

Article

# The IAEA'S Right to Visit Sites Accused of Developing Nuclear Weapons Systems: The Parchin Facility in Iran

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## Abstract

Recent activities at the Iranian facility at Parchin have increased suspicion that Iran has not fully disclosed its nuclear program goals, sparking a debate on how the international community should respond to this potential threat to peace and security. The article investigates which legal provisions could potentially enable the IAEA to access the Parchin facility under international law. In this sense, legal documents relating to the IAEA, resolutions adopted by the Security Council and the Board of Governors and the Geneva Agreement of November 2013 are investigated. The authors find that, although the IAEA may experience difficulties in demanding access to the Parchin facility through its Safeguards Agreement with Iran, it could rely on the resolutions adopted by the Security Council and the Board of Governors, providing the IAEA with a clear mandate to demand access to basically all Iranian facilities involved with either nuclear or weapons development.

## Introduction

Since 2002,<sup>1</sup> the Islamic Republic of Iran ('Iran') has been in a continuous dispute with the international community about its nuclear program. Whereas Iran has on numerous occasions indicated that its nuclear program is intended for the development of nuclear energy only, the International Atomic Energy Agency ('IAEA' or 'Agency') has not been able to verify this notion to this date.<sup>2</sup> Moreover,

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<sup>1</sup> The international community and Iran reached an agreement in November 2013, but past agreements – such as the Tehran Declaration and the Paris Agreement – have shown that time will have to tell the outcome of such events.

<sup>2</sup> Examples of Iran rejecting allegations of aiming to develop a nuclear weapons program are numerous. See for instance the following news articles:–, 'Iran rejects West's demand to ship out enriched uranium' BBC (London 13 October 2013) <<http://www.bbc.co.uk/news/world-middle-east-24513539>> accessed 2 January 2014; Haroon Siddique, 'Iran to maintain nuclear programme' The

recent activities at the Iranian facility at Parchin which could be associated with the development of weapons of mass destruction have further increased suspicion that Iran has not been honest about the goals of its nuclear program.

These developments have sparked a debate on how the international community should respond to this potential threat to peace and security. Not only has this question been dealt with in the political branches of the United Nations ('UN'), most importantly in the Security Council, scholars have also partaken in the discussion, often showing widely-diverging opinions. In particular, the question whether the IAEA should have access to the Parchin facility has increasingly gained attention over the years.<sup>3</sup> What makes this question rather special is that most accusations<sup>4</sup> towards Iran regarding Parchin do not involve the enrichment of fissionable materials – such as uranium or plutonium – but the testing of conventional weapons, which some regard as outside of the IAEA's mandate.

This article investigates which legal provisions could potentially enable the IAEA to claim access to the Parchin facility under international law. The main question being: *on what grounds can the IAEA demand access to the Iranian facility at Parchin?*

To answer this question, the relevant legal documents are investigated as to whether they give, under international law, the IAEA physical access to facilities that could be part of a system aimed at developing missiles that can carry nuclear warheads. These provisions are often open to interpretation thereby necessitating the consultation of academic literature and explanatory notes of relevant institutions, such as the IAEA Board of Governors ('BOG' or 'Board'), and individuals, like the IAEA Director-General.

The article starts with an elaboration on the international effort to halt the proliferation of nuclear weapons. Hereafter, the dispute between Iran and the international community is briefly discussed to provide a context to the main question. Afterwards, the article delves into the question whether and, if so, on what grounds the IAEA can actually demand access to the Parchin facility under international law. In doing so, this section evaluates the Treaty on the Non-Proliferation of Nuclear Weapons ('NPT'), the IAEA Statute, the Safeguards Agreement between the IAEA and Iran,<sup>5</sup> and the resolutions of the UN Security Council and the BOG. The recent agreement of November 2013 between Iran and

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Guardian (London 5 July 2008) <<http://www.theguardian.com/world/2008/jul/05/iran>> accessed 2 January 2014; and —, 'Iran president refuses to budge', CNN (Tehran 1 September 2006) <[http://edition.cnn.com/2006/WORLD/meast/09/01/iran.deadline/index.html?section=cnn\\_world](http://edition.cnn.com/2006/WORLD/meast/09/01/iran.deadline/index.html?section=cnn_world)> accessed 2 January 2014.

<sup>3</sup> See, for instance, David Albright and Robert Avagyan, 'Activity at Parchin Explosive Testing Sites Continues: Time is Running Out for a Sound IAEA Inspection', *ISIS Imagery Brief*, (2 July 2012); Dan Joyner, 'An IAEA Special Inspection of Parchin?' (*Armscontrollaw*, 16 May 2013) <<http://armscontrollaw.com/2013/05/16/an-iaea-special-inspection-of-parchin/>> accessed 5 January 2013.

<sup>4</sup> However, there are some that have accused Iran of working with fissionable materials at Parchin. See *infra* section IV(A).

<sup>5</sup> The Safeguards Agreement between Iran and the IAEA is based on INFCIRC/153. However, the Iranian Safeguards Agreement gives legal rights and duties to both Iran and the IAEA and will be discussed rather than INFCIRC/153.

the international community is also taken into consideration. Hereafter, the article provides its readers with a sound answer to the main question.

## II. The International Community and the Non-Proliferation of Nuclear Weapons

The international community became increasingly concerned with the development of nuclear weapons in the aftermath of the nuclear tests carried out by France and China in the 1960s. These concerns led to the conclusion of the NPT, which was adopted by the UN General Assembly in 1968 and entered into force in 1970.<sup>6</sup> The treaty aimed to prevent the proliferation of nuclear weapons and weapons technology alongside promoting interstate cooperation in the peaceful use of nuclear energy.<sup>7</sup> The core principles of the NPT – often referred to as the three pillars – are (i) the encouragement of the peaceful uses of atomic energy, (ii) the non-proliferation of nuclear weapons, and (iii) the disarmament of existing stockpiles of nuclear weapons.<sup>8</sup>

The treaty is discriminatory in the sense that it gives different rights and obligations to the five nuclear weapon States ('NWS') – China, France, the United Kingdom, the United States, and Russia – and to non-nuclear weapon States ('NNWS').<sup>9</sup> The NPT allows NWSs to possess nuclear deterrents, but also obliges them not to aid NNWSs in the development of nuclear weapons programs.<sup>10</sup> Moreover, the NPT prohibits NNWSs from receiving, producing or acquiring such capacities.<sup>11</sup> To outbalance this discrepancy and to persuade NNWSs to ratify the treaty, the NPT guaranteed that the benefits from peaceful applications of nuclear explosions, predominantly the development and use of clean and sustainable energy, would be made available to NNWSs.<sup>12</sup>

The NPT did not create its own inspectorate to oversee the implementation of the treaty, but rather outsourced this task to the already existing International Atomic Energy Agency.<sup>13</sup> The legal basis for this supervisory function is found in the IAEA Statute, authorising the application of safeguards to nuclear materials in conjunction with IAEA projects, or otherwise at the request of one or more States.<sup>14</sup> The Statute

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<sup>6</sup> UNGA Res 2373 (XXII) (June 12, 1968) UN Doc A/RES/2373.

<sup>7</sup> Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968) 729 UNTS 161 / [1973] ATS 3 / 7 ILM 8809 [hereinafter NPT].

<sup>8</sup> Joseph Pilat, *Atoms for peace: a future after fifty years*, (Woodrow Wilson Center Press, 2007), p. 1.

<sup>9</sup> Gabriella Venturini, 'Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction' (2011), 17 U.C. Davis J. Int'l L. & Pol'y 345, p. 357.

<sup>10</sup> NPT, *op. cit.*, fn. 7, art I.

<sup>11</sup> NPT, *op. cit.*, fn. 7, art II.

<sup>12</sup> NPT, *op. cit.*, fn. 7, art V.

<sup>13</sup> The IAEA was established following the proposal of US President Eisenhower on 8 December 1953 to create an organisation to promote the peaceful use of nuclear energy and to ensure that it will not be diverted for military purpose. David Fischer, 'History of the International Atomic Energy Agency: the first forty years', (IAEA, 1997), p. 9.

<sup>14</sup> The Statute of the International Atomic Energy Agency, (29 July 1957), 8 U.S.T. 1093, 276 U.N.T.S., art III, para A (5), art XII.

confers this authority to the General Conference, the Board, and the Staff, headed by the Director-General.<sup>15</sup>

In this respect, all NNWSs must conclude a Safeguards Agreement with the IAEA to verify their compliance with the NPT and to ensure that no NNWS develops a nuclear weapon.<sup>16</sup> This monitoring system is set forth in the Comprehensive Safeguards Agreement INFCIRC/153<sup>17</sup> ('CSA'), which elaborates on the specific verification protocols to, *inter alia*, facilitate the inspection of any facilities that contain fissionable materials.<sup>18</sup> Most principally, INFCIRC/153 obliges Member States to keep detailed records 'on all source or special fissionable material in all peaceful nuclear activities'<sup>19</sup> and to provide the IAEA with design information on facilities containing such materials; it also regulates access to such facilities for IAEA inspectors.

Supervision of NPT Member States' compliance with their Safeguards Agreement is carried out by the IAEA through four separate phases.<sup>20</sup> The first phase entails the collection of relevant data and information regarding the behaviour of Member States. The second phase revolves around reviewing and verifying the information through appropriate inspections. In the third phase, the IAEA interprets, specifies and clarifies the norms of the arms control treaties (often referred to as its creative function). The last function of correction and enforcement is triggered when a Member State acts in breach of its Safeguards Agreement.<sup>21</sup>

### III. The Dispute between the International Community and Iran over its Nuclear Program

Now that an overview of the non-proliferation efforts of the international community has been drawn out, the article can turn to the dispute between Iran and the international community.

It can be argued that the dispute erupted on 14 August 2002 when Iran declared that two nuclear sites were under construction, one being the much-debated Arak facility.<sup>22</sup> The IAEA asked for access permission to the sites to verify Iran's claims that

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<sup>15</sup> The General Conference is the plenary organ of the IAEA and consists of representatives of all Member States. The Board of Governors is in charge of the daily administration of the IAEA. The Staff is the secretariat of the IAEA and is headed by the Director-General. Statute of the International Atomic Energy Agency, *op. cit.*, fn. 14, art III, para A (5), art VII.

<sup>16</sup> NPT *op. cit.*, fn. 7, art III, para 4.

<sup>17</sup> The Structure and Content of Agreements Between the Agency and States Required in Connection With the Treaty on the Non-proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/153, (June 1972) [hereinafter INFCIRC/153].

<sup>18</sup> Whether these fissionable materials only include those that are declared or if they extend to undeclared materials as well is investigated later on in this article. NPT, *op. cit.*, fn. 7, art III.

<sup>19</sup> INFCIRC/153, para 1.

<sup>20</sup> Guido den Dekker, 'The Effectiveness of International Supervision in Arms Control Law' (2004), 9 J. Conflict & Sec. L. 315, p. 320.

<sup>21</sup> *Ibid.*

<sup>22</sup> Paul Kerr, 'Exiles and Iran Intel' (Arms Control Wonk, 5 April 2005) <<http://guests.armscontrolwonk.com/archive/517/exiles-and-iran-intel>> accessed 2 January 2014.

it pursued peaceful goals; the request was granted by Iran and the inspections started in February 2003.<sup>23</sup>

Since then, Iran and the international community, the latter being deeply divided as to what it could expect from Iran,<sup>24</sup> had been struggling to reach a compromise agreement regarding the transparency of Iran's nuclear program and its rights and obligations under the NPT and the Safeguards Agreement. Finally, in November 2013, a deal was reached in Geneva; the content of which is discussed in another section.

Some of the more important events between 2002 and 2013 include the Tehran Declaration, the Paris Agreement, and the IAEA notification to the Security Council of Iran's incompliance with its Safeguards Agreement and the following resolutions and sanctions.

The Tehran Declaration was a declaration of the Foreign Ministers of France, Germany and the United Kingdom ('EU-3')<sup>25</sup> and Iran in which they agreed, based on Iran signing the Model Additional Protocol, to give the IAEA more powers to verify the peaceful intentions behind Iran's nuclear program by visiting undeclared facilities, and the suspension of Iranian enrichment of nuclear materials during the course of negotiations. On the other side of the coin, Iran would be granted access to modern technologies to further develop its nuclear program.<sup>26</sup> However, only a month later, the IAEA reported that Iran had failed to act in accordance with the obligations under its Safeguards Agreement.<sup>27</sup>

In response, the Paris Agreement was signed on 14 November 2004 by Iran's chief nuclear negotiator after pressure from the EU-3. It entailed that Iran would halt its nuclear enrichment for a short period of time to create space for renewed negotiations.<sup>28</sup> When it turned out that the negotiations were going to take more time than initially envisioned and after the EU-3 had declined an Iranian request to speed up the process, Iran declared that it would never halt nuclear enrichment indefinitely

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<sup>23</sup> See GOV/2003/40, IAEA (19 June 2003), para 4.

<sup>24</sup> For instance, while the EU has upheld a relatively lenient approach, the Bush administration has always opposed any deal that would not include the complete suspension of Iranian enrichment of nuclear materials. An example of the hard line that the US upheld can be found in the failed deal between Iran and Germany, France and the UK. Here, the European countries could not allow any form of nuclear enrichment due to US pressure. See Peter Osborne, 'Iran: how the West missed a chance to make peace with Tehran' *The Telegraph* (London 21 April 2013) <<http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10007603/Iran-how-the-West-missed-a-chance-to-make-peace-with-Tehran.html>> accessed 2 January 2014.

<sup>25</sup> France, Germany and the United Kingdom represented the EU in this matter and are referred to as the 'EU-3'.

<sup>26</sup> 'Statement by the Iranian Government and Visiting EU Foreign Ministers', *IAEA*, (21 October 2003), <[http://www.iaea.org/newscenter/focus/iaearan/statement\\_iran21102003.shtml](http://www.iaea.org/newscenter/focus/iaearan/statement_iran21102003.shtml)> accessed 2 January 2014.

<sup>27</sup> For a full list of Iran's failures in relation to its Safeguards Agreement, see GOV/2004/83, IAEA (15 November 2004), para 86.

<sup>28</sup> See 'Iran-EU Agreement on Nuclear Programme', IAEA, (14 November 2004) ('Paris Agreement') <[http://www.iaea.org/newscenter/focus/iaearan/eu\\_iran14112004.shtml](http://www.iaea.org/newscenter/focus/iaearan/eu_iran14112004.shtml)> accessed 2 January 2014.

and that its intentions remained to continue and further develop its nuclear program.<sup>29</sup>

In August 2005,<sup>30</sup> Iran notified the IAEA of its intention to remove seals on uranium enrichment equipment in Isfahan, which were earlier placed by IAEA staff. The EU responded with a statement that if Iran proceeds with its intention, the EU in its turn 'would have no other option but to pursue other courses of *action*', appealing to the United States' lobby to refer Iran to the Security Council.<sup>31</sup> Nevertheless, Iran broke the seals.

Consequently, the BOG resumed a procedure, after having established Iran's incompliance with its Safeguards Agreement in 2003, which had been deferred for almost two years.<sup>32</sup> On 4 February 2006, the Board of Governors decided in a 27-to-3 vote to refer Iran to the Security Council,<sup>33</sup> Iran, in turn, announced that it would seize all its voluntary non-legally binding activities, such as the implementation of the not yet ratified Additional Protocol.<sup>34</sup> After Ahmadinejad's announcement in April 2006 that Iran had successfully enriched uranium,<sup>35</sup> the Security Council adopted resolution 1696 on the 31<sup>st</sup> of July 2006 demanding Iran to suspend its uranium enrichment activities.<sup>36</sup>

Since then, Iran has refrained from halting its uranium enrichment activities, leading to the adoption of eight other Security Council resolutions, which have, *inter alia*, imposed increasingly harsher sanctions on Iran.<sup>37</sup> Ultimately, Iran and the international community came to an agreement in November 2013 in Geneva. The provisions of the Security Council resolutions and the Geneva Agreement that are relevant to the main question are explored further.

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<sup>29</sup> Seyyed Hossein Mousavian, 'Iran and the West: The Path to Nuclear Deadlock' (Winter/Spring 2006), 8 *Global Dialogue* 1-2, pp. 72-75.

<sup>30</sup> This was only two months after the election of Iranian President Ahmadinejad.

<sup>31</sup> Ian Traynor, 'EU warns Iran: no talks if nuclear freeze ends' *The Guardian* (Brussels 3 August 2005) <<http://www.theguardian.com/world/2005/aug/03/eu.iran>> accessed 3 January 2014.

<sup>32</sup> It officially adopted a resolution in which it recalled the in 2003 determined breaches of the Safeguards Agreement, namely GOV/2005/70, IAEA (24 September 2005).

<sup>33</sup> See GOV/2006/14, IAEA (4 February 2006), para 2.

<sup>34</sup> See GOV/2006/15, IAEA (27 February 2006), para 30.

<sup>35</sup> 'Iran declares key nuclear advance' *BBC* (London 11 April 2006) <[http://news.bbc.co.uk/2/hi/middle\\_east/4900260.stm](http://news.bbc.co.uk/2/hi/middle_east/4900260.stm)> accessed 3 January 2014.

<sup>36</sup> See UNSC Res 1696 (31 July 2006) UN Doc S/Res/1696.

<sup>37</sup> As stated before (i) Resolution 1696 (2006) demanded from Iran to suspend its uranium enrichment activities. (ii) Resolution 1737 (2006) imposed sanctions on Iran and (iii) Resolutions 1747 (2007) and (iv) 1803 (2008) expanded the list of sanctioned Iranian entities and persons. (v) Resolution 1835 (2008) reaffirmed the former four resolutions. (vi) Resolution 1929 (2010) had relatively far-reaching consequences. Namely, it, *inter alia*, imposed an arms embargo on Iran and created a Panel of Experts, which mandate was extended in (vii-ix) Resolutions 1984 (2011), 2049 (2012) and 2105 (2013).

#### IV. The IAEA's Quest for Access to Parchin: a Hopeless Effort or a Right under International Law?

##### IV.1. The Iranian facility at Parchin: what is it all about?

Before the article can evaluate on what grounds the IAEA might be able to send its inspectors to the Parchin facility, it is necessary to lay out what type of practices this facility has been involved with and the allegations made by the international community relation to them.

The Parchin facility is owned by Iran's Defence Industries Organisation and includes hundreds of buildings and test sites.<sup>38</sup> It is allegedly involved in the testing of conventional high explosives, however, the international community, including the Institute for Science and International Security ('ISIS'),<sup>39</sup> has argued that it might also be used to develop weapons systems to carry a nuclear warhead.<sup>40</sup>

In 2000, the IAEA stated that Iran had constructed a large explosives containment vessel chamber at Parchin to conduct high explosive and hydrodynamic experiments relating to the development of nuclear weapons.<sup>41</sup> A few years later, in 2004, ABC News alerted ISIS that it had obtained information which can create a basis for believing that Iran is conducting high explosives testing at Parchin.<sup>42</sup> In response, the IAEA asked and was granted access to Parchin and a few other facilities in 2005; no traces of nuclear materials were found. Since its last visit, the IAEA has been trying to gain access to Parchin again after discovering another high explosives test chamber, which it lacked knowledge about during the 2005 inspection.<sup>43</sup>

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<sup>38</sup> 'Nuclear Sites: Parchin', (ISIS) < <http://www.isisnucleariran.org/sites/detail/parchin/> > accessed 29 December 2013.

<sup>39</sup> ISIS describes itself in a very precise and sharp manner on its website: '[ISIS] is a non-profit, non-partisan institution dedicated to informing the public about science and policy issues affecting international security. Its primary focus is on stopping the spread of nuclear weapons and related technology to other nations and terrorists, bringing about greater transparency of nuclear activities worldwide, strengthening the international non-proliferation regime, and achieving deep cuts in nuclear arsenals. ISIS is widely recognized both as a source of authoritative information on nuclear programs in states that seek or possess nuclear weapons and an important contributor to efforts to stop the spread of nuclear weapons. ISIS's projects integrate technical, scientific, and policy research in order to build a sound foundation for a wide variety of efforts to reduce the threat posed by nuclear weapons to U.S. and international security.' See <<http://isis-online.org/about/>> accessed 4 January 2014.

<sup>40</sup> 'Nuclear Sites: Parchin', (ISIS) < <http://www.isisnucleariran.org/sites/detail/parchin/> > accessed 29 December 2013; - Dan Joyner, 'An IAEA Special Inspection of Parchin?' (Armscontrollaw, 16 May 2013) < <http://armscontrollaw.com/2013/05/16/an-iaea-special-inspection-of-parchin/> > accessed 5 January 2013; -, 'Iran's nuclear program characterized by "deception, deceit and delay"' Fox News (Vienna 6 March 2013) <<http://www.foxnews.com/world/2013/03/06/iran-nuclear-program-characterized-by-deception-deceit-and-delay/>> accessed 29 December 2013; David Albright and Robert Avagyan, 'Activity at Parchin Explosive Testing Sites Continues: Time is Running Out for a Sound IAEA Inspection', *ISIS Imagery Brief*, (2 July 2012), p. 1.

<sup>41</sup> 'Nuclear Sites: Parchin', (ISIS) < <http://www.isisnucleariran.org/sites/detail/parchin/> > accessed 29 December 2013.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

On 9 April 2012, satellite images showed the first signs of a possible clean up at Parchin. These included noticeable changes of the site and evidence of water usages.<sup>44</sup> Moreover, satellite images from the 21<sup>st</sup> of June showed that sanitization activity had continued to progress at the Parchin facility.<sup>45</sup> These and a number of activities had taken place between the 9<sup>th</sup> of April and the 21<sup>st</sup> of June, causing further concern.<sup>46</sup>

The ISIS elaborated that these developments raise suspicion over the intention behind Iran's nuclear program. The water traces found at Parchin could have been 'used as part of a process to wash out radiological evidence from hydrodynamic testing which uses (...) surrogate material[s] for highly enriched uranium.'<sup>47</sup> The water flow would contaminate the soil, creating need for excavation, the evidence of which was also found.<sup>48</sup> It must be made clear that one of the surrogates that were allegedly used (uranium-235) is a source fissionable material as defined in the Safeguards Agreement and the IAEA Statute.<sup>49</sup>

The latest development in relation to the Parchin facility – apart from the conclusion of the Geneva Agreement, which does not directly link to Parchin - is that Iran refused IAEA inspectors access to the facility in the spring of 2013.<sup>50</sup>

#### IV.2. Relevant provisions from the non-proliferation safeguards regime

Iran ratified the NPT in 1970<sup>51</sup> and signed a Safeguards Agreement<sup>52</sup> with the IAEA in 1974.<sup>53</sup> Pursuant to the Safeguards Agreement, the IAEA can invoke special inspections when Iran voluntarily submits a special report or when the information

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<sup>44</sup> David Albright and Robert Avagyan, 'Activity at Parchin Explosive Testing Sites Continues: Time is Running Out for a Sound IAEA Inspection', *ISIS Imagery Brief*, (2 July 2012), p. 1.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, p. 2. First, debris from previously demolished buildings had been removed; second, an object suspected of being an origin of a water flow had been moved just south of the testing chamber structure where traces of water were found, which could have been used for the cleaning of buildings; third, evidence has been found of new earth movement suggesting earth displacement or heavy machinery activity.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> The materials that are suspected of having been used are natural uranium (uranium-238) and tungsten. Art. XX(3) IAEA Statute shows that these materials are source fissionable materials: 'The term "source material" means uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine.' (emphasis added)

<sup>50</sup> 'Nuclear Sites: Parchin', (ISIS) < <http://www.isisnucleariran.org/sites/detail/parchin/> > accessed 29 December 2013.

<sup>51</sup> See <<http://disarmament.un.org/treaties/a/npt/iran%28islamicrepublicof%29/rat/london>> accessed 28 December 2013.

<sup>52</sup> The technical term for the Iranian Safeguards Agreement with the IAEA is INFCIRC/214. The Text of the Agreement Between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/214 [hereinafter INFCIRC/214].

<sup>53</sup> See INFCIRC/214 <<http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc214.pdf>> accessed 2 January 2014.

made available by Iran is considered inadequate for the IAEA to fulfil its responsibilities under the Agreement.<sup>54</sup>

Primarily, the IAEA has

the right and obligation to ensure that safeguards will be applied [...] on all source or special fissionable material in all peaceful nuclear activities within the territory of the State, under its jurisdiction or carried out under its control anywhere, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.<sup>55</sup>

The Board of Governors approved the Additional Protocol in 1997, which allows the IAEA to collect local-area and wide-area environmental samples from any site, regardless of whether it has been declared to the IAEA or not.<sup>56</sup> Iran signed the Additional Protocol in 2003 but has not yet ratified it.<sup>57</sup> Scholars widely discuss the question whether Iran is under a legal obligation to ratify the Additional Protocol, but limited attention is given to its current effects of which little can be said now.<sup>58</sup>

Over time, the academic interpretations of the IAEA's mandate were quite diverse. Dan Joyner, for example, interprets the IAEA mandate under the NPT and the Safeguards Agreement rather narrowly. He believes that the IAEA's mandate only goes as far as to verify the non-diversion of *declared fissile* material within the safeguarded State.

In accordance with this view, the IAEA would have to submit a request to the State to inspect an undeclared site as the State would not be subjected to routine or ad hoc inspections.<sup>59</sup> If the State would consent, a special inspection would proceed. However, in case of a disagreement, the dispute could be resolved through mutually-agreed arbitration<sup>60</sup> or through the International Court of Justice.<sup>61</sup> The outcome of such proceedings could allow the IAEA to access Parchin due to its binding nature.

The so-called 'emergency clause' in paragraph 18 of the Safeguards Agreement stipulates that, in case the Board decides that 'an action by the State is essential and urgent' in order to ensure verification of the non-diversion of nuclear material, the

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<sup>54</sup> See INFCIRC/214, art 73.

<sup>55</sup> INFCIRC/214, art 2.

<sup>56</sup> Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards INFCIRC/540 (September 1997), art 6(a). The IAEA annually certifies the absence of undeclared nuclear materials or activities in Member States that implement the Additional Protocol: Annual Report for 2004 (2005) IAEA Doc. GC (49)/5, p. 62.

<sup>57</sup> 'Iran Signs Additional Protocol on Nuclear Safeguards', (IAEA, 18 December 2003) <<http://www.iaea.org/newscenter/news/2003/iranap20031218.html>> accessed 3 January 2013.

<sup>58</sup> Jack I. Garvey, 'A New Architecture for the Non-Proliferation of Nuclear Weapons', (2007), 12 J. Conflict & Sec. L. 339, p. 343.

<sup>59</sup> INFCIRC/214, art 73, para 2. In accordance with Joyner's view, only declared sites are subject to routine and ad hoc inspections. Dan Joyner, 'An IAEA Special Inspection of Parchin?' (*Armscontrollaw*, 16 May 2013) < <http://armscontrollaw.com/2013/05/16/an-iaea-special-inspection-of-parchin/>> accessed 5 January 2013.

<sup>60</sup> INFCIRC/214, art 21.

<sup>61</sup> INFCIRC/214, art 22.

Board is entitled to call upon the State ‘to take the required action without delay’.<sup>62</sup> According to scholars, however, a legal instrument containing the term ‘call upon’ does not legally bind a State to act.<sup>63</sup>

Based on Joyner’s interpretation, the IAEA would be able to visit the Parchin facility only if Iran voluntarily consented to such an inspection. A refusal would not constitute a breach of the Safeguards Agreement and, therefore, the Board would not be able to report Iran to the Security Council.<sup>64</sup>

Other scholars, such as David Albright, Olli Heinonen and Orde Kittrie, interpret the IAEA’s mandate more widely. For instance, reference is made to a 1995 Director-General report, according to which

the need for the safeguards system provide assurances regarding both the correctness and the completeness of a State’s nuclear material declarations was considered by the drafters of the INFCIRC/153 [and its] scope was not limited to the nuclear material actually declared by the State; it also includes that which should be declared.<sup>65</sup>

When compared to the phrases ‘all source or special fissionable material in all peaceful nuclear activities’ in Iran’s Safeguards Agreement,<sup>66</sup> some scholars argue that the IAEA’s mandate does extend to Iran’s undeclared nuclear materials.<sup>67</sup>

Proponents of this interpretation also refer to paragraphs 19 in conjunction with 28, and 18 in conjunction with 19 of the Safeguards Agreement. Paragraph 19 implies a responsibility to the IAEA to verify that ‘no diversion of nuclear material required to be safeguarded under the Safeguard Agreement’ has taken place.<sup>68</sup> The Agency’s inability to verify the non-diversion of undeclared nuclear material would conflict with the Safeguards Agreement’s objective regarding the timely detection of diversion to nuclear military activity (Article 28),<sup>69</sup> creating a reason for arguing in favour of extending the IAEA’s mandate to undeclared nuclear material.<sup>70</sup>

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<sup>62</sup> INFCIRC/214, art 18.

<sup>63</sup> Dan Joyner, ‘An IAEA Special Inspection of Parchin?’ (*Armscontrollaw*, 16 May 2013) <<http://armscontrollaw.com/2013/05/16/an-iaea-special-inspection-of-parchin/>> accessed 5 January 2013.

<sup>64</sup> See IAEA Statute, art XII (c): ‘[...] *The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations [...].*’

<sup>65</sup> Hans Blix, ‘Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System’ (IAEA, 21 February 1995) GOV/2784, para 5. (emphasis added)

<sup>66</sup> See INFCIRC/214, art 2.

<sup>67</sup> David Albright, Olli Heinonen, and Orde Kittrie, ‘Understanding the IAEA’s Mandate in Iran: Avoiding Misinterpretations’ (ISIS, 27 November 2012), pp. 7-8.

<sup>68</sup> See INFCIRC/214, para 19: ‘*If the Board [...] finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under the Agreement to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute of the Agency.*’

<sup>69</sup> See INFCIRC/214, para. 28: ‘*The objective of the safeguards procedures set forth in this part of the Agreement is the timely detection of diversion of significant quantities of nuclear material from*

According to David Sloss, the ‘emergency clause’ of paragraph 18 in conjunction with paragraph 19 binds a Member State under international law to accept any demand made by the IAEA under the clause if the State wants to avoid acting in violation of its Safeguards Agreement. In his opinion, the two provisions lead to the conclusion that the IAEA’s inability to verify non-diversion is a sufficient condition for the Board to find an act of noncompliance of the Member State in question.<sup>71</sup>

### IV.3. Resolutions adopted by the UN Security Council and the IAEA Board of Governors

The article now takes a closer look at the implications of the resolutions that were adopted by the Security Council and the BOG in response to Iran’s unwillingness to cooperate with the IAEA. Only the provisions with actual enforcement power are considered as other provisions do not necessarily provide the IAEA with access to Parchin and are thus irrelevant in answering the main question.

#### IV.3.1 Implications of the Security Council resolutions

The Security Council has adopted nine resolutions in response to its concern about Iran’s nuclear program since 2006.<sup>72</sup> The resolutions include provisions that could be interpreted in a way that enables the IAEA to demand access to the Parchin facility under international law. Take, for instance, the Security Council’s decision<sup>73</sup> and reaffirmations<sup>74</sup> that Iran shall resolve outstanding questions and issues with the IAEA.

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*peaceful nuclear activities to the manufacture of nuclear weapons or of other nuclear explosive devices or for purposes unknown, and deterrence of such diversion by the risk of early detection.’*

<sup>70</sup> David Albright, Olli Heinonen, and Orde Kittrie, ‘Understanding the IAEA’s Mandate in Iran: Avoiding Misinterpretations’ (ISIS, 27 November 2012), p. 8.

<sup>71</sup> David Sloss, ‘It’s Not Broken, So Don’t Fix It: The International Atomic Energy Agency Safeguards System and the Nuclear Nonproliferation Treaty’ (1994-1995) 35 Va. J. Int’l L. 841, pp. 857-8. Sloss quotes the following sentence from para 19 CSA: ‘*if the Board [...] finds that the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under the Agreement to nuclear weapons or other nuclear explosive devices, it may make the reports provided for in paragraph C of Article XII of the Statute and may also take, where applicable the other measures provided for in that paragraph.*’ He then continues to state that the reports in paragraph C of Article XII of the IAEA Statute refer to reports of noncompliance. He then concludes that the issuing of reports due to the inability to verify non-diversion can only refer to a Member State acting in noncompliance with its Safeguards Agreement.

<sup>72</sup> These are UNSC Res 1696 (31 July 2006) UN Doc S/Res/1696, UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737, UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747, UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803, UNSC Res 1835 (27 September 2008) UN Doc S/Res/1835, UNSC Res 1929 (9 June 2010) UN Doc S/Res/1929, UNSC Res 1984 (9 June 2011) UN Doc S/Res/1984, UNSC Res 2049 (7 June 2012) UN Doc S/Res/2049, UNSC Res 2105 (5 June 2013) UN Doc S/Res/2105.

<sup>73</sup> See UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737, para. 8.

<sup>74</sup> UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747, para 1; UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803, para 1.

In this context, the Security Council decided that Iran will permit IAEA inspectors with access upon request.<sup>75</sup> The Security Council supported such an interpretation through resolution 1929 (2010) by reaffirming

that Iran shall cooperate fully with the IAEA on all outstanding issues, particularly those which give rise to concerns about the possible military dimensions of the Iranian nuclear programme, including by providing access without delay to all sites (...) requested by the IAEA<sup>76</sup>

The resolutions state that some of their provisions shall be terminated when Iran has fully complied with its obligations. However, the termination clause does not include the just discussed provisions.<sup>77</sup> Therefore, the IAEA could request access to Parchin even if Iran proves to be acting in accordance with its Safeguard Agreement. Moreover, the Security Council affirmed that Iran should comply with the resolutions adopted by the BOG and that it should take the steps require<sup>d</sup>.<sup>78</sup>

#### IV.3.2 Implications of the Board of Governors resolutions

The Security Council resolutions refer to two BOG resolutions to which Iran needs to adhere to: GOV/2006/14 and GOV/2009/82.

The most important provision of GOV/2006/14 is its first paragraph stating the necessity to

implement transparency measures, (...) including in GOV/2005/67, which extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol, and include such access to (...) dual use equipment [and] certain military-owned workshops (...) as the Agency may request in support of its ongoing investigations<sup>79</sup>

Thus, the BOG resolution GOV/2005/67 also requires consideration. This resolution provides an extensive overview of the past and the interaction between Iran and the IAEA. Most importantly, it reads that

[g]iven Iran's past concealment efforts over many years (...) transparency measures should extend beyond the formal requirements of the Safeguards Agreement and Additional Protocol and include access to dual use equipment [and] certain military owned workshops<sup>80</sup>

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<sup>75</sup> See UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737, para 8. 'Iran shall provide such access and cooperation as the IAEA requests to be able [...] to resolve all outstanding issues, as identified in IAEA reports'.

<sup>76</sup> See UNSC Res 1929 (9 June 2010) UN Doc S/Res/1929, para 3, (emphasis added).

<sup>77</sup> See UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737, para 24(b); UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747, para 13(b); and UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803, para. 19(b).

<sup>78</sup> See UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737, para 1; UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747, para 1 and UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803, para 1; and UNSC Res 1929 (9 June 2010) UN Doc S/Res/1929, para 2.

<sup>79</sup> GOV/2006/14, IAEA (4 February 2006), para 1.

<sup>80</sup> GOV/2005/67, IAEA (2 September 2005), para 50.

While the resolution does not explicitly define ‘certain military owned workshops’, it could be interpreted as including the Parchin facility, a facility that might be used for the production of nuclear-weapons-missiles systems.

Meanwhile, GOV/2009/82

[u]rges Iran to engage with the Agency on the resolution of all outstanding issues concerning Iran’s nuclear programme and, to this end, to cooperate fully with the IAEA by providing such access and information that the Agency requests to resolve these issues.<sup>81</sup>

This provision basically provides the IAEA with the opportunity to request access to any facility in Iran through backing by the Security Council.

### IV3.3. The Geneva agreement of November 2013

In November 2013, the international community finally managed to reach a deal with Iran on its nuclear program.<sup>82</sup> The government of Iran committed to allow the IAEA inspectors to access two sites, but not Parchin, and to facilities closely involved with fissile materials.<sup>83</sup> The only aspect of the Geneva deal that could relate to Parchin is Iran’s commitment to ‘[p]rovide certain key data and information called for in the Additional Protocol to Iran’s IAEA Safeguards Agreement and Modified Code 3.1.’<sup>84</sup> Modified Code 3.1 of the Additional Protocol to Iran’s Safeguards Agreement requires it to report over new facilities ‘normally no later than 180 days before the facility is scheduled to receive nuclear materials for the first time’.<sup>85</sup> While Iran might have sent source fissionable materials to Parchin, this provision does not automatically grant the IAEA access to it.

## V. Conclusion

This article has investigated all options for the IAEA to demand access to the Parchin facility, inclusive of the legal documents relating to the IAEA, the Security Council and the Board of Governors resolutions, and the Geneva Agreement of November 2013.

In relation to the IAEA documents – the NPT, the IAEA Statute and the Safeguards Agreement – it is important to determine whether the IAEA’s mandate covers the activity that might have taken place at Parchin. Here, one needs to consider that Iran

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<sup>81</sup> GOV/2009/82, IAEA (27 November 2009), para 2.

<sup>82</sup> For a chronological overview of the events leading up to the deal and an interesting comparison with the Syrian ratification of the Chemical Weapons Convention see Stieven Ramdharie, ‘Stappen naar een veiliger wereld’ (De Volkskrant, 30 December 2013), pp. 6-7.

<sup>83</sup> Such facilities include, but are not limited to, (e.g. uranium mines and centrifuge assembly facilities).

<sup>84</sup> The White House, Office of the Press Secretary, ‘Fact Sheet: First Step Understandings Regarding the Islamic Republic of Iran’s Nuclear Program’ (The White House, 23 November 2013) <<http://www.whitehouse.gov/the-press-office/2013/11/23/fact-sheet-first-step-understandings-regarding-islamic-republic-iran-s-n>> accessed 28 December 2013.

<sup>85</sup> Ibid.

is suspected of having used at Parchin a source fissionable material, which is included in the scope of the Safeguards Agreement.<sup>86</sup> Considering the object and purpose of the Safeguards Agreement – the timely detection of diversion to nuclear military activity – it would be unreasonable to limit the IAEA's mandate to declared materials. Such limitations would provide NNWSs with the tools to create a nuclear weapon without being hampered by the IAEA.

In the current situation, the IAEA could mandate a special inspection if Iran would consent or, if Iran refused, after a decision of an arbitral tribunal, providing that Iran agree to such a tribunal. As indicated, some argue that refusing the IAEA access after it has raised the 'emergency clause' indicates noncompliance with the Safeguards Agreement. The authors of this article disagree with this notion as the phrase 'call upon' clearly gives a nonbinding encouragement rather than a legal obligation. The drafters of the CSA would have formulated this differently if they wanted the particular clause to be a tool for the IAEA to force entry into a NNWS.

In sum, under these documents, the IAEA can only demand access to Parchin through a special inspection, authorised by an arbitral tribunal which both Iran and the IAEA would have to agree to invest authority in. As has been shown, the resolutions of the Security Council and the Board of Governors provide the IAEA with nearly unlimited access to Iranian facilities which the IAEA deems necessary to visit in the fulfilment of its responsibilities. It is able to demand access to the Parchin facility through these resolutions. The Geneva Agreement resolved many pressing matters, but did not create additional options for the IAEA to demand access to Parchin.

To conclude, the IAEA may experience difficulties in demanding access to the Parchin facility through its Safeguards Agreement with Iran. It would do well to avoid such difficulties by relying on the resolutions adopted by the Security Council and the Board of Governors instead, which provide the IAEA with a clear mandate to demand access to basically all Iranian facilities involved with either nuclear or weapons development.

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<sup>86</sup> Namely, natural uranium (uranium-235).