

INTERNATIONAL PROGRESS ORGANIZATION

International non-governmental organization in consultative status with the United Nations

MEMORANDUM

on the dispute between the Islamic Republic of Iran and the United States of America and other states over the interpretation of the Treaty on the Non-Proliferation of Nuclear Weapons and related legal and political problems of the non-proliferation régime

addressed by the International Progress Organization to the President of the United Nations Security Council

15 April 2006

Vienna, 15 April 2006/P/RE/19667c

The dispute between the Islamic Republic of Iran and the United States of America and other states over Iran's obligations as a State party to the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) has reached a dangerous level, threatening international peace and stability.

Referring to the statement made on 16 January 1995 by the President of the I.P.O. in connection with the *Conference of the States Party to the Treaty on the Non-Proliferation of Nuclear Weapons*, the International Progress Organization would like to briefly outline (A) the basic legal principles and (B) the political aspects of the dispute over the interpretation of the NPT.

(A) Legal evaluation:

- (1) According to Art. IV of the NPT, Iran possesses the inalienable right "to develop research, production and use of nuclear energy for peaceful purposes without discrimination."
- (2) The "Additional Protocol" to the NPT safeguards agreement signed by Iran on 18 December 2003 has never been ratified by the Majlis (the Iranian Parliament). No legal obligations on the part of Iran can be derived from its voluntary implementation of the Additional Protocol as if it were in force between 2003 and 8 January 2006.
- (3) The Board of Governors of the IAEA has no right to demand of Iran to implement "transparency measures" that go beyond the country's legal obligations under the Agreement between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons signed in Vienna on 19 June 1973 and entered into force on 15 May 1974 (Safeguards Agreement). In strictly legal terms, the demands made by the Board under Para. 1 of the resolution of 4 February 2006 are <u>ultra vires</u>. In particular, Iran cannot be obliged (a) to ratify the Additional Protocol or (b) to act as if the Additional Protocol were in force.
- (4) The Director General's report according to which "[m]any aspects of Iran's nuclear fuel cycle activities and experiments ... had not been declared to the Agency in accordance with Iran's obligations under its Safeguards Agreement" and this "policy of concealment" resulted in "many breaches of its obligation to comply with that Agreement" (GOV/2006/15, 27 February 2006, Par. 46) as documented in the Director General's report of September 2005, does not legally justify the Board's demand that

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Iran go beyond its obligations under existing treaties and agreements. (It is to be noted that the Director General also acknowledges in Para. 47 of his report that, since October 2003, "Iran has taken corrective actions with respect to those breaches.")

- (5) As recent history has shown, arms monitoring and verification régimes, when practiced beyond a clearly defined legal and conceptual framework, are easily politicized and may end up in arbitrary action lacking transparency as to the criteria to be applied that further increases political tension. When "full transparency" is demanded (Par. 54 of the Director General's report), while the definition of that term remains ambiguous, the respective country may never exactly know what documents it has to produce in order to satisfy the demands of the investigators who, in turn, may constantly redefine the term. The report's rather vague mentioning of "access to, and cooperation by, relevant individuals," "access to documentation related to procurement and dual use equipment," "access to certain military owned workshops and R&D locations" (Par. 54) is an invitation to arbitrariness and makes it almost impossible for the country under investigation to know what specific information it would have to make available to satisfy the imprecise demands. Such a state of affairs seriously undermines the legitimacy of any arms monitoring régime.
- (6) Apparently, the IAEA Board of Governors is applying double standards concerning compliance of States with their obligations under their respective Safeguards Agreements. Other States parties to the NPT (including Egypt) and other authorities (such as the authorities on Taiwan with which the IAEA has concluded a Safeguards Agreement and a "Safeguards Transfer Agreement," with the United States as third signatory) did not fully disclose their past nuclear activities to the Agency. The Board, however, did not report them to the United Nations Security Council.
- (7) Para. 2 of the resolution adopted by the IAEA Board of Governors on 4 February 2006 (GOV/2006/14) requesting the Agency's Director General, in conformity with Art. III(B)(4) of the IAEA Statute, to "report" to the Security Council the steps that were "required" of Iran by the Board and to report all other relevant IAEA reports and resolutions relating to the issue of Iran to the Council can in no way be interpreted in

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^{*} According to the IAEA, the Agency also applies safeguards under two agreements (INFCIRC/133 and INFCIRC/158) to the nuclear facilities in Taiwan, China. Pursuant to the decision adopted by the Board of Governors on 9 December 1971 that the Government of the People's Republic of China is the only government which has the right to represent China in the Agency, the relations between the Agency and the authorities in Taiwan, China, are non-governmental. The agreements are implemented by the Agency on that basis.

- the sense of a "referral" of the matter to the Security Council for the adoption of enforcement measures under Chapter VII of the UN Charter.
- (8) The Presidential Statement of the Security Council dated 29 March 2006, read out by the Permanent Representative of Argentina, the Council's President for March, is not legally binding upon Iran. The Council's call on Iran for "re-establishing full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA" does not invalidate Iran's inalienable right to engage in nuclear research and production for peaceful purposes "without discrimination" according to Art. IV of the NPT.
- (9) Furthermore, the Preamble to the NPT affirms the principle "that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties of the Treaty." According to Art. III (3) of the Treaty, the safeguards to be regulated by means of a special Safeguard Treaty to be concluded with the IAEA "shall be implemented in a manner designed to comply with article IV of this Treaty," i.e. with a Party's inalienable right "to develop research, production and use of nuclear energy for peaceful purposes." The rather general and vague demands contained in Para. 1 of the resolution of the IAEA Board of Governors of 4 February 2006 appear to be incompatible with this Treaty obligation of the IAEA vis-à-vis Iran as a State party to the NPT.
- (10) Although the NPT, according to the decision adopted pursuant to Art. X (2) by the 1995 Review Conference, continues in force indefinitely, the States party to the NPT are not indefinitely bound by it. Art. X (1) provides that each Party has the right to withdraw from the Treaty "if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." It is to be noted that Iran, up to the present moment, has not considered such a step.

(B) Political evaluation:

(1) From the outset, the Treaty on the Non-Proliferation of Nuclear Weapons has been plagued by a serious problem of (political) legitimacy. While preaching the principle of non-discrimination in the peaceful research and use of nuclear energy, the Treaty itself has eternalized the discrimination between nuclear weapons states and non-nuclear-

weapons states. This antagonism has undermined acceptance of the Treaty from the very beginning and has eroded the non-proliferation régime from the very beginning. At the (Seventh) NPT Review Conference in 2005, a United Nations report warned "that a lack of compliance with commitments, withdrawals, a changing international security environment and diffusion of technology could soon make erosion of the non-proliferation regime 'irreversible'." (United Nations, Press Release DC/2954, 28 April 2005)

- (2) The nuclear weapons States party to the NPT have not taken seriously the commitment contained in Art. VI towards nuclear disarmament. Since the entry into force of the Treaty on 5 March 1970, no credible measures have been taken for the conclusion of a "Treaty on general and complete disarmament" as stipulated by Art. VI, the "ultimate goal" that has also been affirmed by the (Fifth) NPT Review Conference of 1995.
- (3) The lack of commitment on the part of nuclear weapons states, first and foremost the United States, to the goal of nuclear disarmament has encouraged States not party to the NPT to develop nuclear weapons capacities a development which, in turn, has undermined adherence to the NPT by States party to the Treaty.
- (4) The total failure, in subsequent meetings, of the *Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty* (CTBT) has further destabilized the nuclear non-proliferation régime. The United States administration had earlier declared that it is not even seeking Senate approval for ratification of the CTBT. In a joint NGO statement issued on 5 September 2003 in connection with that year's conference in Vienna, the International Progress Organization stated that "as a result of the actions of a handful of states, the viability of a verifiable, comprehensive ban on nuclear tests and the future of the NPT itself is in jeopardy."
- (5) The most serious political shortcoming in the context of the NPT, however, is the lack of credible measures for the establishment of a nuclear-free Middle East in conformity with Art. VII of the NPT. It is to be recalled that the (Fifth) Review Conference of the States parties to the NPT (17 April to 12 May 1995) that met pursuant to Art. X (2) of the Treaty and eventually decided that the NPT "shall continue in force indefinitely," produced a special "Resolution on the Middle East" (NPT/CONF.1995/32/RES/1), calling upon "all States of the Middle East that have not yet done so, without exception, to accede to the Treaty as soon as possible and to place their nuclear facilities under the full scope of International Atomic Energy Agency safeguards" (Art. 4). Regrettably,

because of Israel's (undeclared) nuclear arms capacity, the Conference's solemn call for the "early establishment by regional parties of a Middle East zone free of nuclear and all weapons of mass destruction and their delivery systems" (Art. 6) has remained an empty gesture – with the main purpose of providing a face-saving formula for the regional countries' acceptance of an indefinite extension of the NPT according to Art. X (2) of the Treaty in 1995.

- (6) It is to be recalled that in resolution 487 (1981), adopted on 19 June 1981, the United Nations Security Council called upon Israel "urgently to place its nuclear facilities under IAEA safeguards." More recently, the Islamic Summit Conference "urged the international community and the Security Council to force Israel to comply with UN resolutions, particularly Security Council resolution 487 (1981), to accede to the Treaty on the Non-Proliferation of Nuclear Weapons, and to implement the resolutions of the UN General Assembly and the International Atomic Energy Agency (IAEA) calling for the subjection of all Israeli nuclear facilities to the Agency's comprehensive safeguards system" and stressed "the need for Israel to abandon nuclear armament and submit an inventory of its nuclear weapons and material capabilities and stocks to the Security Council and the IAEA as indispensable steps for the establishment of a zone free of weapons of mass-destruction, particularly nuclear weapons in the Middle East region ..." (Final Communiqué of the ninth session of the Islamic Summit Conference, Session of Peace and Development – "Al Aqsa Intifada," Doha, State of Qatar, 16-17 Sha'ban 1421 H. [12-13 November 2000], Par. 39, quoted according to United Nations Document A/55/716 S/2000/1236, 11 January 2001). Regrettably, the Council's as well as other international organizations' urgent and repeated calls remained unheeded.
- (7) The demands made vis-à-vis Iran and other states of the Middle East to abstain from nuclear research and development for peaceful purposes lack credibility in *political* as well as *moral* terms in view of the fact that the two main self-declared guardians of a non-proliferation régime in the Middle East are the regional state that has introduced into the region the very arms it should be kept free from (and has refused to accede to the NPT) and the only state ever to have used nuclear arms, namely twice on 6 and 9 August 1945 against civilians.
- (8) The extreme imbalance in terms of military capability in the Middle Eastern region has triggered an arms race that negatively affects not only the economy, but the security and political stability in the entire region and beyond. In a statement made preceding the

1995 review conference of the NPT, the International Progress Organization, referring to the Israeli nuclear arms capacity, warned on 16 January 1995 that "the nuclear non-proliferation policy in the Middle East may well collapse with far-reaching consequences not only for stability in the region itself, but for international security in general."

In view of the above described legal inconsistencies and political contradictions relating to the dispute over nuclear activities of the Islamic Republic of Iran and the nuclear non-proliferation régime in general, the International Progress Organization considers it of utmost importance that the Security Council act in conformity with the United Nations Charter which confers upon it "primary responsibility for the maintenance of international peace and security" (Art. 24). The Council should be particularly careful in avoiding a policy of double standards when it comes to the determination of threats to the peace according to Art. 39, that may precede compulsory action on the basis of Chapter VII or may be used, as in the case of the Iraq crisis of 2002-2003, as pretext for the unilateral use of force by permanent members of the Council.

The monitoring role of the IAEA must in no way be confused with the Council's role in regard to the maintenance of international peace and security. The Agency's reports must not be construed or presented in such a way as to invite punitive measures or provoke the use of armed force against a member state of the United Nations. In view of the experience with the arms monitoring régime of the United Nations in Iraq and the instrumentalization of the then UNSCOM and UNMOVIC for the hostile plans of two member states of the Security Council against Iraq – that eventually led to a disastrous war –, the International Progress Organization solemnly warns of the dangers of politicizing the reporting and monitoring role of the IAEA. The role of the Director General of that Agency is purely technical, not political, and must not be exploited for political purposes. The question of Iran's abidance by the provisions of the NPT has to be studied sine ira et studio, i.e. outside the context of the political interests of the adversaries of Iran. The Security Council is not the appropriate forum for such evaluation.

The Security Council must not aggravate the situation by allowing two of its permanent members to use the Council's statements or resolutions, now or in the future, for an eventual unilateral use of force. There exists factual proof of the huge (though undeclared) military nuclear capacity of one state, not party to the NPT, in the Middle East while there exists, up to the present day, no factual proof whatsoever of an Iranian military nuclear capability. As stated by the Director General of the IAEA in his report of 27 February 2006 (Implementation of the NPT Safeguards Agreement

in the Islamic Republic of Iran, GOV/2006/15), Par. 53, the IAEA "has not seen any diversion of nuclear material to nuclear weapons or other nuclear explosive devices." While in the first case a threat to international peace and security obviously exists (in view of the huge nuclear potential and the enormous regional imbalance resulting from the nuclear arms monopoly of one state in the region), in the second case - up to the present day - only doubts and suspicions have been raised. An evaluation based on doubts and suspicions can not be construed as confirming an existing threat to international peace. No compulsory measure, requiring a determination under Art. 39 of the UN Charter, can be based on doubts and suspicions. In view of the tragic experience of the Iraq war of 2003 (and the devastating consequences of that conflict for the entire region), the Security Council should be circumspect and not create in any way a document that might serve as a pretext for the unilateral use of force against the Islamic Republic of Iran. The maintenance of international peace and security, the noble goal of the Security Council, must not be compromised for the sake of appeasing the most influential permanent member. An arms monitoring and inspections régime must not again be allowed to trigger an international armed conflict - with all the devastation and loss of human life that this would entail and for which the political leaders would bear full moral and legal responsibility before humanity.

> Hans Koechler President