

Iran's nuclear programme: a challenge to verification

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December 2006

Introduction

1. The on-going diplomatic conflict with Iran over its nuclear fuel cycle activities may have a severe impact on international peace and security. But it may also affect the rule of law in international relations.

2. Despite arguments to the contrary, international law is a fundamentally important aspect of international relations. Indeed, as Louis Henkin once put it, '... almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.¹ And even if a state breaks an international rule, intentionally or not, it tries to justify its behaviour by invoking its legal rights or obligations. James Brierly put it this way, 'States may often violate international law, as individuals often violate municipal law, but no more than individuals do states defend their violations by claiming that they are above the law'.²

3. Iran is of course no exception, and does not proclaim to stand above the law. On the contrary, the country claims to honour its commitments and insists that other countries respect its rights. As President Mahmoud Ahmadinejad said in a 13 August 2006 interview: 'If we don't have laws you will not be able to administer anything and to rule anything. And without a law, a proper set of laws ... you cannot even govern a small village.'³

4. The rule of law, and the concept of collective security administered under the law also permeates the principles underlying the United Nations (UN) Charter. Indeed, the UN was founded to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.⁴ The very first paragraph of the very first article of the UN Charter stipulates that international disputes or situations which might lead to a breach of the peace should be brought about by peaceful means, and in conformity with the principles of justice and international law.⁵ In case the peace is broken, or a threat to it exists, the Charter envisions a military response, but only through the UN Security Council. All other forms of threat or use of military force are explicitly outlawed, save in self-defence.⁶

5. Quite successfully, Iran tends to clothe their arguments and concerns in legalistic language. These arguments are well known by now. The country has a right under the 1968

¹ Louis Henkin, 'How Nations Behave', 2nd Edition, Columbia University Press, New York, 1979, p 47

² James Brierly, '*The Outlook for International Law*', Oxford University Press, Oxford, 1994, p 5

³ 'Iranian Leader Opens Up', CBS News, 13 August 2006, <<http://www.cbsnews.com/stories/2006/08/09/60minutes/main1879867.shtml>>

⁴ Charter of the United Nations, preambular paragraph 3, <<http://www.un.org/aboutun/charter/>>

⁵ Charter of the United Nations, article 1, paragraph 1, <<http://www.un.org/aboutun/charter/>>

⁶ Charter of the United Nations, article 2 (4), <<http://www.un.org/aboutun/charter/>>

Nuclear Non-Proliferation Treaty (NPT) to develop its nuclear fuel cycle, as long as the development is for peaceful purposes. Indeed, the country has been non-compliant with its safeguards commitments, but only because it was forced to seek black-market help since no one seemed to respect their rights. It is now in full conformity with its safeguards agreement with the IAEA, no undeclared diversion of nuclear material has been established in recent years, and the country is furnishing the IAEA with all access that the organization is entitled to.

6. Equally successfully, Iran's opponents are dressing up in legalistic language. Iran's right to develop its nuclear fuel cycle is forfeited, since it is in material breach of its non-proliferation commitment. Other concerned states recognize that Iran is affording the IAEA cooperation to the letter of the law, but that this is not enough to convince them that Iran's intentions are completely harmless.

7. However, is Iran really doing everything that is required of it? Does it comply with its obligations under the NPT, its comprehensive safeguards agreement with the International Atomic Energy Agency (IAEA), and relevant UN Security Council resolutions? Do they have the right to continue to develop their nuclear programme despite having been found in non-compliance with their safeguards agreement? If so, are other states providing the nuclear assistance to which Iran is entitled? In any case, is it a sustainable situation that one country can be found in breach of its obligations under relevant safeguards agreements without repercussions?

8. While this paper focuses on the law governing Iran's dispute with other members of the international community, it may be useful to recollect that a reliance on the law itself may not be enough to solve the current mistrust in Iran's peaceful intentions. Indeed, the Director-General of the IAEA has repeatedly called on Iran to become completely transparent, and to furnish cooperation which goes beyond its legal obligations.⁷ While this call is notable and welcome, it is also troublesome, since it shows that there must be deficiencies in the nuclear safeguards system. Otherwise, if there were not deficiencies, there would be no need to call for cooperation extending beyond the letter of the law.

Iran's commitment to international arms control and disarmament

9. In quantitative terms, Iran is a country that compares well with other states. It is either a signatory or a party to most major international arms control and disarmament agreements. Regionally, it has a very good record of accomplishment in terms of the number of conventions signed up to. For instance, it joined the 1925 Geneva Protocol in 1929, the Partial Nuclear Test Ban Treaty in 1964, the Nuclear Non-Proliferation Treaty in 1970, the Sea-Bed Treaty in 1971, the Biological Weapons Convention in 1973 and the Chemical Weapons Convention in 1997. It is

⁷ Mark Heinrich, 'IAEA to Iran: stop dodging probe with legal excuses', Reuters, 28 November 2006, <http://news.yahoo.com/s/nm/20061128/wl_nm/iran_nuclear_elbaradei_dc&printer=1>

a signatory to the Outer Space Treaty (1967), ENMOD (1977) and the Comprehensive Nuclear Test Ban Treaty (1996).⁸

10. It is also a frequent supporter of various UN General Assembly Resolutions that addresses the dangers of nuclear proliferation. For instance, Iran has voted in favour of a resolution that has maintained that 'nuclear disarmament and nuclear non-proliferation are mutually reinforcing processes requiring urgent irreversible progress on both fronts'.⁹ It has voted in favour of another resolution stating that 'the proliferation and development of weapons of mass destruction, including nuclear weapons, are among the most immediate threats to international peace and security which need to be dealt with, with the highest priority'.¹⁰ It has long sponsored a resolution on missiles in the General Assembly. It supports the development of a nuclear free zone in the Middle East. The list could be made longer.

11. Iran has two de-facto nuclear weapon states on its eastern border, it has a former enemy in disarray on its western border, it has fragile ex-Soviet republics scattering its northern border, and it has the US navy constantly patrolling its southern waterways. This situation could foster a strong commitment to arms control and disarmament. However, it could also cultivate a strong sense that weapons of mass destruction, and associated strategic delivery vehicles, are a necessary tool ensuring state survival in a volatile region.

Iran's compliance with the NPT

12. Iran has been a member of the NPT for 36 years. It's been a member of the IAEA almost from the organization's inception, it joined in 1958.

13. Iran's principal obligation in respect to nuclear non-proliferation can be found in article II of the NPT, which requires Iran 'not to ... manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'. It also obliges Iran 'not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices'.¹¹

14. While it sounds straightforward, it should be noted that it is not clear what, precisely, is meant with the term 'manufacture'. The word generally means 'the making or producing of anything'. It is broader than the word 'assembly', which often refers to the fitting together of manufactured parts.¹² It is reasonable to deduce that the word is meant to describe a process

⁸ UN Department of Disarmament Affairs, *Status of Multilateral Arms Regulation and Disarmament Agreements*, accessed 29 November 2006, <<http://disarmament.un.org/TreatyStatus.nsf>>

⁹ UNGA, 'Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments', A/RES/60/56, <<http://disarmament2.un.org/vote.nsf>>

¹⁰ UNGA, 'Promotion of multilateralism in the area of disarmament and non-proliferation', A/RES/60/59, <<http://disarmament2.un.org/vote.nsf>>

¹¹ 1968 Nuclear Non-Proliferation Treaty, article II, <<http://untreaty.un.org/English/access.asp>>

¹² Dictionary.com <<http://dictionary.reference.com/browse/manufacture>>, accessed 01 December 2006

starting somewhere prior to the actual assembly of the device itself. However, it is unclear where this point is. The unchallenged view has been that 'facts indicating that the purpose of a particular activity is to acquire a nuclear device would tend to indicate non-compliance'.¹³ This attempt to clarify the meaning of manufacture is, sadly, as ambiguous as the word itself. What facts? When do these facts really indicate, and not only tend to indicate, non-compliance?

15. The sentence is also taken from the treaty's preparatory works. Such works can only be referred to in treaty interpretation if an ordinary interpretation 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.¹⁴ While it could be argued that the ambiguous nature of the article means that the US interpretation is authoritative, it should be kept in mind that the US introduced a working paper to the third preparatory committee of the 2005 NPT Review Conference, containing similar language.¹⁵ This paper seemed to have attracted some criticism, and in any case it is impossible to establish whether this language represents the consensus of NPT member states since the review conference failed to produce any common language.

16. Little attention has focussed on the fact that compliance with the NPT presently cannot be verified. True, the IAEA, which are administering safeguards under article III of the NPT, has devised a system able to detect in a timely fashion the diversion of so-called significant quantities of nuclear material from peaceful nuclear activities to the manufacture of a nuclear weapon or towards purposes unknown. The system is also thought to deter diversion by creating the risk of early detection.¹⁶ This system can only establish whether there has been a diversion of material (and more recently, whether state declarations are complete). The reach of Agency safeguards essentially stops there and there is no body which can investigate state complaints of non-compliance with the NPT, other than those related to nuclear safeguards.¹⁷

¹³ Jozef Goldblat, *Arms Control: The New Guide to Negotiations and Agreements*, SAGE, Wiltshire, 2002, p. 102

¹⁴ 1969 Vienna Convention on the Law of Treaties, article 32, <<http://untreaty.un.org/English/access.asp>>

¹⁵ 'Recommendations to the 2005 NPT Review Conference on strengthening the implementation of articles I, II, III, IV', Working Paper submitted by the United States, NPT/CONF.2005/PC.III/WP.19, 30 April 2004, <<http://www.reachingcriticalwill.org/legal/npt/RevCon05/wp/index.html>>. In the view of the United States, 'the totality of certain nuclear and nuclear-related activities in a NNWS could point toward intent to violate article II whether through the manufacture of nuclear weapons or through seeking or receiving assistance in the manufacture of nuclear weapons. Examples of such activities include clandestine efforts to acquire fuel cycle facilities of direct relevance to nuclear weapons, the failure to report to the IAEA as required such activities, and the use of denial and deception tactics if these activities are exposed'.

¹⁶ Goldblat, p. 103

¹⁷ Ibid, p. 105

Iran's compliance with IAEA Safeguards

17. It may be difficult, perhaps even impossible, to verify Iran's compliance with article II of the NPT without introducing an extraordinarily intrusive verification regime. It is, however, possible to verify how well Iran has complied with its comprehensive safeguards agreement.

18. Iran's comprehensive safeguards agreement entered into force in 1974. The country signed an additional protocol to this agreement in 2003.¹⁸ This protocol gives the IAEA additional information and tools necessary to conclude whether a country's declaration is complete as well as correct. Iran applied the protocol provisionally for some time. It is not presently applied.

19. In 2003, the IAEA Director-General reported that its non-compliance related to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed.¹⁹ Moreover, the IAEA stressed that Iran has failed 'on many occasions to co-operate to facilitate the implementation of safeguards, through concealment'.²⁰

20. In response to that report, the IAEA Board of Governors found that 'Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement ... constitute non-compliance in the context of Article XII.C of the Agency's Statute'.²¹ In other words, Iran has been found in non-compliance with its safeguards agreement. This non-compliance has been extensive, and Iran's measures to rectify the situation has been deemed to be insufficient.

21. It is important to realize that the number of concrete actions that the Board of Governors can take in respect to non-compliance is limited by the Comprehensive Safeguards Agreement itself. If the board decides that an action by Iran is essential and urgent in order to ensure proper verification, it may call upon Iran to take that action.²² Over the past three years, the IAEA Board of Governors have issued many different calls to Iran. Some of them have been heeded, whereas others have been ignored. The Board may also make those reports and take

¹⁸ International Atomic Energy Agency, Safeguards Current Status, accessed 29 November 2006, <http://www.iaea.org/OurWork/SV/Safeguards/sir_table.pdf>

¹⁹ IAEA, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran', Report by the Director General, GOV/2003/75, 10 November 2003, paragraph 48

²⁰ Id

²¹ IAEA Board of Governors, 'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran', Resolution adopted on 24 September 2005, GOV/2005/77, operative paragraph 1. The resolution was adopted by a vote with 22 Governors in favour (*Argentina, Australia, Belgium, Canada, Ecuador, France, Germany, Ghana, Hungary, India, Italy, Japan, Republic of Korea, Netherlands, Peru, Poland, Portugal, Singapore, Slovakia, Sweden, UK and US*), one (1) Governor against (*Venezuela*), and twelve (12) Governors abstaining (*Algeria, Brazil, China, Mexico, Nigeria, Pakistan, Russia, South Africa, Sri Lanka, Tunisia, Vietnam, Yemen*).

²² 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, article 18, <<http://www.iaea.org/Publications/Documents/Infircs/Others/infirc214.pdf>>

those measures provided for in Article XII.C of the IAEA's Statute.²³ According to the Statute, the following entities should receive a report by the IAEA Board of Governors:

- All IAEA member states;
- The UN Security Council; and
- The UN General Assembly.

22. Unless the state does not take fully corrective action within a reasonable time, the IAEA Board of Governors may, according to the Statute, take the following measures.

- Direct curtailment or suspension of assistance being provided by the Agency or by a member; and
- Call for the return of materials and equipment made available to the recipient member or group of members; and
- Suspend any non-complying member from the exercise of the privileges and rights of membership.

23. Presently, the Board of Governor has exercised its right to report Iran's non-compliance to the UN Security Council. It has not exercised its right to suspend an Agency assistance project yet, but have put off a decision to furnish safety assistance to Iran in respect to its heavy water reactor in Arak.²⁴

Iran's rights

24. According to article IV, all countries have an inalienable right to research, produce and use nuclear energy. One conclusion that can be drawn from the article's language is that the right to develop a domestic nuclear fuel cycle is nothing that is given by the treaty per se. Since the right is inalienable, it exists outside the treaty regime, and is firmly vested in state sovereignty.

25. So why, then, does the treaty refer to civilian nuclear power? The most important requirement of the article is that the treaty should not be interpreted in a way that constrains this right. There is one exception, however, which is clearly stated in the article itself, namely that the country pledges to exercise its right in conformity with the treaty's non-proliferation clauses (articles I and II to be specific). This means that article IV does not establish any specific right for the state. Rather, the article puts a restriction on the states sovereign right to establish and carry out fuel cycle facilities and activities.

²³ Ibid, article 19

²⁴ 'IAEA board agrees to deny Iran nuke aid', *China Daily*, 23 November 2006, <http://www.chinadaily.com.cn/world/2006-11/23/content_740814.htm>

26. In return, states with access to the nuclear fuel cycle undertake to facilitate the ‘fullest possible’ exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. States are also promised that they will be able to carry out this right without discrimination.

27. Consequently, state parties agreed in 2000 that the treaty simply ‘fosters the development of the peaceful uses of nuclear energy by providing a framework of confidence and cooperation within which those uses can take place’.²⁵

28. Article IV does mention that the country’s right to develop its nuclear programme is dependent on its conformity with its non-proliferation commitment. However, it does not mention what the consequences would be for this right if the country breaches IAEA safeguards. Hence, the peculiar situation arises where a state can breach its safeguards agreement with no apparent consequences for its right to develop nuclear energy.²⁶ This situation could be reasonable if the breaches had been minor or unintentional, for instance if the breach occurred through a misunderstanding of the rules or through negligent bookkeeping. But what if the breach or breaches had been major and intentional, such as if a state doesn’t declare major fuel cycle assets, if it engages in clandestine procurement or otherwise engages in systematic deception and denial?

29. State parties agreed in 2000 that the right to develop peaceful nuclear energy should be exercised in conformity with articles I, II and III of the treaty, which would condition the country’s right to its safeguards compliance.²⁷ It would be very tempting to refer to the 2000 review conference documents as subsequent practice which has established an agreement of the parties regarding the interpretation of the treaty. If this were the case, the documents would be relevant for the treaty’s interpretation.²⁸

30. However, some important state parties, the United States in particular, seem to consider the review conference final document as strictly politically binding, and several provisions of the document, most notably in respect to nuclear disarmament, has been openly dismissed.²⁹

31. In any event, for some states, a breach of safeguards not only amounts to bad faith implementation of the country’s safeguards agreement, but also points towards a desire to develop a nuclear weapons or a nuclear weapons capability. For others, such behaviour may be

²⁵ 2000 NPT Review Conference, Final Document, Volume I, Part I, p. 8, paragraph 1

²⁶ NPT, article IV, *e contrario*

²⁷ 2000 NPT Review Conference, Final Document, Volume I, Part I, p. 8, paragraph 2. See, however, UNSCR 1696, preambular paragraph 2, which only refers to articles I and II.

²⁸ VCLT, art 31.3 (b)

²⁹ For instance, according to the Final Document of the 2000 Review Conference, the Anti-Ballistic Missile Treaty should have been ‘preserved and strengthened’ (part 1, p. 14, para. 7). Instead, the US withdrew from the treaty, only one year after the review conference had adopted the document.

acceptable, as long as there is no undeniable proof of weapons development. Unfortunately, one has to accept that there is a considerable legal grey area in this respect.

Temporary constraints on Iran's right to develop nuclear power

32. While each state has a sovereign right to develop its nuclear fuel cycle, this right can be always be curtailed if it has deemed to constitute a threat to international peace and security. This determination is made by the UN Security Council.³⁰ If the Security Council would not be able to make this determination, the collective security system would be seriously undermined.

33. On 31 July 2006, the United Nations Security Council adopted resolution (UNSCR) 1696, which establishes a range of legally binding obligations on Iran.³¹ While skilfully avoiding classifying Iranian fuel cycle activities a threat to international peace and security, the resolution refers to the more general threat posed by the proliferation of weapons of mass destruction, consequently authorizing the Council to enact legally binding norms on a member state.

34. According to the resolution, all Iranian 'enrichment related' activities should cease. It is unclear what is meant with the term. It was not explained during the Security Council's meeting and was only referred to five times; and then only to reiterate the language of the resolution itself. Uranium conversion was not mentioned during the Security Council meeting and neither was uranium mining and milling.³² The use of the word demand makes it clear that the Security Council intends for its provision to have legal effect. Therefore, a relatively comprehensive suspension of nuclear activities³³ is required by Iran, at least until a negotiated solution guaranteeing that Iran's nuclear programme is exclusively for peaceful purposes is found.³⁴

35. The resolution also 'calls upon Iran without further delay to take the steps required by the IAEA ... which are essential to build confidence in the exclusively peaceful purpose of its nuclear programme and to resolve outstanding questions'. The word 'calls' is semantically weaker than the word 'demands', and implies that remaining measures are voluntary. Those measures include:

- The reconsideration of the research reactor moderated by heavy water in Arak;
- The prompt ratification and full implementation of the Additional Protocol;

³⁰ UN Charter, article 39

³¹ These obligations have precedence over sovereign rights and rights established by treaty, UN Charter, article 103. The resolution can be found at <http://www.un.org/Docs/sc/unsc_resolutions06.htm>

³² See United Nations Security Council, *verbatim of the 5500th meeting of the Council*, 31 July 2006, S/PV.5500

³³ According to the IAEA, there are no indications of ongoing reprocessing activities in Iran. However, the country 'has not suspended its enrichment related activities'. See IAEA, *'Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran: Report by the Director General'*, GOV/2006/53, paragraph 8 and 28

³⁴ Compare with UNSCR 1696, preambular paragraph 7

- A return to the provisional application of the Additional Protocol.
- The implementation of transparency measures which 'extend beyond the formal requirements' of Iran's safeguards obligations

36. Presently, Iran shows no indication of complying with the resolution.³⁵ The Security Council is discussing next steps, but there seem to be disagreement of whether sanctions should be applied. There seem to be a considerable gap between the US and the Russian and Chinese respective positions, and the Europeans seem unable to play the balancing role. Action in the council may be forthcoming in December 2006.³⁶

The broader perspective

37. The NPT is weakened by its vague provisions, even though it was intended to be void of any loopholes which might permit nuclear or non-nuclear weapon states to proliferate nuclear weapons in any form. This vagueness can only be rectified by the practice of states parties, most likely through the adoption of new principles in a review conference document, which in itself carries more than political weight. The authority of the final documents of the review conference would be considerably strengthened if all parties assign equal weight to all its provisions, and moves towards their full realization. The establishment of a permanent or temporary NPT secretariat would contribute towards this goal.

38. States' sovereign right to develop nuclear power cannot be seen as a loophole in the non-proliferation regime, but neither can the inherent dangers in the uncontrolled spread of nuclear technology and knowledge be overlooked. The most accepted way would be to continue efforts to strengthen the multilateral arms control and disarmament regime. This means efforts to promote adherence to instruments such as the 1980 Convention on the Physical Protection of Nuclear Materials and its amendment, the 1996 Comprehensive Test Ban Treaty. It also means trying to get negotiations on an effectively verifiable Fissile Material Cut-Off Treaty back on track. More generally, the benefits of consensus based arms control regime should not be undervalued. If the regime is based on consensus, states are more likely to implement its provisions voluntarily.

39. The IAEA verification regime needs to be strengthened, primarily through ensuring that the IAEA meets its universalization target in respect to comprehensive safeguards agreements and their additional protocols.

40. Efforts to deny states standing outside the nuclear non-proliferation regime status as de-jure or de-facto nuclear weapon states need to be reinvigorated.

³⁵ See Dafna Linzer, 'IAEA Head: Iran Close To Enriching Uranium', *Washington Post*, 24 October 2006, page A04

³⁶ Security Council Report, December Forecast, <
http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2266955/k.7A06/December_2006BRFull_ForecastBRTTable_of_Contents.htm, accessed 01 December 2006

41. State parties need to continue to encourage the establishment of nuclear-weapon free zones. The most pressing priority would be to work towards the establishment of such a zone in the Middle East.

42. It is important, in the meanwhile, to strengthen and continually improve national laws and regulations, so that national authorities have the necessary means to prevent, deter and roll back nuclear proliferation.

43. Violations of international law should be punished, and threats against international peace and security needs to be countered. However, in doing so, it is important to use the powers of the UN Security Council wisely, so that its practice does not risk undermining the authority of the Council itself. Already, there are increasing tendencies of states to outright reject Council resolutions, a practice which has been relatively scarce in the past.