

Joint Comprehensive Plan of Action (JCPOA): Interrogating the Legal Status of JCPOA and
Contextualizing the Legal Implication of United States' Withdrawal

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ABSTRACT: *On 9th May 2018, President Donald Trump pulled the U.S. out of the Joint Comprehensive Plan of Action (JCPOA) or Iran Nuclear Deal which is fruit of thirteen years of negotiations between Iran and world powers on Iran's nuclear program. The JCPOA, since its creation, raised question whether it is a treaty or just a non-binding international instrument. This study is aimed at offering an investigation on this question. After examining all elements of a treaty, we found out that it's rather a treaty under international law; and, we concluded that as a matter of international law; it is breach of the Article 56 of Vienna Convention on Law of Treaties (VCLT) as well as violation of United Nations Security Council Resolution 2231 (2015); and, therefore, the withdrawal is contrary to international law.*

KEYWORDS: *JCPOA, International Law, Vienna Convention on Law of Treaties, Iran, United States.*

Introduction

The United Nations Charter recognizes pacific settlement of disputes in its Chapter VI and stipulates that the parties to any dispute of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by i.e. negotiation.¹ The JCPOA is a fruit of two decades of negotiations between Iran and the world powers on its nuclear program. It is a detailed, 159-page agreement with five annexes reached by Iran, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States) and the European Union (EU) on July 14, 2015 to ensure that Iran's nuclear is exclusively peaceful. The negotiating history and sensitivity of the issues covered by the agreement shows that the parties had intended to reach an agreement aimed at curbing Iran's nuclear program. The

¹ Article 33 'Charter of the United Nations' <<http://www.un.org/en/documents/charter/>> accessed (25 November, 2018), as mere passivity does not meet the requirements of this article, the parties are explicitly enjoined to deploy active efforts with a view to settling the dispute, see Simma, Bruno *et al ed.* (2002) *The Charter of the United Nations: A Commentary Volume I*, Oxford University Press, p. 587.

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JCPOA was endorsed by UN Security Council Resolution 2231 on July 20, 2015. Iran's compliance with the nuclear-related provisions of the JCPOA was verified by the International Atomic Energy Agency (IAEA) according to certain requirements set forth in the agreement.² As a result of Iran verifiably meeting its nuclear commitments, the United States and the EU lifted nuclear-related sanctions on Iran, as described in the JCPOA. However, On May 8, 2018, President Trump announced that the United States would withdraw from the JCPOA and reinstate U.S. nuclear sanctions on the Iranian regime. By November 2018, all the earlier lifted sanctions by U.S. were re-instated. According to the U.S. Government, the JCPOA, among other reasons, rather than protecting U.S. and its allies, simply allowed Iran to continue enriching Uranium.³

In this article, based on doctrinal legal research method, we set out to examine the legal status of JCPOA under International law and the consequent legal implications of U.S. unilateral withdrawal. In carrying out the task of the paper, after the introduction, section II provides a general overview and background of the Iran's nuclear program. Section III focuses on the nuclear dispute milestones, by providing a clustered analysis of Iran's nuclear dispute with world powers. Section IV elaborates the sanctions imposed by the UNSC due to Iran's nuclear programme. Section V investigates whether JCPOA is a treaty or not using the Vienna Convention on the Law of Treaties (VCLT) as the analytical framework. The outcome of such investigation would reveal whether the U.S. unilateral withdrawal from JCPOA amounts to breach of Articles 56 VCLT and Article 25 of the UN Charter respectively. In Section five, the paper concludes that the implication of US unilateral withdrawal may amount to a breach of international law as a whole.

History

As one of the first generation of the Non-Proliferation Treaty (NPT)'s ratification, Iran's scientific and technological nuclear program for peaceful purposes started in 1950s backed by the United States as a part of Atom for Peace program. On March 5, 1957, the US-Iranian Agreement entitled "Cooperation Concerning Civil Uses of Atoms" opened the doors for US investment in the fledging Iranian nuclear industry. The United States supplied the newly established Tehran Nuclear Research Center with a five-megawatt reactor and continued to provide Iran with nuclear fuel and equipment for the next 10 years. A decade after signing the mentioned Agreement between Iran and United States, the construction and installation of the reactor was finished in 1978.⁴ Iran's nuclear program was implemented in 1974, when Mohammad Reza Shah Pahlavi (the last king of Iran) established the Atomic Energy Organization of Iran (AEOI). After establishment of AEOI, Iran started to negotiate with the United States, France and West Germany, in order to purchase multiple nuclear power plants.

² GOV/INF/2016/1, 16 January 2016.

³ The New York Times, 'Read the Full Transcript of Trump's Speech on the Iran Nuclear Deal' *The New York Times* (9 June, 2018) <<https://www.nytimes.com/2018/05/08/us/politics/trump-speech-iran-deal.html>> accessed (2 February, 2019).

⁴ Novin, Parviz (2006) Nuclear Energy and Legal Norms, Tadriss Publications, pp. 131-132.

In 1974, Iran also invested in a uranium enrichment plant in France, named as Eurodif, by lending \$1 billion for the construction of the factory in order to have the right to buy 10% of the production. Iran still remains a shareholder of the plant. Most of Shah's nuclear programs were legal and declared except one: "A secret contract for the purchase of natural uranium concentrate known as 'yellow cake', from South Africa. The agreement is documented in a confidential 1976 U.S. State Department cable".⁵ After fall of Shah in 1979 and establishment of Islamic regime in Tehran, the Western countries stopped fulfilling their obligations under the contracts for providing nuclear technology. At that time, Iran only had its U.S. supplied research reactor in Tehran. The progress of Bushehr nuclear power reactors and Darkhouin reactor were halted. In 1984, Iran sought to re-start building the Bushehr power plant but West Germany did not accept unless the war between Iran and Iraq ends. In January 1995, Iran signed a contract with Russia to build light water reactors at Bushehr, under the IAEA safeguards. The contract between Russia and Iran brought fears of transferring the knowledge of building nuclear weapons to Iran by Russian experts who had financial difficulties after the collapse of the Soviet Union due to the very low income.⁶ In 1998, The United States House of Representatives passed the Iran Nuclear Proliferation Prevention Act which Amended the Atomic Energy Act of 1954 to prohibit granting any license, approval, or authorization for the export, re-export, transfer, or retransfer of specified components and facilities to a country that the President determines has provided to the Islamic Republic of Iran special nuclear material, source material, byproduct material, production facility, utilization facility, or items, components, or technologies which can be used in a production or utilization facility or in a nuclear explosive device.⁷

Nuclear Dispute

The milestone in Iran-West disputes over the clandestine nuclear program of Iran can be said to have escalated when in December 2002, the satellite images of Natanz and Arak were sighted. Indeed, the United States immediately accused Iran of "across-the-board pursuit of weapons of mass destruction." The images came to public domain just three months after Russia began construction of a nuclear reactor at the Bushehr power plant. Two months later, in February 2003, Iranian President Mohammed Khatami announces plans to develop a nuclear fuel cycle. Soon after that, IAEA Director General Mohamed ElBaradei held talks with President Khatami and senior Iranian officials on the country's nuclear program. In September 2003, The IAEA Board decided that it is essential and urgent in order to ensure IAEA verification of non-diversion of nuclear material that Iran remedy all failures identified by the Agency and cooperate fully with the Agency to ensure verification of compliance with Iran's safeguards agreement by taking all the necessary actions by the end of October 2003.⁸ During

⁵ Spector, Leonard S. and Jacqueline R. Smith (1990) "Nuclear Ambitions", Westview Press, p. 205.

⁶ See Weiner, Sharon (2011) *Our own Worst Enemy? Institutional Interests and the Proliferation of Nuclear Weapon Expertise*, The MIT Press, England, pp. 1-2.

⁷ H.R.5411 - Iran Nuclear Proliferation Prevention Act.

⁸ Resolution adopted by the Board on 12 September 2003 on Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, GOV/2003/69.

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the meeting with IAEA inspectors in Iran in August 2003, Iranian authorities revealed their old-age plan to enrich uranium since 1985. In a report by IAEA Director General, this issue reads thus: “These findings were provided to Iran, and were discussed with Iranian officials during the meetings that took place on 9–12 August 2003. In that discussion, in contrast to the earlier information provided about the launch dates of the programme and its indigenous nature, AEOI officials stated that the decision to launch a centrifuge enrichment programme had actually been taken in 1985, and that Iran had received drawings of the centrifuge through a foreign intermediary around 1987. The officials described the programme as having consisted of three phases: activities during the first phase, from 1985 until 1997, had been located mainly at the AEOI premises in Tehran; during the second phase, between 1997 and 2002, the activities had been concentrated at the Kalaye Electric Company in Tehran; during the third phase, 2002 to the present, the R&D and assembly activities were moved to Natanz.”⁹

In October 2003, upon the invitation of the Government of Iran, the Foreign Ministers of Britain, France and Germany paid a visit to Tehran. Iran agreed to voluntarily stop producing enriched uranium and sign the Additional protocol after meetings with French, German and British foreign ministers which was called ‘Tehran Agreement’. On 23 February 2004, Iran agreed to stop testing centrifuges designed for uranium enrichment in a meeting with United Kingdom, France and Germany in Paris. In the same year, Iran signed another agreement (Brussels Agreement) with the same EU countries voluntarily undertaking to continue and extend its suspension to include all enrichment related and reprocessing activities, and specifically: the manufacture and import of gas centrifuges and their components; the assembly, installation, testing or operation of gas centrifuges; work to undertake any plutonium separation, or to construct or operate any plutonium separation installation; and all tests or production at any uranium conversion installation. At the meeting, Iran reaffirms that, in accordance with Nonproliferation clause of the NPT, it does not and will not seek to acquire nuclear weapons. It commits itself to full cooperation and transparency with the IAEA. It will continue to voluntarily implement the Additional Protocol pending ratification. The European side, in exchange, agreed to use its best efforts to ensure Iran’s membership in the World Trade Organization (WTO). The agreement reads: “Once suspension has been verified, the negotiations with the EU on a Trade and Cooperation Agreement will resume. The E3/EU will actively support the opening of Iranian accession negotiations at the WTO. Irrespective of progress on the nuclear issue, the E3/EU and Iran confirm their determination to combat terrorism, including the activities of Al Qaida and other terrorist groups such as the MeK. They also confirm their continued support for the political process in Iraq aimed at establishing a constitutionally elected Government.”¹⁰

Although the IAEA was relatively satisfied by Iran’s cooperation with the Agency, the election of Mahmoud Ahmadinejad as President of Iran in 2005, a new era started in Iran’s nuclear

⁹ Report of the Director General of IAEA on Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, GOV/2003/63, 26 August, 2003.

¹⁰ Communication dated 26 November 2004 received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the agreement signed in Paris.

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activities and its relations with the West and the IAEA. In September 2005, speaking before the UN General Assembly, Iranian newly elected President said Iran has an "inalienable right" to produce nuclear fuel. The IAEA immediately passed a resolution referring Iran to the United Nations Security Council (UNSC) on the grounds of its non-compliance with international nuclear safeguards.¹¹

On March 29, 2006, The UNSC issued a Presidential Statement calling on Iran to re-establish full and sustained suspension of all enrichment-related and reprocessing activities, including research and development. In its Presidential Statement, the UNSC underlined the importance of Iran's re-establishing full, sustained suspension of uranium-enrichment activities and called on Iran to take steps required by the IAEA Board of Governors.¹² On 11 April 2006, Iranian President announced that Iran has successfully enriched uranium at its Natanz nuclear facility and Iran, from this date, joined the Nuclear Club. From 2006 to 2010, the UNSC issued six resolutions on Iran including tough sanctions. In its Explanatory Comments to the IAEA (INFCIRC/737), Iran again mentioned that its suspension of nuclear activities was voluntary undertaking, non-binding and as such, could not continue for an indefinite period. In November 2008, Iran announced that it was running 5,000 uranium enrichment centrifuges and plans to install 50,000 uranium enrichment centrifuges over the next five years. After three meetings between Iran and EU, Iran signed an agreement with Turkey and Brazil; accordingly Iran will send its uranium to Turkey for processing in return for nuclear fuel. Based on this agreement, in order to facilitate the nuclear cooperation, the Islamic Republic of Iran agreed to deposit 1200 kg Low Enriched Uranium (LEU) in Turkey. While in Turkey this LEU will continue to be the property of Iran. Iran and the IAEA may station observers to monitor the safekeeping of the LEU in Turkey. This agreement was never executed due to lack of cooperation from the IAEA and EU negotiators. Negotiations between Iran and 5+1 (China, France, Russia, United Kingdom and United States + Germany) continued in Istanbul, Baghdad, Moscow and Amati in order to convince Iran to stop its nuclear activities while Iran seems not willing to give up its "inalienable right" to peaceful nuclear activities. In 2012 and 2013, Iranian economy and oil exports were affected drastically due to the U.S. and EU supported sanctions on its oil exports and financial and banking system.

UN Sanctions

Resulting from wide suspicions particularly among Western states that Iran does indeed had nuclear weapons ambitions and its uranium enrichment was not solely for use in peaceful nuclear energy,¹³ acting under Chapter VII of the United Nations Charter, the Security Council adopted six resolutions against Iran's nuclear activities: 1696, 1737, 1747, 1803, 1835 and

¹¹ Resolution adopted on 24 September 2005 on Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, GOV/2005/77.

¹² S/PRST/2006/15, 29 March 2006.

¹³ Joyner, Daniel H. (2009) International Law and the Proliferation of Weapons of Mass Destruction, Oxford University Press, p. 51.

1929. It seems that the UNSC adopted ‘smart sanctions’ for limiting the officials, companies and other persons relating to the disputed Iran’s nuclear activities; however imposing separate sanctions by the United States and European Union destroyed Iranian economy with its main impacts on people of Iran. Washington Post wrote:

“Harsh economic sanctions have taken a serious toll on Iran’s economy, but U.S. and European officials acknowledge that the measures have not yet produced the kind of public unrest that could force Iranian leaders to change their nuclear policies. Nine months after Iran was hit with the toughest restrictions in its history, the nation’s economy appears to have settled into a slow, downward glide, hemorrhaging jobs and hard currency but appearing to be in no immediate danger of collapse, Western diplomats and analysts say. At the same time, the hardships have not triggered significant domestic protests or produced a single concession by Iran on its nuclear program. Although weakened, Iran has resisted Western pressure through a combination of clever tactics, political repression and old-fashioned stubbornness.”¹⁴

This view, to some extent, was right; however, the result of 2013 Iranian presidential elections shows that the Iranian people responded by saying ‘No’ to foreign policies of Ahmadinejad’s administration which partly destroyed the Iranian economy as a result of the UNSC sanctions. Electing Hassan Rouhani as President of Iran opened a new era in Iranian nuclear program again. President Rouhani, with its moderate administration and open foreign policies, began negotiating with the world powers in order to reach a comprehensive agreement on Iran’s nuclear program and removing the sanctions. After rounds of negotiations, the JCPOA was signed by the E3/EU+3 (China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy) and the Islamic Republic of Iran on July 14, 2015 in Vienna.¹⁵

According to JCPOA, its successful implementation ensures the exclusively peaceful nature of Iran’s nuclear programme¹⁶ and enables Iran to fully enjoy its right to nuclear energy for peaceful purposes under the relevant articles of the nuclear Non-Proliferation Treaty (NPT) in line with its obligations therein; and, the Iranian nuclear programme will be treated in the same manner as that of any other non-nuclear-weapon state party to the NPT¹⁷ and it produces the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran’s nuclear programme, including steps on access in areas of trade, technology, finance and energy.¹⁸

¹⁴ Warrick, Joby (2013) ‘Despite sanctions’ toll on Iran, U.S. sees no shift in nuclear behavior’, Washington Post, (17 March, 2013).

¹⁵ <https://www.state.gov/documents/organization/245317.pdf>

¹⁶ Preamble and General Provisions, para ii.

¹⁷ Preamble and General Provisions, para iv.

¹⁸ Preamble and General Provisions, Para V.

Despite all the efforts put by all the member states to JCPOA, particularly United States under the leadership of President Barak Obama, The U.S. administration led by President Donald Trump in the late 2017 indicated to the world its willingness to pull out from the JCPOA.¹⁹ Indeed, On 9th May 2018, President Trump unilaterally pulled the U.S. out from the JCPOA).²⁰ The decision of the US triggers both legal and political debacle over the legal and to some extent the moral status of the JCPOA agreement.²¹ In the next heading, the paper, focusing purely on the legal issue surrounding the JCPOA, shall investigate the legal status of the JCPOA under International law.

Is JCPOA a Treaty?

Whether JCPOA is a treaty or another international instrument i.e. a Gentlemen's Agreement, is subject to debates and disagreements among international lawyers and scholars. In examining whether it is a treaty, prior to the adoption of Vienna Convention, Lord McNair defined a treaty as "*a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law*".²² A more inclusive definition is given by the Vienna Convention: Article 2(1)(a) of Vienna Convention, the chief instruments on law of treaties, defines a 'treaty' as:

*"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*²³

¹⁹ Chris Bucher (2017) 'LIVE STREAM: President Trump Announces Iran Nuclear Deal Strategy' (*Heavy.com*, 13 October 2017) <<https://heavy.com/news/2017/10/trump-iran-live-stream-strategy-nuclear-deal/>> accessed (6 February, 2019).

²⁰ 'Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon' (*The White House*), <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon>, accessed (6 February, 2019).

²¹ See e.g. Stephen P Mulligan (2018) 'Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement' 31; Michael Goodyear (2018) 'Pulling the Iran Deal: Treading On Treaties and Trade' 39 (*The Michigan Journal of International Law*, (3 July, 2018) <<http://www.mjilonline.org/pulling-the-iran-deal-treading-on-treaties-and-trade/>> accessed (2, February 2019); Fahimirad, Melody (2017) 'The Iran Deal: How the Legal Implementation of the Deal puts the United States at a Disadvantage both Economically and in Influencing the Future of Iran's Business Transactions', 37 *Nw. J. Int'l L. & Bus.* 301 (2017), <http://scholarlycommons.law.northwestern.edu/njilb/vol37/iss2/4>, accessed (27 September, 2018), Padeanu, Iulia E. (2016) 'Is the Trump Administration Bound by the Iran Deal?', *Yale Journal of International Law* (1 December, 2016), <http://www.yjil.yale.edu/is-the-trump-administration-bound-by-the-iran-deal>, accessed (2 February 2019); Kaveh L. Afrasiabi (2018) 'Trump and the Iran Nuclear Accord: The Legal Hurdles' (*JIA SIPA*, 28 February 2018); <<https://jia.sipa.columbia.edu/online-articles/trump-and-iran-nuclear-accord-legal-hurdles>> accessed (2 February, 2019).

²² McNair, Lord (1961) *The Law of Treaties*, Oxford University Press, p.4.

²³ Article 2 (1) (a) United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>, accessed (06 February, 2019).

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The wording ‘whatever its particular designation’ distinguishes this definition from the traditional one which supports our argument in the following paragraphs. To determine whether JCPOA is a ‘treaty’, we should examine all elements of the above definition:

(a) An international agreement concluded between States

Although the VCLT has not expressly mention ‘international organizations’ as parties to treaties; however, considering the traditional definition of treaty, a treaty can be concluded between a state and another subject of international law.²⁴ McNair argues “If fully sovereign States possess a treaty-making power, when acting alone, it is not surprising to find the same power attributed to an international organization which they have created, and the members of which are usually sovereign States.”²⁵ Regarding the nature of the personality of international organization, the Advisory Opinion of the International Court of Justice on Reparation for Injuries suffered in the service of the United Nations is noteworthy. The court stated that:

In the opinion of the Court, the Organization was intended to exercise and enjoy, and in fact exercising and enjoying, functions and rights which can only be explained on the basis of possession of a large measure of international personality and capacity to operate upon an international plane. ... It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to conclusion that the Organization is an international person...²⁶

Therefore, an international organization could become a party to a treaty. JCPOA has an international character. It has been concluded by Iran, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States) and the European Union (EU). Therefore, it’s an international multilateral agreement between States and an international organization.

(b) Form of the Document

The Vienna Convention does not apply to oral agreements and it expresses ‘concluded between States in written form’. This is one of the major characteristics of treaties which distinguish them from domestic contracts due to more sensitivity and the need for more concrete evidences in international law. The JCPOA is a written agreement between the parties. Although not signed by parties; however, in general, it’s not a requirement by Vienna Convention for a treaty to be signed.²⁷ Signature is just one of the ways that parties may show their consent. The consent of a State to be bound by a treaty may be expressed by other means than signature; i.e. exchange of instruments constituting a treaty.²⁸ In treaty law, even minutes of negotiations, depending on circumstances , can be considered as a treaty as was confirmed by the

²⁴ Aust, Anthony (2005) Handbook of International Law, pp.13-15

²⁵ Id. Supra note 22, at 50.

²⁶ I.C.J. Reports, 1949, p. 179.

²⁷ Aust, Anthony (2013) Modern Treaty Law and Practice, Cambridge University Press, p.21.

²⁸ VCLT, Art 11.

International Court of Justice (ICJ or the Court) in the *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* case of 1994. The Court concluded: ‘They thus create rights and obligations under international law for the Parties.’²⁹

(c) Governed by international law

The phrase ‘governed by international law’, according to ILC’s Commentary, embraces an “intention to create obligations under international law”.³⁰ To determine whether the JCPOA is supported by intention of participants to create obligations under international law, we need to refer to its literature and context. JCPOA, which is fruit of two decades of negotiations as discussed in the previous chapter, is designed in three sections: preface, preamble and general provisions, and, voluntary measures. We need to examine these sections to determine if there is intention to create obligations under international law by the parties as this intention is not expressly mention in the JCPOA; however intention can also be gathered from circumstances of its conclusion as well.³¹ Before referring to the terms of the treaty, as the intention of the Parties, except Iran,³² has not been expressed, it is necessary to examine the circumstantial evidences surrounding the JCPOA. As elaborated in the third section, JCPOA is a result of about twelve years of negotiations in several countries under different administrations. The questions is why several States and an international organization should have negotiated for such a long time and finally come to conclude their agreement in an instrument which is not binding and does not create obligations? It does not necessarily mean that any agreement that is a product of a long-term negotiation must be a treaty. However, the intention of the parties must be determined by a ‘case-to-case analysis of the context’³³ which may give weight to circumstantial evidence. The ICJ, in accordance to Article 48 of its Statute, shall make all arrangements connected with the taking of evidence; and, can resort to circumstantial evidence where direct evidence would otherwise be preferred.³⁴ Several decisions of the Court have laid ground to circumstantial evidence such as the *Corfu Channel Case*³⁵, the *Diplomatic and Consular Staff in Tehran Case*³⁶.

Below, are the evidences that show the intention of the Parties to create obligations under the JCPOA:

- JCPOA Preface

²⁹ ICJ Reports, 1994, p.121.

³⁰ Id. 21, p.17.

³¹ Id.

³² It was admitted in an interview by Hosseinali Amiri, Iran’s President Parliamentary Deputy, that JCPOA is an international treaty, ‘Donya-e-Eghtesad Newspaper’, 17 May 2018.

³³ Kolb, Robert (2016) *The Law of Treaties: An Introduction*, Edward Elgar Publishing , p. 27.

³⁴ Scharf, Michael P. and Margaux Day (2012) ‘The International Court of Justice’s Treatment of Circumstantial Evidence and Adverse Inferences’, 13 Chi. J. Int’l L. 123 (2012), pp. 123-151, at Heinonline.org, accessed 23 October, 2018).

³⁵ See *Corfu Channel* 1949 ICJ at 32.

³⁶ See *United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ 3, 9-10

The Preface lays down the purpose of the JCPOA, i.e. to “ensure that Iran’s nuclear programme will be exclusively peaceful”³⁷ and to “anticipate that full implementation of this JCPOA will positively contribute to regional and international peace and security”.³⁸ These purposes which are closely tied with maintenance of international peace and security cannot be fulfilled logically without intention to create obligation under international law. It cannot be acceptable that such important purposes, lack of which may endanger the world’s peace and security, can be embodied in a non-binding instrument. Hence, we regard the preface containing binding provisions.

- JCPOA Preamble and General Provisions

In Preamble and General Provisions, the participants have decided upon ‘this long-term’ JCPOA,³⁹ and, again it reads that the full implementation of the JCPOA ensures that Iran’s nuclear programme is of exclusively peaceful nature;⁴⁰ and, Iran reaffirms that under no circumstances will seek to develop or acquire nuclear weapons⁴¹ and successful implementation of the JCPOA will enable Iran to fully enjoy its rights to nuclear energy for peaceful purposes under the NPT⁴² and, the most importantly, the JCPOA will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran’s nuclear programme.⁴³ The terminology used in the above general provisions, according to some international lawyers, are not intended to impose obligations on participants as it uses ‘will’ in lieu of ‘shall’, and, the general provisions are contained in paragraphs in lieu of articles.⁴⁴ Despite the fact that terminology of an instrument can be a factor to determine if it’s a treaty, the law of treaties does not require a treaty to be in any particular form or to use special wording.⁴⁵ Instead, the terms used in the general provisions, which already contained in the Preface as well, such as ensuring that Iran will not seek to produce or acquire nuclear weapons, is more likely to produce obligations under international law.

- JCPOA and Resolution 2231 (2015)

As mentioned, the JCPOA’s Preamble and General Provisions produced comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran’s nuclear program. Therefore, it was contained in the JCPOA that the E3+3 would submit a draft resolution to the UN Security Council endorsing this JCPOA; affirming that conclusion of this JCPOA marks a fundamental shift in its consideration of this issue; and, expressing its

³⁷ JCPOA, Preface, Para 1.

³⁸ JCPOA, Preface, Para 2.

³⁹ JCPOA, Preamble and General Provisions, Para (i)

⁴⁰ JCPOA, Preamble and General Provisions, Para (ii).

⁴¹ JCPOA, Preamble and General Provisions, Para (iii).

⁴² JCPOA, Preamble and General Provisions, Para (iv).

⁴³ JCPOA, Preamble and General Provisions, Para (v).

⁴⁴ See e.g. Mardani, Nader and Mehdi Hooshmand (2016) ‘JCPOA, A Dialectical Paradigm of Treaty and other International Instruments’, *Journal of Politics and Law*, Vol. 9, No. 3.

⁴⁵ Temple of Preah Vihear (Preliminary Objections), ICJ Reports (1961), p. 17.

desire to build a new relationship with Iran and also would provide for the termination on implementation Day of provisions imposed under previous resolutions.⁴⁶ Resolution 2231 (2015)⁴⁷, provides that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Security Council's decisions, endorsed the JCPOA, and urged for its 'full implementation' on the timetable established in the JCPOA. It also called upon all Member States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including taking actions commensurate with the implementation plan set out in the JCPOA and the resolution itself, and refraining from actions that undermine implementation of commitments under the JCPOA. In addition, the resolution provides for the role of the Director General of the IAEA to undertake the necessary verification and monitoring of Iran's nuclear-related commitments for the full duration of those commitments under the JCPOA, and reaffirmed that Iran shall cooperate fully as the IAEA requests to be able to resolve all outstanding issues, as identified in IAEA reports.

Although the Security Council was not aimed to be a legislative body, it does have a lawmaking function and its decisions are binding under international law⁴⁸ and potentially, have as great or greater significance than the concept of *jus cogens*.⁴⁹ As the UN Member States are obligated to carry out the UN Security Council resolutions, it can be understood that the JCPOA participants intended to create obligations under international law; and therefore, JCPOA is for all intent and purposes governed by international law.

As shown in this section, the JCPOA is an international agreement concluded between States in written form and governed by international law; hence it is a treaty and is governed by the VCLT. Although the United State is not a member of the VCLT; however, it is a signatory, and therefore obliged to refrain from acts which would defeat the object and purpose of a treaty.⁵⁰ More importantly, U.S. has officially announced to the whole world its recognition of the provisions of the VCLT as constituting customary international law.⁵¹

(d) Its Particular Designation

Generally, the VCLT does not require the parties to choose a particular title for their agreed document. It could be convention, treaty, declaration, plan of action, communique, agreed

⁴⁶ JCPOA, Preamble and General Provisions, Para (xiv).

⁴⁷ S/RES/2231(2015).

⁴⁸ Chesterman, Simon *et al* (2016) Law and Practice of the United Nations: Documents and Commentary, Oxford University Press, p. 144.

⁴⁹ Boyle, Alan and Christin Chinkin (2007) The Making of International Law, Oxford University Press, p. 233.

⁵⁰ VCLT, Art. 18.

⁵¹ 'Vienna Convention on the Law of Treaties' (*U.S. Department of State*)

<<http://www.state.gov/s/l/treaty/faqs/70139.htm>> accessed 6 February 2019.

minute, memorandum of understanding, accord, exchange of notes or letters etc.⁵² As the ICJ held in *Aegean Sea Continental Shelf (Greece v Turkey)*:

“On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.”⁵³

It can thus be concluded that since the content of the JCPOA involves voluntary assumption of responsibility by sovereign states after a protracted negotiation the outcome of which imposes an obligation on the sovereign states to act in a particular manner, and to refrain from conducting themselves in a particular manner, undoubtedly, such a curtailment of sovereign freedom would legally have a force of law regardless of its designation.

JCPOA Dispute Settlement Mechanism and Withdrawal Clause

JCPOA has no withdrawal clause; however, it has introduced a dispute settlement mechanism. Paragraph 36 stipulates that either party may refer the dispute to the Joint Commission if the other party fails to meet its commitments under the JCPOA. The United States did not bring the dispute to the Joint Commission as required under paragraph 36 of the JCPOA. Rather, U.S. led by President Trump unilaterally withdrew from the JCPOA on May 9th, 2018. In this regard, the obligation imposed by the VCLT pursuant to Article 42 is engaged. According to Article 42, a party to a treaty may terminate, suspend or withdraw from the treaty by applying the provisions of the treaty or where “none exist” by applying the provisions of the VCLT. In other words, failure to comply with dispute settlement provision as contained in Paragraph 36 JCPOA is a breach of both JCPOA and Article 42 of the VCLT. In addition, as the JCPOA lacks explicit withdrawal clause, resort can be made to Article 56 of the VCLT which provides as follows:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

⁵² Dörr, Oliver and Kirsten Schmalenbach, ed. (2012) *Vienna Convention on the Law of Treaties: A Commentary*, 2012 edition, Springer, 29–30.

⁵³ ‘*Aegean Sea Continental Shelf (Greece v Turkey) 1978 ICJ Rep 3*’, para 96 <<https://www.icj-cij.org/files/case-related/62/062-19781219-JUD-01-00-EN.pdf>> accessed (7 February, 2019).

(a) *it is established that the parties intended to admit the possibility of denunciation or withdrawal; or*

(b) *a right of denunciation or withdrawal may be implied by the nature of the treaty.*

2. *A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.*

The United States' withdrawal from the JCPOA is not covered by either (a) or (b) of Article 56 VCLT as there is no evidence of the intention of parties to admit the possibility of denunciation or withdrawal; and, as the nature of this treaty deals with global security and non-proliferation, it seems that a right of denunciation or withdrawal cannot be implied by the nature of the treaty. Even if there was a possibility of invoking article 56(1), the United States should have observed the twelve-month notice. The United States is not a party to the VCLT; however, has have given its consent to the text of the treaty and is obliged to refrain from acts which would defeat the object and purpose of the treaty.⁵⁴

CONCLUSION

The JCPOA is fruit of more than a decade and through several stages of negotiations, concluded by Iran, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States) and the European Union (EU) on July 14, 2015 which contains vital issues on non-proliferation of nuclear weapons and international peace and security. It ensures that Iran will not build or acquire nuclear weapons; Iran fully enjoys its rights to nuclear energy for peaceful purposes under the NPT; and, the most importantly, the JCPOA produced the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme. The United States refrained to seek resolving the dispute amicably which is desired by the UN Charter, and, withdrew unilaterally. JCPOA meets all the characters of a treaty stipulated in VCLT: it's an international agreement concluded by States, in written form, and, governed by international law; as elaborated, there are many evidences in the JCPOA which shows the intention of the Parties to create obligations under the JCPOA; and, finally it is endorsed by UNSC resolution 2231 which under international law is binding. Therefore, it is the position of this paper, that the United States' unilateral withdrawal from JCPOA was in clear violation of the JCPOA itself, Article 56 VCLT , resolution 2231 of the UNSC and more importantly in breach of Article 25 of the UN Charter. We believe that resorting to Article 33 of the UN Charter as well as seeking political solutions could greatly contribute to the dispute resolution as political factors are often appealed to for making an international legal argument.⁵⁵

⁵⁴ VCLT, Art. 19. See also Shaw, M. N., *International Law*, Cambridge University Press (2014), p. 660.

⁵⁵ Orakhelashvili, Alexander (2011) 'International Law, International Politics and Ideology' in Orakhelashvili, Alexander, ed. (2011) *Research Handbook on the Theory and History of International Law*, Edward Elgar, pp. 328-375.

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