

THE IRAN NUCLEAR DEAL: THE ETHICS OF NEGOTIATIONS WITH A STATE THAT ROUTINELY VIOLATES ITS LEGAL OBLIGATIONS

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I. INTRODUCTION

Since the inception of negotiations, the Iran Deal (the Joint Comprehensive Plan of Action (“JCPOA”))¹ has been a contentious topic: the subject of debate over both the decisions to accept the deal and to negotiate it in the first place. Iran’s history of pushing boundaries with its nuclear program raised serious principle and pragmatic concerns about even pursuing such an agreement. To allay these concerns, the Obama Administration set forth several red lines over which it would not negotiate.² The deal that resulted, however, crossed several of those red lines.

This Article argues that entering into negotiations was proper, as were the initial red lines set forth by the Obama Administration.³ However, the decision to accept the resulting agreement, with radical deviations from those red lines, was unjustified, setting a dangerous precedent almost guaranteed to result in further nuclear weapons proliferation. To that end, this Article discusses: (1) Iran’s obligations and its noncompliance—focusing particularly on Iran’s safeguards

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1. Joint Comprehensive Plan of Action, U.S. DEP’T ST. (July 14, 2015) <https://www.state.gov/documents/organization/245317.pdf> [hereinafter JCPOA].

2. Teresa Welsh, *Did the U.S. and Iran Get What They Wanted Out of the Iran Deal?*, U.S. NEWS (July 15, 2015), <https://www.usnews.com/news/articles/2015/07/15/how-do-the-red-lines-in-the-final-iran-nuclear-deal-compare>.

3. See *infra* Part III.

obligations and its duty to provide accurate information to the International Atomic Energy Agency (“IAEA”);⁴ and (2) the propriety of negotiating and accepting an agreement with a state that violates its international obligations.⁵

II. OBLIGATIONS AND VIOLATIONS

Iran is a party to four legally binding international agreements relating to nuclear nonproliferation: The Nuclear Nonproliferation Treaty (“NPT”),⁶ a safeguards agreement with the IAEA,⁷ the UN Charter,⁸ and the Genocide Convention.⁹ The first two agreements relate directly to nuclear nonproliferation, while the second two agreements relate tangentially.¹⁰ This Part summarizes Iran’s obligations and behavior under each of these agreements.

A. NPT

The first of Iran’s obligations arise from its status as a party to the NPT. Iran became a non-nuclear weapons state (“NNWS”) party to the NPT in 1970.¹¹ As a NNWS, Iran is prohibited from producing or acquiring nuclear weapons, from exercising control over nuclear weapons, or from seeking assistance in the manufacture of such weapons.¹² NNWSs retain the right, however, to the peaceful uses of nuclear energy.¹³

Iran had already engaged in nuclear research and uranium enrichment for several years by the time it became a party to the treaty.¹⁴ Iran’s nuclear program began in the 1950s under the Atoms for Peace Program and progressed steadily into the 1970s.¹⁵ Iran lost its support

4. *See infra* Part II.

5. *See infra* Part III.

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

7. Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA-Iran, June 19, 1973, 954 U.N.T.S. 91 [hereinafter Safeguards Agreement].

8. U.N. Charter art. 2, ¶ 4.

9. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 280 U.N.T.S. 1021 [hereinafter Genocide Convention].

10. *See generally* U.N. Charter art. 2, ¶ 4; Genocide Convention, *supra* note 9; NPT, *supra* note 6; Safeguards Agreement, *supra* note 7.

11. NPT, *supra* note 6, at 169.

12. *Id.* art. II.

13. *Id.* art. IV. Significantly, “peaceful uses” is ambiguously defined in Article IV. *Id.*

14. Greg Bruno, *Iran’s Nuclear Program*, COUNCIL ON FOREIGN REL. (Mar. 10, 2010), <https://www.cfr.org/backgrounder/irans-nuclear-program>.

15. *Id.*

from that program in the late 1970s after concerns arose over the Iranian Revolution and Iran's nuclear ambitions.¹⁶ Iran nonetheless continued developing its nuclear capability.¹⁷ The nature and the extent of Iran's nuclear program remains unclear.¹⁸ Iran consistently denies pursuing a nuclear weapon—maintaining that uranium enrichment is merely an exercise of its NPT right to the benefits of civil nuclear energy.¹⁹

Whether Iran's nuclear activity after the 1970s, specifically uranium enrichment, constitutes an NPT violation is debatable. Indeed, the NPT neither explicitly prohibits nor expressly entitles NNWSs to all aspects of the nuclear fuel cycle, including indigenous enrichment and reprocessing ("ENR").²⁰ The United States' position has historically been that the NPT guarantees NNWSs no right to ENR.²¹ Nonetheless, the issue is a continuing matter of contention among parties to the treaty.²²

Iran may not have violated the NPT technically or legally, but it has almost certainly violated the spirit of the treaty. Iran's lack of transparency and begrudging cooperation, as well as the "possible military dimensions" of its program, are at the very least inconsistent with its obligations under the NPT.²³

B. Agreements with the IAEA

Iran's second set of obligations arise from its legally binding safeguards agreement with the IAEA. Under Article III of the NPT, NNWSs must conclude a safeguards agreement with the IAEA to verify the fulfillment of their obligations under the treaty and to ensure the strictly peaceful nature of their nuclear activity.²⁴ Iran entered into a

16. *Id.*

17. *Id.*

18. *Id.*

19. Peter S. Green, *Iran Says It Has 'Inalienable Right' to Enrich Uranium*, BLOOMBERG (June 29, 2012), <https://www.bloomberg.com/news/articles/2012-06-29/iran-says-it-has-inalienable-right-to-enrich-uranium>.

20. *Id.*

21. Elias Groll, *Did the United States Just Grant Iran the Right to Enrich Uranium*, FOREIGN POL'Y (Nov. 24, 2013), <http://foreignpolicy.com/2013/11/24/did-the-united-states-just-grant-iran-the-right-to-enrich-uranium>.

22. Gary Samore, *Nuclear Rights and Wrongs: Why One Legal Term Stalled Negotiations with Iran*, FOREIGN AFFAIRS (Nov. 14, 2013), <https://www.foreignaffairs.com/articles/middle-east/2013-11-14/nuclear-rights-and-wrongs>.

23. See *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, IAEA (Nov. 23, 2016), <https://www.iaea.org/sites/default/files/gov2010-62.pdf>.

24. NPT, *supra* note 6, art. III.

safeguards agreement with the IAEA in May 1974.²⁵ In doing so, Iran undertook to accept IAEA safeguards on all nuclear material within its territory, under its jurisdiction, or under its control. To that end, Iran is obliged to provide accurate information “concerning nuclear material subject to safeguards under the Agreement and the features of facilities relevant to safeguarding such material.”²⁶

The IAEA suspected Iranian noncompliance with the safeguards agreement in the early 2000s.²⁷ Following allegations of undeclared nuclear activities, the IAEA initiated an investigation into Iran’s nuclear program.²⁸ Through that investigation, the IAEA identified multiple instances of Iran’s failure to comply with its legally binding obligations under its safeguards agreement, specifically those regarding the reporting of nuclear material, the subsequent processing and use of that material, and the declaration of facilities where such material was stored and processed.²⁹ In 2006, the IAEA reported Iran to the UN Security Council for noncompliance with its safeguards agreement.³⁰

C. United Nations Charter

The IAEA report resulted in a third set of obligations, which dealt with Iran’s status as a member of the UN. After the IAEA’s report in 2006, the UN Security Council (“UNSC”) passed several resolutions (“UNSCR”): UNSCRs 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1887 (2009), and 1929 (2010).³¹ These resolutions called on Iran to cooperate fully with the IAEA’s investigation of its nuclear activities, suspend its uranium enrichment program, suspend its construction of a

25. Safeguards Agreement, *supra* note 7.

26. *Id.*, art. VIII.

27. *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA (June 6, 2003), <https://www.iaea.org/sites/default/files/gov2003-40.pdf>.

28. *Id.*

29. *Id.*

30. See Director General, Remarks at Conclusion of IAEA Board Meeting (Mar. 8, 2006) (transcript available at <https://www.iaea.org/newscenter/mediaadvisories/transcript-of-director-generals-remarks-at-conclusion-of-iaea-board-meeting-8-march-2006>). The IAEA has limited ability to address noncompliance other than to report it to the Security Council. See STAT. IAEA (Oct. 23, 1956) (describing the process in Articles III and VIII. The statute was amended three times, and the last amendment is December 28, 1989). Other countries reported to the Security Council for noncompliance include Iraq, Syria, Libya, and North Korea. *The Safeguards System of the International Atomic Energy Agency*, KENT C. L. B.1, I <http://www.kentlaw.edu/faculty/brown/classes/IntlOrgSp09/TheSafeguardsSystemoftheIAEA.pdf> (last visited Feb. 3, 2019); see also Trevor Findlay, *IAEA Noncompliance Reporting and the Iran Case*, ARMS CONTROL ASS’N (Jan./Feb. 2016), https://www.armscontrol.org/ACT/2016_0102/Features/IAEA-Noncompliance-Reporting-and-the-Iran-Case.

31. *Security Council Imposes Additional Sanctions on Iran, Voting 12 in Favour to 2 Against, with 1 Abstention*, U.N. (June 9, 2010), <https://www.un.org/press/en/2010/sc9948.doc.htm>.

heavy-water reactor and related projects, and ratify the Additional Protocol. The UNSC adopted most of these resolutions under Chapter VII of the UN Charter, making many of their provisions legally binding upon Iran as a UN member.³²

Iran systematically violated these UNSCRs. Claiming a right to uranium enrichment for peaceful purposes, Iran rejected the UNSCRs as invalid and refused to observe them.³³ The Iranian government further promised to reject any resolution or treaty that punished it for its nuclear activities or infringed on its perceived right to uranium enrichment.³⁴ The UNSC imposed sanctions on Iran for its failure to comply with the resolutions. Following the conclusion of the Iran Deal negotiations, the UNSC granted relief from those sanctions.³⁵

D. Genocide Convention

As a UN member state, Iran must also adhere to the UN Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).³⁶ This Convention, though less frequently discussed in the nuclear nonproliferation realm, is worth mentioning briefly here. Under the Convention, inciting genocide against a group of people, as Iran does against the people of Israel, is an illegal act.³⁷ These threats are more concerning given Iran’s violations of its other nonproliferation obligations and its departure from international norms. Iran’s stated desire to use nuclear weapons to destroy Israel further complicates negotiations and reaching a nonproliferation agreement.³⁸

By the time JCPOA negotiations began, Iran had already disregarded applicable and legally binding UNSCRs, violated its safeguards agreement in contravention of international law, violated the spirit of the NPT, and threatened the population of another state with the

32. See U.N. Charter ch. VIII; David Jonas, *International Law vs. the Iranian Nuclear Negotiations: Setting a Dangerous Precedent*, WAR ON ROCKS (May 18, 2015), <http://warontherocks.com/2015/05/international-law-vs-the-iranian-nuclear-negotiations-setting-a-dangerous-precedent>.

33. Christine Hauser, *Iran Vows to Ignore UN Resolution*, N.Y. TIMES (May 7, 2006), http://www.nytimes.com/2006/05/07/world/africa/07iht-iran.html?_r=0.

34. *Id.*

35. Somini Sengupta, *U.N. Moves to Lift Iran Sanctions After Nuclear Deal, Setting Up a Clash in Congress*, N.Y. TIMES (July 20, 2015), <https://www.nytimes.com/2015/07/21/world/middleeast/security-council-following-iran-nuclear-pact-votes-to-lift-sanctions.html>.

36. Genocide Convention, *supra* note 9.

37. *Id.* art. III(c); Robert Bernstein, Irwin Cotler & Stuart Robinowitz, *Inciting Genocide Is a Crime*, WALL ST. J., May 2, 2012, at A15.

38. See, e.g., *Iran Threatens to “Raze” Israeli Cities in Nuclear Standoff*, CBS NEWS (Mar. 21, 2013), <http://www.cbsnews.com/news/iran-threatens-to-razz-israeli-cities-in-nuclear-standoff>.

use of nuclear weapons.³⁹ Thus, it is within that context that we consider the ethics of choosing to negotiate with Iran and accepting the resulting agreement.

III. ETHICAL ANALYSIS

The United States, China, France, Russia, the United Kingdom, and Germany (the P5+1), as well as the European Union, pursued negotiations with Iran regarding its nuclear program and ultimately reached an agreement on July 14, 2015.⁴⁰ Given Iran's past transgressions, the P5+1's willingness to engage in negotiations was a matter of ethical concern, as was the P5+1's acceptance of the final agreement. This Part discusses those concerns.⁴¹

A. The Decision to Negotiate

The decision even to negotiate with a state like Iran poses its own ethical dilemma, forcing states to decide between "negotiating with terrorists" and foregoing potentially fruitful talks.⁴² Iran, labeled part of the "Axis of Evil" by the Bush Administration, behaves with indifference toward accepted international norms.⁴³ Considered a rogue state by much of the world, Iran supports terrorism, disregards human rights, deceives the international community, and violates its international legal obligations. Such a state should arguably be denied the privilege of interacting with the international community as other states would.⁴⁴ The international community and the United States will sometimes eliminate negotiations as an option to resolve conflicts with such states.⁴⁵ Just engaging in negotiations with a state like Iran seems to legitimize or reward rogue behavior.⁴⁶ Iran received a seat at the table with the P5+1 (consisting of all the major world powers), which was a

39. See, e.g., Sengupta, *supra* note 35.

40. JCPOA, *supra* note 1.

41. See *infra* Part III.A–B.

42. See COUNTRY REPORTS ON TERRORISM 2015, DEP'T OF ST. 300-01 (June 2016).

43. See Bertram I. Spencer, *Negotiating with Villains Revisited: Research Note*, 8 INT'L NEGOTIATION 613 (2003); President George W. Bush, The President's State of the Union Address (Jan. 29, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

44. Spencer, *supra* note 43, at 614-16.

45. See, e.g., President George W. Bush, State of the Union Address, *supra* note 43. See generally Spencer, *supra* note 43.

46. Spencer, *supra* note 43, at 616-17.

reward in and of itself.⁴⁷ For this reason, the United States had an ethical interest in refusing to negotiate.

On the other hand, the United States was perhaps obliged to negotiate—particularly given the alternatives.⁴⁸ The alternatives to negotiation with Iran included military action, increasing sanctions, or doing nothing and waiting for Iran to concede or build nuclear weapons.⁴⁹ Even without the options of more desirable alternatives, some would go so far as to say that there exists a moral duty to attempt negotiations unless doing so is impossible.⁵⁰ Ethically, there seems to be little to lose by entering into negotiations, particularly when the administration promulgates clearly delineated red lines. Concluding negotiations with an agreement like the JCPOA, however, and ignoring one's own red lines to do so, raises different ethical concerns.

B. The Decision to Accept an Agreement

The P5+1 and Iran concluded the JCPOA on July 14, 2015. Under the JCPOA, Iran agreed to reduce its stockpile of enriched uranium, limit the number and sophistication of its centrifuges, and restrict uranium enrichment to 3.67 percent.⁵¹ Regarding heavy-water and reprocessing, Iran agreed to convert the Arak facility and refrain from building any new heavy-water facilities for fifteen years. Iran also agreed to grant the IAEA regular access to all Iranian nuclear facilities in order to monitor and verify Iran's compliance with the agreement.⁵² To that end, Iran agreed to apply provisionally the Additional Protocol allowing IAEA enhanced access to Iranian sites. In return, the P5+1 promised relief from U.S., European Union, and UNSC nuclear-related sanctions.⁵³

To conclude this deal, the United States deviated significantly from its own red lines. The United States allowed Iran to continue enriching uranium, even if only within certain constraints. Iranian nuclear plants

47. *Official Proposals on the Iranian Nuclear Issue, 2003-2013*, ARMS CONTROL ASS'N (July 2015), https://www.armscontrol.org/factsheets/Iran_Nuclear_Proposals.

48. President Barack Obama, Remarks by the President on the Iran Nuclear Deal (Aug. 5, 2015) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal>).

49. Spencer, *supra* note 43, at 615-17.

50. G. Richard Shell, *The Morality of Bargaining Identity Versus Interest in Negotiation with Evil*, 26 NEGOTIATION J. 453, 458-61, 469-73 (2010).

51. David Jonas, *Five Reasons Why the Iran Nuclear Deal Is Still a Really Bad Idea*, WAR ON ROCKS (Oct. 14, 2015), <http://warontherocks.com/2015/10/five-reasons-why-the-iran-nuclear-deal-is-still-a-really-bad-idea>.

52. *Id.*

53. See *id.*; Jonas, *supra* note 32.

remain open and Iran continues its nuclear program. By agreeing to these terms, the United States contradicted decades of consistent, bipartisan U.S. nonproliferation policy, and its previously held position that the NPT includes no right to ENR for NNWSs.⁵⁴ This agreement announces to the world that it is acceptable for Iran to enrich uranium, a right the United States has denied many allies.⁵⁵ The JCPOA, which specifically authorizes Iranian enrichment, arguably resolves for all states, intentionally or not, the dispute over the guarantees in the NPT in favor of an indigenous right to enrich.⁵⁶

The deal also required the alteration of existing UNSCRs and the sanctions they imposed.⁵⁷ Iran ignored Security Council mandates, yet the JCPOA legitimizes its noncompliance.⁵⁸ “Indeed, the JCPOA constitutes an initial legal authorization for Iran to abrogate all existing Security Council resolutions prohibiting it from enriching uranium.”⁵⁹ The deal sets a precedent for disregarding Security Council Resolutions and weakens both the nonproliferation regime and the effectiveness of future UNSCRs.⁶⁰

Even if the administration had maintained its red lines, the JCPOA is a non-binding political commitment that may be changed or terminated at any time.⁶¹ Political commitments, when made by a state that will observe them, can be quite valuable.⁶² The United States, for example, typically treats its political commitments as it does its legally binding obligations—as most Western states do.⁶³ Had the deal been made with Switzerland, there would not be cause for concern. But the JCPOA was not made with Switzerland or the Vatican; it was made with Iran—a state with a history of breaking its commitments by maintaining secret nuclear sites, threatening a UN member state’s existence, engaging in terrorism, producing intercontinental ballistic missiles, violating its legally binding safeguards agreement, and withholding information from the IAEA. Iran, which disregards even legally binding obligations, will not be constrained by a mere political commitment.⁶⁴

54. Jonas, *supra* note 51.

55. *Id.*

56. *Id.*

57. Jonas, *supra* note 32.

58. *Id.*

59. *Id.*

60. *Id.*

61. Jonas, *supra* note 51.

62. *Id.*

63. *Id.*

64. *Id.*

If Iran's past behavior was not enough to raise ethical considerations about agreeing to the terms of the JCPOA, Iran's behavior during negotiations should have been. Even as talks progressed, Iran remained fundamentally hostile to the United States and to the idea of adhering to international obligations. Iran continued referring to the United States as the "Great Satan."⁶⁵ Iran also launched missiles near American warships.⁶⁶ Just days before implementation of the JCPOA, Iran took hostage two U.S. Navy boats and ten U.S. Navy sailors and released videos of the sailors surrendering to Iranian forces.⁶⁷ Iran continued this behavior even after signing the JCPOA, performing ballistic missile tests clearly intended to threaten Israel and engaging in a series of naval provocations with the United States.⁶⁸

Crossing our own red lines to reach this agreement with Iran, given its history and continued violation of its international obligations is imprudent and unjustified. It sets a dangerous precedent that encourages further nuclear weapons proliferation and the flouting of the nuclear nonproliferation regime and international law. Other states will now desire indigenous ENR, and if many regional states believe that Iran is about to obtain nuclear weapons, those states will procure them also.

Furthermore, it now appears that the administration conceded more to Iran than previously thought. In September 2016, a well-respected think tank, the Institute for Science and International Security, issued a report stating that secret exceptions were created to allow Iran to exceed limits set by the actual agreement.⁶⁹ Not only did the administration concede to Iran's demands, it did so in an unethically nontransparent way—obscuring the extent to which it crossed its own red lines and preventing proper oversight.

65. Thomas Erdbrink, *Hard-Liners' Attacks on U.S. Hint at a Struggle in Theran*, N.Y. TIMES, Sept. 1, 2015, at A10, http://www.nytimes.com/2015/09/02/world/middleeast/us-remains-the-great-satan-hard-liners-in-iran-say.html?_r=0.

66. Ken Chamberlain & Lance M. Bacon, *Navy: Video Shows Iranian Rockets Launched near Truman, other Warships*, MARINE CORPS TIMES (Jan. 9, 2016), <http://www.marinecorpstimes.com/story/military/2016/01/09/navy-video-shows-iranian-rockets-launched-near-truman-other-warships/78554342>.

67. David Larter, *U.S. Navy Rebukes Iran After Propaganda Video Shows Sailors Crying*, NAVY TIMES (Feb. 10, 2016), <http://www.navytimes.com/story/military/2016/02/10/iran-images-riverine-crying-strong-condemnation-navy/80186322>.

68. See Colum Lynch, *Washington Made it Easy for Iran to Fire its Ballistic Missiles*, FOREIGN POL'Y (Mar. 15, 2016), <http://foreignpolicy.com/2016/03/16/washington-made-it-easy-for-iran-to-fire-its-ballistic-missiles>; see also Barbara Starr & Olivia Beavers, *Iran Escalates High Seas Harassment of US Navy*, CNN (Sept. 7, 2016), <http://www.cnn.com/2016/09/06/politics/iran-us-navy-confrontation>.

69. David Albright & Andrea Stricker, *JCPOA Exemptions Revealed*, INST. SCI. & INT'L SEC. (Sept. 9, 2016), http://isis-online.org/uploads/isis-reports/documents/JCPOA_Exemptions_Revealed_1Sept2016_Final1.pdf.

IV. CONCLUSION

Iran's historical failure to adhere to its obligations makes negotiating and reaching an agreement an ethical dilemma. Ultimately, it is hard to argue that negotiations were not worth a try. Negotiation was perhaps the least unpleasant of several undesirable alternatives. The morality and wisdom of negotiating with Iran are debatable. But while the process of obtaining the agreement with Iran may or may not be objectionable, the outcome surely was. By crossing our own red lines and granting nearly all of Iran's demands, the agreement has set a dangerous precedent for other states to follow and weakened international law, the UN Security Council, and the NPT.