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Gothenburg University

# **The legal status of the Revised Code 3.1 in relation to the Islamic Republic of Iran**

Lily Maria König

Supervisor: Mikael Baaz

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# 1. INTRODUCTION

## 1.1 Presenting the topic

The catastrophic effects of nuclear weapons have been clear ever since the United States dropped two nuclear bombs over Hiroshima and Nagasaki at the end of World War Two. At that time US was the only Nuclear Weapons State (NWS) but already by 1964, France, the United Kingdom, China and the Soviet Union had developed nuclear weapons capacity.<sup>1</sup> Later these were joined by India, Pakistan, North Korea and Israel.<sup>2</sup> The proliferation of nuclear weapons is seen as one of the most serious and challenging security issues of today. Not only are nuclear weapons of great danger if acquired by failed States, rogue nations, and military dictatorships but could lead to a cascade of destabilizing reactions by other nations.<sup>3</sup> This insight has since the beginning of the Cold War era resulted in an extensive international cooperation attempting to prevent further proliferation of nuclear weapons; without rendering more difficult the peaceful use of nuclear energy. The Non-Proliferation Treaty (NPT) of 1970 constitutes the core document and contains the fundamental rules as well as mechanisms for handling the complicated tasks of verifying the solely peaceful character of Member States' nuclear programs.

In September 2009 the world was once more made aware of the existence and actuality of the nuclear issue. Reports of a newly discovered nuclear facility<sup>4</sup>, the *Fordow Fuel Enrichment Plant*, in the desert near the city of Qom again raised the question if the Islamic Republic of Iran (Iran) is in compliance with its obligations

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<sup>1</sup> Darryl Howlett: "Nuclear Proliferation", in John Baylis, Patricia Owens and Steve Smith (eds.): *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2008), p. 391

<sup>2</sup> South Africa, having attained a nuclear weapons capability (between 1979 and 1989), became the first NWS to renounce its nuclear weapons possession and change into a NNWS, see Pierre Goldschmidt: *The IAEA Safeguards System Moves Into The 21<sup>st</sup> Century*, Supplement to the IAEA Bulletin, Vol.41, No. 4/December 1999, available at <http://www.iaea.org/Publications/Magazines/Bulletin/Bull414/article8-suppl.pdf>. In the case of Israel, the country neither denies nor confirms possession of nuclear weapons but it is widely presumed that Israel does possess such weapons, see Daniel Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 68

<sup>3</sup> Washington Institute 2009

<sup>4</sup> A facility is defined in INFCIRC/153 (Corr.) p. 27, as '(i) A reactor, a critical facility, a conversion plant, a fabrication plant, a reprocessing plant, an isotope separation plant or a separate storage installation or; (ii) Any location where nuclear material in amounts greater than one effective kilogram is customarily used', available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf>

under the NPT.<sup>5</sup> In accordance with article III of the NPT Iran has concluded a Safeguards Agreement (SA) with the International Atomic Energy Agency (IAEA).<sup>6</sup> The Safeguards Agreement is the fundamental tool for implementing Member States commitment not to develop or acquire nuclear weapons and lays out the principles of how the non-proliferation commitment shall be kept and controlled. Exact details on safeguards application are however not treated in the Safeguards Agreement itself but in “Subsidiary Arrangements”, to which the Safeguards Agreement refers. The Subsidiary Arrangements specify, in what is commonly referred to as the “Code 3.1”, at what time a new facility has to be reported to the IAEA.

After the discovery of Iraq’s secret nuclear program it was clear that the provision in the Subsidiary Arrangements concerning the declaration of new facilities was not effective enough and it was therefore modified in the early 1990’s.<sup>7</sup> According to the IAEA Iran is bound by the revised rules in the “Revised Code 3.1” and therefore should have declared the Fordow facility years back in time. Iran, on the other hand, claims to be in full compliance with its Safeguard Agreement, considering, as the Iranian government argues, that Iran is not bound by the changes to the rules.<sup>8</sup>

In 2003 Iran agreed to apply the revised provisions of the Subsidiary Arrangements. Following IAEA’s referral of Iran to the UN Security Council in 2006, Iran however informed the IAEA that due to a law passed by the Iranian Parliament Iran would no longer implement the non-ratified changes to its Subsidiary Arrangements. The IAEA has not accepted Iran’s position.<sup>9</sup> Being one in a long row of conflict-issues between Iran and the IAEA the revelation of the Fordow facility raises important questions of international law and serves as point of departure for this paper.

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<sup>5</sup> Iran signed the NPT in 1968 and the treaty entered into force in 1970, see <http://disarmament2.un.org/TreatyStatus.nsf>

<sup>6</sup> The Agreement entered into force on 15 May 1974, pursuant to its Article 25, INFCIRC/214, <http://www.iaea.org/Publications/Documents/Infcirc/Others/infirc214.pdf>

<sup>7</sup> The Board of Governors took a decision in 1992 in this regard, GOV/2003/40 paragraph 6, available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>

<sup>8</sup> Statement by Iran at the IAEA Board of Governors, November 2009, p. 2, INFCIRC/799, available at <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml>

<sup>9</sup> GOV/INF/2007/8, available at <http://www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf>

## 1.2 Objectives

The overall aim of the paper is to highlight *one* of the parts of a current international conflict and to provide a basis for understanding the chosen problematic from an international legal perspective. For this purpose international treaty law will serve as the main tool of analysis. In the international society there takes place a continuous process of legitimization where international actors appeal to norms of legality to legitimize their actions.<sup>10</sup> Other ways of legitimization include applying arguments of morality or of necessity. The principle of auto-interpretation<sup>11</sup> of international rights and obligations is still prevailing on the international scene but proving that an action is “legal” is thus a way of justifying it in the eyes of the international community. Therefore taking resort to international treaty law, more precisely the Vienna Convention on the Law of Treaties (VCLT), for the interpretation of Iran’s rights and obligations in its relationship to the IAEA makes sense. Being *the* universally accepted legal instrument for evaluating international treaty relationships, a legitimization by any of the actors involved will logically fall within the realm of the principles expressed in the Vienna Convention.

The objective is not to say that one position is *definitely* right and the other is *definitely* wrong.<sup>12</sup> With the approach to the problematic that has been chosen this is in any case not possible. Nevertheless a conclusion on the credibility of the opposing positions on the legal status of the Revised Code 3.1 in relation to Iran will be attempted. Arriving there, however, requires setting the problematic both in its legal/political as well as historical context. The objectives pursued can more precisely be formulated as follows:

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<sup>10</sup> Ian Clark shows how States throughout history have sought to legitimize their undertakings through complex and intertwined practices. Interesting to note is that Clark attempts to demonstrate that the practice of appealing to norms itself is fundamental to normative change, Ian Clark: *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), p. 207

<sup>11</sup> This follows from the *horizontal* structure still largely prevailing in the international society, where no international actor or group of actors has the authority to impose or enforce a certain interpretation on any other actor, Antonio Cassese: *International Law* (Oxford: Oxford University Press, 2005), p. 6

<sup>12</sup> International legal argumentation is rhetorical as much as it is logical. Therefore taking a stand in a question of interpretation is not the same as stating an *objective truth* in the matter, see Christian Reus-Smith: “International Law” in John Baylis, Patricia Owens and Steve Smith (eds.): *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2008), p. 284

- To examine the legal and institutional framework of nuclear non-proliferation; to which the IAEA maintains that Iran is not fulfilling its obligations in view of the Revised Code 3.1.
- To sort out the up-come situation and to explain the legal difficulties under consideration, as well as the positions of the involved actors.
- To analyze the specific rules in question and elaborate on whether or not Iran can or can not be said to be bound by the Revised Code 3.1, using the norms and principles on creation and interpretation of international law, as have been formalized in the Vienna Convention on the Law of Treaties.

### **1.3 Theoretical approaches**

#### *1.3.1 International Relations and International Law*

##### *1.3.1.1 Bridging the abyss*

The theoretical study of international conflicts can be attempted from various angels. Traditionally the disciplines *International Law* (IL) and *International Relations* (IR) have been divided into two distinct and separate subject matters, where the one has been dealt with without consideration of the other. In recent times this separation has been increasingly challenged.<sup>13</sup> Both IL and IR scholars have put forth the need to create a bridge between the two disciplines in order to make it possible, not only to *understand*, but to find ways how to truly *handle* the modern international reality.<sup>14</sup> It is not questioned that IR and IL contain differences to one another, but held that the level of difference between them varies depending on the specific question asked and the interests behind its formulation.<sup>15</sup> Thus, depending on the point of departure the

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<sup>13</sup> David Armstrong, Theo Farrell and Hélène Lambert: *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), p. 69, Başak Çali: “International law for international relations: foundations for interdisciplinary study”, in Başak Çali (ed.): *International Law for International Relations* (Oxford: Oxford University Press, 2010), p. 23

<sup>14</sup> Mikael Baaz: *Rätt och Politik i det Internationella Samhället: Essäer och Artiklar* (Stockholm: Jure Förlag AB, 2010, forthcoming June)

<sup>15</sup> Başak Çali: “International law for international relations: foundations for interdisciplinary study”, in Başak Çali: (ed.): *International Law for International Relations* (Oxford: Oxford University Press, 2010), p. 9

disciplines IL and IR might even be closer to each other than different approaches *within* the two disciplines. In consequence, using both IL and IR theories when making a legal analysis of an international phenomenon is not contradictory. Rather the contrary; taking assistance from both camps must in many cases be necessary to succeed with the operation.

### 1.3.1.2 *International Relations*

The study of international relations has as objective to examine and explain the content and structure of the international system as well as why States and other international actors behave the way they do in that system.<sup>16</sup> The three dominant and competing theories in the history of IR: *Realism*, *Liberalism* and *Marxism*<sup>17</sup> have been challenged, most importantly by *Social Constructivism*, emerging in the late 1980's and growing in importance ever since.<sup>18</sup> Each providing their view of the world, these theories all contribute to our understanding of the processes and motives behind actions taken on the international plane.<sup>19</sup>

As opposed to the realist view of world politics as being a struggle for power in accordance with national interests, the liberal tradition puts emphasis on progress and believes international cooperation is possible. Not only States, but also non-State entities are seen as taking part in the global interaction. Consequently, liberals define the existing world order as being a result of the interdependent relationship between various international actors, rather than a result of a power balance between sovereign States.<sup>20</sup> Therefore liberals stress the importance of building international structures where cooperation is enabled, and in doing so, put fundamental weight on

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<sup>16</sup> Başak Çali: "International law for international relations: foundations for interdisciplinary study", in Başak Çali (ed.): *International Law for International Relations* (Oxford: Oxford University Press, 2010), p. 7

<sup>17</sup> Mikael Baaz: "Human Rights or Human Wrongs? Towards a "Thin" Universal Code of International Human Rights for the Twenty-first Century" (*Juridisk Tidskrift*, 2008/2009, no 2, p. 422

<sup>18</sup> For a most comprehensible overview of the main IR theories as well as emerging trends see John Baylis, Patricia Owens and Steve Smith: "Introduction", in John Baylis, Patricia Owens, Steve Smith (eds.): *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2008), pp. 3 f

<sup>19</sup> As held by Baylis, Owens and Smith, it is not possible to ignore theory and to only look at "facts". Without the "simplifying device" that theories constitute, facts cannot be assessed. In this the authors also imply that it is not important *which* theory is chosen, only *that* it is chosen, *ibid.* p. 4

<sup>20</sup> *Ibid.* p. 5



international institutions and the rule of law.<sup>21</sup> Out of their progressive attitude traditional liberals initiated the development of theoretical models for explaining complex and inter-linked systems of cooperation existing in the international sphere.

### 1.3.1.3 International Law

The discipline of international law puts emphasis on the *norms, principles* and *practices* governing the international arena; how these can be discerned and how they can be interpreted. Equally important is establishing the influence of international law and to explain why or why not international actors comply with international law.<sup>22</sup> IL scholars study international institutions on different levels and with different theoretical approaches. The lowest level of international institutions studied is constituted by *issue-specific institutions* (regimes); a matter that will be revisited in the following.

Built upon *empirical study*<sup>23</sup> and the notion of *consent* the dominant theoretical approach in modern IL is positivist.<sup>24</sup> Developed during the eighteenth and nineteenth centuries as a reaction to natural law, *Legal Positivism* sees international law as deriving from State's acceptance, may it be explicit or tacit, to adhere to international regulation.<sup>25</sup> Although traditional sources of law, made out by treaties and custom, remain the core of legal positivist's perception of international law, an understanding of the normative effects of less formal mechanisms has entered the positivist scene.<sup>26</sup> Modern positivists also increasingly acknowledge the role of non-State actors in the

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<sup>21</sup> Ibid. p. 119

<sup>22</sup> David Armstrong, Theo Farrell and Hélène Lambert: *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), p. 4

<sup>23</sup> Positivists believe morality and law are two different things, and that law thus should be subject to scientific study, not wishful thinking, *ibid.* p. 77

<sup>24</sup> Armstrong et al. *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), p. 74

<sup>25</sup> Natural Law again gained importance after WW II, and the inclusion of peremptory norms, *jus cogens*, in the Vienna Convention on the Law of Treaties, as well as the debated *responsibility to protect* are examples of expressions of modern natural law, see Alan Boyle and Christine Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 11 ff, Mikael Baaz: "Statsuveränitet och Humanitär Intervention: (O)förenliga Principer i ett Globaliserat Internationellt Samhälle?" (*Juridisk Tidskrift*, 2009/2010, no. 4), p. 805

<sup>26</sup> Boyle and Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 12. According to Çali this development in positivism has parallels with social constructivism theories in IR, Çali: "Perspectives on international relations in international law", in Çali (ed.): *International Law for International Relations* (Oxford: Oxford University Press, 2010), p. 77

making of international law.<sup>27</sup> The emergence of other theoretical orientations such as *Legal Process Theory*<sup>28</sup> and *Legal Constructivism*<sup>29</sup> makes clear that the positivist approach is not unquestioned.<sup>30</sup> Greater focus on institutions has for example shown how law can be created beyond the strict consent of States; clarifying how institutional procedures, processes and practices can fill out gaps or serve as tools for interpretation of existing law.<sup>31</sup>

### 1.3.2 Regime Theory

#### 1.3.2.1 Defining International Regimes

Born out of the liberal idea tradition, *Regime Theory* aims at explaining the origins, maintenance and consequences of international regimes. With this in view regime theorists have distinguished the combined use of hard- and soft law tools<sup>32</sup> existing in international cooperation.<sup>33</sup> Regimes are explained as rule-governed behaviour in distinct issue-areas, which can come into being either through formalized agreements (full-blown regime) or through the emergence of an expectation of obedience to a set of informal rules (tacit regime).<sup>34</sup> One widely recognized definition of “International Regimes” was put in writing by Stephan Krasner in 1983 and states that international regimes are:

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<sup>27</sup> Boyle and Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 43

<sup>28</sup> Besides of placing law in a context of broader social and political processes the theory has in part a prescriptive approach to IL, and has been used by the *New Havens School* to justify, what has been criticised as aggressive US power-politics, see e.g. Mikael Baaz: *The Use of Force and International Society* (Stockholm: Jure Förlag AB, 2009)

<sup>29</sup> Legal constructivists believe that the processes defined by legal process scholars are constitutive, meaning that norms play a role in *forming* actor’s behaviour, Armstrong et al.: *International Law and International Relations* (Cambridge: Cambridge University Press, 2007), p. 14

<sup>30</sup> With its many competing theories International Law has been defined as a “divided” discipline, which gives it something further in common with the discipline of international relations, Baaz: *Rätt och Politik i det Internationella Samhället: Essäer och Artiklar* (Stockholm: Jure Förlag AB, 2010, forthcoming June)

<sup>31</sup> Boyle and Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 13

<sup>32</sup> Soft law being defined as “a variety of non-legally binding instruments used in contemporary international relations” such as *declarations, resolutions, non-treaty agreements, practices and standards by organizations etc.* Conversely, hard law is always legally binding and has the form of treaties or custom. The two categories interact and the distinction between them is far from always clear, see Boyle and Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 213

<sup>33</sup> Being one of the important contributions of regime theory to provisions approaches.

<sup>34</sup> Richard Little: “International Regimes”, in Baylis et al. (eds.): *The globalization of world politics: an introduction to international relations* (Oxford: Oxford University Press, 2008), p. 301

Implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of right and obligations. Rules are specific prescriptions or proscriptions for actions. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>35</sup>

The purpose of the regime is to provide norms of behaviour that, if they are obeyed, result in collective outcomes that are in harmony with the principles of the regime. According to Krasner there are two kinds of regime changes. A change of the *regime in itself* takes place only if the principles or norms of the regime are overthrown. All other modifications of the content of the regime are *changes within the regime*.

### 1.3.2.2 From Rationalism to Cognitivism

Regimes are today recognized as important features of the contemporary international system but theorists disagree on how and why regimes are formed and maintained. The classical rationalist theories *Realism* and *Liberalism* both consider regimes as being a product of rational self-interested actors striving towards wealth-maximization. The *Cognitive* regime theory offers a quite different approach; bringing forth that institutions are better understood from a sociological perspective than from a rational choice perspective. In the cognitive theory institutionalism is strong and States are rather seen as team players than wealth-maximizers. Mainstream realist and neo-liberal approaches are criticized for neglecting how States' identities and preferences are constituted by "knowledge distribution". Actors' interests are not seen as simply "given" but as a result of a "body of knowledge in the actors possession."<sup>36</sup> Cognitive theory stresses that States' interests can be redefined because of new knowledge changing previous opinions in a certain matter<sup>37</sup>, or a shift of normative ideas in the internal politics of a state.<sup>38</sup> Arguing that social factors need to be

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<sup>35</sup> Andreas Hasenclever, Peter Mayer and Volker Rittberger: *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), p. 9

<sup>36</sup> Ibid. p. 140

<sup>37</sup> According to Joseph Nye the change of ideas by the Soviet and the US concerning the usability of nuclear weapons during the post-war period made cooperation on non-proliferation possible, *ibid.* p. 147

<sup>38</sup> Decolonization was, as Robert Jackson argues, largely a result of a "fundamental shift of normative ideas" by colonizing powers on what was legitimate and illegitimate rule, and not due to a change in the balance of power, *ibid.* p. 143

considered for understanding regime creation and persistence, the cognitive theory has emerged as a valuable complement to classical approaches.<sup>39</sup>

Rationalist approaches see regimes as completely dependant of the will of pre-existing States, whereas cognitive theory holds that states are greatly influenced and shaped by social institution, without which rational choices would be impossible.<sup>40</sup> According to this line of thought international regimes have both a *regulative* and a *constitutive* dimension. Not only do they prescribe to States a specific behaviour through norms and rules, but also create a common understanding of the social world and the frame in which States can act.

The observation by Louis Henkin that “almost all nations observe almost all principles of international law and almost all their obligations almost all of the time”<sup>41</sup> is explained by cognitivists through what Thomas Franck calls the “Power of Legitimacy”. Franck argues that the binding force of norms and rules is dependent of their degree of legitimacy<sup>42</sup>, and that if legitimate, rules exert a “compliance pull” of their own.<sup>43</sup> This explains why States to a large extent respect their international obligations even if they have both the incentives and the capacity to break them. Rules not perceived as legitimate are on the other hand less likely to be observed voluntarily and need sanctions to be upheld.

### *1.3.2.3 Understanding Nuclear Non-Proliferation through Regime Theory*

The international cooperation on the nuclear area is one of the most important security regimes of today. Harald Müller defines the prevention of nuclear proliferation as an international regime based on four main principles<sup>44</sup>:

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<sup>39</sup> Christer Jönsson: “Cognitive Factors in Explaining Regime Dynamics”, in Volker Rittberger, with the assistance of Peter Mayer (eds.): *Regime theory and International Relations* (Oxford: Oxford University Press, 1993), p. 203

<sup>40</sup> Like the rules in chess enable the players to play the game in the first place, Hasenclever et al.: *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), p. 139

<sup>41</sup> *ibid.* p. 170

<sup>42</sup> The legitimacy of rules is according to Franck dependent of four dimensions: determinacy, symbolic validation, coherence and adherence, see Thomas M. Franck: *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990), p. 49

<sup>43</sup> *Ibid.* p. 24

<sup>44</sup> Hasenclever et al.: *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), p. 9

1. Nuclear proliferation increases the risk of a nuclear war.
2. A multilateral non-proliferation policy is compatible with the continuation and spread of the use of nuclear energy for peaceful purposes.
3. The prevention of nuclear proliferation in a long-term perspective is possible only if the Nuclear Weapon States are willing to reduce their nuclear arsenals.
4. Verification is necessary to achieve the objectives of the non-proliferation regime.

The principles of the non-proliferation regime are, according to Müller, defined by norms, of which some of the most important are: the obligation for all Non Nuclear Weapon States to refrain from *producing or acquiring nuclear weapons*, all Member States to refrain from *assisting in such production or acquisition* and the obligation for NWS to make serious efforts aiming at total *nuclear disarmament*.<sup>45</sup> The fundamental norms of the regime are realized through a set of specific rules consisting of prescriptions or proscriptions. Important examples are the precisely detailed rules in relation to NNWS on nuclear verification and export control. The obligations for NWS are on the contrary formulated only vaguely, giving no time frame for reaching disarmament agreements.<sup>46</sup>

The final component of the non-proliferation regime consists of a multitude of procedures through which the regime functions. Although the core of the non-proliferation regime is made out of the Nuclear Non Proliferation Treaty, the one cannot be taken for the other. The regime encompasses a much larger range of formal as well as informal documents and agreements, including the Safeguards System and the Additional Protocol. The non-proliferation regime is furthermore accompanied by the IAEA, an international organization with the purpose to represent and act on behalf of the regime, but distinct from the regime itself.

Regime theory can be an essential tool for analyzing States' behaviour when it comes to nuclear related issues. Through regime theory the legal character of the declaration

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<sup>45</sup> See NPT art I, II, VI, INFCIRC/140, available at <http://www.iaea.org/Publications/Documents/Infocircs/Others/infcirc140.pdf>

<sup>46</sup> This is one of the major points of critic towards the non-proliferation regime. See e.g. Daniel Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009)

of the Fordow facility can be understood from a broader perspective; one where State's actions are not dealt with in isolation but seen as part of a complex whole.

### *1.3.3 The relationship between International and National Law: Monism versus Dualism*

Throughout the evolution of international law one of the essential questions has been to define its relationship to national law. The two main theoretical approaches, monism and dualism, oppose each other and offer States radically different options in dealing with international law.

Developed to a complete theory by Hans Kelsen after World War I the *Monistic* doctrine sees only one unitary legal system including all legal orders on varying levels. The international legal order is on the top of the pyramid and prevails over municipal law. In case of conflict the municipal rule is invalid and disregarded in favour of the international norm. Within the monistic tradition the “transformation” of international rules into domestic law is not necessary, since they both belong to the same legal order. International legal rules are directly applicable and individuals are thus attributed with the rights and obligations of an international legal subject.<sup>47</sup> Admitting that most national legal systems accept international norms only after they have been transformed into national legislation Kelsen argued that this is a concern of national law and does not affect the position of international law.<sup>48</sup> Kelsen was of the opinion that the primacy of international law could not be founded on legal or scientific considerations but is dependant of political decisions.<sup>49</sup> The monistic theory has been elaborated and supported by many scholars of law but has also been criticized for being a merely intellectual creation, disregarding States' sovereign and independent existence.<sup>50</sup>

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<sup>47</sup> Antonio Cassese: *International Law* (Oxford: Oxford University Press 2005), p. 215

<sup>48</sup> Meaning that despite being in accordance with national legislation the state concerned is in breach of its international obligations.

<sup>49</sup> Eileen Denza: “The Relationship Between International and National Law”, in Malcolm, D. Evans, *International Law*, (Oxford: Oxford University Press, 2006), p. 428

<sup>50</sup> Ian Brownlie: *Principles of Public International Law* (Oxford: Oxford University Press, 2003), p. 32

The *Dualistic* approach, to a great extent formulated by Dionisio Anzilotti in the beginning of the 20<sup>th</sup> century, stresses the existence of two distinct and separate categories of legal orders, with their own legal content, subjects and sources. Emphasising the differences between national and international law the dualistic theory does not accept a primacy of one of the legal orders over the other.<sup>51</sup> To obtain legal effect in the national system international norms have to be transformed through domestic legislation. According to the dualistic approach international law has no possibility of changing or altering municipal legislation and in the case of conflict courts would apply national law.<sup>52</sup> At the same time compliance to international norms is advocated through different forms of national implementation mechanisms.<sup>53</sup> Influenced by a nationalistic ideology dualism aims at guaranteeing States the freedom of acting in accordance with national interests in case of conflict with international law.

Due to the fundamental principle of State sovereignty the choice between a monistic or a dualistic-oriented approach will largely affect a State's behaviour in relation to international law. Although there are many different methods of approach and the division between monism and dualism in no way is clear-cut the theories give a fundamental understanding for the existing problematic in the relationship between national and international law.<sup>54</sup> The way in which international commitments are created and fulfilled depends upon national standpoints and it is therefore important to consider the underlying ideological base from which a State acts.

#### 1.4 Method

The overall purpose being to analyze a specific treaty question in a broader context of international law a legal dogmatic approach has been considered suitable.<sup>55</sup> The aim is

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<sup>51</sup> Antonio Cassese: *International Law* (Oxford: Oxford University Press 2005), p. 214

<sup>52</sup> Ian Brownlie: *Principles of Public International Law* (Oxford: Oxford University Press, 2003), p. 33

<sup>53</sup> Statutory ad hoc incorporation or Automatic ad hoc incorporation, see Antonio Cassese: *International Law* (Oxford: Oxford University Press 2005), p. 221

<sup>54</sup> For a critical view on the applicability of the theories see Eileen Denza: "The Relationship Between International and National Law", in Malcolm, D. Evans: *International Law* (Oxford: Oxford University Press, 2006), p. 429

<sup>55</sup> Although there exists a confusion around the notion of legal dogmatic the jurisprudential method characterized by its free argumentation and a wide range of legal theories and sources, is commonly

not to make any qualitative judgements on how actors should behave or state a preferred outcome in the issue. The humble ambition is rather to examine, explain and formulate an argumentation around the occurred situation with a legal empiric point of departure.<sup>56</sup> In its consideration of a legal problem the paper simply seeks to include the political and theoretical context in which the law exists.

Primary sources on the area of nuclear-non-proliferation, of which most importantly the NPT, the IAEA/Iran Safeguards Agreement and its Subsidiary Arrangements, constitute the basis for the legal analysis. Secondary sources in form of doctrine in the field of international law, reports and articles have been essential and necessary means for understanding and evaluating the complexities of today's international legal reality. The two categories of sources should be seen as complementary to each other and as equally important.

The IAEA homepage has been a valuable source of information, providing up to date legal documentation as well as in depths knowledge of the structure and content of the nuclear non-proliferation regime. In order to pin out the opposing positions IAEA reports as well as internal communication between the IAEA and Iran have been utilized, in so far as these have been available. As many documents concerning the relationship between the IAEA and its contracting parties under Safeguards Agreements are confidential it has at times been necessary to resort to documents *referring* to information of interest for this paper. The most obvious example is the Code 3.1, the provisions of which are consistently referred to both by the IAEA and Iran, as well as international media and international legal experts. The Code itself has never been published and makes out a part of the confidential Subsidiary Arrangements to Iran's Safeguards Agreement. Notwithstanding, the pertinent provision of the Subsidiary Arrangements has been sufficiently and consistently reflected in other mediums, as to leave no doubt on its content.

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classified as legal dogmatic, Cleas Sandgren: *Rättsvetenskap för uppsatsförfattare* (Stockholm: Norstedts Förlag, 2007), p. 53.

<sup>56</sup> See Mikael Baaz: *The use of Force and International Society* (Stockholm: Jure Förlag AB, 2009), p.



## **1.5 Disposition**

The disposition of the paper follows a chronological model where the problematic is treated in a successive manner, leading towards a conclusion on the same. Firstly the institutional and legal framework in which the disagreement between Iran and the IAEA has occurred will be presented. In doing so emphasis is put on the relationship between the different legal instruments and international actors involved in securing nuclear non-proliferation.

Thereafter the question of the legal character of the revised Code 3.1 is systematized and put in a historical perspective, clarifying how the rules on nuclear verification have evolved and thus resulted in a conflict on their legal status. In the same line the specific treaty relationship between Iran and the IAEA is investigated and structured, and put in relation to the positions taken by the opponents, as is discerned from their argumentation and actions.

An analysis is then undertaken where the Vienna Convention on the Law of Treaties is applied on the treaty relationship between Iran and the IAEA. Conclusions on how the opposing standpoints can be judged under the Vienna Convention follow. The report is ended by a more general reflection on how the outcome of the analysis can be assessed in relation to the perceived legitimacy-level of the non-proliferation regime.

## **1.6 Delimitations**

The interest of the report is to lift out one specific question from the multitude of issues surrounding the nuclear program of Iran. Necessarily many separate but connected matters must be left aside or dealt with only superficially. One of those matters is what in the practice of the IAEA has been/or should be defined as formal non-compliance of the Safeguards Agreement, and the consequences of such a finding. The issue has been, and will continue to be, much debated.<sup>57</sup> For the purpose

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<sup>57</sup> Pierre Goldschmidt: *Exposing Nuclear Non-compliance*, Global Politics and Strategy, Vol. 51, No. 1, February-March 2009, p 149, available at [http://carnegieendowment.org/files/goldschmidt\\_survival20090201.pdf](http://carnegieendowment.org/files/goldschmidt_survival20090201.pdf)

of the analysis of this paper it is however considered sufficient to depart from the fact that there exists a disagreement on the legal character of Iran's obligations in relation to the Revised Code 3.1.

Neither is there any intent to elaborate in a deeper manner on other parallel developments of the Safeguards System, most importantly the Additional Protocol; other than for giving a background understanding and explaining the points of contact with the problematic under investigation. Finally it has to be made clear that the ambition is not to cover all angles of international law possibly relevant. Instead the provisions of the Vienna Convention on the Law of Treaties will be applied in a selective manner, on the basis of what the author deems as pertinent and illuminating for the questions at hand.

## **2. THE NUCLEAR NON-PROLIFERATION REGIME**

### **2.1 The Treaty on the Non-Proliferation of Nuclear Weapons**

#### *2.1.1 Growing nuclear awareness and the birth of the NPT*

The Treaty on the Non- Proliferation of Nuclear Weapons is a result of a multilateral process within the framework of the United Nations General Assembly. Starting out with a draft resolution proposed by Ireland at the 13<sup>th</sup> session of the General Assembly in 1958, the NPT could ten years later open for signature on the 1 July 1968. The 5 March 1970 the Treaty entered into force, when, in accordance with article IX.3, the three Depository Governments of the United Kingdom, United States and the Russian Federation, as well as 40 other States had deposited their instruments of ratification.<sup>58</sup> In 1995 the majority of the parties to the Treaty took a decision that the NPT shall continue in force indefinitely.<sup>59</sup> Furthermore the NPT foresees a mechanism of conferences to be held every five years in view of assuring that the

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<sup>58</sup> Treaty on the Non-Proliferation of Nuclear Weapons, Notification of the entry into force, INFCIRC/140, 22 April 1970, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc140.pdf>

<sup>59</sup> The decision was taken as previewed in accordance to article IX.6 NPT, David Fischer: *History of the International Atomic Energy, The First Forty Years*, Division of Publications International Atomic Energy Agency, Vienna, 1997, p. 11, available at [http://www-pub.iaea.org/MTCD/publications/PDF/Pub1032\\_web.pdf](http://www-pub.iaea.org/MTCD/publications/PDF/Pub1032_web.pdf)

objectives of the Treaty are being realized.<sup>60</sup> Today, forty years after its entry into force the NPT has a membership of nearly 190 States and remains, despite much criticism, the fundamental legal instrument in the efforts towards the non-proliferation of nuclear weapons.<sup>61</sup>

### *2.1.2 Differentiated and reciprocal rights and obligations under the NPT*

The NPT contains two groups of actors, both of which attributed with a distinct set of rights and obligations. The one group, consisting of States already in possession of nuclear weapons (Nuclear Weapon States)<sup>62</sup> at the time of conclusion of the Treaty committed, in article I NPT, not to spread those weapons or the technology to obtain such weapons to States not yet in possession of nuclear weapons (Non Nuclear Weapon States).<sup>63</sup> Furthermore, as is spelt out in article VI NPT, the Nuclear Weapon States (NWS) agreed to take upon themselves an obligation to “peruse negotiations in good faith” towards disarmament of their own nuclear programs, as well as towards global disarmament under multilateral control.<sup>64</sup>

The Non Nuclear Weapon States (NNWS), on the other hand, undertook in article II of the Treaty, not to acquire nuclear weapons or to attempt to manufacture such weapons on their own.<sup>65</sup> The reason why NNWS accepted such an unequal legal position has been referred to as the “grand bargain” of the NPT and entails the exchange of the right to nuclear weapons against the recognition of the right to nuclear technology for civilian purposes, and importantly, the technical assistance for obtaining such technology.<sup>66</sup> The NWS<sup>67</sup> are thus obliged, under the NPT, to positively support NNWS in their development of nuclear programs for peaceful

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<sup>60</sup> Article VIII.3 NPT. The most recent review conference was held in May 2010. The 2005 conference was largely seen as a disaster and no agreement was reached, see Michel Richard: “The New Challenges to the Nuclear Non-Proliferation Regime”, in Rudolf Avenhaus, Nicholas Kyriakopoulos, Michel Richard and Gotthard Stein (Eds.): *Verifying Treaty Compliance, Limiting Weapons of mass Destruction and Monitoring Koyoto Protocol Provisions* (Berlin: Springer, 2006), p. 270

<sup>61</sup> Daniel Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 8

<sup>62</sup> Article IX.3 NPT defines a Nuclear Weapon States as a State “which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967”

<sup>63</sup> Article I NPT, INFCIRC/140

<sup>64</sup> Article VI NPT, INFCIRC/140

<sup>65</sup> Article II NPT, INFCIRC/140

<sup>66</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 9

<sup>67</sup> Including NNWS with such technology, see article IV NPT

purposes.<sup>68</sup> The “inalienable” right of the NNWS to nuclear energy for peaceful purposes was however conditioned in such a way that its exercise must be in conformity with articles I and II of the Treaty.

### *2.1.3 Controlling NPT compliance*

For the purpose of securing that NNWS are in compliance with their commitment not to acquire or manufacture nuclear weapons article III of the NPT was constructed to hold an obligation for all NNWS to conclude bilateral Safeguards Agreements with an independent controlling body and to apply export controls on specified materials. The control mechanism foreseen in article III gave a mandate for the already existing International Atomic Energy Agency to monitor the nuclear programs of NNWS in order to verify the non-diversion of nuclear materials. The very essence of accepting such a control mechanism was to demonstrate a transparency and create trust in NNWS’ exclusively peaceful nuclear activities.<sup>69</sup>

## **2.2 The International Atomic Energy Agency and its role as guardian of the NPT**

### *2.2.1 An Agency with dual objectives: promoting peace through nuclear energy and preventing war through nuclear weapons*

The IAEA is an autonomous intergovernmental body that was created in 1957 as the world’s *Atoms for Peace Organization* with the purpose to meet the growing fear of an uncontrolled spread of nuclear weapons technology.<sup>70</sup> The proposition to establish an international organisation for this end was first addressed by President Eisenhower in a speech before the General Assembly of the United Nations on the 8<sup>th</sup> of December 1953.<sup>71</sup> The essence of his discourse was then elaborated upon by diplomats, scientists, experts and politicians and founded what in October 1956 was

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<sup>68</sup> Article IV NPT obliges “all the Parties to the Treaty” to engage in technical assistance, meaning that even NNWS with sufficient nuclear resources are included.

<sup>69</sup> Pierre Goldschmidt: *The IAEA Safeguards System Moves Into the 21<sup>st</sup> Century*, Supplement to IAEA Bulletin, Vol. 41, No. 4/December 1999, Vienna 1999, p. 1, available at <http://www.iaea.org/Publications/Magazines/Bulletin/Bull414/article8-suppl.pdf>

<sup>70</sup> *THEN&NOW THE IAEA TURNS FORTY*, IAEA Bulletin 39/3/1997, Vienna, 1997, p. 2, available at <http://www.iaea.org/Publications/Magazines/Bulletin/Bull393/bull393opt.pdf>

<sup>71</sup> David Fischer: *History of the International Atomic Energy, The First Forty Years*, Division of Publications International Atomic Energy Agency, Vienna, 1997, p. 9

unanimously adopted by the General Assembly as the Statute of the International Atomic Energy Agency.<sup>72</sup> Article II of the Statute states the *Objectives* of the Agency:

The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

The idea behind the structure and functions of the IAEA was to establish a pool of nuclear resources and technologies under collective control and administered by an independent body. Member States were to profit from the gathered resources and were obliged to accept IAEA safeguards and safety standards on their nuclear activities only if they received assistance from the IAEA. First with the entry into force of the NPT, Safeguards Agreements with the IAEA became mandatory to all Non Nuclear Weapon Member States.

The IAEA thus predates the NPT with eleven years and holds in its Statute a wide range of responsibilities and functions on the atomic energy area that were developed freestanding from the NPT.<sup>73</sup> Today however, the IAEA is known worldwide primarily for its role as watchdog over the NPT Safeguards Agreements concluded with NNWS.<sup>74</sup> The relationship between the NPT and the IAEA aims at making possible what has been called the *Janus Face* of the Non-Proliferation Treaty.<sup>75</sup> The twin mandate of the IAEA is supposed to enable States not in possession of nuclear energy to obtain necessary technology and materials to benefit from the “peaceful atom”, and to assure the international community that the proliferation of nuclear weapons is halted.

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<sup>72</sup> Stressing the need for global disarmament in his speech, the US nuclear arsenal nevertheless grew under Mr. Eisenhower’s Presidency, as did those of the Soviet Union, See Richard G. Hewlett and Jack M. Holl: *Atoms for Peace and War: 1953–1961, Eisenhower and the Atomic Energy Commission* (Berkeley: University of California Press, 1989), p. 272.

<sup>73</sup> Article III of the Statute lists the functions of the IAEA, including: to encourage and assist research on atomic energy for peaceful purposes, to foster the exchange of scientific and technical information and training, to establish and monitor safety standards. The functions of the IAEA form three main pillars: Safety, Security and Technical Assistance, available at <http://www.iaea.org/About/statute.html>

<sup>74</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 19

<sup>75</sup> Shahram Chubin: *Iran’s nuclear Ambitions* (Washington DC: Carnegie Endowment for International Peace, 2006), p. 5

### 2.2.2 The Governing Bodies of the IAEA

The IAEA has two policy-making organs: the *General Conference* and the *Board of Governors* (BoG). The General Conference represents all Member States whereas the Board of Governors holds only 35 seats. The IAEA also has a *Director General* who is the head of the Secretariat and responsible for implementing the Agency's program.<sup>76</sup> The division of power in the IAEA differs quite significantly from other UN-related organizations, the executive power being strongly concentrated to the Board of Governors and not to the forum where all Member States are represented, namely the General Conference.<sup>77</sup>

As follows of the IAEA Statute, the Board of Governors has the exclusive power in almost all matters concerning safeguards, including the power to negotiate and conclude Safeguards Agreements as well as to determine if a Member State is in breach of its obligations under such an agreement. The Board is to report findings of a breach *directly* to the Security Council and General Assembly of the United Nations, thus without consulting the General Conference.<sup>78</sup> The power of the Board is further shown by the position of the Director General who "shall be under the authority of and subject to the control of the Board of Governors... [and] shall perform his duties in accordance with regulations adopted by the Board".<sup>79</sup>

The Board of Governors meets five times a year and, in addition to its safeguards-responsibility, prepares the programme and budget of the Agency, as well as considers new memberships and designates the Director General. The General Conference meets once a year and has amongst its competences to approve the budget, membership applications and the appointment of a new Director General. The power of the General Conference is however limited to returning a proposal to the

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<sup>76</sup> The current Director General Yukiya Amano took office in December 2009 according to the procedure laid out in article VII.A of the Statute. Before him the Nobel Prize winner Mohamed ElBaradei was the IAEA Director General for 12 years, [http://www.iaea.org/About/dg/former\\_dgs.html](http://www.iaea.org/About/dg/former_dgs.html)

<sup>77</sup> David Fischer: *History of the International Atomic Energy, The First Forty Years*, Division of Publications International Atomic Energy Agency, Vienna, 1997, p. 37

<sup>78</sup> Article XII.C, available at <http://www.iaea.org/About/statute.html>

<sup>79</sup> Article VII.B

Board of Governors for new consideration and can thus not *change* Board recommendations.<sup>80</sup>

### 2.2.3 *The composition of the Board of Governors*

Due to the significant power attributed to the Board of Governors the procedure for designating its 35 members was subject to much attention during the creation of the IAEA Statute. The version finally approved is complex and divides the Board seats between different regions of the world, and with regards to the technology level of Member States in the nuclear field. Article VI of the Statute holds that the outgoing Board shall designate the *ten most advanced* members independent of geographic location and another *three* members, each of which is the most advanced in a region not represented by the first ten members.<sup>81</sup> Originally, in 1956, the number of members selected in the first group was only five and the procedure was clearly designated to guarantee more or less permanent seats to certain Member States.<sup>82</sup> Time has also shown that all States who were selected this way in 1956 have been able to retain their seats and are Board members today.<sup>83</sup> The remaining 22 members of the Board are selected by the General Conference on the basis of equitable geographic representation. These members rotate and are selected for periods of two years.<sup>84</sup>

## 2.3 **The relationship with the United Nations Security Council**

### 2.3.1 *A three-part relation: NPT-IAEA-UNSC*

The link between the NPT and the United Nations Security Council (UNSC) goes via the IAEA and its mandate to monitor and control Safeguards Agreements as enjoined in article III.1 of the Non-Proliferation Treaty. As an independent international organization the IAEA is related to the United Nations system through a *special*

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<sup>80</sup> See for example the provision on the budget procedure, article V.E.5 IAEA Statute

<sup>81</sup> The regions given in article VI are: North America, Latin America, Western Europe, Eastern Europe, Africa, Middle East and South Asia, South East Asia and the Pacific, Far East.

<sup>82</sup> Members of group one were in 1956: the USA, the United Kingdom, France, USSR and Canada.

<sup>83</sup> For the composition of the current Board of Governors see

<http://www.iaea.org/About/Policy/Board/index.html>

<sup>84</sup> Article VI.A.2 IAEA Statute

*agreement* that has been concluded in accordance with article XVI of the IAEA Statute.<sup>85</sup> The statute furthermore entails two explicit provisions connecting the body of rules under the NPT with the Security Council. Firstly article III.B.4 states a general recognition of the Security Council as being the “principal organ for the maintenance of international peace and security” wherefore the IAEA, when appropriate, accepts the obligation to notify the Security Council on matters falling “within the competence of the Security Council”. The second provision explicitly regards the prohibition for NNWS to acquire or manufacture nuclear weapons under article II NPT. However, the IAEA Statute limits the power of the IAEA to determine non-compliance to the Safeguards Agreements, and the IAEA thus has no authority to determine breaches to the underlying NPT obligations.<sup>86</sup> The task of the IAEA is to *verify* NPT compliance through Safeguards Agreements but the power to *define* and *react* upon NPT non-compliance is reserved the UNSC.<sup>87</sup> Article XII. C of the IAEA Statute simply lays out the circumstances and the procedure for when a NNWS shall be reported to the Security Council.

### *2.3.2 The definition and consequences of a non-compliance to Safeguards Agreements*

The procedure in article XII.C prescribes IAEA inspectors to report what they consider being a non-compliance of the Safeguards Agreement to the Director General of the Agency, who then on his part shall transmit the issue to the Board of Governors. If the Board of Governors formally finds that there has indeed occurred a non-compliance it shall be reported to all Member States *and* to the Security Council and the General Assembly of the United Nations. According to the IAEA Statute it is necessary that the Board of Governors reach its own conclusion that the facts reported by the inspectors constitute a non-compliance.<sup>88</sup> The mandate of the IAEA to notify

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<sup>85</sup> INFCIRC/11, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc11.pdf>

<sup>86</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 267

<sup>87</sup> The IAEA however has a limited scope of manoeuvre in that the Agency can suspend or terminate assistance and withdraw any materials and equipment made available by the Agency or a member if corrective steps are not taken within reasonable time by the State in breach of its Safeguards Agreement, Article XII.C. 7 IAEA Statute

<sup>88</sup> The obligation of the BoG stems from the wording in Article XII.C clearly states that speaks of “any non-compliance **which it finds** [the BoG] to have occurred” (emphasis added), see Goldschmidt: *Rule of Law, Politics and Nuclear Nonproliferation*, Presentation to the International School of Nuclear Law at the University of Montpellier in France, Session 2007, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=19564>



the SC is however not dependant of the finding of a non-compliance *strictu sensu* but arises as soon as occurs a situation that “falls within the competence of the Security Council”.<sup>89</sup> Upon a referral, it is in the hands of the Security Council to take those actions deemed necessary for the maintenance of international peace and security, as foreseen in Chapter VII of the UN Charter.

At the creation of the IAEA there were divided opinions between different groups of States on how great a role the United Nations should have in the work of the IAEA. Developing countries wanted a strong connection to the UN, preferably to the General Assembly, as a guarantee that their interests would not be completely overseen due to the strong power concentration to the Board of Governors, and the way the latter is constituted. For the Soviet Union the incentive to attribute power to the UNSC was to assure its veto power against potential anti Soviet actions by the West.<sup>90</sup> The West lastly wanted an IAEA with as much autonomy as possible in order to avoid any “politicization” of the organisation.<sup>91</sup>

### **3. THE NON-PROLIFERATION SAFEGUARDS SYSTEM**

#### **3.1 Early provisions for the verification of nuclear activities**

##### *3.1.1 Background to IAEA control measures*

From its creation the IAEA has employed some sort of safeguards in connection to its purpose of spreading the “peaceful atom”. The safeguards regime is to a great extent made out of legal documents but also includes the decisions, interpretations and practices of the Board of Governors.<sup>92</sup> The Statute of the IAEA provides the legal authority of the Agency and was drafted in a way to enable increased responsibility

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<sup>89</sup> The competence of the SC includes all threats or potential threats to international peace and security, see article 24 of the UN Charter, available at <http://www.un.org/en/documents/charter/chapter5.shtml>

<sup>90</sup> Primarily the US, UK, France, Belgium, Portugal, Australia and South Africa, Fischer: *History of the International Atomic Energy, The First Forty Years*, Division of Publications International Atomic Energy Agency, Vienna, 1997, p. 45

<sup>91</sup> *Ibid.*

<sup>92</sup> Laura Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996, available at <http://www.opanal.org/Articles/Jamaica/jam-Rockwood.htm>

and growth for its verification role.<sup>93</sup> The earliest formalized version of the system was defined by the mid 1960's in document INFCIRC/66 and gave the Agency a limited authority to conduct verification measures, including only certain nuclear fuel cycle activities and only on voluntary basis, or in relation to State-recipients of technical assistance.<sup>94</sup>

With the conclusion of the NPT in 1968 and the new role attributed to the IAEA it became clear that a more extensive safeguards system was necessary.<sup>95</sup> The *Comprehensive Safeguards System* that was envisaged should include the whole nuclear fuel cycle, all nuclear materials and all nuclear facilities in the State in question. Two years after the coming into force of the NPT the new verification regime of the IAEA was established in document INFCIRC/153, named *The Structure and Content of Agreements Between the Agency and States Required in Connection With the Treaty on the Non-Proliferation of Nuclear Weapons*.<sup>96</sup> Today all Comprehensive Safeguards Agreements concluded bilaterally between NNWS and the Agency pursuant to article III of the NPT are based on the model document INFCIRC/153.<sup>97</sup>

### 3.1.2 Subsidiary Arrangements to the Safeguards Agreement

Safeguards Agreements concluded with NPT Member States aim at clarifying the Member States' obligations under the NPT on a practical level, and lay out how the fulfilment of these obligations shall be verified. Safeguards Agreements based on INFCIRC/153 are however not exhaustive in their formulation but refer to *Subsidiary Arrangements* for the precise regulation of certain questions.<sup>98</sup> The obligation to give the IAEA information on existing, as well as on planned nuclear facilities is defined in the *Code 3.1* of the *General Part* of the Subsidiary Arrangements. The provision of

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<sup>93</sup> Article III.A.5 gives the Agency the authority to apply safeguards, see also Laura Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996

<sup>94</sup> The three non-NPT members India, Pakistan and Israel have concluded type INFCIRC/66 agreements with the IAEA, see *Latest Status of Safeguards Agreements & Additional Protocols*, available at <http://www.iaea.org/OurWork/SV/Safeguards/sv.html>

<sup>95</sup> Ben Sanders: *IAEA Safeguards and the NPT*, Disarmament Forum, THE 2005 NPT REVIEW CONFERENCE, 2004, p. 45, available at <http://www.unidir.org/pdf/articles/pdf-art2189.pdf>

<sup>96</sup> INFCIRC/153 [corrected], [www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf](http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf)

<sup>97</sup> *The Safeguards System of the International Atomic Energy Agency*, available at <http://www.iaea.org/OurWork/SV/Safeguards/about.html>

<sup>98</sup> Article 39, INFCIRC/153, [www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf](http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc153.pdf)

such information, termed *Design Information* is no doubt one of the most essential issues dealt with in Subsidiary Arrangements; and crucial in order for the IAEA to keep track of NNWS nuclear programs. Subsidiary Arrangements are concluded individually with Member States but largely follow a standard model developed in connection with the development of the standard documents for Safeguards Agreements.<sup>99</sup>

### 3.1.3 *The Iraqi conflict and the realization of the shortcomings of INFCIRC/153*

In the early 1990's once again concerns were raised as to the efficiency of the IAEA Safeguards System and the conclusion was that INFCIRC/153 had failed as an adequate instrument for the detection of nuclear proliferation. In 1991 it was revealed that the NPT Member State Iraq, outwardly in full compliance with its Safeguards Agreement, had managed to secretly develop a wide-ranging nuclear program without the knowledge of the IAEA.<sup>100</sup> Two years later North Korea's refusal to give access to the IAEA inspectors reinforced the need for change.<sup>101</sup>

It was widely understood that the fundamental lack of the INFCIRC/153 provisions is that the system is designed to verify only the *correctness* of the signatory State's declarations on its nuclear activities but not the *completeness* of these declarations.<sup>102</sup> In other words, the Agency has under INFCIRC/153 the authority only to verify if the *declared* materials in NNWS civil nuclear programs are not diverted to military use, but has no authority to control if there exists any *undeclared* nuclear activity in the State concerned. In addition to the fundamental aspect of completeness, it was deemed crucial to make substantial changes to the provisions on the time frame for providing design information. The legislation contained generally in Member States' Subsidiary Arrangements at the time of the crisis in Iraq and North Korea was judged

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<sup>99</sup> See *The Evolution of IAEA Safeguards*, International Nuclear Verification Series, No. 2, IAEA, Vienna, 1998, p. 44, available at [http://www-pub.iaea.org/MTCD/publications/PDF/NVS2\\_web.pdf](http://www-pub.iaea.org/MTCD/publications/PDF/NVS2_web.pdf) and Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph V

<sup>100</sup> The Iraqi program included some 30 facilities, a staff of 20 000 people and amounting to between 10 and 15 billion dollars, see Chen Zak: *Iran's Nuclear Policy and the IAEA: An Evaluation of Program 93+2* (Washington: The Washington Institute for Near East Policy, 2002), p. 5

<sup>101</sup> Zak: *Iran's Nuclear Policy and the IAEA: An Evaluation of Program 93+2* (Washington: The Washington Institute for Near East Policy, 2002), p. xi

<sup>102</sup> Goldschmidt: *The IAEA Safeguards System Moves Into The 21<sup>st</sup> Century*, Supplement to the IAEA Bulletin, Vol.41, No. 4/December 1999, p. 3

to leave a much too large scope of manoeuvre for Member States to engage in clandestine activities.

### **3. 2 Program 93+2 and updated provisions on design information**

#### *3.2.1 Introduction*

During the 1990's the IAEA Safeguards System underwent a significant overview and resulted in two sets of substantial changes of rules, through distinct procedures and based on different legal foundations. The two sets of changes make out Part I and Part II of what has been called "Program 93+2".<sup>103</sup> The conclusion made concerning Part I changes was that such changes could be made within the already existing legal mandate attributed to the IAEA by Member State's Safeguards Agreements in force. Because of their legal character, the changes with regards to design information, resulting in the "Revised Code 3.1", constitute one of the components of Part 1 of Program 93+2.<sup>104</sup>

The second part of the Program 93+2, containing the substantially most important changes, could however not be introduced through existing Safeguards Agreements based on INFCIRC/153 but necessitated an enlarged legal fundament, resting on a *new* document which would be added to INFCIRC/153 and apply parallelly.<sup>105</sup> The result of Part II of "Program 93+2" was the bringing online of the *Additional Protocol*, or document INFCIRC/540. Adopted by the Board of Governors in 1997, the Additional Protocol largely extends the scope of the Safeguards System and provides for information and access to *all* aspects of a State's nuclear program (not only those declared) and the necessary administrative underpinning for its enforcement.<sup>106</sup> The enlarged authority under the Additional Protocol provides the necessary tool for enabling the Agency to give credible assurance of the absence of

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<sup>103</sup> The process of enlarging the authority of the IAEA and bringing into force measures under existing mandate began internally within the IAEA in 1993 and was expected to come to a conclusion two years later, Zak: *Iran's Nuclear Policy and the IAEA: An Evaluation of Program 93+2* (Washington: The Washington Institute for Near East Policy, 2002), p. 12

<sup>104</sup> Other Part I changes include environmental sampling, remote monitoring, unannounced inspections, expanded declarations etc, *ibid.* pp. 23-24

<sup>105</sup> *Ibid.* p. 12

<sup>106</sup> Jill N. Cooley: "IAEA Safeguards under the NPT: Challenges in Implementation" in Rudolf Avenhaus, Nicholas Kyriakopoulos, Michel Richard and Gotthard Stein (eds.): *Verifying Treaty Compliance, Limiting Weapons of Mass Destruction and Monitoring Koyoto Protocol Provisions* (Berlin: Springer, 2006), p. 62

undeclared nuclear activities.<sup>107</sup> Entry into force of the Additional Protocol however requires ratification<sup>108</sup> by Member States, and this has to this day not been undertaken by Iran.<sup>109</sup>

### 3.2.2 Part I of Program 93+2: revising Code 3.1

The recommendation on measures to be advanced under existing Safeguards Agreements, including the modification of Code 3.1, was taken through a decision by the IAEA Board of Governors on the 26 of February 1992.<sup>110</sup> In its decision the Board affirmed that in order to create confidence in the peaceful purpose of a facility and to give enough time for safeguards preparations it is necessary that design information is provided already “at the time of the decision to construct or to authorise the construction” of a new facility.<sup>111</sup> In doing so the Board interpreted in a new manner article 42 of INFCIRC/153, which states that design information shall be provided “as soon as possible before nuclear material is introduced in a new facility”.<sup>112</sup> The new interpretation significantly changed the substance of the provision, which in its original interpretation, as put down in all Subsidiary Arrangements concluded before that date, only required a declaration 180 days before the introduction of uranium into the facility.<sup>113</sup>

The IAEA Secretariat had been asked to examine the necessary legal, technical and financial requirements for the implementation of the Board recommendations. Concerning the legal aspect it was understood that the implementation of Part I measures is conditioned by Member States’ decision to incorporate them into their own Safeguards Agreement, or in the case of the Code 3.1 into the Subsidiary

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<sup>107</sup> *The Safeguards System of the International Atomic Energy Agency*, p. 2, see <http://www.iaea.org/OurWork/SV/Safeguards/about.html>

<sup>108</sup> Article 17 INFCIRC/540, see <http://www.iaea.org/Publications/Documents/Infcircs/1997/infcirc540c.pdf>

<sup>109</sup> Iran signed the Additional Protocol in December 2003 but has never ratified it. Iran implemented the protocol voluntarily until 2006, see Paul K. Kerr: *Iran’s Nuclear Program: Tehran’s Compliance with International Obligations*, Congressional Research Service, December 10, 2009, p. 3, available at <http://www.crs.gov>

<sup>110</sup> GOV/2554/attachement2/rev.2, April 1992, see Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph I.6

<sup>111</sup> GOV/2003/40 para.15, available at <http://www.iaea.org/Publications/Documents/Board/2003/gov2003-40.pdf>

<sup>112</sup> Article 42, INFCIRC/153, *ibid.*

<sup>113</sup> GOV/2007/22 para. 3, available at <http://www.iaea.org/Publications/Documents/Board/2007/gov2007-22.pdf>

Arrangements to their Safeguards Agreement.<sup>114</sup> In this view the decision of the Board of Governors from 1992 entailed a request for the Secretariat to start negotiating individually with Member States in order to bring about the desired changes.<sup>115</sup>

## 4. IRAN AND THE NON-PROLIFERATION REGIME

### 4.1 Treaties and agreements concluded by Iran

#### 4.1.1 Ratification of the NPT and Safeguards Agreements (SA)

Iran signed the NPT in 1968 and the Treaty was ratified and entered into force in March 1970.<sup>116</sup> Fulfilling article III of the NPT, a Safeguards Agreement was thereafter concluded between the IAEA and Iran.<sup>117</sup> Pursuant to its article 25 SA, the Safeguards Agreement would enter into force when Iran's statutory and constitutional requirements had been met.<sup>118</sup> The Constitution of Iran requires in article 77 that international treaties are approved by the Islamic Consultative Assembly, known as the *Majles*.<sup>119</sup> In May 1974 such approval by the Majles was notified to the IAEA and the Safeguards Agreement entered into force. Both the NPT and the Safeguards Agreement thus needed ratification in order to become binding upon Iran. The Safeguards Agreement gives the IAEA the right and the obligation to make sure that safeguards are applied on Iran's nuclear activities, for the exclusive purpose of verifying that no material used in Iran's peaceful nuclear program is diverted into nuclear weapons.<sup>120</sup> Like those of most Member States', Iran's Safeguards Agreement is of the Comprehensive type, meaning that all nuclear activity and all nuclear materials in Iran are covered.<sup>121</sup>

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<sup>114</sup> Zak: *Iran's Nuclear Policy and the IAEA: An Evaluation of Program 93+2* (Washington: The Washington Institute for Near East Policy, 2002), p. 22

<sup>115</sup> GOV/2554/attachement2/rev.2, April 1992, see Laura Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph I.6

<sup>116</sup> <http://disarmament2.un.org/TreatyStatus.nsf>

<sup>117</sup> Contained in document INFCIRC/214 and based on the standard INFCIRC/153 (corr.), available at [www.iaea.org/Publications/Documents/Infcircs/Others/infirc214.pdf](http://www.iaea.org/Publications/Documents/Infcircs/Others/infirc214.pdf)

<sup>118</sup> INFCIRC/214 art 25

<sup>119</sup> See *Iran Chamber Society* for the text of the Iranian constitution, [http://www.iranchamber.com/government/constitutions/constitution\\_ch06.php](http://www.iranchamber.com/government/constitutions/constitution_ch06.php)

<sup>120</sup> INFCIRC/214 art 2

<sup>121</sup> *The Safeguards System of the International Atomic Energy Agency*, available at <http://www.iaea.org/OurWork/SV/Safeguards/index.html>

#### 4.1.2 Conclusion of Subsidiary Arrangements on design information

The obligation of Iran to provide information on its nuclear facilities has its foundation in the Safeguards Agreement but is regulated in detail in its Subsidiary Arrangements. Article 8 SA holds that the Government of Iran must provide the Agency with information concerning nuclear material and *the features of facilities* relevant to safeguarding such material. How this information shall be provided is specified in Part II of the Safeguards Agreement, where the conclusion and content of Subsidiary Arrangements is regulated. Article 39 SA states that Subsidiary Arrangements shall be concluded between Iran and the IAEA in order to permit the Agency to fulfil its responsibilities under the Agreement in an effective and efficient manner: The legal basis of the obligation to declare a *new* nuclear facility to the IAEA, in other terms to provide design information, is found in article 42 SA:

The time limits for the provision of design information in respect of new facilities shall be specified in Subsidiary Arrangements and such information shall be provided *as early as possible* before nuclear material is introduced into a new facility.<sup>122</sup>

Subsidiary Arrangements between Iran and the IAEA were concluded in 1976.<sup>123</sup> The 1976 General Part of Iran's Subsidiary Arrangements, Code 3.1, calls upon Iran to provide design information on a new facility to the IAEA "no later than 180 days before the introduction of nuclear material into the facility"<sup>124</sup>, as was standard text until the revision of the Subsidiary Arrangements in 1992. The modified version of the Subsidiary Arrangements, Revised Code 3.1 requires, as we have seen, that a new facility is declared already when the *decision to construct, or to authorize a construction* of a new facility is taken.<sup>125</sup>

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<sup>122</sup> Italics added

<sup>123</sup> GOV/INF/2007/8, see [www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf](http://www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf)

<sup>124</sup> GOV/2003/40 para.15

<sup>125</sup> See above at 3.2.3

## **4.2 Amendments and modifications to Subsidiary Arrangements**

### *4.2.1 Procedures for the entry into force of Subsidiary Arrangements*

Pursuant to article 40 SA, Iran's Subsidiary Arrangements shall enter into force "at the same time or as soon as possible after" the entry into force of the Safeguards Agreement. Unlike the regulation in article 25 SA on the entry into force of the Safeguards Agreement, there exists no provision clarifying the procedure for the entry into force of Subsidiary Arrangements. In practice the content of the Subsidiary Arrangements is established through a process of negotiations conducted in meetings as well as in writing between the IAEA Secretariat and the Member State. Standard procedure then holds that the final agreement is reflected in an exchange of letters.<sup>126</sup> The objective of the Subsidiary Arrangements is to permit flexibility to the regulation, making it possible to take into account specific circumstances and technical differences of individual States. In this context a formal process was not deemed desirable for the conclusion of Subsidiary Arrangements.

### *4.2.2 Procedures for amending or modifying Subsidiary Arrangements*

Iran's Safeguards Agreement includes some provisions on how changes to the legal relationship between the IAEA and Iran on the area of safeguards are to be made. According to article 24 SA all amendments of the Safeguards Agreement require the consent of both parties. Furthermore the entry into force of amendments is conditioned by the same requirements as the Safeguards Agreement itself. This means that the Treaty foresees a ratification procedure for amendments, if so is required by the contracting party.<sup>127</sup>

Changes in the Subsidiary Arrangements are however not seen by the Treaty-text as amendments of the Safeguards Agreement and thus do not fall under the provisions on amendments. Article 39 SA provides that "The Subsidiary Arrangements may be extended or changed by agreement between the Government of Iran and the Agency

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<sup>126</sup> Rockwood: Legal Instruments Related to the Application of the Safeguards, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph V

<sup>127</sup> INFCIRC/214 art. 25



without amendment of this Agreement".<sup>128</sup> The Safeguards Agreement does not entail any formal procedure on the entry into force of modifications to the Subsidiary Arrangements. In the same way as for *conclusion* of Subsidiary Arrangements, the way of agreeing on *modifications* is ruled by the internal IAEA practice consisting of an exchange of letters between the IAEA and the contracting party.<sup>129</sup> Since Subsidiary Arrangements are confidential papers,<sup>130</sup> and therefore not published by the IAEA, it is however not possible to verify if *all* Subsidiary Arrangements have been concluded or modified in this manner.

## 4.2 The Revised Code 3.1 in relation to Iran

### 4.2.1 Iran's acceptance and subsequent rejection of the modifications to its Subsidiary Arrangements

Between the years 1976 and 2003 Iran's obligations to declare new facilities were indisputably ruled by the original version of the Subsidiary Arrangements, since Iran had never agreed to the revised text requested by the IAEA Board of Governors in 1992.<sup>131</sup> In a letter dated the 26. February 2003 Iran however informed the IAEA that Iran accepted the revised version and now would start providing design information in accordance with the new rules.<sup>132</sup> Iran's decision came not long after the Iranian opposition group *The National Council of Resistance of Iran* had made public the existence of two undeclared nuclear facilities in Iran.<sup>133</sup> The announcement and proof

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<sup>128</sup> Italics added

<sup>129</sup> See Goldschmidt: *Concrete Steps to Improve the Nonproliferation Regime*, Carnegie Endowment For International Peace, No. 100, April 2009, p 3, available at <http://www.carnegieeuropa.eu/publications/?fa=22943>, and James, M. Acton: *Iran Violated International Obligations on Qom Facility*, Carnegie Endowment For International Peace, 25 September 2009, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23884>

<sup>130</sup> See *The Evolution of IAEA Safeguards*, International Nuclear Verification Series, No. 2, IAEA, Vienna, 1998, p. 44, available at [http://www-pub.iaea.org/MTCD/publications/PDF/NVS2\\_web.pdf](http://www-pub.iaea.org/MTCD/publications/PDF/NVS2_web.pdf) and Rockwood: *Legal Instruments Related to the Application of the Safeguards*, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph V

<sup>131</sup> The Board decision is reproduced in GOV/2554/Attachment2/Rev.2 (1 April 1992), see Goldschmidt: *The IAEA Safeguards System Moves Into The 21<sup>st</sup> Century*, Supplement to the IAEA Bulletin, Vol.41, No. 4/December 1999, available at <http://www.iaea.org/Publications/Magazines/Bulletin/Bull414/article8-suppl.pdf>

<sup>132</sup> GOV/2003/40 para. 6

<sup>133</sup> Paul, K. Kerr: *Iran's Nuclear Program: Status* Congressional Research Service, Sept. 18, 2009, p 4, available at <http://www.crs.gov>

presented by the opposition group for the first time made the international community aware of the scope of Iran's nuclear program; revealing that uranium enrichment and plutonium separation had been concealed from the IAEA for 18 years.<sup>134</sup> Extensive pressure on Iran followed and the acceptance to apply the Revised Code 3.1 was one of several confidence-building measures Iran consented to during 2003.<sup>135</sup>

After more than three years of investigations and efforts of negotiation Iran was in February 2006<sup>136</sup> referred by the IAEA Board of Governors to the UN Security Council, and in July 2006 the Security Council adopted its first resolution requiring Iran to suspend all uranium enrichment activities.<sup>137</sup> As a response to the referral to the Security Council and the treatment of the Iranian dossier in the Security Council Iran notified the IAEA in March 2007 by letter that the Revised Code 3.1 would no longer be implemented.<sup>138</sup>

#### 4.2.2 *The position of Iran*

The letter from Iran, dated the 29. March 2007, entails Iran's reasons for withdrawing from the Revised Code 3.1. After asserting that both the referral to, and the resolutions by the Security Council constitute breaches of international law<sup>139</sup> the letter announced that:

As long as the full implementation of the provisions of the Non-Proliferation Treaty (NPT), specifically achieving the inalienable rights stipulated in Article IV of the Treaty and the cessation of perusing Iran's nuclear dossier with the United Nations Security Council, its full

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<sup>134</sup>Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 50

<sup>135</sup> In 2003 Iran importantly agreed to sign and implement the Additional Protocol pending ratification, *Iran: Is There a Way Out of the Nuclear Impasse?* International Crisis Group, Middle East Report N° 51, 23 February 2006, p 1, available at <http://www.crisisgroup.org>

<sup>136</sup> The IAEA Board of Governors had already threatened to refer Iran to the SC in a resolution from September 2005 (GOV/2005/77) but since the BoG never "requested" the Director General to report to the SC the matter was put on hold. First in the resolution from February 2006 (GOV/2006/14) such a request was made.

<sup>137</sup> Resolution 1696 (July 2006) is the first out of five resolutions by the UNSC concerning Iran's nuclear program. Resolutions 1737 (December 2006), 1747 (March 2007), 1803 (March 2008) and 1835 (September 2008) were subsequently adopted. The resolutions are available at <http://www.iaea.org/NewsCenter/Focus/iaeaIran/index.shtml>.

<sup>138</sup> Iran's letter to the IAEA is attached to GOV/INF/2007/8, available at [www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf](http://www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf)

<sup>139</sup> The referral to the UNSC being a breach of the NPT and article XII of the IAEA statute, and the UNSC resolution being contrary to the UN charter, articles 1 and 3

disengagement, and thus the return of the dossier to the framework of the IAEA, in full, is not realized; and as long as potential military adventures are not removed from the table and threats to Iran's security are not eliminated, further implementation of the modified code 3.1 of the Subsidiary Arrangements to the Safeguards Agreement, accepted in 2003, but *not yet ratified* by the parliament, aimed at enhancing Iran's cooperation with the IAEA, shall be suspended and Iran reverts to implement the code 3.1 as reflected in the Subsidiary Arrangements on 12 February 1976.<sup>140</sup>

Furthermore is stated that Iran's decision was made in accordance with a bill passed by the Iranian Parliament in 2006 *requiring* withdrawal from the modified version of its Subsidiary Arrangements. Iran's claim of not being bound by the Revised Code 3.1 is thus built on the fact that the modifications to its Subsidiary Arrangements from 1976 were never ratified by its Parliament and the fact that the implementation of the modified version no longer is in line with domestic legislation. According to Iran the declaration of the Fordow facility therefore is in consistency with the obligations under the Subsidiary Arrangements to its Safeguards Agreement, since the IAEA was informed of the new facility by Qom well in advance of the 180-day requirement contained in the 1976 text.<sup>141</sup>

#### *4.2.3 The position of the IAEA*

In a letter of response to Iran from the 30<sup>th</sup> March 2007 the IAEA urged Iran to reconsider the suspension of the Revised Code 3.1 as it was said to be contrary to the Board decision from 1992, in which the Board request all Member States to implement the modified version of the Subsidiary Arrangements. Iran was moreover informed that:

...the modified text of Code 3.1 is now included in all Subsidiary Arrangements General Part in force with States that have Comprehensive Safeguards Agreements. Iran's decision therefore is regrettable.<sup>142</sup>

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<sup>140</sup> GOV/INF/2007/8, para.6, (italics added). Iran's position was withheld at the latest BoG in March 2010, see, INFCIRC/786 available at <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml>

<sup>141</sup> Statement by Iran at the IAEA BoG, November 2009, INFCIRC/799, p 2, repeated at the March 2010 BoG, INFCIRC/786, p 5, <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml>

<sup>142</sup> The letter is attached to GOV/INF/2007/8, available at [www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf](http://www.pmiran.at/sts2007/GOV%20INF%20Subsidiary%20arrangement.pdf) www.

The former Director General of the IAEA, Dr. Mohamed ElBaradei has in a number of reports to the Board of Governors on the implementation of safeguards in Iran repeated that Iran's suspension of the Revised Code 3.1 is inconsistent with its obligations under the Subsidiary Arrangements to its Safeguard Agreement.<sup>143</sup> In his May 2007 report the Director General asserted that:

In accordance with Article 39 of Iran's Safeguards Agreement, 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.<sup>144</sup>

In March 2009 the Legal Advisor of the IAEA made a statement at the Board of Governors where he reiterated that "the implementation of the provisions of Subsidiary Arrangements can only be amended or suspended with the agreement of both parties to them".<sup>145</sup> The position of the IAEA is clearly that the Revised Code 3.1 became mandatory to Iran through Iran's letter of the 26<sup>th</sup> February 2003. The IAEA thus contests that Iran's implementation of the Revised Code 3.1 between 2003 and 2007 was voluntary or that a later internal Iranian law can repeal it.

## **5. IRAN'S RELATION TO THE REVISED CODE 3.1 IN THE LIGHT OF INTERNATIONAL TREATY LAW**

*To Be, or not to Be, Bound,  
That is the Question*<sup>146</sup>

### **5.1 The Vienna Convention on the Law of Treaties (VCLT)**

#### *5.1.1 The Treaty on treaties; an introduction*

In order to formulate an opinion on whether or not Iran can be held, under international law, to be bound by the Revised Code 3.1 the analysis will take as point of departure the *Vienna Convention on the Law of Treaties*. The Vienna Convention constitutes the body of rules which determines how a treaty is defined, how it is

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<sup>143</sup> GOV/2010/10 para.31, GOV 2009/74, para.17; GOV/2009/55, para.14; GOV/2008/59, para.9, GOV/2007/22, paras.12-14, available at <http://www.iaea.org/NewsCenter/Focus/IaeaIran/index.shtml>

<sup>144</sup> GOV/2007/22, para.14

<sup>145</sup> Available at [http://www.armscontrolwonk.com/file\\_download/162/Legal\\_Adviser\\_Iran.pdf](http://www.armscontrolwonk.com/file_download/162/Legal_Adviser_Iran.pdf).

<sup>146</sup> Inspired by Shakespeare's Hamlet

concluded, amended, interpreted and terminated; and has therefore tellingly been called “the treaty on treaties”.<sup>147</sup> The Vienna Convention on the Law of Treaties was one of the first creations of the International Law Commission (ILC), having been established by the UN in 1947 for the purpose of promoting and codifying international law. The now forty-year-old Vienna Convention was drawn up in big parts after already well established customary international law on treaties. The Convention was adopted at the *United Nations Conference on the Law of Treaties* in Vienna in 1969 but did not enter into force until 1980.<sup>148</sup>

### 5.1.2 Applicability of the Convention

Little doubt remains on the question of the applicability of the Vienna Convention in areas that fall outside the exact limits drawn up by its text. The Vienna Convention is today widely, if not universally, recognized as constituting customary international law.<sup>149</sup> The International Court of Justice has frequently reaffirmed the position of various of the provisions of the Convention as customary law and legal scholars around the world give an affirming opinion on the matter.<sup>150</sup> The status of customary law is particularly clear for the provisions on interpretation, articles 31 and 32 VCLT, and was explicitly determined by the ICJ in the *Botswana/Namibia* case.<sup>151</sup>

Since the Vienna Convention according to article 1 VCLT applies only between State-actors, a “replica” was created in the 1986 *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*. The 1986 Convention has not yet entered into force but the treaty relationships it regulates are covered by the 1969 Convention, article 3 VCLT, in so far as the latter represents customary law.<sup>152</sup> Thus, although the text of the 1969 Convention indicates that it applies only to treaties concluded between States and

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<sup>147</sup> Anthony Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 6

<sup>148</sup> See the *United Nations Treaty Collection* on <http://treaties.un.org/Pages/ParticipationStatus.aspx>

<sup>149</sup> Ian Brownlie: *Principles of Public International Law* (Oxford: Oxford University Press, 2003), p. 580, Alan Boyle and Christine Chinkin: *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 190

<sup>150</sup> Anthony Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), pp. 12-13

<sup>151</sup> See *Kasikili/Sedudu Island* (Botswana/Namibia), ICJ Report 1999, p. 1045, para.18

<sup>152</sup> Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 400

despite the fact that it is non-retroactive and requires adoption by the States concerned, the 1969 Vienna Convention on the Law of Treaties is applicable on the Safeguards Agreement concluded between Iran and the IAEA.<sup>153</sup>

### *5.1.3 Premises for the analysis*

The analysis must necessarily be based on an interpretation of the “main” document, namely the Safeguards Agreement, which refers to the document Iran no longer implements in the way requested by IAEA, namely the Subsidiary Arrangements, Revised Code 3.1. Subsidiary Arrangements are not freestanding documents but on the contrary a part of the Safeguards Agreement, thought to enable the interpretation, and by that the fulfilment of the latter. Consequently the provisions of the Safeguards Agreement are those that should be under investigation, and specifically the provision on how changes to Subsidiary Arrangements can be made, entailed in article 39 of Iran’s Safeguards Agreement. Article 39 SA lays out the conditions for the establishment of a document that will interpret the provision on design information, as foreseen in article 42 SA and thus constitutes the legal prescription challenged by Iran. When analyzing the bilateral agreement between the IAEA and Iran it is lastly important to keep in mind the relationship to the NPT and how the normative structure and content of the “Mother-Treaty” has bearing upon the functioning of the Safeguards Agreement.

## **5.2 Fundamental implications of becoming party to an international treaty**

### *5.2.1 Pacta sunt servanda and the subordinate role of domestic legislation*

Iran’s Safeguards Agreement has entered into force through ratification, which is one of several means foreseen in article 11 VCLT for a State to express its *consent to be bound* by a treaty.<sup>154</sup> Iran is thus party to a bilateral treaty concluded with the IAEA.<sup>155</sup>

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<sup>153</sup> Iran has neither ratified the Convention nor was the Safeguards Agreement concluded after 1980 and the contracting Party is the IAEA, not a *State*, see article 1 and 4 VCLT, and the status of the VCLT on

[http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en)

<sup>154</sup> Necessary for the entry into force of the Safeguards Agreement was that the consent to bound was *notified* to the IAEA, as it was the 15 May 1974, article 25 INCIRC/214 and article 24 VCLT

Consequently Iran is bound by the provisions of the Safeguards Agreement and must perform them in *god faith*, in accordance with the fundamental international principle *pacta sunt servanda* entailed in article 26 VCLT. From an international legal point of view, as made clear in article 27 VCLT, becoming party to a treaty furthermore has as consequence that a State is deprived of the possibility to invoke internal law as justification for a failure to perform in accordance with the treaty in force. The Iranian Parliament having passed a law suspending the implementation of the Revised Code 3.1 can thus not in itself dissolve Iran's international obligation to comply with its commitments under the Safeguards Agreement.

Iran's argumentation is however two-fold and implies that it was not the *subsequent Iranian law* alone that repealed the Revised Code 3.1 but the fact that it was *not legally binding* upon Iran from start. Although the IAEA has used the words "unilateral withdrawal" to describe Iran's actions the critical question to analyze from the Vienna Convention is rather if the Revised Code 3.1 has at all been legally binding upon Iran.<sup>156</sup> The argument employed by Iran in this regard is that the changes in their Subsidiary Arrangements require ratification. Reasonably the argument can only be understood either as a claim that these changes constitute an amendment of the Safeguards Agreement or that although the changes do not amount to an amendment they still require ratification.

### **5.3 The amending of treaties**

#### *5.3.1 Amendment procedure provided for in the Safeguards Agreement*

How a treaty should be amended is fully up to the parties and article 39 VCLT lays out the basic rule that "A treaty may be amended by agreement between the Parties". Amendments will only be governed by the Convention if the treaty itself does not

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<sup>155</sup> "Party" signifies that the treaty has entered into force and is legally binding for the State, this is to be compared to other formulations such as "Signatory" or "Contracting" which imply that the State is not yet legally bound by the treaty, see article 1 (g) VCLT and Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 115

<sup>156</sup> Treaty provisions are seen as inseparable and the Vienna Convention does not provide any possibility to withdraw from only *one part* of the treaty, article 44.1 VCLT and neither do the provisions of the Safeguards Agreement, see above 4.2.2. Focusing on "withdrawal" would mean arguing around a withdrawal from the Safeguards Agreement itself, which however doesn't appear fruitful since none of the parties has claimed anything the like.

provide an amendment mechanism. The Safeguards Agreement of Iran entails such a mechanism in article 24 SA. The difficulty therefore lies not in finding the applicable rules but in the classification of what in this case is an amendment. The changes to the rules regarding the provision of design information are of substantial significance, and could be held to constitute an amendment if it was not for the specific regulation in article 39 SA and 42 SA.

According to article 42 SA the obligation to provide design information shall be specified in Subsidiary Arrangements and article 39 SA states that “The Subsidiary Arrangements may be extended or changed by agreement between the Government of Iran and the Agency without amendment of this agreement”. Being an integral part of the Subsidiary Arrangements, the modification of the Code 3.1, therefore can hardly be classified as an amendment of Iran’s Safeguards Agreement. Remaining is then to investigate whether an interpretation of the Safeguards Agreement allows for ratification of Subsidiary Arrangements, without them being considered amendments.

## **5.4 Interpretation of treaties**

### *5.4.1 General Principles of interpretation*

Reading the commentary of the International Law Commission to the Vienna Convention it becomes evident that there are a number of principles of international law that may be relevant for the interpretation of a treaty. International jurisprudence is also rich in reference to various national and international principles; of which some put the main emphasis on the *text*, some on *intention* and yet some on *finality*. With this background the ILC came to the conclusion that “...the interpretation of documents to some extent [is] an art, not an exact science”.<sup>157</sup> Result of the work process of the ILC, the Vienna Convention attempts to include and to balance the diverging approaches; and has indeed by many been called a piece of art. The general rule of interpretation as it was finally put down in article 31.1 of the Vienna Convention starts out by declaring that:

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<sup>157</sup> Yearbook of the International Law Commission, 1996, Vol. II, p 218, available at <http://untreaty.un.org/ilc/sessions/18/18sess.htm>



A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Three elements are to be considered: *the text, the context* and *the object and purpose* of the treaty. In order to determine the words in its context guidance is to be found in article 31.2 and 31.3 of the Convention. First however, there is some to be said about good faith and the object and purpose of treaties.

#### 5.4.1.1 Interpretation in good faith

The principle of interpretation in good faith directly flows from the *pacta sunt servanda* principle in Article 26 VCLT and means in this regard that the provision of a treaty must be interpreted in a way that the *result* of their application does not turn out unreasonable or manifestly absurd.<sup>158</sup> Iran's interpretation of the Safeguards Agreement may not be manifestly absurd but what clearly can be said is that the IAEA from the day when Iran by letter accepted the application of the Revised Code 3.1 has held Iran to be legally bound by it.<sup>159</sup> The responsibility of clarifying its intentions of a *voluntarily* application should in this situation lie on Iran, since the position taken clearly differs from what has been normal IAEA practice.<sup>160</sup> Not having done so makes the standpoint of the IAEA seem to be the one more in line with a reasonable result of an interpretation. The extent to which the principle of good faith *in itself* can create legally binding obligation is however not without question and the ICJ has stated that good faith "is not in itself a source of obligation where none would otherwise exist".<sup>161</sup>

#### 5.4.1.2 Object and purpose of the Treaty

Determining the object and purpose of a treaty is a complex undertaking and there may be not only one, but several coexisting in the treaty.<sup>162</sup> The task is also given a secondary rang, meaning that what will be sought for primarily when interpreting a

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<sup>158</sup> Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 234

<sup>159</sup> See above under 4.2.2

<sup>160</sup> Rockwood: Legal Instruments Related to the Application of the Safeguards, IAEA/OPANAL Seminar, Jamaica, 1996, paragraph V

<sup>161</sup> See the *Border and Transborder Armed Actions Case*, ICJ Report 1988, at 105, paragraph 94, for a discussion see Jan Klabbbers: *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996), pp. 111-113

<sup>162</sup> Malgosia Fitzmaurice, "The Practical Workings of the Law of Treaties", in Malcolm, D. Evans (ed.): *International Law* (Oxford: Oxford University Press, 2006), p. 202

treaty is the *ordinary meaning* of the words in their context, and not an inherent *finality* embodied in the treaty.<sup>163</sup> One object and purpose however shared by most treaties is the maintenance of the balance of the rights and obligations created by the treaty.<sup>164</sup> The teleological approach can thus serve as a tool for understanding the diverging character of international treaties and the different aims of particular treaty-types. The Safeguards Agreement is a bilateral treaty between a State and an international organisation but has come to existence for the purpose of fulfilling the multilateral Treaty on the Non-Proliferation of Nuclear Weapons. Therefore the object and purpose of the NPT is of importance also for the interpretation of the Safeguards Agreement.

Multilateral treaties can be divided into *law-making* treaties and *contract* treaties.<sup>165</sup> A law-making treaty provides the same rules for all its parties on a specific issue area. A contract treaty on the other hand attributes differentiated and reciprocal rights and obligations between the parties or between defined groups of parties to the treaty. The substantial difference between these two types of treaties lies within the internal relationship between the actors having committed to the rules of the treaty. In a law-making treaty the breach by one of the parties will not affect the remaining parties' obligation to perform in accordance with the treaty. The opposite can be said of a contract treaty, where the failure of one of the categories of parties to fulfil its commitments indeed affects the obligatory character of the other's.<sup>166</sup> Like most contracts found in private international law the non-compliance of the one side can be held to alter the binding force of the obligations of the other side's.

The NPT obviously has the character of a contract treaty and it may well be argued that possible breaches by the Nuclear Weapon States to the NPT in no way are without bearing on the interpretation of Non Nuclear Weapon States' obligations

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<sup>163</sup> When it comes to dealing with *reservations* to treaties defining *object and purpose* is crucial, see Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 136

<sup>164</sup> Mark, E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009), p. 427

<sup>165</sup> Ian Brownlie: *Principles of Public International Law* (Oxford: Oxford University Press, 2003), p. 608

<sup>166</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), pp. 10-11

under their respective Safeguards Agreements.<sup>167</sup> Admittedly the exercise of determining if and at what moment such a situation might arise where Iran would no longer be obliged under the NPT is outside of what is possible in this report. The discussed however provides an eye-opener to the complexity of the issue and sheds a different light on the commitment of NWS to disarmament.<sup>168</sup>

#### 5.4.2 *The relevance of the context for the interpretation of the terms of the text*

##### 5.4.2.1 *The terms of article 39 of Iran's Safeguards Agreement (article 31.1 VCLT)*

Giving primacy to a textual approach the International Law Commission presumed the *text* of a treaty to be the basic expression of the intention of the parties and consequently suggested that all treaty interpretation should start out from the terms of the text.<sup>169</sup> The Safeguards Agreement of Iran states in article 39 that Iran's Subsidiary Arrangements can be changed "by agreement between Iran and the Agency *without amendment* of this Agreement". As we have seen above, article 24 SA entails a procedure where amendments enter into force when the IAEA is notified that Iran's statutory requirements have been fulfilled.<sup>170</sup>

Using the wording "without amendment" in article 39 indicates that a *different* procedure for changing Subsidiary Arrangements is desired than the one chosen for amendments of the Safeguards Agreement.<sup>171</sup> An *a contrario* interpretation would suggest that since amendments require ratification and Subsidiary Arrangements are expressly exempt from the provision on amendments, Iran, by ratifying the Safeguards Agreement, agreed to the fact that Subsidiary Arrangements could be changed without ratification.

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<sup>167</sup> See Joyner remarks about NNWS obligations under the NPT, which can be transmitted to the obligations under Safeguards Agreements, p. 10

<sup>168</sup> For further discussion on the topic see *ibid.* at p. 66 f

<sup>169</sup> Yearbook of the International Law Commission, 1996, Vol. II, p. 220

<sup>170</sup> Through a referral to article 25 which states the indicated procedure for the entry into force of the Safeguards Agreement in itself, see above 4.2.2

<sup>171</sup> The Additional Protocol INFCIRC/540 is the best example of an amendment of the Safeguards Agreement, entering into force through a ratification procedure. As of December 2009 only 94 of the 145 States with which the IAEA has bilateral Safeguards Agreements had brought the Additional Protocol into force, see <http://www.iaea.org/OurWork/SV/Safeguards/sv.html>

#### *5.4.2.2 Relating agreements revealing the intension of the parties (article 31.2 VCLT)*

When establishing the context in which the terms of a treaty are employed article 31.2 of the Vienna Convention declares that any “agreement relating to the treaty which was made between [...] the Parties in connection with the conclusion of treaty” shall be considered. Although concluded first in 1976, two years after the entry into force of the Safeguards Agreement, the original Subsidiary Arrangements between Iran and the IAEA was made “in connection” with the Safeguards Agreement. The conclusion of the Subsidiary Arrangements is a direct consequence of article 39 of Iran’s Safeguards Agreement and *the way in which* it was concluded provides guidance for the interpretation of the intention of the parties with regards to the terms employed in article 39 SA.

Since the SA is silent on the procedure for both the entry into force and changing of Subsidiary Arrangements a conclusion could be that the same, non-specified, procedure would apply for both. In this regard an analogous interpretation gives that if Iran did not require ratification for the entry into force of the original version of its Subsidiary Arrangements it can be taken as an indication that such ratification neither is necessary for a modification of the same. If the other way round, this would suggest an agreement to the contrary, thus that ratification is required. At this moment the author of the paper cannot confirm whether it is the one or the other, but what has been elaborated is still illuminating as to possible approaches to the issue.

#### *5.4.2.3 Subsequent practice influencing the interpretation of the Safeguards Agreement (article 31.3 b VCLT)*

A most important element for the interpretation of a treaty is how the treaty has been applied and concretized by the parties after its entry into force. The Vienna Convention states in sub-paragraph b of article 31.3 that together with the context of a treaty shall be taken into account:

Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

As has been laid out above there exists an established IAEA practice to conclude and modify Subsidiary Arrangements by an exchange of letters. Safeguards Agreements

being separate bilateral treaties between the IAEA and a NNWS it would however be going too far to say that the general practice of the IAEA is *directly* determinate in the relationship between Iran and the IAEA.<sup>172</sup>

Nonetheless, the IAEA practice has bearing on the IAEA/Iran relationship both in the sense that it shows us what is custom in these situations and that it can tell us something of the intentions of the parties. Iran, while consenting by letter to the Revised Code 3.1 in 2003 must have been well aware of the lengthily applied practice of the IAEA. Consequently Iran can be considered as having consented through its letter to become bound by the changes, in accordance with the IAEA practice. This opinion is built on the fact that in applying article 31.3 b VCLT it is not necessary to show that the contracting party has *definitely engaged* in the practice, only that the party has *accepted* it, even tacitly.<sup>173</sup> In international media Iran has also been said to previously have modified its Subsidiary Arrangements through letter correspondence with the IAEA, but due to the confidential nature of these documents the statement is difficult to verify.<sup>174</sup>

#### 5.4.2.4 General international law influencing the interpretation of the Safeguards Agreement (article 31.3 c VCLT)

Sub-paragraph c of article 31.3 VCLT holds that the interpretation of a treaty shall comprise “relevant rules of international law “ applicable between the parties. The possibly *relevant* rules of international law in this case could be the 1992 decision of the IAEA Board of Governors to change the interpretation of the obligation to provide design information. The letter from the IAEA to Iran in response to Iran’s declaration that it would no longer apply the Revised Code 3.1 states that Iran’s decision is “contrary to the Board’s decision”. The letter thus seems to be saying that Iran is bound by the Revised Code 3.1 already upon the decisions of the Board of Governors. This would imply that the Board of Governors has the power to unilaterally modify individual NNWS Subsidiary Arrangements. Such a conclusion is quite contrary to express provisions of the Safeguards Agreement concluded between the IAEA and

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<sup>172</sup> See Aust who explains that the practice should exist *between* the Parties, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 241

<sup>173</sup> Aust: *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), p. 243

<sup>174</sup> See James M. Acton: *Iran Violated International Obligations on Qom Facility*, Carnegie Endowment For International Peace September 25, 2009. See also above at 4.2.2

Iran. Neither does such a standpoint have any support in the Statute of the IAEA or in IAEA practice.<sup>175</sup>

The letter from the IAEA also puts emphasis on the fact that the revised Code 3.1 now is included in the Subsidiary Arrangements of *all* States having Comprehensive Safeguards Agreements in force. The pertinent question to ask is thus if a customary norm can be held to have evolved, containing the new interpretation of the obligation to provide design information. In that case Iran would be bound by the Revised Code 3.1 irrespective of its own approval.<sup>176</sup> This assumption follows from the basic feature of international law that there exists no hierarchy between custom and treaty-sources and that their relation consequently is governed by the general principle of *lex posterior derogat priori*.<sup>177</sup>

Firstly the fulfilment of the general conditions, *usus* and *opinio juris*, for the existence of a customary norm would need to be ascertained. Not being rocket science, the evaluation of the possible formulation of customary rules requires extensive surveys of empirical facts, knowledge of State “attitudes”, as well as deliberation upon varying time-aspects.<sup>178</sup> Secondly, the question is if, and to what extent, customary norms can change the content of treaties. The interrelation between customary and conventional rules and the ability of the former to affect the latter is seen as both complex and difficult to apply in practice.<sup>179</sup> Prudence and a restrictive application has therefore been considered necessary when attempting such conclusions.<sup>180</sup> Lastly, a plausible assumption is that most NNWS would strongly reject any trends in the

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<sup>175</sup> Since the procedure for modifying Subsidiary Arrangements routinely includes an acceptance by the NNWS, transmitted by a written notification.

<sup>176</sup> The most well-known example is “new” content of article 27.3 of the UN Charter on voting rules in the Security Council, where the ICJ held in the *Namibia* case that due to the consequent practice of the SC the meaning of article 27 had changed, see Jan Klabbers: *The Concept of Treaty in International Law*, (The Hague: Kluwer Law International, 1996), p. 91

<sup>177</sup> Antonio Cassese: *International Law*, (Oxford: Oxford University Press, 2005), p. 154

<sup>178</sup> For an in depths consideration of the two criteria see Mark E. Villiger: *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, (The Hague: Kluwer Law International, 1997), pp. 29 f.

<sup>179</sup> *Ibid.* p. 218. See also Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff Publishers, 2009), p. 16 for a discussion on the difference between *subsequent practice*, art. 31.3 b and *customary law*, art 31.3 c VCLT

<sup>180</sup> Boyle and Chinkin: *The Making of International Law*, (Oxford: Oxford University Press, 2007), p. 245; see however Villiger who puts into questions the presumption against a customary rule replacing a conventional rule, Villiger: *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, (The Hague: Kluwer Law International, 1997), p. 218

direction of their bilateral agreements with the IAEA being modified without their express consent.

## 5.5 Conclusions

The International Law Commission made clear that the different parts of the general rule of interpretation embodied in article 31 VCLT should be seen as forming a single integrated unity, enabling, what they call, the *process of interpretation*.<sup>181</sup> Placing the different aspects analyzed as blocks in the mentioned process and evaluating them in relation to each other, the conclusion can be drawn that the position of Iran is not in line with the Vienna Convention. Iran has since its decision to stop implementing the Revised Code 3.1 used a legalistic argumentation based on its unquestionable rights as a sovereign State to chose freely which approach to take in relation to international law.

From an international legal perspective however, Iran's position does not hold stand for closer scrutiny. While it is uncertain that the modified provisions on design information have become obligatory upon Iran through customary law, the Safeguards Agreement itself gives less room for doubt as to the legal character of the Revised Code 3.1. Both the express *terms*, in their context, employed in the Safeguards Agreement and what can be read out as the *intention* of the parties from their behaviour, point in the same direction. The treaty does not specify *how* changes to the Subsidiary Arrangements are to be made (only that they are not to be made in the same way as amendments). Without a subsequent practice on the area, or if clear that the practice does not apply in the specific relationship between Iran and the IAEA, a different outcome cannot be excluded. However existing, and in any case tacitly consented to (if not even taken part in establishing), Iran can be held to have intended to modify its Subsidiary Arrangements without ratification, in accordance with IAEA practice.

In sum, there are strong grounds for the view that Iran is bound by the modifications to its Safeguards Agreement, as agreed to by written notification to the IAEA the 26

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<sup>181</sup> Yearbook of the International Law Commission, 1996, Vol. II, p 220

February 2003. Bearing in mind Neil MacCormick's well-known words about the relativity of truth<sup>182</sup> the conclusion concerning the Fordow Fuel Enrichment Plant is consequently that Iran should have declared the facility at a much earlier stage, in effect already when the decision was taken to build the facility.<sup>183</sup>

## 6. COMPLETION

### 6.1 Strengthening the safeguards system through internal measures?

The conflict between Iran and the IAEA over the implementation of the Revised Code 3.1 has been going on for several years. At the latest Board of Governors in March 2010, the issue was one of the central points of discussion and both sides raised the same arguments as have been raised before. The discovery of the Fordow facility has however increased the tone of urgency by those members of the Board of Governors who want Iran to submit to their interpretation of Iran's Safeguards Agreement.<sup>184</sup> Iran's announcements of the countries plans to build up to ten additional nuclear plants also shows that the issue is not likely to lose in actuality in the near future.<sup>185</sup> According to a letter from Iran to the IAEA in connection with the March Board of Governors any future nuclear plants will be declared "in due time", in accordance with Iran's original Subsidiary Arrangements of 1976.<sup>186</sup> Iran does thus not show any intentions of giving way to the pressure put up by the IAEA Board of Governors on this point.

From a general point of view the question of the legal character and the compliance-potential of documents established in connection to international treaties is clearly

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<sup>182</sup> For a discussion of relative and absolute truth and the possibilities of finding either of them see Neil MacCormick: *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978), p. 271

<sup>183</sup> Not to be forgotten is also that *if* (which according to the latest report, GOV/2010/10, para. 15, seems plausible) the decision to build the Fordow facility was taken before the 29 March 2007, (which was the date when Iran notified the IAEA of its reversal to the 1976 text) Iran was in any case obliged to report the decisions, due to its "voluntary" application of the Revised Code 3.1

<sup>184</sup> See the resolution adopted by vote at the November BoG GOV/2009/82, available at <http://www.iaea.org/Publications/Documents/Board/2009/gov2009-82.pdf>

<sup>185</sup> See e.g. the article by William J. Broad and David E. Sanger, *A Defiant Iran Vows to Build Nuclear Plants*, New York Times, 29 November 2009, available at <http://www.nytimes.com/2009/11/30/world/middleeast/30iran.html>

<sup>186</sup> See the Communication dated 1 March 2010 received from the Permanent Mission of the Islamic Republic of Iran to the Agency regarding the implementation of safeguards in Iran, INFCIRC/786, p 5, available at [http://www.iaea.org/NewsCenter/Focus/iaeaIran/iran\\_timeline7.shtml](http://www.iaea.org/NewsCenter/Focus/iaeaIran/iran_timeline7.shtml)



crucial for the functioning of international law as a mode of regulating State interaction. Whatever conclusion one comes to concerning the legal status of the Revised Code 3.1, the current situation is problematic, and has to be understood in relation to the non-proliferation regime as such. There have been many voices raised on the lack of efficiency, and the incapability of the non-proliferation regime to achieve the objective of preventing NNWS from acquiring nuclear weapons.<sup>187</sup> Former Head of Department of Safeguards (1999-2005) Pierre Goldschmidt is however of the opinion that with sufficient political will, there are things that can be done to significantly strengthen the non-proliferation regime. Goldschmidt talks about procedural changes that do not require modification of the NPT or the Safeguards Agreements; thus emphasising the possibility of *internal* changes to the safeguards system.

With regards to the provisions on design information the proposed changes are directed at the way Iran's behaviour has previously been dealt with in the Board of Governors. In this view Goldschmidt put forth that the Board of Governors should adopt a resolution *clearly* declaring that Iran's refusal to implement the Revised Code 3.1 constitutes a case of non-compliance under article XII.C of the IAEA Statute. According to Goldschmidt this would be necessary, not only to put pressure on Iran but also in order to avoid establishing "wrong precedents".<sup>188</sup>

During the Board of Governors in November 2009, following the revelation of the Fordow facility, the Board did indeed adopt a resolution concerning the Revised Code 3.1, and Iran was reported to the Security Council.<sup>189</sup> The concern that other NNWS will follow Iran's example is valid and arguably has to be taken into the equation. Although the text of the resolution remains ambiguous, the reporting of Iran to the Security Council secures the possibilities of the IAEA to take the same measures in future similar situations.<sup>190</sup> When it comes to the specific case of Iran it can however

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<sup>187</sup> Goldschmidt: *Concrete Steps to Improve the Nonproliferation Regime*, Carnegie Endowment For International Peace, No. 100, April 2009, p. 3

<sup>188</sup> Ibid.

<sup>189</sup> GOV/2009/82

<sup>190</sup> The resolution does not expressly apply the term "non-compliance" or refer to article XII.C but instead "notes with serious concern" that "Iran's failure to notify the Agency of the new facility until September 2009 is inconsistent with its obligations under the Subsidiary Arrangements to its Safeguards Agreement" Furthermore Iran is "urged" to apply the modified Code 3.1 and it is "affirmed" that Iran's decision "does not contribute to the building of confidence", GOV/2009/82, p 2

be deemed questionable to what extent an additional referral to the Security Council on this matter will have a desirable effect. Recent developments do in any case not point in that direction.

## 6.2 The power of legitimacy among nations<sup>191</sup>

### 6.2.1 *The idea of legitimacy as a force in international society*

Material for a somewhat broader reflection upon the non-proliferation regime can be found in the increased discussion about legitimacy in international relations.<sup>192</sup> Focus has been put not only on defining what legitimacy actually represents but also what the consequences are of legitimate respectively illegitimate systems of international regulation. Returning to the words of Thomas Franck, legitimate rules exert a compliance pull of their own and are thus more likely to be observed than rules not endowed with legitimacy.<sup>193</sup> This rimes well with the assumption that the *idea* of legitimacy affects State's behaviour and functions as both a constraining and an enabling force in international society.<sup>194</sup>

According to another of the main figures of legitimacy theory, Max Weber, a system is legitimate when those who are subject to the rules of the system perceive it to be legitimate.<sup>195</sup> Considering the continuous claims of being victim to “double standards” and arbitrary application of IAEA-rules this is clearly not the case with Iran.<sup>196</sup> Having been in part a strategy for winning public support<sup>197</sup> (with varying results) Iran's assertions cannot be easily dismissed. The fact that both South Korea (2004) and Egypt (2005) were *not* found by the Board of Governors to be in non-compliance, and

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<sup>191</sup> The title of the essential book by Thomas Franck: *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990)

<sup>192</sup> Ian Clark: *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), p. 1

<sup>193</sup> Thomas Franck: *The Power of Legitimacy Among Nations*, (Oxford: Oxford University Press, 1990), p. 24

<sup>194</sup> Clark: *Legitimacy in International Society* (Oxford: Oxford University Press, 2005), p. 246

<sup>195</sup> *Ibid.* p. 18

<sup>196</sup> One example being President Ahmadinejad's speech before the Sixtieth Session of the UN General Assembly, 17 September 2005, available at

<http://www.un.org/webcast/ga/60/statements/iran050917eng.pdf>

<sup>197</sup> George Perkovich: *Dealing With Iran: The Power of Legitimacy*, Carnegie Endowment for International Peace, Policy Outlook No. 50, October 2009, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23971>

consequently *not* reported to the Security Council in situations clearly constituting breaches of their respective Safeguards Agreements underpin Iran's accusations.<sup>198</sup>

Critics argue that Iran has been subject to an institutional escalation that cannot be explained objectively by difference in fact to other cases, and is unsupported by previous precedents.<sup>199</sup> Recognizing the problematic Pierre Goldschmidt deems it of crucial importance for the IAEA Board of Governors to acknowledge its past inconsistent actions and to take appropriate corrective measures. Goldschmidt is quite clear when he says that a failure to do so could seriously undermine the credibility of the safeguards regime.<sup>200</sup>

### 6.2.2 *Components in the legitimacy equation*

A distinction has been made between *formal* and *substantial* legitimacy, meaning that a set of rules that have come to being in a formally correct manner can still be illegitimate because they do not correspond to underlying values such as fairness or justice.<sup>201</sup> Coherent and consistent application, transparency, and objective decision-making procedures are variables that have an impact. As for the non-proliferation regime criticism is directed primarily towards the IAEA Board of Governors. The composition and the way the Board of Governors is made up, in combination with the large power it occupies, raises concerns that the decisions taken in this forum are susceptible to manipulation and might be serving political agendas of a few, rather than accurately representing the international community on the nuclear arena.<sup>202</sup>

The US-Indian "Global Partnership" where the United States has decided to transfer civilian nuclear equipment and technology to a Non-NPT State who is in possession of nuclear weapons also seriously brings into question alleged commitments to non-

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<sup>198</sup> Goldschmidt: *Exposing Nuclear Non-compliance*, Global Politics and Strategy, Vol. 51, No. 1, February-March 2009, p 149

<sup>199</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction*, (Oxford: Oxford University Press, 2009), p. 53

<sup>200</sup> Goldschmidt: *Concrete Steps to Improve the Nonproliferation Regime*, Carnegie Endowment For International Peace, No. 100, April 2009, p. 13

<sup>201</sup> Clark: *Legitimacy in International Society*, (Oxford: Oxford University Press, 2005), p. 19

<sup>202</sup> Joyner: *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. 24

proliferation.<sup>203</sup> If not a direct violation of article III.2 NPT,<sup>204</sup> the US acknowledging a State that has refused to participate in the multilateral cooperation on halting the spread of nuclear weapons, *and* that has in fact acquired such weapons, without doubt goes against the spirit of the NPT.<sup>205</sup> One of the main reasons for NNWS, such as Iran, to give up the right to nuclear weapons was exactly that access to civilian nuclear power would follow in return.<sup>206</sup> If such access is obtainable in any case, the logic of renouncing to nuclear weapons is quite considerably reduced.

### 6.2.3 Remembering the flip side of the non-proliferation deal

Notwithstanding what has been said above, the most important aspect of legitimacy lies perhaps within the unequal distribution of rights and obligations embedded in the Non-Proliferation Treaty itself. A minority of States have the legal right to possess nuclear weapons and the rest do not. In a system of independent sovereign States this is far from a given state of reality. Considering that the final goal of the NPT is to prevent nuclear war indefinitely the “unjust” structure of the NPT can make sense only if it is a means to attain the common goal. Nuclear Weapon States’ commitment to disarmament is therefore momentous. The obligation for NWS to disarm themselves from nuclear weapons is formulated vaguely, and article VI of the NPT does not specify *when* it should happen.<sup>207</sup> This however does not make the commitment less real, or its fulfilment less important.<sup>208</sup> Only by putting equal

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<sup>203</sup> The agreement between India and the US was signed into law by President Bush on December 18, 2006, and entered into force by mid December 2008, after it had been approved by both the US Congress and Senate, see Paul K. Kerr: *CRS: U.S. Nuclear Cooperation with India: Issues for Congress*, 5 November 2009, available at <http://www.cfr.org/publication/20815/crs.html>

<sup>204</sup> Article III.2 prohibits the transfer of nuclear material or equipment to NNWS not under comprehensive safeguards. The US argument is that the term “Non-Nuclear Weapon States” used in the NPT only refers to NNWS who are *party* to the NPT (which India isn’t). One can also observe that India is *no longer* a NNWS, due to the fact that it never signed the NPT and therefore *legitimately* could produce nuclear weapons.

<sup>205</sup> Interview with Lawrence Scheinman: *Scheinman: New U.S.-India Agreement Undercuts U.S. Allegiance to Nonproliferation of Nuclear Weapons*, Council on Foreign Relations, 3 November 2005, available at <http://www.cfr.org/publication/9149/scheinman.html>

<sup>206</sup> See above 2.2.2 on the “grand bargain” of the NPT

<sup>207</sup> Article VI of the NPT reads “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”. Available at [www.iaea.org/Publications/Documents/Infcirc/Others/infcirc140.pdf](http://www.iaea.org/Publications/Documents/Infcirc/Others/infcirc140.pdf)

<sup>208</sup> During both the 1995 and 2000 NPT Review Conference article VI NPT was given substance through politically binding consensus resolutions, interpreting its content and putting forth practical steps for advancing disarmament, see Jean du Preez: *The 2005 NPT Review Conference: Can It Meet*

emphasis on Nuclear- and Non-Nuclear Weapon State's respective contributions to a nuclear free world can the legitimacy of the non-proliferation regime be ascertained. As for the fiercest critics of Iran, the United States, it is clear that promises in this regard in previous years have been all but respected.<sup>209</sup> When it comes to the other Nuclear Weapon States they may not have ignored article VI of the NPT as bluntly as the US, but the fact remains that 40 years after the entry into force of the NPT none of the NWS has undertaken serious attempts towards total disarmament.<sup>210</sup> Non-proliferation scholar Jean du Preez puts the finger on the question of legitimacy when he asks the following question:

If the nuclear-weapon states are allowed to cherry-pick which commitments they consider applicable, then why are non-nuclear-weapon states refused the same privilege?

Iran possibly developing nuclear weapons is very serious. A nuclear Iran is the last thing the world wants and Iran's disregard of its safeguards obligations needs to be addressed effectively and swiftly. If this is to be done in a credible manner the attempts must however include more than the regular finger pointing and condemnation of Iran. As obvious as it sounds it still should to be said: Nuclear Weapon States have to start living up to their part of the deal.

Following the Bush administrations total rejection of nuclear disarmament all eyes are placed on the new American leadership. In April 2009 President Obama held an ambitious speech in Prague where he said:

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*the Nuclear Challenge?* Arms Control Today, April 2005, available at [http://www.armscontrol.org/act/2005\\_04/duPreez](http://www.armscontrol.org/act/2005_04/duPreez)

<sup>209</sup> As examples of US unwillingness under the Bush administration can be mentioned the refusal to ratify the CTBT (ban on nuclear testing) and to participate in negotiations to forbid the production of fissile material used in nuclear weapons, and importantly the increased role for national security nuclear weapons were given in the 2001 Nuclear Posture Review, see Joyner: *International Law and the Proliferation of Weapons of Mass Destruction*. (Oxford: Oxford University Press, 2009), p. 62

<sup>210</sup> Disarmament with the words of the NPT preamble being “ [...] the cessation of the manufacture of nuclear weapons, the liquidation of all the[eir] existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.”, see Joyner: *International Law and the Proliferation of Weapons of Mass Destruction*. (Oxford: Oxford University Press, 2009), p. 66

So today, I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons.<sup>211</sup>

President Obama's words filled many hearts with joy and raised hopes for change. It now remains to be seen to what extent these words can be realized through concrete policy decisions.<sup>212</sup>

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<sup>211</sup> *Obama Prague Speech On Nuclear Weapons: Full Text*, (5 April 2009), Huffington Post. Available at [http://www.huffingtonpost.com/2009/04/05/obama-prague-speech-on-nu\\_n\\_183219.html](http://www.huffingtonpost.com/2009/04/05/obama-prague-speech-on-nu_n_183219.html)

<sup>212</sup> On April 8 a new START treaty was signed with Russian and as the New York Times puts it, Obama's 2010 *Nuclear Posture Review* (a document all Presidents redefine according to their nuclear policy) entails "dramatic" reduction of nuclear stockpiles a halt to further development of *new* nuclear weapons. At the same time the budget for maintaining and updating the existing (in the future *reduced*) nuclear arsenal will increase as dramatically (amounting to 5 billion dollars), see David E. Sanger and Thom Shanker: White House Is Rethinking Nuclear Policy, New York Times, 28 February 2010, available at <http://www.nytimes.com/2010/03/01/us/politics/01nuke.html>

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