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Daniel H. Joyner

University of Alabama School of Law

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IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW*

*Daniel H. Joyner***

INTRODUCTION

This essay will provide a discussion and analysis of international legal questions relating to the dispute between Iran and Western states with regard to Iran's nuclear program. In particular, it will consider the competing interpretations between the parties of the Nuclear Nonproliferation Treaty (NPT) and International Atomic Energy Agency (IAEA) safeguards agreements. It then will consider what this legal analysis means for the future of the international nuclear nonproliferation regime.

The current international dispute over Iran's nuclear program began in 2002 when Iranian dissident groups revealed to the IAEA that Iran had constructed two facilities, at Natanz and Arak, the existence of which Iran had not reported to the IAEA.¹ This revelation was subsequently confirmed by Iran, though Iran

* This essay was adapted from the transcribed remarks of Professor Daniel Joyner delivered on February 15, 2013 at the annual symposium of the *Penn State Journal of Law & International Affairs* on *The U.S.-Iranian Relationship and the Future of International Order*. Video of the symposium is available at http://law.psu.edu/academics/journals/law_and_international_affairs/lectures_and_symposia.

** [Daniel H. Joyner](#), Professor of Law, University of Alabama School of Law.

¹ IRAN'S STRATEGIC WEAPONS PROGRAMMES: A NET ASSESSMENT 16 (Gary Samore ed. 2005).

maintained that no fissile (nuclear) materials had been introduced into these facilities, and that they were purposed exclusively for peaceful, civilian use.²

However, Iran's failure to declare the existence of these facilities in what the IAEA considered a timely manner led to further investigations of Iran's nuclear program³ and to the IAEA's determination in November 2003 that, in a number of instances, Iran had been noncompliant with its legal obligations pursuant to its INFCIRC/153 Comprehensive Safeguards Agreement (CSA) with the IAEA.⁴

The CSA is a bilateral treaty between the IAEA and Iran that details the legal relationship between the IAEA and Iran and spells out both Iran's obligations related to nuclear safeguards and the IAEA's authority to conduct investigations and assessments of Iran's nuclear facilities and material.⁵ Specifically, this determination of noncompliance was based upon the discovery of small amounts of undeclared uranium and upon Iran's failure to report the further processing of this material and the facilities in which it had been stored.⁶ In addition, however, the Agency was also concerned about what it saw as Iran's "hiding" of the facilities at Natanz and Arak.⁷

The IAEA Board of Governors (BOG), through a number of resolutions over the next two years, imposed upon Iran a duty of

² Int'l Atomic Energy Agency [IAEA], *Statement by the Iranian Government and Visiting EU Foreign Ministers* (Oct. 21, 2003), http://www.iaea.org/newscenter/focus/iaeciran/statement_iran21102003.shtml.

³ IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, Bd. of Gov., IAEA Doc. GOV/2003/75 (Nov. 10, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-75.pdf>.

⁴ IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Resolution adopted by the Board on 26 November 2003*, Bd. of Gov., IAEA Doc. GOV/2003/81 (Nov. 26, 2003), <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-81.pdf>.

⁵ IAEA, *The Text of the Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/214 (Dec. 13, 1974), <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc214.pdf>.

⁶ IAEA, *supra* note 4.

⁷ *See id.*

cooperation with the Agency in order to address these issues of noncompliance and to satisfactorily answer the IAEA's remaining questions regarding Iran's nuclear program.⁸ These questions included whether there were yet further aspects to Iran's nuclear program that had not been declared to the IAEA, including possible military dimensions to the program.⁹ Iran's failure to meet this standard of cooperation to the satisfaction of the IAEA BOG, led to the Board's decision in 2006 to refer Iran to the U.N. Security Council.¹⁰

Later that year, the U.N. Security Council adopted Resolution 1696, in which it ordered Iran to cooperate with the IAEA and to suspend its uranium enrichment program.¹¹ Iran's refusal to comply with the demands of this and subsequent Resolutions adopted by the Security Council has led to several rounds of economic and financial sanctions imposed upon Iran by the Security Council.¹² Further, both the United States and the European Union have imposed separate and additional unilateral economic and financial sanctions on Iran due to this impasse.¹³

Since 2002, a number of Iranian civilian nuclear scientists have been assassinated inside Iran, in what Iran alleges to have been

⁸ See IAEA, *supra* note 5.

⁹ See *id.*

¹⁰ Press Release, IAEA, Report on Iran's Nuclear Programme Sent to U.N. Security Council (Mar. 8, 2006), <http://www.iaea.org/newscenter/news/2006/bog080306.html>.

¹¹ Press Release, Security Council, Security Council Demands Iran Suspend Uranium Enrichment by 31 August or Face Possible Economic, Diplomatic Sanctions, U.N. Press Release SC/8792 (July 31, 2006), <http://www.un.org/News/Press/docs/2006/sc8792.doc.htm>.

¹² See S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008); S.C. Res. 1835, U.N. Doc. S/RES/1835 (Sept. 27, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010). See also Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519, 533-48 (2007).

¹³ See Kittrie, *supra* note 12.

targeted killings orchestrated by Israel.¹⁴ Further, Iran's nuclear facilities have been damaged on multiple occasions by cyberattacks, including through the introduction of the sophisticated Stuxnet and Flame computer viruses/worms into these facilities, which Iran attributes to the United States and Israel.¹⁵ While not confirming their involvement in these events, officials in the United States and Israel have been variously quoted publicly as supporting potential military strikes against Iran's nuclear facilities if a diplomatic resolution to the crisis cannot be reached through negotiations between Iran and the P5+1 group of states (United States, Russia, United Kingdom, China, France, Germany).¹⁶

This discussion analyzes the legal arguments on both sides—meaning, on the one side, Iran; and on the other side, the U.S., Britain, France, Germany, and, to a lesser extent, Russia and China, whom I will collectively (although of course inaccurately) refer to as “the West” —regarding the relevant sources of international nuclear law, and regarding whether Iran has been in compliance with these sources of law. I hope in doing so to flesh out further the nuclear nonproliferation legal framework.

¹⁴ Karl Vick and Aaron J. Klein, *Who Assassinated an Iranian Nuclear Scientist? Israel Isn't Telling*, TIME, Jan. 13, 2012, <http://www.time.com/time/world/article/0,8599,2104372,00.html>.

¹⁵ David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>. See also DAVID E. SANGER, CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER (2012).

¹⁶ See *Bush Won't Rule Out Military Action Against Iran*, L.A. TIMES, Aug. 14, 2005, <http://articles.latimes.com/2005/aug/14/world/fg-iran14>; Jon Swaine, *Barack Obama: I'm not bluffing on military action against Iran*, TELEGRAPH, Mar. 2, 2012, <http://www.telegraph.co.uk/news/worldnews/barackobama/9119775/Barack-Obama-Im-not-bluffing-on-military-action-against-Iran.html>; Alistair Dawber, *Iran's nuclear ambitions: Israel will not wait until it's too late, warns Benjamin Netanyahu*, THE INDEPENDENT, July 15, 2013, <http://www.independent.co.uk/news/world/middle-east/irans-nuclear-ambitions-israel-will-not-wait-until-its-too-late-warns-benjamin-netanyahu-8709097.html>.

THE “WESTERN” ARGUMENTS

The essential Western legal argument is that Iran has been in the past, and is to this day, in noncompliance with its obligations under its CSA with the IAEA.¹⁷ Again, through IAEA resolutions, the IAEA BOG has imposed on Iran specific requirements of cooperation.¹⁸ And the Western legal argument is that, because those levels of cooperation have not been met—meaning access by inspectors to facilities and Iran’s answering of questions that the IAEA has—the IAEA BOG continues to determine that Iran is in noncompliance with its safeguards agreement obligations.¹⁹ This in turn, has led to an argument by some Western officials that Iran is also in violation of Article III of the NPT, which, in paragraph four, requires Non-Nuclear-Weapon States (NNWS) parties to conclude a safeguards agreement with the IAEA. Thus, there is both the safeguards agreement compliance level, but also a link in this legal argument to compliance with Article III of the NPT.²⁰

One legal interpretation underpinning the Western legal argument regarding Iran’s CSA compliance is regarding the scope of the authority, or mandate of the IAEA, to investigate and to assess compliance with CSA. The Western legal argument—and this is the legal argument also maintained by the IAEA itself—is that the IAEA has the authority and mandate not only to confirm the correctness of Iran’s required declaration of its nuclear materials and facilities under the CSA and the non-diversion of this declared fissile material from peaceful to military uses, but also the authority and mandate to confirm the absence of any undeclared nuclear facilities and materials

¹⁷ See IAEA, *supra* note 4; IAEA, *supra* note 5; IAEA, Rep. of Dir. Gen., *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2013/27 (May 22, 2013), <http://www.iaea.org/Publications/Documents/Board/2013/gov2013-27.pdf>.

¹⁸ *Id.*

¹⁹ Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of the Dir. Gen., at paras. 67-71, IAEA Doc. GOV/2013/27 (May 22, 2012), <http://www.iaea.org/Publications/Documents/Board/2013/gov2013-27.pdf>.

²⁰ Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

inside Iran, *and* any potential nuclear weapons-related activity (i.e., warhead development activity).

In brief, the INFCIRC/153 CSA, which is the only safeguards agreement to which Iran is a party, requires a declaration by the NWS of their fissile materials accounting and their facilities relating to those fissile materials.²¹ The argument of the West and of the IAEA is that the IAEA not only has the right to, and the mandate to, confirm the correctness of that declaration, but also its completeness. This means that the IAEA has the mandate to make sure that the state has declared everything it was supposed to declare. That argument has far-reaching implications for the standard of compliance with the CSA. If one considers that the IAEA's mandate is to determine not only the correctness, but also the completeness of the declaration, the IAEA has the authority, nay, the *obligation* to conduct additional inspections to those called for under the INFCIRC/153 itself, in order to determine, with any confidence, that there are no undeclared fissile materials. This is the argument of the West and the IAEA, as to the IAEA's mandate. And so the argument goes that, with this standard and the mandate of the IAEA, Iran has not provided enough cooperation to satisfy suspicions regarding past and possibly current nuclear weapons-related activity in Iran.²²

Under the tenure of Director General Yukiya Amano, the IAEA has accepted from national intelligence agencies, information regarding not only Iran's use of fissile material itself, but also information concerning the other elements of building a nuclear weapon, essentially meaning the physical construction of a nuclear warhead. In November 2011, the Director General of the IAEA produced a report to the BOG laying out the evidence the IAEA had obtained from the national intelligence sources, that it argued raised the specter of Iran having engaged in a number of industrial and

²¹ See IAEA, *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on Non-Proliferation of Nuclear Weapons*, Bd. of Gov., IAEA Doc. INFCIRC/153 (June 1972), <http://www.iaea.org/Publications/Documents/Infcircs/Others/infirc153.pdf>.

²² IAEA, *Council on Foreign Relations (CFR) Interview with Albert Carnesale*, IAEA Doc. CFR Interview 091110 (Nov. 9, 2010), <http://www.iaea.org/newscenter/transcripts/2010/cfr091110.html>.

scientific experiments, the understanding from which could be used in the development of a nuclear warhead.²³

This adds yet another dimension to the legal arguments of the West and the IAEA regarding Iran's compliance with international nuclear law—the possibility of an Article II breach of the NPT.²⁴

In summary, the West and the IAEA argue that Iran is in breach of its CSA obligations, which in turn links to Article III of the NPT. Second, the West and the IAEA argue that there is a possible military dimension of Iran's nuclear program that raises the specter of an Article II violation of the NPT.

The U.N. Security Council, as I noted, in Resolution 1696 and subsequent resolutions, has commanded Iran to cease uranium enrichment.²⁵ This then, becomes yet another dimension of international law relevant to this case—i.e. the legally binding force of Security Council resolutions under Articles 25 and 103 of the U.N. Charter.²⁶

IRAN'S RESPONSES AND AFFIRMATIVE ARGUMENTS

Let's switch now to Iran's legal arguments, which are responsive in some respects to the West's accusations, and in other respects, rest on independent assertions Iran's legal arguments are essentially based in Article IV of the NPT—the inalienable right of all states to peaceful uses of nuclear energy.²⁷ I wrote a book, published in 2011, probably half of which is devoted to interpretation of Article IV and Article III and this whole question of the inalienable right.²⁸ I will only mention here that we need not think of

²³ IAEA, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, Rep. of Dir. Gen., IAEA Doc. GOV/2011/65 (Nov. 8, 2011), <http://www.iaea.org/Publications/Documents/Board/2011/gov2011-65.pdf>.

²⁴ See NPT, *supra* note 20, at art. II.

²⁵ S.C. Res. 1696, ¶ 2, U.N. Doc. S/RES/1696 (July 31, 2006).

²⁶ U.N. Charter arts. 25, 103.

²⁷ NPT, *supra* note 20, at art. IV.

²⁸ DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY (2011).

the right to the full nuclear fuel cycle as residing only in the NPT. Under the *Lotus* principle of international law, according to which, essentially, that which is not prohibited by law is lawful, the real question is: are the activities related to the fuel nuclear cycle prohibited anywhere in international law?²⁹ And the answer to this is no, except in very specific ways in the context of Article II of the NPT, and to some extent, Article III and the safeguards requirement of the IAEA. So that's an important change of vision to look at it that way. A right need not exist under the NPT. Instead, the proper determination would be whether any activities are prohibited in international law, and if they are not, then they are lawful. Thus, Iran argues, its NPT Article IV right to peaceful uses of nuclear energy provides the essential starting point for legal analysis.³⁰

Iran specifically disputes the argument by the West and the IAEA that Iran is in noncompliance with its IAEA CSA on a number of bases. One is the question of the mandate of the IAEA. Iran, in viewing the INFCIRC/153 Comprehensive Safeguards Agreement, sees the mandate of the IAEA spelled out very clearly in Article II, and that is to detect the diversion of fissile materials from peaceful to military uses.³¹ It essentially argues that the framework provided by the CSA, is that detecting diversion of fissile material is to be accomplished through a declaration by the State Party of its fissile materials and facilities, and then the IAEA's determination of the accuracy of that declaration.³² Iran argues that anything beyond that – including the imposition of a higher level of cooperation than that contained in the CSA; or the idea that the IAEA has a mandate not only to determine the accuracy but also the completeness of Iran's declaration—is *ultra vires* the IAEA's authority under the CSA.³³

²⁹ See S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, <http://documents.law.yale.edu/sites/default/files/SS%20Lotus%20-%20PCIJ%20-%201927.pdf>.

³⁰ H.E. Ambassador A.A. Soltanieh, Statement to the Second Session of the Preparatory Committee of the 2015 NPT Review Conference (Apr. 23, 2013), at 4, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/23April_Iran.pdf.

³¹ See *id.* at 4-5.

³² See *id.* at 3.

³³ See *id.*

Essentially, Iran argues that if the IAEA is accorded the mandate of determining not only the accuracy but also the completeness of a declaration, then a NPT NNWS would be required to prove the negative—i.e. to prove that Iran does not have undeclared fissile materials; to prove that Iran has never engaged in possible military dimensions; and to prove that it is logically impossible for Iran to do so.³⁴ How can one prove that one has not done something? It is a basic principle of logic - that you cannot prove the negative. It is a never-ending game that produces only time and argument. Based on this point, Iran argues that it is in compliance with its IAEA CSA.

In response to the possible military dimensions legal angle, Iran argues that, again, under the CSA, there is no mandate for the IAEA to investigate or to assess potential nuclear weapons-related work not directly relating to diversion of fissile material from peaceful to military uses. Furthermore, with regard to NPT Article II, they argue that the NPT does not prohibit research, design, or industrial capabilities that could be used to make a nuclear warhead, but that could be used for other things as well. They point to Japan, in particular, as a state that has every industrial and technical capability to build a nuclear weapon, and thus has every capability outlined in the November 2011 IAEA report on Implementation of Iran's Safeguards Agreement. And yet, there have been no arguments by the West or the IAEA that Japan is in noncompliance with its safeguards agreement or in violation of the NPT. In summary, Iran argues that it is in compliance with its IAEA safeguards agreement. Even if it were not in compliance, there would be no NPT Article III breach.

Iran further argues that there is certainly no Article II breach of the NPT. Iran has not manufactured or otherwise acquired nuclear weapons, and, in fact, the IAEA has no mandate to investigate or assess that question.

Iran is essentially correct in its legal arguments regarding NPT interpretation and interpretation of the IAEA's authority and mandate under its statute and its CSA with Iran. According to the

³⁴ *Id.*

correct legal interpretation, Iran is in compliance both with the NPT and with its CSA with the IAEA.

WHAT THE IRAN CASE MEANS FOR THE FUTURE OF THE NPT REGIME

Finally, what does the Iran case mean for the future of the nuclear non-proliferation regime? Iran's case illustrates warped and incorrect legal interpretations of the NPT and of IAEA sources of law and a prejudicial and inconsistent application of the law to this case by the West and by the IAEA itself.

From the macro view, the Iranian case is illustrative of the longstanding and varied policies and practices of the U.S. and its allies, which have fundamentally undermined the NPT legal regime. The NPT was and is a *quid pro quo* grand bargain between nuclear-weapon states and developing NNWS. As the developing NNWS, including but not limited to Iran, feel that the powerful nuclear-weapon states simply disregard their own obligations under the NPT,³⁵ disregard the grand bargain with regard to non-NPT parties,³⁶ and, furthermore, prejudicially and incorrectly use NNWS obligations against them to their harm,³⁷ the treaty regime will fade into further perceived illegitimacy and, ultimately, irrelevance.

The future of the NPT as the normative cornerstone of international law's regulation of nuclear energy is unfortunately bleak. The one most significant reason for this is the warped and prejudicial manner in which the West has generally interpreted and sought to apply the law of the NPT to non-nuclear-weapon states, including Iran. The time has come for a new grand bargain—one that

³⁵ Here, I'm referring specifically to Article VI on disarmament.

³⁶ See *Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement)*, Council on Foreign Relations, Aug. 2007, <http://www.cfr.org/india/agreement-cooperation-between-government-united-states-america-government-india-concerning-peaceful-uses-nuclear-energy-123-agreement/p15459> (discussing the nuclear sharing deal between the U.S. and India).

³⁷ Here is where I would locate the Iran case, such that its leaders no longer feel they are getting the benefit of the grand bargain.

progresses the aim of global nuclear disarmament, as well as strengthens the legal framework governing nonproliferation, while at the same time ensuring that civilian nuclear energy programs may be freely pursued and developed by states that choose to do so.