26/when-fact-becomes-opinion-half-truths-non-truths-and-the-phony-objectivity-of-the-associated-press/> accessed 23 February 2015.

[181] Rauf and Kelley 'Assessing the IAEA 'Assessment'' (n 176).

[182] Fredrik Dahl 'U.N. nuclear watchdog dismisses Iranian offer of site access' (11 December 2014) Reuters <http://mobile.reuters.com/Article/idUSKBN0JP1RM20141211?irpc=932> 15 February 2015.

[183] IAEA (N 1) Annex (A) para 8.

[184] Rauf and Kelley 'Assessing the IAEA 'Assessment'' (n 176).

[185] See footnote (n 123). 7.

[186] ibid.

[187] Jonathan Tirone, 'IAEA Focus on Iran's Parchin Site May Undermine Monitors' (16 January 2013) Bloom Berg <http://www.bloomberg.com/news/Articles/2013-01-16/iaea-focus-on-iran-s-parchin-site-may-undermine-monitors> accessed 23 February 2015; Jahn (n 171).

arguing that the Agency's plan would interfere with the agenda of their countries, especially since the Agency has recently become "naive" in dealing with Iran's nuclear programme.[188] Such control and influences make the Agency become more of a political body than a technical international organization. It has rendered the Agency a politicized instrument in the hand of superpower states who wish to achieve their national interests and agenda.[189] It is, in fact, shifting away from its true role as a technical organisation for counting nuclear materials to doing a broader job of assessing the entire nuclear programme of states and investigating their nuclear related activities.[190]

Rauf and Kelley[191] argue that the Agency is a technical organisation that has a very small team of experts to carry out the nuclear materials accountancy involved in the timely detection of nuclear materials diverted to nuclear weapons. This team is not familiar with nuclear-related activities or the development of nuclear weapons. For example, despite the fact that the materials were under the IAEA seal and monitored since 2003,[192] the Agency reported in 2011 that its measurement of nuclear materials at the Jabr Ibn Hayan Multipurpose Research Laboratory (JHL) was 19.8 kg less than the operator's declaration of 270.7 kg.[193] The Agency continued by saying that it is working with Iran to try to resolve this discrepancy after receiving a letter from Iran dated 2 November 2011 providing additional information on this matter.[194]

As soon as the Agency issued that report, governmental officials and the media declared their positions and the potential military scenarios for the missing uranium. Glyn Davies,[195] USA Ambassador to the IAEA, accused Iran of a

[188] Shirazi (n 180).

[189] Jahn (N 171).

[190] Butt (n 175).

[191] Tariq Rauf and Robert Kelley, 'Nuclear Verification in Iran' (September 2014) Arms Control Association <http://legacy.armscontrol.org/act/2014_09/Features/Nuclear-Verification-in-Iran> accessed 06 February 2015.

[192] IARA, GOV/2011/65, footnote 40.

[193] IAEA (n 1) para 49.

[194] ibid.

[195] Fredrik Dahl and Sylvia Westall, 'USA concerned about uranium "discrepancy" in Iran' (18 November 2011) Reuters <http://www.reuters.com/Article/2011/11/18/us-nuclear-iran-usa-idUSTRE7AH1CL20111118> accessed 04 February 2015.

"provocative expansion" of its nuclear activities and voiced concerns over some nuclear material which may have been diverted to suspected nuclear weapons' development. He said that the Iranian government has covered attempts to develop undeclared pathways for the production of nuclear material and work on nuclear weapons technology. These attempts are part of the puzzle that the IAEA is piecing together to prove the nuclear weapons related activities of Iran.[196] On the other hand, the associated media made it headline news that Iran has carried out nuclear weapons' experiments.[197] They reported that the missing nuclear materials could have been used at the Parchin site, Fordow plant, or could be used in a nuclear bomb.[198]

Ironically, after all these accusations from officials and the media, the IAEA reported in August 2012 that 'following further analysis and measurement of the relevant material by the Agency and evaluation of clarifications and corrections provided by Iran, the Agency has been able to reduce its initial estimate of the discrepancy'.[199] However, the case has not been officially resolved and the two parties 'have agreed to conduct further analysis with a view to resolving the discrepancy'.[200]

6.7. Conclusion

The legal analysis carried out in this chapter reiterates that the IAEA statute grants the Agency the character of an international technical organisation to monitor and verify fissile materials within state members' territories. Under this statute, the Agency is authorised to sign bilateral safeguards agreements with state members. The CSA is a bilateral treaty which allows the Agency to verify the correctness of nuclear fissile materials. The Agency does not have the legal authority to verify the completeness of the nuclear fissile materials of state members. This authority can only be obtained by bilaterally signing and

[196] ibid.

[197] Rauf and Kelley 'Assessing the IAEA 'Assessment'' (n 191).

[198] Michael Adler, 'U.N. Inspectors Seek 'Smoking Gun' In Iranian Nuclear Program' (19 December 2011) Breaking Defense <http://breakingdefense.com/2011/12/u-n-inspectors-seek-smoking-gun-in-iranian-nuclear-program/> accessed 04 February 2015.

[199] IAEA, GOV/2012/37, (30 August 2012), para 49.

[200] ibid.

bringing into force an AP or another subsidiary agreement with its members. Therefore, arguing that the Agency has the authority to search for undeclared nuclear fissile materials in a manner outside the scope of a safeguards agreement is not in accordance with the correct legal understanding held by state members and it degrades the credibility and unbiased character of the Agency.

Therefore, for more credibility, it is better for the Agency to implement in good faith the obligations of the safeguards agreements and stick with the legal limitations of the CSA. For more efficiency and to increase its legal limitations, states should be urged to sign and bring into force AP and subsidiary agreements.

The criticisms made of the Agency in this chapter do not mean that it is a futile and unimportant body. On the contrary, the IAEA is an important international technical organization which has done much in the field of nuclear proliferation. What has been discussed in this chapter is about increasing its positive influence by taking on board constructive criticism to make necessary changes to its role and approach. These criticisms are important because it is noticeable that recently the Agency has shifted its authority increasingly beyond its true authority and mandate. This is demonstrated by the Iranian nuclear case.

The IAEA's approach to Iran's nuclear case is irresponsible and serves to generate misleading facts. The Agency uncritically deludes the status quo of Iran's nuclear case. Directing endless questions to Iran over its nuclear programme under the pretext of seeking the truth has led to nothing but proving that these questions have been as procedural weapons used by the Agency to hide the real truth and reveal what the influential states would prefer to believe.

7. Iran's Right to Access Nuclear Technologies for Peaceful Purposes

7.1. Introduction

The use of nuclear energy for peaceful purposes under Article IV[1] of the Nuclear Non-Proliferation Treaty (NPT) is the most controversial and debatable issue in the context of the interpretation of the NPT principles. The controversy is not about whether Article IV of the NPT guarantees a right for states to enjoy and benefit from nuclear energy; rather, the debate is about the extent to which this article grants states access to nuclear technologies. These concerns and debates reach a peak when a Non-Nuclear Weapons State (NNWS) demands full access to nuclear technologies as is coded in the Article.

George Tenet, Director of the Central Intelligence Agency (CIA) in the US, said that the difference between enriching uranium for peaceful purposes and producing Highly Enriched Uranium (HEU) for weaponry purposes is only a matter of time and intention, not technologies.[2] Therefore, it is very well known that when a state possesses a nuclear reactor for civilian purposes, it has the basis from which to develop its nuclear weapons programme into a military phase.

Based on the above understanding, Iran's nuclear programme and its efforts to possess uranium enrichment and fuel cycle capabilities have concerned the international community. Therefore, the International Atomic Energy Agency (IAEA) and United Nations Security Council (UNSC) have accused Iran of breaching its obligations and have demanded that it suspend all its nuclear activities including uranium enrichment.[3]

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[1] NPT, Art. IV.

[2] Alice Slater, 'The "Inalienable right" to Peaceful Nuclear Power: A Recipe for Chaos' in Richard A Flak and David Krieger (eds), *At the Nuclear Precipice: Catastrophe or Transformation* (Palgrave Macmillan 2008) 58.

[3] Joyner, *International Law and the Proliferation of Weapons of Mass destruction* (OUP 2009) 52.

Thus, this chapter focuses on Iran's right to access nuclear technologies and whether or not this state has exceeded its legal limitations under Article IV by acquiring full possession of uranium and fuel cycle facilities.

In doing so, the chapter analyses different governments' interpretation of Article IV of the NPT, primarily relying on statements and official speeches that have been provided by states to formal meetings and conferences. The next part sheds light on the legal interpretation of Article IV of the NPT. It analyses the legal nature and the scope of this article. The arguments in this part are to see whether the restrictions and limitations implemented by NWSs over the terms of this right are legally appropriate to the legal essence of the treaty its objectives. Then the chapter moves on to examine Iran's nuclear activities in the context of Article IV and investigates how the coalition, particularly the USA, has approached and dealt with Iran's inalienable rights. Finally, it concludes that Iran and all NNWSs have a sovereign right to access nuclear technologies including uranium enrichment, fuel cycles and nuclear research and development. No state or organization can hold them back from exercising these rights. NWSs should avoid bilateral interpretation of the NPT principles and should stop dictating to NNWSs what it is allowed and what it is not, especially in cases where the law is very clear.

7.2. The Scope and Applications of Nuclear Energy and Technologies

Nuclear energy plays a significant role in enriching our life as it has brought about many useful changes in many fields, such as in medicine, agriculture, outer space, electricity, opening a channel in a mountain and fusion research. However, the dual-use nature of this technology is behind all of the difficulties in regulating nuclear energy through international legal sources.[4]

Nuclear fission is a nuclear reaction which splits or fissions atoms. There are many elements that can be split through fission. However, what concerns us in this context are two elements: isotopes of uranium-U235 and Plutonium-P239.

[4] Joseph M Siracusa, *Nuclear Weapons: a Very Short Introduction* (OUP 2008) 3-10.

These two elements are the principle elements that are used in nuclear reactors and nuclear weapons.[5]

The purity percentage of the fission materials (U-235 or P-239) forms the main difference between critical mass that is being used for military purposes and that which is being used in nuclear reactors for civilian purposes. This means that if the critical mass consists of 85-90% pure U-235, it is regarded as highly enriched uranium and of weapons grade. If this percentage is less than 85%, but it is higher than 20%, the critical mass is sufficient for producing crude weapons, the uranium in this situation is categorized as HEU and it is considered to be weapons usable. Lower than 20% purity of the uranium in a critical mass is considered as Low Enriched Uranium (LEU), and this is typical of uranium used in nuclear reactors for civilian purposes.[6] Accordingly, the only difference for military or civilian uses is the purity percentage of the uranium and the duration of the process of creation that is applied to the explosive uranium. This lack of distinguishability, particularity of uranium enrichment, forms the issue of most concern for governments and proliferation experts.[7]

What is important from the foregoing explanation is that, from a legal perspective, nuclear enrichment and fuel cycles are permissible within the NPT under Article IV and carrying them out does not constitute a breach to the NPT as long as the enrichment percentage of the uranium is within the legal limit which is less than 20%.[8] In other words, enriching uranium on its own territory by any state is a legal activity and is guaranteed by Article IV of the NPT if the enriched uranium is still classified as LEU. If a NNWS enriches uranium above 20%, its nuclear activities are considered as an NPT violation *per se*. Thus, a state such as Iran, which enriches or stockpiles enriched uranium up to 19.75%

[5] Ian Bellany, *Curbing the Spread of Nuclear Weapons* (Manchester University Press 2005) 5-12.

[6] Elli Louka, *Nuclear Weapons, Justice and the Law* (Edward Elgar 2011) 80-95.

[7] Joseph Cirincione, *Bomb scare: The History and Future of Nuclear Weapons* (Columbia university Press 2008) 7-11.

[8] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 52.

on its own territory, is exercising a right within its legal limitations. It is producing or stockpiling LEU, which is legally permissible.[9]

7.3. States' Interpretations of their Right to Access Nuclear Technologies

Up to the present day, it seems that states are divided in how they interpret the right to enrich uranium and fuel cycle that is coded in Article IV of the NPT. For some states, mainly the NNWSs, the inalienable right of Article IV is a *per se* right for all states.[10]

Most of these states see Article IV as a legal document that sets up definitive rights for all states. Ahmed Fathalla, on behalf of the Arab league, said that the League reaffirms the rights of all states to use and access nuclear energy for peaceful purposes.[11] In the same context, Malaysia reaffirmed its understanding of the rights coded in Article IV. It said that this Article guarantees an inalienable right to 'develop research, production and use of nuclear energy as well as the right to participate to the fullest possible exchange of equipment, materials and technologies for peaceful purposes, in conformity with respective safeguards agreements'.[12] Thus, Malaysia does not only reaffirm the rights of Article IV; rather, it determined the scope and activities that are guaranteed under this Article. From its interpretation, all states should be provided with full access and support for their nuclear programme.

In fact, many states have tried to clarify the mandatory legal enforcement power contained in the terms of Article IV. They translate and give these terms the character of sovereign rights that are possessed by states and from which no one

[9] David Albright and Christina Walrond, 'Iranian Production of 19.75 Percent Enriched Uranium: Beyond its Realistic Needs' (15 June 2012) Institute for Science and International Security <http://isis-online.org/uploads/isis-reports/documents/Twenty_percent_production_15June2012.pdf> accessed 20 April 2015, 2.

[10] Henry Sokolski, 'Nuclear Policy and the Presidential Election' [2008] 21 The New Atlantis 3.

[11] Statement of Ahmed Fathalla, the Permanent Observer of the Arab League to the United Nations at the general debates of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons between 27 April to 22 May 2015, New York, 30 April 2015, 2.

[12] Ramlan Ibrahim, Permanent Representative of Malaysia to the United Nations at the general debates of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons between 27 April to 22 May 2015, New York, 30 April 2015, para 14.

can detract. The Non Aligned Movement (NAM) in their statement to the 2014 Preparatory Committee 'emphasizes the significance of full, effective and non-discriminatory implementation of article IV of the Treaty on the inalienable right of all the parties', which 'constitutes one of the fundamental objectives of the Treaty'.[13] Every state to the treaty has 'a sovereign right to define its national energy and fuel-cycle policies, including the inalienable right to develop, for peaceful purposes, a full national nuclear fuel-cycle'.[14] These quotations assert that the NAM claims a full implementation of the rights of Article IV in its broad interpretation and without any discrimination between states, including NWSs and NNWSs. Consequently, states' decisions in this regard must be respected, and concerns related to nuclear proliferation must not in any way restrict the inalienable right of states.[15] This attitude has also been adopted by Iran. It said that all NPT review conferences have reaffirmed the inalienable right of Article IV as sovereign. This 'requires full compliance of all states in 'promoting the peaceful uses of nuclear energy in all its aspects and their right to participate in the fullest possible exchange of equipment, materials and scientific and technological information'.[16]

With an understanding that full access to nuclear technologies is permitted, some states criticize the restrictions implemented by the Nuclear Suppliers Group (NSG) on nuclear export to NNWSs.[17] These restrictions are certainly not

[13] H.E. Mr. Marty M. Natalegawa, Minister of Foreign Affairs Republic of Indonesia on behalf of the Non-Aligned Movement States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons at the general debate of the Third Session of the Preparatory Committee for the 2015 Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 28 April 2014, 3.

[14] ibid.

[15] ibid.

[16] Statement by H.E. Mr. Hamid Baeidinejad Director General for Political and International Security Affairs, Ministry of Foreign Affairs of the Islamic Republic of Iran, at the Third Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 30 April 2014, 3-4.

[17] With the increased demand for nuclear energy by many states since the 1970's and the nuclear test performed by India in 1974, the NSG has met to consider nuclear sharing and to put together guidelines for nuclear participation and facilitation policies. The NSG has agreed provisions related to safeguards, nuclear non-proliferation, and physical security and conditions for nuclear equipment, materials, or technologies. Most importantly, they agreed to (A) apply restraints and restrictions on the export of enrichment, reprocessing, and heavy water production; (B) encourage restoring to multilateral nuclear enrichment and reprocessing, by creating a multilateral fuel bank, if the progress of these activities in national facilities were of concern; (C) require the recipient state to sign an additional protocol with the IAEA as a condition of nuclear

in harmony with the objective of the treaty, and therefore, they lack legitimacy. One of these states is Cuba who argues that such restrictions have abbreviated the scope of Article IV, and that these restrictions are a 'violation of the treaty and should cease'.[18]

Following from the above, we can conclude that most of the NNWSs clearly regard Article IV as a legal document containing normative rules. These norms impose mandatory obligations upon all states, particularly NWSs as they have the most advanced nuclear technologies, to provide assistance and access to nuclear technologies in the field of nuclear energy for peaceful purposes. The extent of this assistance and access includes uranium enrichment, nuclear fuel cycle and related activities, research and development, and the exchange of information, scientists, equipment and technologies.

Contrary to the NNWSs' interpretations, the NWSs see Article IV as a commitment for them to provide nuclear technologies and assistance, but it does not constitute any legal binding obligation on them.[19] They have seen this denial as the best way to promote and enhance nuclear non-proliferation.[20]

The general understanding of Article IV, at least up to the end of 2008, between the NWSs throughout was that this Article does not constitute a fundamental right or, at least, does not grant an unconditional right. Most of them denied the existence of the rights of full access to nuclear technologies as an inalienable right to all states. Rather, they correlated the use of the right of Article IV of the

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sharing; Ian Anthony, Christer Ahlstrom, and Vitaly Fedchenko, 'Reforming Nuclear Expert Controls the Future of Nuclear Suppliers Group' (2007) Stockholm International Peace research Institute, Report No 22 <http://books.sipri.org/files/RR/SIPRIRR22.pdf> accessed 25 February 2012, 4-6.

[18] Christopher Ford, 'Nuclear Technology Rights and Wrongs: The Non-proliferation Treaty, Article IV, and Non-proliferation' in Henry Sokolski (ed), *Reviewing the Nuclear Non-proliferation Treaty* (May 2010) <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB987.pdf> accessed 11 November 2011, 9.

[19] ibid.

[20] John Simpson, 'Is the Nuclear Non-Proliferation Treaty fit for purpose?' (August 2011) Nuclear Disarmament and Non-Proliferation Towards 2015 – UNA-UK Briefing Report No. 1, United Nations Association of the UK, <http://www.una.org.uk/sites/default/files/Is%20the%20Nuclear%20Non-Proliferation%20Treaty%20Fit%20For%20Purpose%20-%20Professor%20John%20Simpson.pdf> accessed 15 April 2015, 14.

NPT with the condition of compliance with international obligations, specifically, with the obligations of Articles I and III of the NPT. Put in a different way, their understanding of the rights of Article IV up to 2008 was based on the concept that Article IV rights are secondary or subsidiary commitments to the other rights and obligations of the NPT.

For example, the USA had misguidedly read the inalienable right of Article IV in such a way that someone could assume that 'the United States does not think that Article IV creates or describes any sort of "right" to specific technologies irrespective of proliferation risk'.[21] It categorized the right for peaceful purposes as a 'loophole which has been abused by states, such as North Korea and Iran. This Article allows states to produce nuclear materials that can be used to build bombs under the cover of civilian nuclear programs.[22] France and Russia said the provisions of Article IV are not unconditional.[23] Rather, they are restricted and, due to the increased number of states interested in nuclear energy, a state building its own nuclear enrichment facilities is a complicated process in terms of many aspects.[24]

The period after 2008 has seen a slight shift in the positions of NWSs with regards to their interpretation of Article IV. It seems that the NWSs have adopted, to some extent, a more balanced understanding of the three pillars of the NPT[25] and a closer to correct legal interpretation of Article IV.[26] The trends have changed in such a way that they have recognized the right of states to access nuclear technologies. However, they do not admit or recognise full

[21] Ford (n 18) 13.

[22] Robert Einhorn, 'President's Bush's Non-proliferation Proposal and Implication for the United Nations' (15 March 2004) UNA-USA Policy Brief No1, <http://www.unausa.org/Document.Doc?id=246> accessed 21 December 2011, 1-2; Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (OUP 2011) 43.

[23] François Rivasseau, Permanent Representative of France at the Conference of Disarmament at the general debates of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 05 May 2005, New York, 4.

[24] Statement by H. E. Ambassador Anatoly Anatonov, Head of the Delegation of the Russian Federation at the Second Session of the Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 28 April 2008, New York.

[25] Simpson (n 20) 14.

[26] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* (n 22) 109.

access; rather, it is restricted to certain stipulations and terms. Russia, for example, consistently 'promotes a wide access to the benefits of peaceful nuclear energy for the NPT States Parties as well as the development of international cooperation in this area'.[27] However, it continued discussing 'the non-proliferation dimension of the IAEA's work is the key opening the door to all the benefits of the peaceful atom for non-nuclear states. Therefore, we fully support the universalization of the Additional Protocol to the Safeguards Agreement'.[28] Accordingly, the Russian government stipulate that, to enjoy their rights under Article IV, states should comply with the rules of the IAEA and sign the Additional Protocol with the Agency. China holds that 'every country should be allowed to enjoy its full right to the peaceful use of nuclear energy while fulfilling earnestly its nuclear disarmament and non-proliferation obligations'.[29] For France; 'all states which scrupulously meet their international obligations and pursue civil nuclear programmes in good faith must be able to benefit from the peaceful applications of the atom'.[30] All NWSs, in their statement as Permanent Members of the UNSC (P5), have reaffirmed the right of NPT parties to pursue peaceful use and they have committed themselves to continuing to broaden the access of states to nuclear technologies. Yet, they 'strongly support measures to assure access to nuclear fuel and they note the importance of establishing the IAEA low-enriched uranium (LEU) bank'.[31]

These statements reveal that the NWSs began recognising that access to nuclear technologies for peaceful purposes was a legal right granted to all states without

[27] Statement by Mikhail I Uliyanov, Head of the Delegation of the Russian Federation at the first session of the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 29 Aril 2014, 7.

[28] ibid 5.

[29] Statement by H.E Mr. Wang Quo, Director General of the Department of Arms Control and Disarmament of MFA at the general debate in the Third Session of the Preparatory Committee for the 2015 NPT Review Conference, New York, 28 April 2014, 4.

[30] Statement by Mr Jean-Hugues Simon-Michel Ambassador, Permanent Representative of France to the Conference on Disarmament, Head of the French Delegation at the Third Session of the Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference, 28 April 2014, 7.

[31] Statement by the People's Republic of China, France, The Russian Federation, the United Kingdom, and the United States of America, at the general debates of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 30 April 2015, para 20-21.

discrimination. However, notably, none of the NWSs define these rights as sovereign rights of states. Rather, they see them as rights conditioned by compliance with international nuclear obligations; namely, those obligations set up by the IAEA such as the IAEA safeguards agreements and additional protocols. It seems that they want from these stipulations to keep NNWSs away from building their own nuclear enrichment facilities, and that they want to circumscribe their right to fuel cycle facilities. This can be observed from the proposal to create an international fuel bank to supply enriched uranium.

The proposal to create a fuel bank originated from a speech by President Obama in Prague in 2009. In that speech, he indicated to create a new treaty that would dedicated to stop the production of weapons-grade materials intended to use in nuclear weapons. In addition, he called to build a new framework for civil cooperation, including an international nuclear fuel bank.[32]

Thus, the American administration evidently believes that there is no need for NNWSs to build their own indigenous fuel cycle capability. Relatively, in an effort to confront nuclear proliferation, NNWSs should limit their nuclear fuel sources to international sources. This limitation would obviously deprive NNWSs from fully exercising their rights under Article IV. Indeed, as a matter of law, NWSs' understanding and interpretation of the rights of Article IV of the NPT are inconsistent with the legal meaning and objective of the Article.

7.4. The Legal Interpretation and Analysis of Article IV

It is worth mentioning at this point that Article IV was not included in the first draft of the treaty. According to Shaker,[33] it was proposed by Mexico and added to the agreed drafts of 1967 at the insistence of the NNWSs. So, it can be said that this Article was included in the treaty as a "sweetener"[34] from the NWSs to encourage the NNWSs to give up the possession of nuclear weapons and ratify

[32] Barak Obama, 'remarks by President Barak Obama'(Prague, 5 April 2009) The White House Office of the Press Secretary <http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/> accessed 11 December 2011.

[33] Mohamed I Shaker, *The Nuclear Non Proliferation Treaty: Origin and Implementation 1959-1979* (Vol 1, Oceana Publication 1980) 275-77.

[34] Slater (n 2) 58.

the treaty. For their part, there was a desire among the NNWSs to attain a guarantee from the NWSs on their right to access nuclear technologies for peaceful purposes, and to bind these states to assisting them in developing their nuclear civilian programme.[35] Therefore, these desires were exemplified in two provisions contained in Article IV.

Reading this Article reveals that it contains the most controversial pillar of the NPT, which is the right of states to access nuclear technologies for peaceful purposes.[36] This controversy arises, on the one hand, because it constitutes an inalienable right under which states can satisfy their desire to possess nuclear energy for peaceful purposes and, on the other hand, because it reflects the desire of all states to prevent any further nuclear proliferation by correlating the use of these rights with the implementation of Articles I, II, and III of the NPT. So, it is not very difficult to understand why the two provisions of this Article, which will be interpreted below, have been seen as a loophole[37] of the treaty and have been under considerable criticism.

7.4.1. The Legal Interpretation of the Provision (1) of Article IV

In previous chapters, interpreting Article IV has been carried out in accordance with the interpretive methods of Articles 31 and 32 of the VCLT. Consequently, the interpretation of this Article should be accomplished in accordance with the plain ordinary meaning of its text within the context of the treaty and in light of the objective and purposes of the treaty.

Provision 1 of this Article identifies the right of states to access nuclear technologies as "inalienable". Theoretically, inalienable rights mean those rights

[35] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 44.

[36] NPT, Art. IV.

[37] Giorgio Franceschini, 'The NPT review process and strengthening the treaty: peaceful uses' (February 2012) EU Non-Proliferation Consortium, Non-Proliferation Papers No 11, <http://www.sipri.org/research/disarmament/eu-consortium/publications/non-proliferation-paper-11> accessed 16 April 2015, 12; Einhorn (n 22) 1-2.

which cannot voluntarily or involuntarily be alienated, transferred, or subject to forfeiture.[38]

The concept of inalienable right is a very rare term used in international law.[39] This term is based on the *jus cogens*, which corresponds to the sovereign rights of states and fundamental norms of international policy.[40] Article 53 of the VCLT defines *jus cogens* as a 'norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[41] Therefore, stating that states have an inalienable right means that this right has *jus cogens* and cannot be surrendered, sold, or transferred to another state party by any individual party.

This definition suggests that, when the drafters of the NPT chose such strong language in the text of Article IV, it seems that they meant to affirm the recognition of deep legal and underogable rights of states.[42] Semantically, this recognition is analogous to the recognition of the "inherent right" of states to self-defence of Article 51 coded in the United Nations Charter (UNC). This right is, undoubtedly, recognised as one of the sovereign rights of states which no state or international organisation can seize or override.[43] It constitutes a norm of *jus cogens*, and thus, only other norms having the same character would impair its exercise.[44] Therefore, this is a peremptory right, not because it was coded in the UN, but rather, because it is a fundamental right that states hold by their

[38] John P Grant, and J Craig Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 275.

[39] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* ((n 22) 80.

[40] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation under the U.N. Charter' (2005) 3 (1) Santa Clare Journal of International Law 72, 72.

[41] VCLT, Art. 53.

[42] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* ((n 22) 80-81.

[43] Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 (1) European Journal of International Law 59, 72.

[44] Jean-Marc Thouvinen, 'Self-Defence' in James Crawford, Alain Pellet, Simon Olleson, and Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010) 465.

virtue of their statehood. So, it is a sovereign right that existed before the creation of the UNC, and this charter merely serves to reaffirm its existence.

As the inherent right of self-defence in the UNC has such a strong legal character and deep legal meaning, the rights of Article IV of the NPT should also convey a particular legal meaning. It cannot be meaningless that both the UNC and the NPT describe certain rights in their text as inherent or inalienable. These two rights were designated as conventional rights 'inuring to all states, but with little explanation as to the jurisprudential meaning and effect of this designation'.[45] Each one is a separate sovereign right of states and forms a body of "*jus cogens*" norms. Subsequently, with this interpretation, they cannot be derogated or violated by general law rules, international law and treaties, or by national, regional, and international organisations.[46]

Depending on the above interpretation, the right of access to nuclear technologies is a sovereign right that must be respected by all states individually or collectively through international organisations regardless of whether the states have nuclear power or not. This conclusion, in fact, corresponds to the common understanding between all states that all technologies and scientific achievements, including nuclear energy, are the heritage of all human beings, and this legacy is considered to be an unchangeable or undeniable right.[47] It cannot be destabilized for any alleged reason. Thus, access to nuclear energy, as a delegate to the NPT conference affirmed, 'was inherent in its sovereign right to independent economic development, and was an essential attribute of national sovereignty and independence'.[48]

Accordingly, the arguments of the NWSs that the rights of Article VI were 'simply "colour language" designed to serve the political purpose of emphasizing that the drafters thought that the right somehow to take advantage

[45] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* ((n 22) 82.

[46] Dinah Shelton, 'International Law and Relative Normativity' in Malcolm D Evans (ed), *International Law* (OUP 2014) 150.

[47] Yeal Ronen, *The Iran Nuclear Issue* (Hart 2010) 9.

[48] Shaker (n 33) 294.

of nuclear know-how for peaceful purposes was a very important one'[49] do not mean anything. Also, arguing that the "*inalienability*" of this Article 'was a rhetorical device employed to reassure NNWSs who feared the curtailment of their nuclear programmes,[50] does not give the justice and legal meaning of Article IV. Rather, they are misleading and obfuscating the sovereign right of states to use nuclear energy and serve the political agenda of NWSs. All states should respect these rights and should not act in any way that would prejudice them. Otherwise, their acts would constitute violations of international law and would be considered as internationally wrongful acts which provoke international responsibility according to Article 1 of the Responsibility of States for Internationally Wrongful Acts (RSIWA) 2001.[51]

Nevertheless, this does not mean that the use of these rights is unregulated. Rather, their usage is subject to two conditions. As Article IV states, these rights should be practiced 'without discrimination and in conformity with Articles I and II of this Treaty'.[52]

'Without discrimination' means that the rights of Article IV to access nuclear technologies for peaceful purposes, including nuclear research, develop, and production, are recognised to exist to signatory states without discrimination.[53] The discrimination referred to here is the recognition by the NPT of two categorised parties (NWSs and NNWSs). The assertion of 'without discrimination' by Article IV serves to affirm that the categorisation between NWSs and NNWSs is not applicable in the context of the rights of states to use nuclear energy in all its available applications.

The second condition provides that the exercise of these rights must be in conformity with Articles I and II of the treaty. From first glance, it seems that

[49] Ford (n 18) 57.

[50] Ronen (n 47) 9.

[51] Article 1 states that a 'very internationally wrongful act of a State entails the international responsibility of that State', RSIWA, Art. 1.

[52] NPT, Art. IV.

[53] Xinjun Zhang, 'The Riddle of "Inalienable Right" in Article IV of the Treaty on the Non-Proliferation Nuclear Weapons: International Ambiguity' (2006) 5 (3) Chinese Journal of International Law 647.

this condition is contradicted by the recognition of an inalienable right in the first part of the Article. It imposes limitations on this inalienable right by stipulating conformity with Articles I and II.[54] This insight has led some states to argue that the principles of Articles I and II take precedence over the principles of Article IV, which become subsidiary rights.[55]

However, this insight is far removed from the distinctive feature of the inalienable right. The stipulation of "conformity with Articles I and II" should be understood as terms forming 'a limited conventional exception'[56] on the rights of Article IV in the case of clear evidence that a NNWS is shifting its nuclear assistance for peaceful purposes, to which it is entitled and which is obtained under this Article, to be used in the production of nuclear weapons. In other words, it means that the right of Article IV is not recognised unless the state has safeguarded all its nuclear activities and facilities and has not in any way been involved in nuclear proliferation.[57] Violating these conditions would consequently mean that the state concerned could not claim its inalienable rights to peaceful use of nuclear energy. The stipulation of conformity with Articles I and II does not in any way cheapen the legal meaning and distinctive features of the inalienable right.[58] Rather, it enhances the achievement of the objectives and purposes of the NPT by asserting the interdependent implementation of its three main pillars.

Thus, in summary, provision 1 of Article IV of the NPT institutes a sovereign right for all states without discrimination between NWSs and NNWSs to access, develop, research, produce and use nuclear energy for peaceful purposes within its limited conventional exception of not violating nuclear non-proliferation obligations. The extent of this sovereign right is determined in the second

[54] Ford (n 18) 59.

[55] Zhang (n 53) 660-61.

[56] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 46.

[57] Robert Zarate, 'The Three Qualifications of Article IV's "Inalienable right"' in Henry Sokolski (ed), *Reviewing the Nuclear Non-proliferation Treaty*, May 2010 <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB987.pdf> accessed 11 November 2011, 226-27.

[58] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 46.

provision of the same Article. Thus, at this stage, it is important to focus on the nature and scope of this provision.

7.4.2. Legal Interpretation of the Nature and Scope of Provision (2) of Article IV

Provision (2) of Article IV contains an undertaking on the part of all states to provide and facilitate 'the fullest possible exchange' of nuclear technologies, materials, and information. Further, this provision codes that states, who are 'in a position to do so', are obliged to cooperate in contributing to further development of the applications of nuclear energy for civilian purposes, especially in the territories of NNWSs.

The word "undertake" linguistically means to give a formal pledge or lay oneself under obligation.[59] Thus, the ordinary meaning of Provision (2) reveals that all states, NWSs and NNWSs, are under a legally binding obligation to assist and exchange, as fully as possible, information and technologies in the field of nuclear energy, and especially in the territories of NNWSs.

The obligatory legal nature of this provision was rejected by some states in the negotiations on the NPT.[60] There are some commentators, such as Ford[61] and Scheinman,[62] who have based their refusal to accept the obligatory character of Article IV on these rejections, specifically of the Mexican proposal.

However, as Joyner[63] contends, the objection to the obligatory character of Article IV by some states, particularly the NWSs, and some commentators is

[59] Oxford English dictionary; Webster's New International Dictionary, (2nd edn, 1939) 2770.

[60] In the negotiation of the NPT, the Mexican Representative provided a proposal for Article IV containing the term "duty". He said that this term can and should be articulated as a legal obligation. However, this proposal was rejected by NWSs and some NNWSs with advanced nuclear power on the basis that the term "duty" is extensive and too sweeping and could be interpreted to the extent that NWSs must meet any nuclear request of NNWSs on the basis of that duty; Zhang (n 53) 660-61; Shaker (n 33) 328-9.

[61] Ford (n 18) 59.

[62] Lawrence Scheinman, 'Article IV of the NPT: Background, Problems, some Prospects' (7 June 2004) WMD Commission <http://www.wmdcommission.org/files/No5.pdf> accessed 14 February 2010.

[63] Joyner, International Law and the Proliferation of Weapons of Mass Destruction (n 3) 46-7.

groundless. According to Daniel, this argument is based on the scope of the obligation, not on the nature of its legally binding character. In addition, the preparatory works of the NPT are less important and have less relevance when it comes to the interpretation of Article IV. The language and pure meaning of the text of the provision, particularly the word "undertake", is more harmonised with the concept of establishing a legally binding obligation on all states. This obligation appears within the context of the clear legally binding nature of the whole treaty. Therefore, according to Articles 31 and 32 of the VCLT, if the meaning of the text of the provision in question is very clear, there is no need to refer to the preparatory works of the treaty to determine the meaning of this provision.

In terms of the scope of provision (2), this provision states that all members shall provide 'the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy'. It is clear that the articulation of provision (2) refers to a wide range of nuclear assistance and cooperation between all states as it states "the fullest possible exchange".

However, there is a contrary trend in the interpretation of provision (2), in that it has been argued that the scope of this provision should instead be interpreted in a narrow manner, whereby nuclear supplier states should retain discretion in the field of nuclear assistance and cooperation with peaceful nuclear programmes.[64]

Ford[65] maintains that the language in Article IV should be read as discretionary rather than mandatory and the phrase "fullest possible exchange" should be read in a modified rather than unrestricted manner. According to him, nuclear technology states should not continually supply nuclear technologies to the extent where they cannot supply any more. Rather, nuclear sharing must be

[64] For example, the USA said that 'we do not, however, interpret Article IV as meaning that the USA will be compelled to embark on any costly new program or as obliging the USA to meet all requests and demands. Neither do we construe Article IV as overriding the provision of the USA Atomic Energy Act, nor will it remove the discretion we have in determining the nature of our cooperative relationships with other countries, on a case by case basis'; Joyner, *Interpreting the Nuclear Non-proliferation Treaty* ((n 22) 82.

[65] Ford (n 18) 54.

limited and nuclear technology possessors should have broad discretion in nuclear sharing and transferring these technologies to other non-nuclear states.

In the context of interpreting provision (2) and determining whether it contains legal limitations on its scope or not, it clearly seems that the text of this provision makes no indication of a limit to the nuclear cooperation between states, either implicitly or explicitly; it only states that this must be in the field of peaceful nuclear applications. In other words, as Shaker[66] argues, the scope of provision (2) is not limited only to direct transfers of enriched uranium or nuclear fuel for nuclear plants. Rather, it includes the exchange of information, research, and technical design to facilitate the indigenous production of nuclear fuel in the territory of NNWSs. Thus, every state, without discrimination, has the right to possess a full indigenous nuclear fuel cycle and enrichment facilities.

Therefore, limiting the scope of provision (2) by giving states discretionary power is inconsistent with the legal interpretation, objectives and purposes of the NPT. This is because assuming that nuclear supplier states have discretionary powers in providing nuclear assistance for peaceful purposes would make this assistance and cooperation subject to any legal instrument created individually by these states[67] or conditional upon their national policies, whereas the obligations of NNWSs are absolute according to Article II of the NPT and as verified by the IAEA under Article III of the same treaty.[68] In this way, the balance between the three pillars of the NPT would be destabilised and would become biased and subjective. In addition, the NNWSs should be rewarded for forgoing the option to possess nuclear weapons. So, depriving states of their right to full access to nuclear energy would make them rethink their position and the benefits that they gain from signing and abiding by the NPT.[69]

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[66] Shaker (n 33) 330.

[67] Such as the NSG which assumingly contributes to nuclear non-proliferation by implementing two sets of guidelines for nuclear exports and nuclear-related exports; NSG, <http://www.nuclearsuppliersgroup.org/en/about-us> accessed 28 march 2016.

[68] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 48.

[69] Jonathan L Black-Branch and Dieter Fleck, 'Nuclear Weapons, Non-Proliferation, and Disarmament: A Comprehensive Audit of Relevant Legal Issues and International Concerns' in Jonanthan L Black-Branch and Derek Fleck (eds), *Nuclear Non-Proliferation in International Law* (Vol 1, Springer 2014) 12.

Under this interpretation, provision (2) creates a legally binding obligation on all member states. It compels nuclear technology-possessor states (including all states with nuclear energies regardless of whether these states have nuclear weapons or not) to participate and fully assist NNWSs in using nuclear energy for peaceful purposes, including using independent nuclear enrichment and fuel cycle facilities. For the NWSs to fulfil their obligations under Article IV, this researcher agrees with Joyner that the implementation of the principles of this Article must be based upon the rules of law. This implies that, to obtain the fullest possible nuclear exchange, a state must be a NNWS that has signed and ratified the NPT and that all its nuclear facilities and programmes are safeguarded and subject to IAEA monitoring.[70] If a state meets these key conditions and there is no positive evidence that it has been involved in producing or diverting nuclear materials for military purposes, nuclear assistance and the transfer of nuclear technologies and information for civilian and peaceful purposes should be fully available to that state at its request.[71]

Further, following on from the above interpretation and in the context of implementing Article IV, the Iranian nuclear case presents a good case study to illustrate the misunderstandings and suspicions of the coalition regarding the scope of Iran's nuclear rights. These are illustrated below.

7.5. Recognition of Iran's Right to Access Nuclear Energy for Peaceful Purposes

Since the revelation of Iran's nuclear programme, the coalition has sought to compel Iran to suspend all these activities by adopting resolutions to contain these activities, mainly uranium enrichment, nuclear research and development (R&D) and fuel cycle activities.[72] In its reports of 2015, the IAEA, contrary to the relevant resolutions of the Board of Governors and the Security Council,

[70] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 49.

[71] ibid.

[72] See, UNSC resolutions against Iran; UN, UNSC, S/RES/1696 (2006), S/RES/1737 (2006), S/RES/1747 (2007), S/RES/1803 (2008), S/RES/1835 (2008), AND S/RES/1929 (2010).

accused Iran of not suspending all of its enrichment related activities in the declared facilities referred to below'.[73]

Thus, essentially, the coalition demanded that Iran suspend activities which are recognised as legitimate and within the legal limitations of the NPT. In other words, the activities for which Iran has been sanctioned do not constitute a violation *per se* of the NPT or international law. This is confirmed by the USA Arms Control and Disarmament Agency. The Director of this agency said in 1986 that:

> It may be useful to point out, for illustrative purposes, several activities which the United States would not consider per se to be violations of the prohibitions in Article II. Neither uranium enrichment nor the stockpiling of fissionable material in connection with a peaceful program would violate Article II so long as these activities were safeguarded under Article III. Also clearly permitted would be the development, under safeguards, of plutonium fuelled power reactors, including research on the properties of metallic plutonium, nor would Article II interfere with the development or use of fast breeder reactors under safeguards.[74]

Thus, legally, it is incorrect to accuse Iran of breaching its nuclear obligations just for carrying out nuclear activities which were not originally prohibited by law. By the same token, the IAEA, the UNSC, or states individually cannot simply adopt resolutions requesting Iran to suspend nuclear activities. This is because, first of all, Iran is a member of the NPT and has a sovereign and inalienable right to access nuclear technologies. It is not a privilege or immunity granted by states. This is confirmed by the Iranian Foreign Minister, Zarif, who said that the right to use nuclear energy is not granted, and since it is not granted, it cannot be ceased.[75] Thus, the international community cannot deprive Iran of enjoying this right as long as its nuclear activities remain within the legal limitations of this right.

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[73] IAEA, GOV/2015/15, 19 February 2015, Section D, para 13.

[74] Sharon Squassoni, 'The Iranian Nuclear Programme' in Nathan E Busch and Daniel H Joyner (eds), *Combating Weapons of Mass Destructions the Future of International Nonproliferation Policy* (University of Georgia Press 2009) 295.

[75] Scott Lucas, 'Iran Video: Foreign Minister Zarif's YouTube Address on Eve of Nuclear Talks' (20 November 2013) EA World View, http://eaworldview.com/2013/11/iran-video-foreign-minister-zarifs-youtube-address-eve-nuclear-talks/> accessed 22 April 2015.

In addition, from a legal standpoint, it should be understood that these activities are not, in and of themselves, prohibited by the NPT or by international law rules.[76] There is no rule and no international principle which prohibits such activities. As long as there is the absence of such a prohibition, these activities cannot be prohibited. The reason for this is that the binding character of the rules of international law emanate from the sovereignty of states.[77] Restrictions upon sovereign states cannot be presumed as long as the acts of these states are not prohibited by international law.[78] This was confirmed by the Permanent Court of International Justice in 1927 when it issued the well-known *Lotus* principle. This principle states that 'whatever is not prohibited is permitted'.[79]

Therefore, this principle, in the field of nuclear proliferation, implies that Iran is free to engage fully in nuclear activities. This permissibility should be suspended only by prohibitive obligations of the treaty, and 'only to the extent that the prohibited activities are clearly delineated by the conventional obligation'.[80] Put another way, Iran can carry out nuclear enrichment, stockpiling of enriched uranium, and other related nuclear enrichment activities as long as these actions do not violate the conventional obligations of the treaty such as Articles I, II, and III,[81] or international law rules.[82]

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[76] Joyner, *Interpreting the Nuclear Non-proliferation Treaty* ((n 22) 82.

[77] Gilbert Guillaum, 'Dissenting Opinion of Judge Guillaum' ICJ, 'Legality of the Threat of Use of Nuclear Weapons' Advisory Opinion, I.C.J. reports Page 226, 08 July 1996, para 10, 269.

[78] Ole Spiermann, '*Lotus* and the Double Structure of International Legal Argument' in Laurence Boisson de Chazournes and Philips Sands (eds), *International Law, International Court of Justice and Nuclear Weapons* (CUP 1999) 132.

[79] Joost Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 150; Daniel Bodansky, 'Non Liquet and the Incompleteness of International Law' in Laurence Boisson de Chazournes and Philips Sands (eds), *International Law, International Court of Justice and Nuclear Weapons* (CUP 1999) 160.

[80] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (n 3) 82.

[81] Daniel H Joyner, 'Iran's Nuclear Program and International Law' (2013) 2 (2) Penn State Journal of Law & International Affairs 237, 289.

[82] This position has been adopted by the ICJ several times, for example, in the Asylum case of 1950 and the Nicaragua Case of 1986. In the Nicaragua case, the court stated that '[F]rom that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State'; ICJ, 'Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America)' 27 June 1986, para 265.

This was confirmed by the Russian government who declared that, although that they had been told by the IAEA that Iran 'will install next generation centrifuges; however, Iran is doing everything in line with their commitments under the Safeguards Agreement'.[83] Also, the IAEA, who is responsible for monitoring and verifying Iran's nuclear programme, said that:

> Since 20 January 2014, Iran has not produced UF6 enriched above 5% U-235 and all of its stock of UF6 enriched up to 20% U-235 has been further processed through down-blending or conversion into uranium oxide. All of the enrichment related activities at Iran's declared facilities are under Agency safeguards, and all of the nuclear material, installed cascades, and feed and withdrawal stations at those facilities are subject to Agency containment and surveillance.[84]

Accordingly, Iran or any other NNWS may engage in uranium enrichment and related activities that are legal as long as they submit to the inspection and verification of the IAEA, and do not intend to make nuclear weapons or nuclear devices.[85] Even though Iran, on some occasions, has shown its capability to produce fissionable materials and has intensified its nuclear enrichment activities, such behaviours cannot be legally considered a violation *per se*. This behaviour, in fact, is no more than a negotiating card used by the Iranian government to gain what it is in its interests.[86]

Contrary to the above, on behalf of the American Government, Wendy Sherman, who is the Undersecretary of State for Political Affairs and the senior USA representative to the nuclear talks with Iran said that its position with regards to Article IV was that this Article does not speak about the right of enrichment at all. Despite that some states have taken that uranium enrichment to be right,

[83] Russian Today, 'Iran's move to upgrade centrifuges is within legal limits – Lavrov' (31 January 2013) <http://rt.com/politics/russia-iran-nuclear-security-lavrov-167/> accessed 23 April 2015.

[84] IAEA, (n 73).

[85] Richard Butler AC, 'NPT: A Pillar of Global Governance' (2013) 2 (2) Penn State Journal of Law & International Affairs 237, 277.

[86] Russian Today (n 89).

USA does not take that position, it does not believe there is inherent right by anyone to enrichment.[87]

Therefore, it seems that, despite the nuclear talks with Iran having reached a historical Joint Comprehensive Plan of Action (JCPA)[88] and despite it having made significant concessions to its rights under Article IV,[89] the coalition, particularly the USA and its allies, look at the Iranian case from a discriminatory rather than from a legal perspective. George Bush said that 'the reason Iran must not be allowed to have nuclear weapons is, something to the effect of, *because of the kind of people they are'*,[90] Sherman,[91] in reference to Iran's nuclear case, said that 'deception is a part of the DNA'; the Iranian case constitutes 'a sui generis case, in many ways more dangerous than any country who has the ability to reprocess, enrich or has nuclear weapons or seeks to get nuclear weapons'.[92] Controversially, Israel, who has nuclear weapons but is not an NPT member, shares the same opinion as the USA and claims that Iran cannot be trusted and should not be permitted to have the capacity to make fissionable materials even for peaceful purposes.[93] In addition, President Obama said that his administration respects the right of the Iranian people to access nuclear energy

[87] William O Beeman, 'Does Iran Have the Right to Enrich Uranium? The Answer Is Yes' (31 October 2013) The Huffington Post <http://www.huffingtonpost.com/william-o-beeman/does-iran-have-the-right-_b_4181347.html> accessed 15 April 2015; Shaker (n 33) 251.

[88] USA Department of State, 'Parameters for a Joint Comprehensive Plan of Action Regarding the Islamic Republic of Iran's Nuclear Program' (02 April 2015) <http://www.state.gov/r/pa/prs/ps/2015/04/240170.htm> accessed 22 April 2015.

[89] including enriching uranium only up to 3.67%, cutting centrifuges from 19,000 to 6,104, and cutting its uranium stockpiles from 10,000kg to just 300kg despite the fact that the IAEA has reported that all Iran's uranium enrichment activities are safeguarded and monitored as mentioned earlier; ibid.

[90] Butler AC (n 85) 273.

[91] Flynt Leverett, and Hillary Mann Leverett, 'America's Lead Iran Negotiator Misrepresents USA Policy (and International Law) to Congress' (03 November 2013) Going to Tehran <http://goingtotehran.com/americas-lead-iran-negotiator-misrepresents-u-s-policy-and-international-law-to-congress> accessed 15 April 2015.

[92] This was her answer when she was asked whether Iran is more like Pakistan or North Korea, or more like Germany and Japan; Beeman (n 87).

[93] Jonathan Tirone, 'Iran's Nuclear Program' (20 April 2015) Bloomberg View <http://www.bloombergview.com/quicktake/irans-uranium-enrichment> accessed 20 April 2015.

for peaceful purposes.[94] However, the word "access" was interpreted as a phrase which was carefully chosen in contrast with "right".[95]

Obviously, the USA and its allies, as Butler[96] describes, deal with Iran's nuclear case on the basis that nuclear power states are the good guys who are protecting the proper implementation of international nuclear obligations and NNWSs who seek to legally exercise their rights under Article IV are the bad guys who should not be trusted as they would have violated their international nuclear obligations by seeking nuclear weapons. We could simply say that there is a pervasive view in coalition circles that nuclear activities are allowed for some states but not others. They are legal and permitted for their allies, but they are prohibited and a source of international concern when it comes to other states. This view emanates from the unjustified understanding that the NPT is essential to prevent any further spread of nuclear weapons and to achieve disarmament which is factually incorrect.

7.6. Conclusion

This chapter has presented a legal interpretation of Article IV of the NPT and its legal scope. It demonstrates that this Article constitutes a sovereign right for all states to access nuclear technologies for peaceful purposes. From this point of view, recognition of the access to nuclear energy as an inalienable right by the NPT and the signature and ratification of this treaty by over 190 state members, strongly imply that this is accepted as a fundamental right for all members of the treaty and it should be respected by all states individually or collectively by international organisations. From this viewpoint, no state or international organization can impose limitations or act in a seriously prejudicial way if a state is exercising its inalienable right under Article IV. There is no discrimination or limitation involved in this inalienable right. Otherwise, this is an internationally wrongful act that mirrors state responsibility for wrongful

[94] Anita Kumar, 'Obama talked to Iran's Rouhani about nuclear program' (27 September 2013) McClatchy DC <http://www.mcclatchydc.com/2013/09/27/203494/obama-talked-to-irans-rouhani.html> accessed 15 April 2015.

[95] Beeman (n 87).

[96] Butler AC (n 85) 274.

acts. The imposed limitations or the denial of the sovereign character of this right is no more than unilateral interpretation of the NPT conducted by and in favour of the NWSs at the expense of NNWSs. It is an interpretation that only serves their interests, without reflecting and taking into account the interests of the NNWSs and their ratification. Hence, it might make NNWSs feel that their nuclear rights are prejudiced and would simply push these states to disobey the international community's will and challenge legal nuclear limitations.

Accordingly, it seems that despite Iran conceding, freely or under persuasion, its right to enrich uranium and reduce its capability as is clear from the JCPA, there is no legal justification for demanding that Iran hold or limit its nuclear activities. This is because Iran, like any other NNWS, has the right to fully access nuclear technologies. This means that this state is legally allowed to carry out uranium enrichment, fuel cycle, R&D, and any other related activities in order to use them for peaceful purposes.

Again, the dispute over the scope and legality of Iran's nuclear activities is due to the omissions of the NPT and to misunderstandings related to its objectives and purposes. The situation worsens when one considers that the NPT has no effective enforcement mechanisms in cases of non-compliance with its provisions. The only available enforcement mechanisms are the targeted sanctions and measures which have proved to be insufficient in the field of nuclear proliferation as the subsequent chapter discusses.

8. The Legitimacy and Effectiveness of the Sanctions Regimes under the NPT: Containing Iran's Nuclear Programme

8.1. Introduction

Iran's failure to comply with the International Atomic Energy Agency Board of Governors (BOG) demands has led to involve the United Nations Security Council (UNSC). The Council has repeatedly adopted resolutions under which Iran has been sanctioned, also it was demanded to suspend all its nuclear activities.[1] The aims of these sanctions were to 'constrain Iran's development of sensitive technologies in support of its nuclear and missile programmes'.[2] In order to contribute to the achievement of these aims, the council requested all states to adopt appropriate measures and regulations.[3] Accordingly, some states, individually such as United States of America (USA) or collectively such as European Union (EU), have imposed autonomous sanctions on Iran, who have gradually toughened their sanctions in an effort to contain and change the nuclear behaviour of Iran's government.

These sanctions regimes take a form of enforcement measures to limits Iran's nuclear capability. The problematic legal issue in this domain is that the Nuclear Non-Proliferation Treaty (NPT) lacks a clear definition of enforcement mechanisms. In addition, it suffers of the absence of a legal specialist institution that would determine legally the non-compliance of members and set up effective legal measures to contain this non-compliance.[4]

Under the *status quo* of the NPT and the International Atomic Energy Agency (IAEA) Statute, the IAEA is the only agency involved in the determination of

[1] These resolutions are: UNSC, S/RES/1696 (2006), S/RES/1737 (2006), S/RES/1747 (2007), S/RES/1803 (2008), S/RES/1835 (2008), S/RES/1929 (2010), S/RES/1984 (2011), S/RES/2049 (2012), S/RES/2105 (2013), S/RES/2159 (2014), and S/RES/2231(2015).

[2] UNSC, Res S/RES/1929, 9 June 2010, Preamble, 3.

[3] ibid para 8.

[4] Yen-Chiang Chang, 'Legality of the Threat or Use of Nuclear Weapons' [2009] 37 Energy Policy 2131.

non-compliance of states with the NPT, and the UNSC is the only international body available to address these non-compliances and adopt solutions to resolve them. This means that determinations of non-compliance and their solutions are based on the vicissitudes of international affairs and the national interests of powerful states.[5] This is because the IAEA was not established as an enforcement or judicial body by the NPT.[6] Thus, determining non-compliance is not directly within the jurisdiction of the IAEA.[7] Furthermore, the authority of the UNSC under Chapter VII of the United Nations Charter (UNC) has been criticised and recognised as illegal in certain cases, such as Iran's nuclear case.[8]

Therefore, the aims of this chapter are to discuss the legitimacy and effectiveness of sanctions regime in the domain of containing nuclear proliferation. This discussion will be carried out by analysing the sanctions regimes adopted against Iran. Its objectives are to measure the extent to which these regimes have achieved their targets, and to assess whether these regimes are the most appropriate and effective enforcement mechanisms in containing and changing the nuclear behaviour of states, especially given that, since their adoption, these regimes have not produced any noticeable change in Iranian nuclear behaviour.[9]

In doing so, it is first essential to understand the legal framework of the UNSC's authority in maintaining international peace and security under the UNC.

[5] Gordon Friedrichs, *Smart Security Council? Analysing the Effectiveness of Targeted Sanctions* (Anchor Academic Publishing 2013); Ferdinand Frisch, *The United Nations Security Council's Effectiveness as a Sanctions Regime: An Intrinsic and Extrinsic Analysis of Targeted Sanctions* (Grin Varleg 2012).

[6] Barry Kellman, 'Enforcing Nuclear Non-Proliferation – the Role of Verification' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law*, Volume II - Verification and Compliance (Spring 2015) 256-57.

[7] Cristian DeFrancia, 'Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures' [2012] 45 Vanderbilt Journal of Transnational Law 705, 709.

[8] Deepti Choubey, 'The Non-Proliferation Motivation of the Non-Aligned Movement' in Jeffrey R Fields (ed), *State Behavior and the Nuclear Nonproliferation Regime* (The University of Georgia Press 2014) 282.

[9] Trita Parsi, 'No, Sanctions Didn't Force Iran to Make a Deal' (14 may 2014) Foreign Policy <http://foreignpolicy.com/2014/05/14/no-sanctions-didnt-force-iran-to-make-a-deal/> accessed 07 Aril 2015; Mohamed Younis, 'Iranians Feel Bite of Sanctions, Blame U.S., Not Own Leaders: Most support nuclear program despite sanctions' (07 February 2013) Gallup <http://www.gallup.com/poll/160358/iranians-feel-bite-sanctions-blame-not-own-leaders.aspx> accessed 09 April 2015.

Therefore, this chapter begins with a review of this authority and ultimately discusses whether the UNC guarantees an unwarranted degree of legal powers to this Council. Then, this chapter proceeds to consider the legality of the sanctions regimes adopted against Iran. These regimes will be categorised into two groups. The first contains the sanctions regimes adopted by the UNSC; the second includes those autonomous sanctions regimes adopted by certain states, mainly by the USA and EU. Finally, the chapter proceeds to evaluate the effectiveness of the target sanctions in changing the nuclear behaviour of the Iranian government. It concludes that sanctions regimes and coercive measures have a very limited effect on containing nuclear proliferation and that diplomatic solutions remain the best option for the international community to resolve a potential nuclear proliferation case.

8.2. The Legal Effects of the UNSC's Resolutions

According to Oberg[10] the legal effects of instruments of the UNSC can be divided to three categories: (1) Substantive effects; this include binding, authorizing and (dis)empowering effects. (2) Causative effects, whereby determinations of fact or law bring substantive effects into existence. (3) Modal effects, how and when the substantive effects come into existence. The intrinsic effects of these categories are directly and immediately stemmed from the adoption of the resolution. This adoption is based on the treaty special powers of the UNSC or the customary law internal to it.

The term "resolution" has a generic sense and differs from recommendations and decisions. Unlike the recommendations, determinations or declarations, the resolutions of the UNSC have binding effects on all member states in accordance with Article 25.[11] A resolution is 'binding' only when it is capable of establishing obligations on its addressee(s).[12]

[10] Marko Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 (5) EJIL 879, 881-2.

[11] Article 25 of the UNC states that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'; UNC, Art. 25.

[12] Oberg (n 10) 880.

The legal effects of the UNSC resolutions are controversial. Sheikh[13] contends that the legal effects of the UNSC resolutions depend on the will of the Council. If the Council wishes to give a legal binding character to a resolution, then this resolution become binding on all member states according to Article 25. In other words, the nature of the meaning and content of the UNSC resolutions depend on the intention of the Council itself.[14] In the same manner, Oberg[15] contends that the legal effects of the UNSC resolution differ according to the type of the adopted resolution. The binding effects are determined by the language of the resolution itself; the discussions leading to it; and the charter provisions invoked, all with establishing the intent of the UNSC.

Other scholars, including Joyner,[16] contend that although the charter grants the council's resolution binding effects, these effects are restricted by the UNC itself[17] and the international law principles. He continues that despite that Article 25 of the UNC establish universal binding effects of the UNSC resolutions on all its members, this article in fact imposes some legal limitations on the council resolutions. It states that member states agree to accept and carry out the resolution of the council in 'accordance to the present charter'.[18] This implies that the compliance of member states are conditioned with validity of the council's resolutions and actions as held up to the standard of the principles of the Charter, and further that it is conceivable that some principles of the Charter might take precedence over conflicting resolution of the council. The council must respect the legal principles and norms when it carries out its duties.

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[13] Ahmed Sheikh, 'U.N. Peace-Keeping Forces a Reappraisal of Relevant Charter Provisions' [1971] 7 Belgian Review of International Law 469, 486-88. Dupont also argues in the same manner; Pierre-Emmanuel Dupont, 'countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (Winter 2012) 17 (3) The Journal of Conflict & Security Law 301, 305.

[14] David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (Kluwer Law International 2001) 36.

[15] Oberg (n 10) 880.

[16] Daniel Joyner, 'The Security Council as a Legal Hegemon' [2012] 43 Georgetown Journal of International Law 225, 234.

[17] One such limiting provision upon the UNSC authority is Article 24 (2) which states that '[i]n discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations.', UNC, Art. 24 (2).

[18] UNC, Art. 25.

Even given that Article 103[19] of the UNC grants the resolutions of the Council privilege over other international obligations that emanate from other international treaties or agreements, it cannot be argued that the council's resolutions can override the fundamental principles of international law or norms that become part of *jus cogens*,[20] such as rights to equality, sovereignty, and independence. The contrary might be right if the conflict was between the Council's resolution and a right or obligation established by an international treaty. But when the conflict is between the UNSC obligations and the fundamental principles of international law, Article 103 it is not applicable. Consequently, the legal binding effects of the UNSC's resolution are suspended.[21]

The validity of this argument was examined by the European Court of Justice in Kadi's case.[22] In this case the Court of First Instance states that the general principles of international law including the *jus cogens,* which are coded in the UNC and adopted individually by all states in the world as the legal foundation regulating their existence and interrelationships, must be observed, protected, and implemented by the UNSC.[23] Presumably, if a resolution of the Council is fully legal and adopted within the scope of its authority, it may still be unenforceable on the grounds that it conflicts with higher rules of international law.[24]

[19] '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'; UNC Art. 103.

[20] Alexander Orakhelashvili, 'Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 782.

[21] ibid 782.

[22] Pursuant to the UNSC resolution 1267 1999 against terrorism, the EU community adopted measures in order to freeze financial funds for individuals involved in any act of terrorism. Mr Kadi was identified as a supporter of terrorism and Al-Qaida. Consequently, the EU community froze all his assets. Mr Kadi attacked the decision of the EU community before a court, *Kadi and Al Barakaat v Council and Commission,* Case T-315/01; before the Court of First Instance, 21 September 2005, and C-402/05 P, before the European Court of Justice, 3 September 2008.

[23] *Kadi and Al Barakaat v Council and Commission*, Case T-315/01, 21 September 2005, para 231.

[24] Orakhelashvili (n 20) 784.

The non-intervention principle or equivalently what is regarded as non-interference principle is one of the fundamental principles of customary international law and part of *jus cogens*. This principle is a mirror of the state's sovereignty and independence. The UNGA in its Friendly Relations Declaration 1970 defines this principle by 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.[25]

The ICJ in the case of Nicaragua *v* USA states that

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. Expressions of an *opinio juris* of States regarding the existence of this principle are numerous., […], bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.[26]

From the above definitions, states should exercise their rights in affirmative aspects without any intervene by any foreign country in any way. This means that the sovereignty of a state must be respected and none of the other states can force this state to adopt another state's will, social, and political system and ideologies. Intervention in a state's affair could be in different ways. It may take place through military, subversive, economic coercion, and diplomatic means.[27]

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[25] UN, UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with UN Charter', annexed to UNGA A/Res/25/2625 (XXV), 24 October 1970.

[26] ICJ, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua* **v.** *United States of America). Merits, Judgment. I.C.J. Reports 1986,* **p.** *14*, para 205, 108.

[27] Müge Kinacioğlu, 'The Principle of Non-intervention at the United Nations: The Charter Framework and the Legal Debates' (2005), Centre for Strategic Research <http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf> accessed 14 December 2016, 23

The UNC does not explicitly spell out the principle of non-intervention as rule governing the relations between states. Rather, it is stated impliedly in Article 2 of the UNC. Provision 2 (4) of the UNC states that member states must refrain from the threat or use of force in their international relations. Provision 7 of the same Article directs the inference of the UN as an international organisation. It is specifically directed to the intervention of the UN rather than states' interventions in affairs of a state. It set up a sort of guideline for the UN organs in dealing with matters that fall within the domestic jurisdiction of a state. According to this provision, UN organs, including the UNSC, must respect the domestic jurisdictions of states; they should not submit to matters that are essentially within the jurisdiction to the UN for a peaceful dispute settlement; and the situation should constitute one of the pre-conditions stated in Chapter VII of the UNC, as will be discussed in further details below.[28]

Following on from the above, for the resolutions of the UNSC to take place and obtain binding effects they must be within the limitation on the UNC particularly Article 2(7). In other words, a UNSC's resolution has no legal binding effects on its member states as stated in Article 25 or 103 of the UNC if the concerned situation does not evoke the implementation of enforcement measures under Chapter VII of the UNC. Otherwise, the UNSC in violation of the principle of non-intervention and it resolution is invalid and lacks of legal foundations.

The ICJ has not definitely decided whether UNSC decisions have overriding binding effects. However, it has specified that the binding effect includes operational matters (*ratione materiae*) and covers all its member states (*ratione personae)*.[29] This means that the court has provide a provisional finding that the UNSC decisions have an overriding normative power capable of pre-empting obligations flowing from traditional sources of international law. Recognizing such overriding would give a secondary source of UNSC decisions a greater normative value than many primary sources of international law such as treaty – thereby giving the UNSC a potentially very disruptive power – and would

[28] ibid.

[29] Oberg (n 10) 884.

ultimately place greater faith in the UNSC truly acting on behalf of all its members.

As the UNSC possesses decisional powers to maintain the international peace and security, the binding effects of its decision belongs to the realm of international peace and security and includes enforcement under Chapter Vii of the UNC, but not limited to that.[30] However, there are certain implicit legal effects put some limits on the effects when this conflict with principles and purposes of the UNC and rules of international law. However, this limitation is too vague in the absence of any organ competent to review the validity of the UNSC resolutions.[31]

8.2.1. The Legal Effects of the UNSC's Resolutions under the UNC

The legal effects of the UNSC resolution with regard to the maintenance of international peace and security are controversial. The UNC grants the council a primary responsibility for the maintenance of international peace and security.[32] In carrying out this responsibility, the council was granted specific powers that are laid down in Chapters VI, VII, VIII, and XII of the UNC.[33] The concern here is with the authority of the Council under Chapter VII which empowers it to adopt sanctions and measures in the context of carrying out its duties. However, the current discussion provides a brief analysis of its authority under the other chapters where necessary.

Reading Chapter VII reveals that the Council was clearly granted authority to impose sanctions when a state conducted a wrongful act. However, what is also clear is that the Council cannot invoke its binding powers of Articles 41 and 42 under this Chapter before certain conditions are met as stated in Articles 39 and 40 of the UNC.

[30] ibid 885.

[31] ibid 885.

[32] UNC, Art. 24(1).

[33] UNC, Art. 24(2).

8.2.1.1. Analysis of the Legal Scopes of the UNSC's Authority under Chapter VII of the UNC

Article 40 of the Chapter VII states that clearly says that the Council is required, before using its authority under Article 39, to adopt "provisional measures" that would contribute to the resolution of a dispute brought before it.[34]

There are arguments as to the extent to which the Council can adopt mandatory obligations under Article 40.[35] The core of these arguments is whether these provisional measures only constitute recommendations with no binding power or are mandatory obligations binding all member states as obliged by Article 25 of the UNC.

Sheikh[36] contends that the character of the resolutions adopted under Article 40 depends on the will of the Council. If the Council wishes to give a legal binding character to these resolutions, then they become Council decisions and all states will be required to comply with them according to Article 25. In other words, the nature of the meaning and content of the resolutions taken under Article 40 depends on the intention of the Council.[37]

In the case of Tadić, the International Criminal Tribunal for the Former of Yugoslavia dealt with the authority of the Council under Article 40 and stated the provisional measures taken by the Council under this Article should be aimed at stopping or slowing an aggressive act that would lead to a breach or threaten international peace.[38] Overall, they should not influence the rights or positions of the concerned states.[39] Thus, even if the UNSC is presumed to be empowered to adopt binding mandatory recommendations under Article 40, it cannot usurp any sovereignty rights of states. Accordingly, in the proliferation domain, the UNSC cannot issue provisional measures or any resolution that

[34] UNC, Art. 40.

[35] Wet (n 12) 179.

[36] Sheikh (n 13) 486-88. Dupont (n 13) 305.

[37] Schweigman (n 14) 36.

[38] *Prosecutor v Dusko Tadic,* 'Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction' (02 October 1995) IT-94-1-T, para 33.

[39] ibid.

might derogate or privilege over the nuclear rights of states as they are sovereign rights.[40]

Regardless of whether the provisional measures of Article 40 are binding or not, the articulation of Article 39 clearly obliges the Council to determine that the situation brought before it contains a threat to peace, a breach to peace, or an act of aggression before taking any resolution under Chapter VII.[41] This determination is a precondition to imposing provisional measures, sanctions, or the use of force.[42]

According to Spies, any decision of the Security Council, in carrying out its primary responsibility to maintain international peace and security, must have three elements to be binding: first, the UNSC must determine that the situation in question constitutes a threat to international peace and security; second, the UNSC must mention in its resolution that it is working under the authority of chapter VII of the UNC; and third, the Council must use clear language that imposes legal obligations.[43]

Consequentially, with the lack of a specific definition of the norms of Article 39,[44] 'the Council may very well decide that a situation which does not have the character of a conflict between two states is a threat to international peace.[45]

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[40] Sharon Squassoni, 'The Iranian Nuclear Programme' in Nathan E Busch and Daniel H Joyner (eds), *Combating Weapons of Mass Destructions the Future of International Nonproliferation Policy* (University of Georgia Press 2009) 295; Muhammad Sahimi, 'Iran's Nuclear Energy Program. Part VII: Are Referral of Iran's Nuclear Dossier to the Security Council and Resolutions 1696, 1737, and 1747 Legal?' (12 May 2007) Payvand Iran News <http://www.payvand.com/news/07/dec/1044.html> accessed 23 November 2013.

[41] 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'; UNC Art. 39.

[42] Tarcisio Gazzini, *The Changing Rules in the Use of Forces in International Law* (Manchester University Press 2005)7; Antonios Tzanakopooulos, *Disobeying the Security Council Countermeasures against Wrongful sanctions* (OUP 2011) 60.

[43] Hitoshi Nasu, 'Chapter VII Powers and the Rule of Law: The Jurisdictional Limits' (2007) 26 Australian International Year Book 87.

[44] Vera Gowlland-Debbas, 'Sanctions Regime Under Article 41 of the United Nations Charter' in Vera Gowlland-Debbas, *National Implementation of United Nations Sanctions a Comparative Study* (Martinus Nijhoff Publisher 2004) 4.

[45] Santori Valeria, 'The UN Security Council's (Broad) Interpretation of the Notion of the Threat to the Peace in Counter-Terrorism' in Giuseppe Nesi (ed), *International Cooperation in*

Indeed, this lack gives the council a wide discretion in determining, freely on a case-by-case basis, whether the situation constitutes a threat to peace.[46]

However, with such arguments, the Council will be a "*legibus solutus*" when acting in such manner. This is because the determination of the norms of Article 39 would be a judgement based on fact finding and political considerations, which could not be measured by legal criteria.[47] Certainly, it 'releases the Council from any constraint in the interpretation of the notion, effectively negating the Article 39 prerequisite's status as an obligation incumbent upon the Council'.[48] Consequently, "a threat to peace" could become a password for the superpower states to abuse the authority of Chapter VII of the UNC.[49] The UNSC resolutions with regards to international peace and security will be based exclusively on national political considerations,[50] and challengeable on legal foundations.[51]

In addition, a common understanding has been established between all member states of the UN, including the P5, that the determination of a threat to peace is a precondition for the UNSC to act under chapter VII.[52] This understanding has been supported by the ICJ, which treated it as 'necessary' for the Council to discharge its main responsibility in maintaining international peace and security.[53] The Council cannot act in response to contrived or alleged threats; the

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Counter-Terrorism the United Nations [and] *Regional Organisations in the fight against terrorism* (Ashgate Publishing Limited 2006) 102.

[46] Tzanakopooulos (n 42) 61.

[47] Daniel H Joyner and Marco Roscini, 'Withdrawal from Non-Proliferation Treaties' in Daniel H Joyner and Marco Roscini *Non-Proliferation Law as A Special Regime a Contribution to a Fragmentation Theory in International Law* (CUP 2012) 166.

[48] Tzanakopooulos (n 42) 61.

[49] Elias Davidsson, 'The Security Council's Obligation of Good Faith' (Summer 2003) VX (4) Florida Journal of International Law 541, 547.

[50] Monica Lourdes de la Serna Galvan, 'Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security council a Legislator for the Entire International community?' [2011] XI Anuario Mexicano de Derecho Internacional 152.

[51] Oscar Schachter, 'the UN Legal Order: An Overview' in Christopher C Joyner, *The United Nations and International law* (CUP 1997) 12.

[52] Muge Kinacioglu, 'The Principle of Non-intervention the United Nations: the Charter Framework and the Legal Debates' (Summer 2005) Perceptions 15 <http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf> accessed 06 July 2013, 31.

[53] Tzanakopooulos (n 42) 60.

threats must be imminent and grave.[54] Without such a determination, its resolutions are legally challengeable and *ultra vires*.[55]

In addition to the stipulation of Article 39, the Council, under Chapter VI, is required to settle international disputes by peaceful means before resorting to using its authority under chapter VII.[56] Article 33 of this Chapter states that the Council should call upon the parties to the international dispute to settle their dispute by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[57] In addition Article 2 (2) of the UNC obliges the Council to act in accordance with the principle of good faith.[58] In the case of nuclear tests between Australia and France, the ICJ stated that 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this co-operation in many fields is becoming increasingly essential'.[59] Consequently, although the violation of the good faith principle does not give rise to international responsibility, still the Council is required to respect this principle and act effectively, responsibly, fairly and objectively with a sense of proportion; otherwise its activities would be considered *ultra vires* as it is violate Article 33 and 2 of the UNC.[60]

In summary, the authority of the Council is not unfettered. Rather, it is bound by some restrictions and obliged to respect rules.[61] Rather, the Council should

[54] Davidsson (n 49) 548.

[55] Michael Spies, 'The Security Council and Iran: Further Escalation and Isolation Commentary on resolution 1747 (2007) on Iran' (03 April 2007) The Lawyers Committee on Nuclear Policy <http://lcnp.org/disarmament/iran/unsc1747commentary.pdf> accessed 05 October 2013, 5.

[56] Michael Spies and John Burroughs, 'Commentary on the Possible Security Council Resolution on Iran' (26 July 2006) The Lawyers Committee on Nuclear Policy <http://www.lcnp.org/disarmament/iran/UNSCdraftres-jul06.htm> accessed 05 October 2013.

[57] UNC, Art. 33.

[58] UNC, Art. 2(2).

[59] Nuclear test case (Australia *v* France), Judgement, ICJ Reports 1974, 253, para 46, 268.

[60] Davidsson (n 49) 550.

[61] Mohamed Bedjaoui, 'Introduction: on the Efficacy of International Organisations: Some Variations on an inexhaustible theme…', in Neil Blokker and Sam Muller, *Towards More*

observe the conditions stipulated by the UNC and international law. Before the council employs any sanctions regimes, the Council should call the parties together to resolve the dispute by peaceful means. In addition, the Council should, in good faith, seek to settle the dispute by peaceful means and adopt provisional measures to prevent any escalation of the situation between the parties. In the case of the failure of peaceful means, the Council must determine that the case brought before it is a threat or breach to the peace. Only this determination can authorise the Council to adopt sanctions regimes or to use force to restore peace.

After reviewing the scope of the UNSC authority, this chapter proceeds to discuss whether the Council has observed the above conditions and stipulations with regards to sanctions regimes against Iran.

8.3. The Legal effects of the UNSC's Resolutions against Iran's Nuclear Programme

In response to the alleged breach of its international obligations, the UNSC has adopted several resolutions against Iran under the authority of Chapter VII of the UNC.

The Iranian government has repeatedly reiterated that the UNSC's resolutions are illegal and unjustified and, consequently, it considers the resolutions issued by the UNSC with regards to its peaceful nuclear programme neither legitimate nor acceptable.[62] Iran maintained that this Council has accepted the Joint Plan of Action. This acceptance makes all previous resolutions of the Council invalid and any other actions stemming from those resolutions are not justifiable.[63] This reiteration means that Iran considers the resolutions of the UNSC with regard to its nuclear programme lack legitimacy and they are beyond the legal scope of the Council's authority.

Effective Supervision by International Organisations, (Vol 1, Martinus Nijhoff publishers 1994) 19.

[62] IAEA, INFCIRC/873, (17 March 2015), Section C.

[63] ibid.

Iran is quite right with its argumentations. Indeed, the Security Council has been accused of or criticised for, not only concentrating all powers in its hands, but also abusing or exceeding its authority under Chapter VII and therefore acting as "*legibus solutus*" or unbound by law.[64] The Council, as will be discussed below, did act beyond and above its conferred legal power by Chapter VII.[65] In particular, there is an absence of the fundamental international principle of good faith in all its decisions.[66] It has acted outside its legal boundaries[67] by failing to apply Article 39 criteria in its resolutions.[68] Finally, it has shifted its role as an international political body maintaining international peace and security to become a world legislator and judicial body.[69] However, before proceeding to these points, the research will provide a summary of these resolutions below.

8.3.1. The Lack of Good Faith in the UNSC Resolutions

The mandatory recommendations contained in resolution 1969, which demand that Iran 'suspend all enrichment-related and reprocessing activities, including research and development',[70] conflict with Iran's inalienable right to access peaceful nuclear energy. As demonstrated above, the Council cannot adopt resolutions that dispute the sovereign rights of states and in the case of conflict, the sovereign rights take priority over the resolutions of the UNSC, otherwise the decisions of the latter lack legal foundations.

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[64] Georges Abi-Saab, 'the Security Council Legibus Solutous? on the Legislative forays of the Council' in Laurence Boisson De Chazounes and Marcelo Kohen. (eds), *International Law and its Quest of Implementation* (Martinus Nijhoff Publishers 2010) 23; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era Applying the Principle of legality* (Martinus Nijhoff publishers 2006) 5.

[65] John Burroughs, 'The Role of the UN security Council' in John Burroughs and Michael Spies (eds), *Nuclear Disorder or Cooperative Security? U.S. weapons of terror, the global Proliferation Crisis, and Paths to Peac : an Assessment of the Final Report of the Weapons of Mass Destruction Commission and its Implications for U.S. Policy* (Online Edition 2007) Lawyers' Committee on Nuclear Policy <http://wmdreport.org/ndcs/online/NuclearDisorderPart3Section2.pdf> accessed 09 July 2013, 42; Max Hilaire, *United Nations Law and the Security Council* (Ashgate 2005) 253.

[66] UNC, Art. 2; VCLT Art. 31.

[67] UNC, Art. 40.

[68] UNC, Art. 39.

[69] Joyner, 'The Security Council as a Legal Hegemon' (n 16) 225.

[70] UNSC, RES S/RES/1696, (31 July 2006), para 2.

In addition, it is clear that, in this resolution, the Council has not exhausted, in good faith, all possible solutions to resolve the matter, but it has acted in bad faith. To illustrate this, when the council adopted this resolution, Iran was considering an offer presented by the permanent members of the UNSC and Germany (P5+1) on 6 June 2006. This offer requested that Iran stop indefinitely all its nuclear enrichment and related activities.[71] Iran requested time to respond to the offer, until 22nd August.[72] However, instead of waiting to receive Iran's response, the Council adopted resolution 1696 on 31 July 2006.

The General Director of the IAEA, ElBaradei, when he referred the Iranian dossier to the Security Council,[73] did not expect the Council to take action under chapter VII of the UNC; rather, he thought that the Council would resolve the Iranian case by peaceful means. As he stated at the conclusion of the IAEA board meeting, 'let´s not get too much involved into the legalities… As to how we can get back the parties to the negotiating table, there are so many options, so many modalities.[74]

This trend corresponds with the opinion of state members such as Qatar and South Africa. In the 5500th meeting where the Council gathered to vote on the adoption of resolution 1696, Qatar's representative said that there is no harm if the council wait few days before adopting sanctions against Iran, 'particularly since Iran has not rejected the package that was offered to it; it has simply asked for a period of time in which to consider it'.[75] The representative of South Africa, in a meeting held in New York to vote on resolution 1803 against Iran, said that 'We are seriously concerned about the implications of this situation for the credibility of the Security Council, and the only reason we will vote in

[71] UNSC, S/2006/512.

[72] Spies and Burroughs (n 56).

[73] IAEA, 'Report on Iran's Nuclear Programme Sent to UN Security Council' (08 March 2006) IAEA News <https://www.iaea.org/newscenter/news/report-irans-nuclear-programme-sent-un-security-council> accessed 09 October 2013.

[74] IAEA, 'Transcript of Director General´s Remarks at Conclusion of IAEA Board Meeting' (08 March 2006) IAEA News Centre <http://www.iaea.org/newscenter/transcripts/2006/transcr08032006.html> accessed 06 October 2013.

[75] UNSC, Meeting S/PV/5500, (31 July 2006), 3.

favour of the resolution is to preserve the previous decisions of the Council that Iran has not fully implemented those resolutions.[76]

A further example occurred on 17 May 2010 when Iran, Brazil, and Turkey signed what is called the Tehran Declaration or Agreement. With this agreement, Iran obliged itself to submit 1200KG of its Low Enrich Uranium (LEU) to Turkey in exchange for fuel for its research reactor.[77] Iran's aims in making this agreement were, first, to regain the international community's trust and secondly, to secure nuclear fuel for its reactors. However, this agreement was viewed by the states with scepticism. In reaction to this agreement, France announced progress on new sanctions at the UN.[78] The U.S. did not reject the agreement, but said it still had its concerns over the Iranian government's intentions with regards to the agreement.[79] The UK said that work on a resolution to impose new sanctions on Iran would continue until Tehran showed that its intentions were peaceful.[80] Russia welcomed the deal, but remained suspicious about Tehran's intentions.[81] All of this ended with the adoption of new sanctions against Iran in resolution 1929 on 9th June 2010, less than three weeks after signing the agreement.[82] It seems that the Council prioritized consensus of the international community to increase sanctions on Iran as punitive measures over any other peaceful solutions. Such conduct would not only forestall all diplomatic negotiations, but it would also make the actions of the council *ultra vires* and its resolutions would therefore lack legitimacy.[83]

8.3.2. The Lack of the Determination of Prerequisite of a Threat to Peace

[76] Mr. Kumalo, the Representative of South Africa in the 5848th Meeting of the UNSC, UNSC Meeting 5848th 03 March 2008, S/PV/5848, 6.

[77] BBC, 'Nuclear Fuel Declaration by Iran, Turkey, and Brazil' (17 May 2010) BBC News <http://news.bbc.co.uk/1/hi/8686728.stm> accessed 07 Oct 2013.

[78] BBC, 'Iran signs nuclear fuel-swap deal with Turkey' (17 May 2010) BBC News <http://news.bbc.co.uk/1/hi/8685846.stm> accessed 07 October 2013.

[79] ibid.

[80] ibid.

[81] ibid.

[82] UNSC, RES S/RES/1929, (09 June 2010).

[83] Spies and Burroughs (n 56).

The Security Council in all its resolutions against Iran did not determine that the Iranian nuclear programme consisted of a threat to international peace and security.[84] Again, in its very first resolution 1696, the Council affirmed that it was 'acting under Article 40 of Chapter VII of the Charter of the United Nations in order to make mandatory the suspension required by the IAEA',[85] without stating that the Iranian case constituted one of the criteria coded in Article 39. This manner had been followed by the council in all its resolution with regard to the nuclear energy of Iran. In the preamble to its last resolution against Iran, as with the other resolutions, the Council says that it was 'mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security',[86] and to give effect to its resolutions, the Council was 'acting under Article 41 of the Chapter VII'.[87]

It has been argued that, due to political pressures and to show its intention to deal with all cases or disputes brought before it, the Council has given priority to unanimity in adopting resolutions under chapter VII over clarity of the legal foundations that its resolutions are based on.[88] In addition, the Council recently avoided determining Iran's case as a threat to peace to prevent the use of force against Iran[89] and to not increase the tensions in the Middle East.[90]In particular, in a Summit Declaration, the Council said that 'the proliferation of all weapons of mass destruction constitutes a threat to international peace and security'.[91] Still, despite these facts, the text of Article 39 is very clear. The determination of a threat to peace acts 'as not simply precursor to, but also justification for, the

[84] Djacoba Liva Tehindrazanaarivelo, 'Targeted Sanctions and Obligations of States in Listing and De-Listing Procedures' in Laurence Boisson De Chazounes and Marcelo Kohen (eds), *International Law and its Quest of Implementation* (Martinus Nijhoff Publishers 2010) 14; Dupont (n 13) 307.

[85] UNSC, Res S/RES/1696, (31 July 2006).

[86] UNSC (n 68) 3.

[87] ibid.

[88] Nasu (n 43) 95.

[89] Jason Starr, 'The UN resolution' in Robin Wright, *The Iran Primer Power, Politics, and U.S. Policies* (United States Institution of Peace 2010)120.

[90] Jon B Alterman and John W Garver, *The Vital Triangle, China, the United States, and the Middle East* (Centre for strategic and International Studies 2008) 43.

[91] UNSC, S/23500, (31 January 1991), 4.

exercise of such powers'.[92] Stating that the Council is acting under its authority of Chapter VII without asserting that the situation is a threat to peace makes the scope of Chapter VII 'unclear, and principles of proportionality and necessity are called into question'.[93] To be of legal effect, the resolution of the UNSC should make explicit reference to one of the criteria of Article 39 and should also describe the reasoning behind this reference. This would not infringe the broad authority and discretion of the Council; rather, it stresses the intentions of the Council and clarifies the legitimacy of its resolutions and their legal impacts, and thereby, increases the transparency and accountability of the Council.

8.3.3. The UNSC's Acts beyond its Granted Legal Scope and Nature

Recently, it has been noted that the UNSC sits at the apex of authority in international security law, with essentially unlimited power to deal with all cases that it deems related to international peace and security.[94] To some extent, as Joyner[95] argues, the Council does not only act as executive body of the organisation, but rather acts as legislative organ enacting on behalf of the state members such as in its resolutions 1373[96] which is on terrorism[97] and 1540[98] which is on weapons of mass destruction proliferation.[99] It acts as a judicial body,[100] as shown by issues such as resolution 1929,[101] which was adopted with regards to Iran's nuclear programme.

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[92] Jared Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (Fall 2007) 6 (1) Northwestern Journal of International Human Rights 24, 35.

[93] ibid 44.

[94] Abi-Saab (n 64) 23; Manusama (n 50) 5.

[95] Joyner, 'The Security Council as a Legal Hegemon' (n 16) 226.

[96] UNSC, Res S/RES/1373, (28 September 2001).

[97] For more discussion on the UNSC as legislator, see; Mathew Happold, 'Security Council Resolution 1373 and the constitution of the United Nations' (September 2003) 16 (3) Leiden Journal of International Law 593.

[98] UNSC, Res S/RES/1540, (28 April 2004).

[99] Masahiko Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2008) 13 (3) Journal of Conflict and Security Law 303 Abi-Saab (n 64).

[100] Mark Angehr, 'The International Court of Justice's Advisory Jurisdiction and the Review of the Security Council and the General Assembly Resolutions' (2009) 103 (2) Northwestern University Law Review 1007.

Resolution 1929 was framed by the increased tensions between Iran and the western states after revelation of the nuclear site near Qom city in 2009.[102] The dispute was about whether Iran, with a view to the timing of the revelation of that site, should have applied the original code 3.1 or the modified one under the safeguards agreement.[103]

Under the former, Iran was obliged to inform the IAEA about a new site no 'later than 180 days before the facility is scheduled to receive nuclear material for the first time', the modified code 3.1 states that Iran should inform the Agency about a new site as soon as the decision to construct or to authorize construction has been taken, whichever is earlier'.[104] This means that the core of the disputes between Iran and the IAEA in terms of which code Iran should implement is a pure judicial determination.[105]

The Council involved in this matter and stated in its resolution 1929 that 'Iran shall without delay comply fully and without qualification with its IAEA safeguards agreement, including through the application of modified Code 3.1 of the subsidiary arrangement to its safeguards agreement'.[106] Thus, it clearly appears that the Council has expanded and signed up a new role to its original duties as a political international body and become a judicial organ.

However, it should not as this violates the UNC's principles. The legality of the actions of any body of the UN must be judged by reference to the rules and

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[101] UNSC, Res S/RES/1929, (09 June 2010).

[102] David E Sanger and William J Broad, 'U.S. and Allies Warn Iran Over Nuclear Deception' (25 September 2009) New York Times <http://www.nytimes.com/2009/09/26/world/middleeast/26nuke.html?pagewanted=all&_r=0> accessed 06 October 2013.

[103] Daniel H Joyner, 'The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?' (05 March 2010) Jurist <http://jurist.org/forumy/2010/03/qom-enrichment-facility-was-iran.php> accessed 09 October 2013.

[104] James M Acton, 'Iran Violated International Obligations on Qom Facilities' (25 Sep 2009) Carnegie Endowment for International Peace <http://www.carnegieendowment.org/2009/09/25/iran-violated-international-obligations-on-qom-facility/12oy#3> accessed 06 October 2013; Paul K Kerr, 'Iran's Nuclear Programme: Tehran's Compliance with International Obligations' (23 December 2009) Congressional Research Service <http://fpc.state.gov/documents/organization/193702.pdf> accessed 06 October 2013.

[105] Joyner, 'The Qom Enrichment Facility' (n 103).

[106] UNSC (n 68), para 5.

principle of its Charter which is the constitution of the delegated power.[107] As it is obliged to respect the rules of UNC,[108] Articles 36 and 92 clearly grant the judicial function to an independent organ which is the ICJ, not the UNSC.

Article 36 explicitly draws up a framework for the Council when a legal dispute is brought before it. It states that 'in making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court'.[109] Article 92 of the charter also applies in the case of settling a legal dispute and performing judicial functions, with the ICJ as the main organ of the UN when performing such a duty.[110]

As political body[111] composed of 15 politicians representing their states to serve and observe the implementation of UNC rules,[112] the UNSC was created as 'an organ of action'[113] to keep the peace and security in the world,[114] but not to judge or enact. Therefore, it is certainly unable to play a judicial role due to the fact that it is ill-qualified and ill-represented structurally and institutionally to produce legal interpretations or mandates.[115] Thus, the Council has no authority to deliver any interpretations or give answers to any legal questions as it did in resolution 1929 when it demanded that Iran implement the modified code 3.1. It has no judicial jurisdiction to do this and it should not seize judicial functions for itself, otherwise, its actions lack transparency and legal grounds.

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[107] Davidsson (n 49) 5.

[108] Bardo Fassbender, 'Review Essay Quis Judicabit? The Security Council, its Power and its Legal Control' (2000) 11 (1) European Journal of International Law 219, 221.

[109] UNC Art. 36.

[110] UNC Art. 92.

[111] Steven R Ratner, 'The Security Council and International Law' in David M Malone (ed), *The UN Security Council from the Cold War to the 21st Century* (Lynner Rienner Publishers 2004) 593.

[112] *Prosecutor v. Dusko Tadic* (n 17) para 43; Tzanakopooulos (n 42) 58.

[113] Angehr (n 100) 22.

[114] Andrea Bianchi, 'Assessing the Effectiveness of the Security Council's Anti-Terrorism measures: The quest for legitimacy and cohesion' [2006] 17 European journal of International Law 881, 887.

[115] Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 192.

Following from the above discussion, it seems very difficult to establish a legal basis for sanctions regimes adopted by the Council. This makes the UNSC resolutions with regard to Iran lack of legitimacy which in return gives rise to grave concerns regarding the legality of the autonomous sanctions regimes adopted by adopted by states individually or collectively.

8.4. The Legality of Autonomous Sanctions Regimes Imposed by States against Iran

In implementing the UNSC's sanctions against Iran, the EU, the USA and their allies have imposed what are called "restrictive measures" or "autonomous sanctions" on Iran.[116] They have sought to interpret the UNSC resolutions broadly and have expanded them to impose tougher and more restrictive target sanctions regimes.[117] Their sanctions regimes take a form of financial sanctions targeting persons and industries involved in Iran's nuclear programme in an effort to prevent this state form going ahead with its nuclear weapons programme.[118] Mainly, they target the import and export of Iran; freezing its assets; and banning or restricting the freedom of movement of persons from that state.[119] However, these autonomous sanctions have raised various questions on their effectiveness and their compatibility and legitimacy with regards to international law as will be discussed below.

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[116] Sahib Singh, 'Iran, The Nuclear Issue & Countermeasures' (10January 2012) Blog of the European Journal of International Law <http://www.ejiltalk.org/iran-the-nuclear-issue-countermeasures/> accessed 10 October 2013.

[117] Mark Landler, 'United States and Its Allies Expand Sanctions on Iran' (21 November 2011) New York Times <http://www.nytimes.com/2011/11/22/world/middleeast/iran-stays-away-from-nuclear-talks.html?_r=2&hp=&pagewanted=print> accessed 03 April 2015.

[118] Mohammad Habibi Mojandeh, 'Filing International Lawsuit against Economic Sanctions' (23 July 2012) Iran Review <http://www.iranreview.org/content/Documents/Filing-International-Lawsuit-against-Economic-Sanctions-2.htm> accessed 10 October 2013.

[119] For further details on these regimes; see, EU, The Foreign Affairs Council, Meeting 3142, Brussels, 23 January 2012, para 2 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/127480.pdf> Accessed 09 October 2013; US Department of States, 'Fact Sheet: Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA)' (23 May 2011) <http://www.state.gov/e/eb/esc/iransanctions/docs/160710.htm#> accessed 09 October 2013; US Department of Treasury, 'Treasury Targets Assets of Iranian Leadership' (04 June 2013) Press Centre <http://www.treasury.gov/press-center/press-releases/Pages/jl1968.aspx> accessed 03 April 2015.

8.4.1. The Legal Framework Applicable to the Legality of Sanctions Adopted by States

Bothe[120] defines sanctions as those measures adopted by an international actor, which could be a state or international organization, in response to alleged illegal acts of the sanctionee, which could be a state or international organization, for the purpose of making the sanctionee refrain from committing such acts.

The right of states to adopt autonomous sanctions is disputable. It has been argued that involving the UNSC and imposing sanctions on a state for non-compliance with an international obligation, such as of Iran's nuclear case, does not limit the states' right to adopt measures under the law of state responsibility.[121]

Contrary to the above trend, it is contended that states have recourse to countermeasures only when the UNSC had not adopted any sanctions. If the UNSC has decided to impose measures against the target state under the authority of Articles 41 and 42 of the UNC, states are no longer eligible to adopt their own countermeasures.[122]

However, with this regard it should be distinguished between Sanctions adopted by the UNSC and those adopted by states. When the UNSC adopt sanctions, it acts according to its authority under Article 41 of the UNC. This means, as White[123] notes, that the case concerned constitutes a threat to peace, a violation of peace, or an act of aggression. This implies that the Council can act even if the target state did not commit any wrongful act. However, when the states adopt autonomous sanctions, they act in response to an international wrongful

[120] Micheal Bothe, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document IAI, 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 5.

[121] Jason Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 (5) Vanderbilt Journal of Transnational Law 1393, 1418.

[122] Dupont (n 13) 332.

[123] Nigel D White, in a Conference on 'Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 15.

act as coded in the Responsibility of States for Internationally Wrongful Acts (RSIWA) of 2001. The responsibility of states to respond to a wrongful act does not emanate from the existence of the countermeasure and countermeasures do not institute state responsibility. Rather, their existence is derived from the internationally wrongful act. This means that the countermeasures and state responsibility are consequences of internationally wrongful acts. Put another way, for states to legally discharge their responsibility with regards to their rights to impose countermeasures, a wrongful act of the accused state must have occurred. This condition must be met to allow states to discharge their responsibility to impose countermeasures. This implies that states cannot impose countermeasures if there is no wrongful act or violation of international rules or obligations committed by the target state. In addition, states to adopt sanctions depends on the extent to which the sanctions and measures adopted by the UNSC have achieved their objectives. If these measures are effective in precluding or changing the behaviour of the target state, it is arguable that the UNSC measures limit the states' right to adopt autonomous measures. In addition, the autonomous sanctions or countermeasures adopted by states are assumed to be of subsidiary character in relation to the authority of the UNSC.[124] This means that the involvement of the UNSC under the authority of Article 41 blocks and invalidates the right of states to adopt countermeasures; otherwise, the effectiveness of the UNSC resolution would be negatively challenged and affected.[125] In all cases, although the UNC gives freedom to its state members to choose from among the various possible models for transposition in implementing the UNSC resolutions into their domestic legal order, states' transpositions should not overstep the scope of these resolutions.[126] The Council's resolutions do not grant states any discretionary power in expanding or making additional obligations for those included in its resolutions; otherwise states would be acting *ultra vires*.[127] The Council itself stresses that

[124] Linos-Alexander Siciliano, 'Counternmeasures in Response to Garve Violations of Obligations Owed to the Internatioanal Community' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OXP 2010) 1138.

[125] For further discussion; see, ibid 138-42.

[126] *Kadi and Al Barakaat v Council and Commission,* C-402/05 P, 03 September 2008, para 298.

[127] Any new sanctions, or expanding an existing one, needs the UNSC involvement to make a new designation; Calamita (n 107) 1408; Dupont (n 13) 333.

'nothing in this resolution compels States to take measures or actions exceeding the scope of this resolution, including the use of force or the threat of force'.[128]

Moreover, states do not have free recourse to sanctions and countermeasures. Rather, their right is subject to several requirements. First of all, the legal framework applicable to the compatibility and legality of these sanctions is coded in 2001's Responsibility of States for Internationally Wrongful Acts (RSIWA).

According to Article 52 (1)(a and b) of this Act, before states adopt any sanctions or countermeasures they should call upon the target state to fulfil its obligations[129] and to negotiate and notify it of any decision to take countermeasures against it.[130]

What is more important, according to Iwasawa and Iwatsuki,[131] is when the parties to the dispute participate in negotiations in good faith to settle the dispute, the injured states should not resort to sanctions. Sanctions would be justified under the requirement of necessity when the target state refused to cooperate in good faith to settle the dispute. The legal problem in this argument is that it is very difficult to determine when the sanctions are necessary and justifiable.[132] There are no mechanisms that identify the extent to which make the non-cooperation of target states premise a legal foundation to adopt countermeasures.

Besides these procedural conditions that limit recourse to countermeasures, there are substantial conditions coded in Articles 50 and 51 of RSIWA. These Articles emphasize that the sanctions or countermeasures should not in any way affect the general norms of international law, human rights law, and humanitarian law,[133] and they must be proportionate to the committed wrongful act.[134] These

[128] UNSC (n 68) p 3.

[129] RSIWA, Art 52(1)(a).

[130] ibid (b).

[131] Yasuhiro Iwasawa and Naoki Iwatsuki, 'Proccedural Conditions' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OXP 2010) 1153.

[132] Dupont (n 13) 324.

[133] RSIWA, Art 50.

rules have attained the status of extraterritorial applications, which refers to the extent to which states 'must secure the rights and freedoms of individuals outside their borders commensurate with their ability to do so – that is: the scope of their obligations depend [sic] on the degree of control and authority that they exercise'.[135] Accordingly, by acknowledging the extraterritorial applications of human rights, states are responsible for any human rights violations or suffering of people that they may incur in imposing autonomous sanctions on another state. If these sanctions lead to human suffering, they should be lifted because they are simply inconsistent with the UNC and the norms of international law.

Last but not least, the autonomous sanctions imposed by states are considered as coercive measures.[136] With such characteristics, these sanctions should not violate a fundamental international obligation of non-intervention.[137] In the Charter of Economic Rights and Duties of States, the UNGA stresses the principle of non-intervention in a state's affairs by imposing economic sanctions. It states that 'economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles: d. Non-intervention; k. Respect for human rights and international obligations'.[138] Accordingly, extreme forms of political and economic coercion are illegal.

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[134] RSIWA, Art 51.

[135] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 (4) The European Journal of International Law 1223, 1233.

[136] ibid 9.

[137] This obligation considers as a fundamental international obligation due to the number of treaties, ICJ's cases, United nations General Assembly's resolutions, and other instruments of soft law in which it has included; see, for example, the Case of Certain Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits. ICJ Reports 1986, pp.106-109, para.202-207; Case of Certain Military and Paramilitary Activities in and against Nicaragua, supra note 25. For an example UNGA resolutions; see; UN, UNGA Res. 39/210, UNGAOR, 39th Sess., Supp. No. 51, 104th Plen. mtg. at 160, UN Doc. A/RES/39/210 (1984). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 October 1970) U.N. Doc. A/RES/2625 (XXV).

[138] Charter of Economic Rights and Duties of States UNGA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) UN Doc., A/RES/29/3281 Chapter 1, (Fundamentals of International Economic Relations).

States are obliged to respect the sovereign immunity of states within its territory and population.[139]

8.4.2. The Legality of Sanctions Regimes Imposed on Iran

The legality and compatibility of the autonomous sanctions imposed on Iran are still arguable. This is because, so far as discussed in Chapter 6, there is insufficient evidence that Iran is responsible for a wrongful act that would necessitate adopting enforcement measures against it.[140] The legality or illegality of Iran's nuclear activities has never been addressed by an authoritative legal body to determine the existence of a violation of international nuclear obligations by Iran.[141] Determination of a wrongful act is a matter that involves a decision as to which judicial or tribunal body should carry out such a determination.[142] All the UNSC resolutions and the autonomous sanctions against Iran are grounded on allegations. Unless Iranian nuclear behaviour or policy constitutes an international wrongful act, states can adopt sanctions in the form of countermeasures within the legal limitations of adopting countermeasures.[143] They cannot be based on a good faith belief about the unlawfulness of the act. In addition, although there is obviously a long process of negotiations regarding its nuclear programme, but there is no official notification sent to Iran containing detailed explanations of contemplated sanctions.[144] Moreover, many reports state that these regimes have violated basic and fundamental human rights. They have violated the human right to life; the human right of development, and the right of self-determination.[145] These

[139] Natalino Ronzitti, 'Respect for Sovereignty, Use of Force and the Principle of Non-intervention in the Internal Affairs of Other States' (2015) European Leadership Network <http://www.europeanleadershipnetwork.org/medialibrary/2016/04/05/90287197/ELN%20Narratives%20Conference%20-%20Ronzitti.pdf> accessed 08 April 2015.

[140] Singh (n 116) 5.

[141] Dupont (n 13) 327.

[142] Marco Roscini, in a Conference on 'Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 8.

[143] Ronzitti (n 139) 4.

[144] Iwasawa and Iwatsuki (n 131) 1152-54.

[145] Arash Izadi, 'Economic Sanctions Against the Islamic Republic of Iran from the Human Rights Perspective' [September 2014] 2, Special edition, European Scientific Journal 99, 100-05.

reports indicate to that these sanctions have in fact gone beyond their objectives, and have become punitive instruments instead of mechanisms for justice. They have avoided the high cost of military action at the expense of the penalized nations. Sanctions that overstep the limitations and purposes of the sanctions are prohibited.[146] Therefore, with this foregoing analysis, the regimes imposed on Iran legally violate Articles, 50, 51, and 52 (1)(a and b) of the RSIWA.

Furthermore, these autonomous sanctions adopted by states in the form of coercive measures violate the international customary norm of non-intervention. First of all, these sanctions are aimed at changing Iranian behaviour and policies in the nuclear domain in which Iran, as a sovereign state, has the right to choose and adopt any behaviour or policy to the extent it chooses as long as it is within legal boundaries.[147] Also, the implementation of these sanctions might constitute a violation of an international treaty. States, in adopting countermeasures, should ensure that these measures do not conflict with other international obligations or violate international law. The restrictions on Iranian imports and exports violate the General Agreement on Tariff and Trade (GATT) and General Agreement on Trade and Services (GATS),[148] and the implementation of an oil embargo appears to imply that some of the implementing states, such as Italy, are in non-compliance with the Bilateral International Treaty (BIT).[149]

The arguments over the legality of the sanctions regimes adopted by the UNSC and states raise questions as to whether these regimes are accountable and appreciated in the field of containing potential nuclear proliferation.

8.5. The Effectiveness of Sanctions in Containing Potential Nuclear Proliferation: Iran a Case Study

[146] Tzanakopooulos (n 42) 59.

[147] Daniel H Joyner, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 25.

[148] Bothe (n 120) 5.

[149] Marina Mancini, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document IAI 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 9.

An authoritative study[150] on target sanctions has proved that the principal purposes of targeted sanctions are to: (1) coerce or change behaviour; (2) constrain proscribed activities; and (3) signal/ stigmatize targets. According to the workshop in which this publication appeared, target sanctions are effective in coercing a change in behaviour only 13% of the time. By contrast, they are effective in constraining target behaviour (increasing costs and inducing changes in strategy) more than three times as frequently, or 42% of the time. They are even more effective in sending signals to target audiences, which they do 43% of the time. Moreover, coordination within the UN system is still problematic and undermines sanctions' effectiveness. In addition, measures that are imposed by regional organisations or individual states do not only complicate, they also potentially undermine UN sanctions by making them appear less discriminating than they are.

Indeed, all these intensively targeted sanctions and coercive measures imposed collectively or unilaterally upon Iran have not yet resolved the case,[151] and have brought nothing but devastation of the Iranian economy and have led to suffering for the Iranian people across many aspects of their lives. Hillary Clinton, Secretary of State, said that 'our efforts to apply pressure on Iran are not meant to punish the Iranian people, they are meant to change the approach

[150] A workshop, supported by the Governments of Canada, Switzerland, and the United Kingdom, on Targeted Sanctions Consortium (TSC) convened in Geneva 2009 and the resolution prepared for discussion at a meeting at the Canadian Mission to the United Nations in New York on 27 April 2012. It was carried out to develop a common framework for the systematic analysis of UN targeted sanctions. Graduate Institution, 'Designing UN Targeted Sanctions: Initial Findings of the Targeted Sanctions Consortium' (Geneva, August 2012) The Graduate Institution Geneva <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/internationalgovernance/shared/PSIG_images/Sanctions/Designing%20UN%20Targeted%20Sanctions.pdf> accessed 05 October 2013, 2.

[151] Yousaf Butt, 'Make Tehran a Serious Offer' (20 February 2013) The National Interest <http://nationalinterest.org/commentary/make-tehran-serious-offer-8120?page=2> accessed 11 October 2013; Erich C Ferrari and Samuel Cutler, 'New Sanctions on Iran and Neo-Big Stick Diplomacy' (22 January 2013) Lobe Log Foreign policy <http://www.lobelog.com/new-sanctions-on-iran-and-neo-big-stick-diplomacy/> accessed 11 October 2013; Max Fisher, 'New Poll: Iranians Mostly Blame the U.S. for Sanctions, Still Want a Nuclear Program' (08 February 2013) the Washington Post <http://www.washingtonpost.com/blogs/worldviews/wp/2013/02/08/new-poll-iranians-mostly-blame-the-u-s-for-sanctions-still-want-a-nuclear-program/> accessed 10 October 2013.

that the Iranian Government has taken toward its nuclear programme',[152] but in fact the situation is the other way round. In the 6335th meeting, the representative of Brazil said that 'sanctions will most probably lead to the suffering of the people of Iran and will play into the hands of those on all sides who do not want dialogue to prevail'.[153]

Certainly, the sanctions regimes have caused unemployment, inflation, an increase in the price of essential commodities such as food and medicines,[154] a continuous decrease in the value of the national currency[155] and a noticeable plummeting of oil sales on which the Iranian economy was largely reliant.[156] They have turned into punitive sanctions, but they have not deterred the Iranian government, nor have they pushed the government to change its approach to dealing with its nuclear programme.[157] Rather, these regimes have targeted the basic living standards of the whole Iranian people,[158] who blame the international community, particularly the U.S. for their human suffering, but not their government.[159]

The foregoing discussion leads to a very simple but important fact which is that the target sanctions regimes imposed as counter-proliferation measures have insufficient influence to change the behaviour of the target state. Consequently,

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[152] Hillary Rodham Clinton, 'Remarks at the International Conference on Afghanistan' (London, 28 January 2010) US Department of State <http://www.state.gov/secretary/rm/2010/01/136159.htm> accessed 11 October 2013.

[153] Mr. Viotti, the Representative of Brazil in the UNSC 6335th meeting, 09 June 2010, New York, UNSC, S/PV/6335, 2.

[154] Iran Blog, 'Reports of Street Protests in Iran Due to Soaring Price of Chicken' (23 July 2012) The Guardian <http://www.theguardian.com/world/iran-blog/2012/jul/23/street-protests-iran-chicken> accessed 08 October 2013.

[155] BBC, 'Iran's Rial Hits an All-Time-Low against the US Dollar' (01 October 2012) BBC News <http://www.bbc.co.uk/news/business-19786662> accessed 08 October 2013.

[156] Glenn Geenwald, 'Iran Sanctions Now Causing Food Insecurity, Mass Suffering' (07 October 2012) The Guardian <http://www.theguardian.com/commentisfree/2012/oct/07/iran-santions-suffering> accessed 08 October 2013.

[157] Tabassum Zakaria and Susan Cornwell, 'Iran Sanctions "Biting" in Recent Weeks: CIA Chief' (31 January 2012) Reuters <http://www.reuters.com/Article/2012/01/31/us-usa-intelligence-threats-idUSTRE80U18Z20120131> accessed 08 October 2013.

[158] Robert Tollast, 'The Lasting Price of Sanctions' (06 February 2013) The National Interest <http://nationalinterest.org/print/commentary/the-lasting-price-sanctions-8062> accessed 10 October 2013.

[159] Younis (n 9).

they are insufficient and ineffective in the domain of nuclear proliferation. This is because the targeted state is usually in a better position to avoid or to adjust the negative impacts of the imposed sanctions;[160] especially if these regimes are not universal.[161] To illustrate this, Iran always finds a way to ease the impact of sanctions by finding investors outside western markets such as in Asia or South America.

Indeed, the possibility of the spread of the negative impacts of these sanctions to the whole population is more likely than achieving a limited and restricted result on specific entities of the state. Giumelli[162] suggests that the ineffectiveness of the target sanctions for counter-proliferation purposes is due to the fact that the sanctioning states' focus is only on changing the behaviour of the target. He suggests that, to be more effective, these sanctions should be adopted with defined objectives and within the larger context of the foreign policy strategy. Indeed, the imposition of target sanctions cannot be isolated from the implementation of other foreign policy and strategies. Moreover, the objectives of these sanctions would be different in each case; in other words, they could be coercive, signalling, or constraining objectives. Thus, as Krause[163] argues, the effectiveness of target sanctions should be determined on a case-by-case basis according to their objectives and whether they play a major or marginal role in the overall objectives pursued by the sanctioner, taking into account the extent to which they are effective in resolving the case without resorting to the use of force.

Moreover, the targeted sanctions should be proportionate to the behaviour of the targeted state and should be lifted proportionately to what this state gives up.

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[160] Jasmine Ramsey, 'Iran's Nuclear Activities Go on despite Sanctions' (27 March 2013) Lobe Log Foreign Policy <http://www.lobelog.com/irans-nuclear-activities-go-on-despite-sanctions/> accessed 24 November 2013.

[161] Konstanty Gebert, 'Shooting in the Dark? EU Sanctions Policies' (2013) European Council on Foreign Relations (Policy Brief London) 3.

[162] Francesco Giumelli, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 28-9.

[163] Joachim Kraue, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (05 March 2015) Istituto Affari Internazionali (IAI), Document 15 <http://www.iai.it/sites/default/files/iai1505.pdf> accessed 04 April 2015, 30.

This means that these regimes should be implemented and imposed flexibly: they can be easily suspended or removed in order to incite the targeted state to change its nuclear behaviour.[164] Yet it seems that the relationship between the implementation of sanctions regimes and changing the nuclear behaviour of targeted states has an inverse correlation. In practice, as discussed above; states toughen their sanctions as long as the targeted state does not change its nuclear behaviour, and despite the fact that the targeted state tends to harden its nuclear position as a reaction to the firming of sanctions. Hence, the imposition of sanctions regimes impedes all political efforts to reach a desirable solution[165] and undermines the effectiveness of the UNSC in dealing with cases in the domain of nuclear proliferation.[166]

8.6. Conclusion

The UNC and the norms of international law grant the UNSC and individual states the authority to act against any wrongful act that would threaten international peace and security. However, this authority is unfettered from any limitations. Rather, it is subject to legal limitations and stipulations that are coded in the Charter and international law, particularly in relation to decisions to adopt sanctions and coercive measures. Therefore, the legal problem of implementing sanctions regimes is that the adoption, legal framework, and objectives of these regimes are determined by a political body rather than an international legal body.

In addition, states must not go beyond the objectives of UNSC Sanctions in order to achieve their national interests. There is a need to balance the objectives of the sanctions regimes adopted by the UNSC and the interests of the states implementing these regimes. Such a balance could be achieved by determining whether or not the UNSC resolutions regarding imposing sanctions on targeted states are final and restricted or whether there is a possibility of complementary or extra sanctions that states could adopt.

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[164] Tehindrazanarivelo (n 84).

[165] Joyner, in a 'Conference on Coercive Diplomacy, Sanctions and International Law' (n 147) 23.

[166] Mancini (n 149) 9.

From the Iranian nuclear case, it seems that the sanctions regimes impede any political solutions in cases of nuclear proliferation. Undoubtedly, states will remain insistent about their rights with regards to peaceful nuclear energy. Consequently, imposing and gradually increasing the sanctions on these states would not push them to give up their rights. Rather, these sanctions might provoke targeted states to become more stubborn. This contribute the conclusion that sanctions are not perfectly effective in the field of nuclear proliferation.

9. Conclusion

9.1. Key Arguments

The aim of this study was to discuss international legal issues that were involved in the diplomatic standoff in the Iran-Coalition dispute. The two parties to the dispute have used international legal arguments to attempt to give legitimacy to their positions and actions. From that perspective, ensuring the international law is accurately interpreted and implemented can help to set the position of the parties correctly and help them towards peaceful solutions. Therefore, this research has provided legal analysis of the Nuclear Non-Proliferation Treaty (NPT), focusing on Iran's nuclear case in order to investigate the weaknesses and omissions of the treaty.

The foregoing research focused on the legal interpretation of international nuclear obligations and arguments offered by the parties in support of their efforts to respond to and otherwise criticize their rivals. It sought to understand the political policies and status of states involved in Iran's nuclear dispute in order to discern the elements that have shaped the trajectory of negotiations between Iran and the coalition. Hopefully, the major findings of this research and its recommendations will contribute to establishing a better understanding of the nuclear rights and obligations of all states and will contribute to the development of the international nuclear non-proliferation regime.

9.2. Research Questions

Fundamentally, the research answered its questions by conducting legal interpretation and analysis of the international nuclear regime, particularly the NPT and other related legal documents, such as the International Atomic Energy Agency (IAEA) Statute, its safeguards and other subsidiary agreements; related principles of the United Nations Charter (UNC); and United Nations Security Council (UNSC) Resolutions. In completing the task, and due to divergences between states in interpreting the nuclear rights and obligations under the NPT,

the research adopted the general interpretive rules that are coded in Articles 31 and 32 of the Vienna Convention of Law of Treaty (VCLT) to understand the nature and scope of the rights and obligations of the NPT.

This study proceeded to address several secondary legal questions to support answering the main research questions. The legal framework of these questions basically dealt with a discussion of whether Iran had violated its obligations, particularly under Articles II, III, and IV of the NPT. It addressed the legal mandates of the IAEA and the extent to which that agency acted legally regarding Iran's nuclear programme and it assessed, from a legal perspective, the effectiveness of coercive approaches and sanctions in containing nuclear proliferation cases.

9.3. Main Findings

The arguments between Iran and the coalition with regards to Iran's nuclear programme were based on the allegations and accusations of violating the rule of international law that are applicable in this case, particularly the NPT obligations. These arguments were due to suggestion divergent understandings and interpretations of the rules of law.

The NPT treaty does not consist of any interpretive mechanisms or requirements to resort to a particular legal body to resolve any legal dispute which occurs over its principles. With this lacuna, interpreting the NPT principles should be carried out in accordance with the general interpretive rules of Article 31 and 32 of the VCLT.

Implementing these rules leads to the conclusion that the three principles of the NPT -- non-proliferation, nuclear disarmament, and the right to use nuclear energy for peaceful purposes-- constitute legally binding obligations imposed on all states without discrimination. Thus, all states are bound mutually to respect and implement these principles. This is because they collectively reflect the object and purposes of the NPT, which are to prevent nuclear war and promote security. The credibility and integrity of the treaty depend on implementing its obligations in a parallel manner. If this equilibrium was disturbed, the treaty

would lose its trustworthiness and effectiveness – which is precisely what is happening at the moment. For example, the Nuclear Weapons States (NWSs) have not shown any serious intent to achieve complete and general nuclear disarmament as required by Article VI of the NPT. Limiting the right to access nuclear technologies for some states and leaving it widely open to others is another example where states feel that they have been deceived which might lead them, directly or indirectly, to shift away from their nuclear obligations.

This research argues, in contrast to established opinion, that the NPT suffers from omissions and weaknesses that prevent it from achieving its object and purposes; in addition, it will be largely incapable of meeting any unexpected challenges which occur in the future. Apart from the absence of interpretive mechanisms, the treaty lacks enforcement mechanisms in cases of non-compliance; it discriminates between two categorised parties (NWSs and NNWSs) and only addresses states rather than non-state actors such as terrorist groups and private businesses. All these features affect its efficiency and universality and limit its capability to achieve its purpose. This shows that there is a need to reform and amend this treaty.

This research contends that these omissions and weaknesses impose an urgent need to create a new international nuclear treaty that would address the deficiencies of the existing one. This is understandable: the NPT is now in the second half of its fifth decade, having been created at a time which was very different from the present. The status quo that it was established to defend has disappeared and it will not be sufficiently effective to meet any unexpected challenges that might occur in the future. So, instead of attempting to strengthen the outdated NPT and holding five-yearly review conferences to discuss and examine its principles of implementation, this researcher firmly believes that states should engage in discussions to establish a New Nuclear Non-proliferation Treaty (NNPT).

Creating a new treaty in the field of nuclear weapons proliferation is not new. However, this research discusses the creation of the new treaty on bases that none of the sources of this research have discussed before. These bases are: first, discussions on the NNPT should be carried out through an international forum

or body that represents all states around the world, such as the United Nations General Assembly (UNGA). In addition, as nuclear weapons affect everyone on the face of the earth, civil societies, national and international non-governmental organisations, and major industrial private businesses working in the field of nuclear energy, should be welcome to participate in the discussions.

Secondly, the treaty should principally aim to prohibit the use of all nuclear weapons on the ground of their potentially catastrophic consequences. indiscriminate nature, and uncontrollable destructive capability.[1]

Thirdly, the treaty should be given a law-making character forbidding the possession, production and development of nuclear weapons as they are the trigger for further nuclear weapons proliferation. In other words, it should have a non-discriminatory character where all states are equal in terms of their rights and obligations. Exactly the same applied when the UNSC adopted its resolution 1450[2] and set up binding rules on all states which oblige them, *inter alia*, to refrain from supporting by any means non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.[3] In this manner, the treaty will achieve universality as it will apply to all states, non-state actors, and those in the private sector.

Fourthly, in the case of non-compliance or a legal dispute over its legality and scope, the treaty should consist of interpretive and enforcement mechanisms. These mechanisms should be implemented by a nominated specific legal specialist body, such as the International Court of Justice (ICJ). This legal body would supervise the implementation of the principles of the NNPT and resolve any legal dispute which occurs in the future.

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[1] Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered by H.E. Sebastian Kurz Federal Minister for Europe, Integration and Foreign Affairs of Austria at 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 28 April 2015.

[2] UNSC, Res S/RES/1450, 28 April 2004.

[3] ibid para 1.

Fifth and finally, as compensation for giving up their nuclear weapons, the treaty should guarantee the fullest access to nuclear technologies to all states. It should guarantee a share of and assistance in the field of nuclear energy for peaceful purposes between all its members.

With regards to the Iran-coalition confrontation, Iranian nuclear motivations and ambitions are driven by factors that include security, the state's identity and prestige, domestic objectives, and international influences. Despite the fact that Iran has carried out some undisclosed nuclear activities, this state has no proven intentions to develop a nuclear weapons programme; at least not in the near future. Rather, its nuclear activities show that it has steadily worked on obtaining and building an advanced nuclear infrastructure. From the Iranian point of view, this infrastructure is regarded as essential. From its experiences with the international community in the nuclear cooperation field, Iran feels that it should have the independence to produce the fuel needed to run its nuclear plants and to be free from relying on foreign nuclear fuel suppliers. In addition, these advanced nuclear technologies allow the Iranian government to assert some political pressure to reach its internal and international objectives. In the worst case scenario, Iran, like other states, wants to possess enough nuclear technologies and knowledge to allow it to build its own nuclear weapons whenever the need arises and it decides to do so.

However, as a matter of law, Iran's nuclear activities do not constitute a *per se* violation of its obligations under international law. Indeed, Iran's nuclear case does not differ from other nuclear cases. As a state, Iran seeks nuclear energy to enhance its economy and develop its industry and environment; this is a legal right which is protected by the rules of international law. However, what is different is how the coalition and its allies have approached and dealt with Iran.

Investigating and analysing this confrontation reveals that political disputes and influence lie at its core rather than a conflict over legal rights and obligations. This confrontation has been given legal cover to legitimise other objectives, seeking to gain international support by presenting Iran as a law violator that should be questioned and punished. It can be argued that the international community's concerns are not whether Iran has violated its nuclear obligations;

rather, they are on what lies beyond this and the consequences of Iran's nuclear capacities. Iran has recently become involved in other theatres of conflict, such as Syria, the Iraq war, Lebanon and Yemen. These involvements have provided Iran with a broad popular base and an increase in its political influence in the region. The decline of American influence and the central governmental and sectarian disputes in the region have given the Iranian government the opportunity to become a major player in defining the political map of the area. Such a role and influence have become a source of concern and constitute a real challenge to the political and military existence of powerful states in the Middle East, particularly the USA. It is also not in harmony with the interests of other states, such as Israel, Saudi Arabia, or Turkey, who are seeking to gain and play the same role as Iran.

From the legal perspective, the arguments of the coalition are based on the idea that Iran is breaching Article III of the NPT in its secret nuclear activities, and therefore breaching its obligations under its Safeguards Agreements. Furthermore, the IAEA Board of Governors' (BOG) 2011 reports particularly alleged that there were capacities in place inside Iran that could be applied to the production of nuclear weapons, which then raised the coalition's concerns that there might potentially be a breach of Article II of the NPT related to the manufacture of nuclear weapons.

However, we should distinguish between non-compliance with Article III of the NPT and non-compliance with Safeguards Agreements. Non-compliance with the Safeguards Agreements is not equal to a breach of Article III of the NPT. It is true that the key feature of Article III is that it maintains that states must enter into Safeguards Agreements with the IAEA, but breaching one of the obligations of these agreements does not amount to a breach of Article III. This is because non-compliance with Safeguards Agreements can happen due to a very technical omission, such as a state's failure to report the exact amount of uranium in one of its nuclear facilities. For further illustration, the research points to the inherent right to self-defence for all states which is coded in Article 51 of the UNC. According to this right, all states can deter any threat and defend themselves against any armed attack until the UNSC has taken the measures necessary to

restore international peace and security. Once the UNSC becomes involved in the matter, the inherent right of self-defence is suspended and the measures that have been taken by states before UNSC involvement must be reported to the UNSC. However, the failure of states to report those measures would not illegalise the exercise of its inherent right to self-defence. Comparably, the inalienable right of the NPT is very similar to the inherent right of Article 51 of the UNC. A failure of a state to comply fully with reporting its nuclear activities to the IAEA does not stand as a legal basis to demand this state cease its exercises and suspend its nuclear activities. Thus, although Iran has undeniably failed at some stages to be fully compliant with its Safeguards Agreements' obligations to the IAEA, these failures do not constitute a *per se* violation of its obligations under Article III as the coalition contends. Subsequently, Iran is not legally in breach of Article III because it signed a Comprehensive Safeguards Agreement with the IAEA (CSA).

Moreover, the BOG determined that Iran was not compliant with its Safeguards Agreements and that it should prove its compliance by resolving all outstanding issues and questions regarding its nuclear programme. In legal terms, this implies that Iran was under a positive obligation to prove the negative; meaning that there were no unsafeguarded activities and no undeclared nuclear activities taking place inside Iran. This means that the BOG understanding has extended its legal mandates to go beyond the monitoring and verification of fissile materials to the monitoring and verification of the location of fissile materials and all related activities inside Iran. Reading Iran's CSA carefully reveals that all that the IAEA is mandated to do is to count the fissile materials inside Iran. Therefore, the BOG has acted outside of its mandate in imposing this positive obligation to prove the negative.

Certainly, this was the first time that the BOG has worked in that way. Never in any other case of non-compliance has it imposed such a positive obligation upon the country concerned, only in the case of Iran. For example, in 2002, it was discovered that South Korea had had enrichment experiments going on for decades which were undisclosed to the Agency, but no positive obligation was

imposed as a result. As such, it could be said that the BOG's treatment of Iran was discriminatory.

In addition, the BOG's demand that Iran should cooperate with IAEA inspectors to resolve all outstanding issues has a legal implication. This is because there is no legal standard for the level of cooperation demanded by the BOG in order for Iran to justify that it is in compliance with its Safeguards Agreements. It is neither in the NPT, nor in the Statutes of the IAEA. Indeed, neither Iran nor the IAEA knows what Iran must do to satisfy the BOG and comply with the safeguards. The absence of legal standard makes the level of corporation objectively applied by the IAEA. No nation will accept having to agree in advance to put all its sensitive and military sites under objective scrutiny without an existing legal standard.

Turning to the allegation of a potential violation of Article II and the PMD file, it was found that there were scientific industrial experiment research applications taking place in Iran, although these applications could not in fact be used in a nuclear weapons development programme. Therefore, the allegations of the PMD were criticised as being specious, inaccurate, and unproven.

Following on from the above, we can contend that the IAEA has dealt with the Iranian nuclear case from a hostile and aggressive perspective and on an illegal basis. It has exceeded the legal authority of its Statute as it has been acting beyond its technical nature. In the opinion of this researcher, the PMD file can only be explained as an effort to save the face of the coalition and gain a hollow victory by supporting their allegations and convincing people of their analysis.

It is owing to the BOG's position and its understanding of its mandates, that the UNSC became involved in the Iranian nuclear case. The first resolution in 2006 saw the demand that Iran suspend all its nuclear activities. After that resolution came four more rounds of resolutions, taking the form of financial sanctions on persons, industries, and entities involved in the Iranian nuclear programme. These sanctions have mainly been applied unilaterally by the USA and the European Union (EU). Technically, these sanctions were imposed on Iran not because it is really in violation of its nuclear obligations, but, rather, because the

council chose to interpret its nuclear activities as a threat to international peace and security. States such as India, Israel, and Pakistan have exceeded Iran's nuclear capability and have built their own nuclear weapons but their activities did not trigger the concerns of the council. They have never been categorised as threats to international peace which might necessitate dealing with them by imposing sanctions and the use of force to contain their nuclear programmes. Some might argue that these states are not under the IAEA Safeguards Agreements and a referral by the IAEA that there is a nuclear threat is needed for these cases to be seen by the council, but this is completely wrong. Under the authority of Chapter VII, the council can involve and impose sanctions on these states on its own initiative. Stipulating that such a referral is needed is a major weakness of the NPT which allows severe punishment of members, but leaves non-NPT members untouched even though they may contribute to nuclear proliferation.

The resolutions of the UNSC constitute a violation of international law, particularly the inalienable right of Article IV of the NPT. This is a fundamental right of states and neither an international organisation such as the UNSC nor individual states can act to seriously prejudice it as long as the beneficiary state from this right is a NNWS to the NPT and all its nuclear activities are safeguarded. Denying or preventing states from fully exercising their nuclear rights is an internationally wrongful act implicates states responsibility. The argument that the UNSC resolutions, according to Article 25 and 103 of the UNC, take precedence over all rights and obligations of states is not valid in this instance. This is because the right to use nuclear energy for peaceful purposes has the character of a *jus cogens* norm. It is not a right established or created by bilateral or international treaty which can be suspended or amended by the consent of the parties.

Therefore, demanding that Iran ceases all its nuclear activities, including uranium enrichment and related activities, is illegal as it is denying Iran's nuclear rights. Moreover, these demands overly restrict the negotiations on diplomatic and peaceful solutions. This is because negotiating states cannot legally offer Iran any option less than full suspension of its nuclear activities;

otherwise this offer would breach the UNSC resolution. This was exactly what happened when the USA rejected Turkey and Brazil's proposal in 2010 on the basis that it did not meet the UNSC's demands. Thus, despite the UNC directing the council to encourage and facilitate peaceful settlements, it seems that, in the case of Iran, the council chose an opposing viewpoint which made the council's resolution unrealistic and badly affected the credibility of the council.

According to the above discussion, it is the sanctions regimes imposed on Iran without a legal foundation that raises concerns about the legality and harmonisation of these sanctions with the rules of international law due to their negative humanitarian impacts. Moreover, regardless of their legality, these regimes have been shown to have few positive effects in practice, especially in the field of nuclear proliferation. Although they target specific persons and entities, they cause harmful suffering to the people of the state as they target the whole economy of the country. They have also proved to be insufficient to change

the nuclear behaviour of the target state. Rather, they may even be counterproductive by pushing the target state to go further in its nuclear programme development. This is very clear from investigating the trajectory of Iran's nuclear case. The tougher the sanctions, the more the Iranian people suffer and the further the Iranian government took its nuclear programme, particularly its uranium enrichment activities. Indeed, despite the political and economic pressures caused by these sanctions, Iran has succeeded in maintaining its nuclear trajectory and infrastructures.

9.4. Recommendations

Although this research has focused on Iran's nuclear case as a case study, the findings and recommendations could also apply to a wide range of nuclear proliferation cases.

It is clear that, at some stages of its nuclear programme, Iran hid some of its activities from the IAEA inspectors, whether intentionally or unintentionally. However, an important question arises which is: do we really need to deeply

investigate and scrutinize the past nuclear activities of a state? How would digging deep into the history of the nuclear activities of a state, as the IAEA's 2011 reports and the PMD files did, help in resolving a nuclear dispute? This research observes that there is no need to investigate carefully the past nuclear activities of a state, especially where there is no credible evidence that this state has definitely developed a nuclear weapons programme. In Iran's case, there are intensive allegations of involvement in nuclear experiments in the past, but there is no evidence of such activities at present. This conduct simply does not serve efforts to contain the nuclear programme of a state and instead lead to a loss of confidence in the international nuclear regime. Therefore, states should not be accused of running a nuclear weapons programme until trustworthy evidence is provided. This implies that the state in question must show the highest transparency about its nuclear activities. This sort of transparency is very important to build up trust and convince the international community about the peaceful purposes of its nuclear programme.

The negotiation and trajectories of the Iranian nuclear case show that mutual respect, diplomatic solutions and recognition of Iran's nuclear rights are the best approaches to resolving the dilemma of nuclear proliferation. This is clearly illustrated by the fact that, after more than a decade of coercive approaches, the parties to the Iran-coalition confrontation reached a final diplomatic agreement on the 14th of July 2015[4], which is called The Joint Comprehensive Plan of Action (JCPOA). This agreement is a major success of international diplomacy as it deals with all the major nuclear issues between the parties; despite the fact that this agreement is still at an early stage, it is difficult to predict and comment on some of its weak points.[5]

[4] IAEA, 'Director General's Statement on the Announcement by the E3/EU + 3 and Iran on the Agreement of the Joint Comprehensive Plan of Action' (14 July 2015) IAEA News Centre <https://www.iaea.org/newscenter/pressreleases/director-general%E2%80%99s-statement-announcement-e3/eu-3-and-iran-agreement-joint-comprehensive-plan-action> accessed 23 April 2016.

[5] To read the full text of the JCPOA; see the U.S. Department of State, 'Joint Comprehensive Plan of Action' (no date) <http://www.state.gov/documents/organization/245317.pdf> accessed 23 April 2016. The weak points of this agreement are, for example, but are not limited to the fact that this agreement is not a treaty. This is clear from the text of the agreement which refers to the fact that the 'parties will take the following voluntary measures within the timeframe as detailed in this JCPOA and its Annexes' (page 6 of the agreement. This means that the JCPOA has no

In the case of any legal dispute over the limitation of this right, or any legal dispute in the nuclear field, it is highly recommended, due to the sensitivity of nuclear proliferation cases, to resort to a specialist legal body, such as the International Court of Justice (ICJ) to review the legality and carry out a judicial review of the validity of the international entities' resolutions. None of the legal interpretations and resolutions adopted by the UNSC, IAEA, or states regarding Iran's nuclear case have been reviewed by an international judicial body. A competent international body with legal jurisdiction is very important to determine the legality or illegality of the resolutions and acts of the parties to a dispute.

This leads this researcher to contend the necessity to create legal standards or mechanisms that would distinguish between a legal nuclear dispute and a technical nuclear dispute. For explanation, the IAEA is the only international body responsible for monitoring and verifying that there are no undeclared fissile materials or any diversion of nuclear material to nuclear weapons within the territories of its member states. It is a technical international organisation. As it is facing new challenges and growing expectations, this Agency needs to create mechanisms that would provide it with the tools and capacity to take on a more intensive and broader role. Most importantly, it should reform its construction and functions. In terms of constructional reform, the Agency needs to develop the capacity to investigate the entire nuclear programme of a state

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legal obligations. Rather, it consists of political commitments. This fact has a legal implication from the viewpoint of international law. It means that the agreement could collapse without any legal consequence given any unreasonable or aggressive request by either side to the agreement. In addition, Iran will provisionally abide by its Additional Protocol agreement (AP), proceed with its ratification within the timeframe as detailed in Annex V (which is 8 years) and fully implement the modified Code 3.1 of the Subsidiary Arrangements to its Safeguards Agreement. This raises controversial questions on the implementation of the AP (Para 13, Page 8). Moreover, the JCPOA demands that Iran and the IAEA resolve the PMD issue within six months of signing the JCPOA pursuant to the "Road Map" agreed between Iran and the IAEA on the same day of signing the JCPOA. It is not very clear why the coalition agreed to resolve a complex issue such as PMD, which has been contested between the parties for many years, in such a surprisingly short time. It could be that the coalition was focusing on the present and future and wanted to avoid anything that might lead to the collapse of the agreement in the form of forcing Iran to admit its illegal past nuclear activities. If this is true, then it is a good thing and it is in harmony with what this research recommends concerning parties to a nuclear dispute not looking intensively to the past. Last but not least, the timeframe of the work of the JCPOA was determined as mostly within ten years, so how will the international community deal with Iran after the expiry of the JCPOA as Iran will be free from any international restrictions by the end of this year and it will also have gained more sophisticated nuclear technologies and international legitimacy for these technologies.

and the ability to assess its related nuclear activities (or what is called a State-Level Concept), but it needs professional and skilled experts to carry out such role.

In terms of functional reform, the Agency is required to be more transparent; especially in terms of relying on data provided by third parties. If the Agency sees that there is a vital need to rely on information provided by national intelligence agencies, the adoption of such information should be handled according to clear mechanisms. As for the IAEA inspectors, every effort should be made to verify the quality of the information and evidence included in the accusation. They should not postulate one single outcome; rather, their methodology should study all possible causes for all possible given outcomes. Then, they should choose the most likely outcomes and its causes. Finally, they must explain why and how they chose this hypothesis and why other possibilities were excluded.

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