

# Iran and the International Atomic Energy Agency (IAEA)

## - dubious grounds, taqqiya and double standards

Rede von Rechtsanwalt Otto Jäckel, Vorsitzender von IALANA Deutschland, auf dem Symposium "Die Rolle der Internationalen Atomenergie Organisation – Atomenergie nach Fukushima" am 03. Mai 2012 im Rathaus von Wien

"The infinite variety of human spirit brings about that one truth does never present itself in the same way to two persons."

These words from the novel "War and Peace" by Lew Tolstoy came to my mind when I read the news from Israel the last weeks.

Whereas Israel's Prime Minister Netanyahu said after the 5P+1 talks with Iran mid-April Iran would have been given a freebie to produce enriched uranium, according to a report by the Austrian Newspaper "Der Standard" from 30 April /1 May 2012 the former Chief of Israel's internal security agency "Shin Bet" Juval Diskin accused the Israeli government of misleading the public. "The citizens are being deceived, if they are told a military attack would avert an Iranian nuclear bomb – the result could also be a dramatic acceleration of the Iranian nuclear program," he said.

On 29 December 2011 Mossad Chief Tamir Pardo had already criticized that the term "existential threat" was used too freely addressing an audience of about 100 Israeli Ambassadors. His predecessor Meir Dagan had also warned Netanyahu and Barak that an assault on Iran would have disastrous consequences.

Even more interesting seems to be what the current chief of staff of the Israeli Army Lt Colonel Benny Gantz told the Newspaper Haaretz on April 25. 2012:

"Iran", Gantz says, "is going step by step to the place where it will be able to decide whether to manufacture a nuclear bomb. It hasn't yet decided whether to go the extra mile." And speaking of the supreme religious leader Ayatollah Ali Khamenei he continues: "I don't think he will want to go the extra mile. I think the Iranian leadership is composed of very rational people."

This leads us to the following Questions.

1. If the leading personnel of the Israeli military and intelligence community is convinced that Iran does not have a program to manufacture nuclear weapons (yet), on which intelligence are the findings of the IAEA based?
2. Are the reports of the IAEA on Iran in compliance with the statutes?
3. Does the IAEA treat the other parties to the NPT on exactly the same principles?
4. Which consequences should be drawn?

In his book "The Age of Deception" the former director general of the IAEA Mohamed ElBaradei has described in detail the contention between the IAEA and Iran since 2002. But until the end of his tenure in 2009 he declared that there would be no evidence of the existence of an Iranian nuclear weapons program. (Guardian 20.09.2009)

That was in line with a statement of US intelligence service chief Dennis C. Blair from March 2009: According to the estimate of the 16 US-American intelligence services Iran does not possess weapons grade uranium and has not yet decided on its production.

In stark contrast to these statements the new Secretary General of the IAEA Yukia Amano now declares: I quote the report of 24. February 2012 to the Board of Governors Section H "Possible Military Dimensions":

"40....Since 2002 the Agency has become increasingly concerned about the possible existence in Iran of undisclosed nuclear related activities involving military related organizations, including activities related to the development of a nuclear payload for a missile, about which the Agency has regularly received new information.

41. The Annex to the Director General's November 2011 report ... provided a detailed analysis of the information available to the Agency indicating that Iran has carried out activities that are relevant to the development of a nuclear explosive device. This information, which comes from a wide variety of independent sources including from a number of Member States, from the Agency's own efforts and from information provided from Iran itself, is assessed by the Agency to be, overall, credible. The information indicates that: prior to the end of 2003 the activities took place under a structured program; that some continued after 2003; and that some may still be ongoing."

In the annex the report refers to it says under "B credibility of information" margin number 12:

"...among the information available to the Agency is the alleged studies documentation: a large volume of documentation (including correspondence, reports, view graphs from presentations, videos and engineering drawings) amounting to over a thousand pages..."

Obviously the IAEA is talking about the so called laptop documents which are said to have been stolen from an Iranian computer by an unknown person and transferred to a US-American secret service in 2004.

These documents seem to have received an upgrade under Amano from "incorrect" to "credible".

On 22 February 2007 the Guardian cited an official of the IAEA as follows. "Most of it has turned out to be incorrect. First of all if you have a clandestine program you don't put it on laptops, which can walk away. The data is all in English, which may

be reasonable for some of the technical matters, but at some point you'd have thought there would at least be some words in Farsi. So there is some doubt over the provenance of the computer." The Article appeared under the headline "US Iran intelligence is incorrect."

In the reports of the IAEA signed by Amano there is no explanation to be found why the officials of the IAEA now have changed their minds. Did they simply have to because of a political decision? This would mean that the agency is suffering a severe loss of independence.

Now I'd like to mention in brief some legal aspects.

According to Article 2 of the statute the IAEA has two objectives:

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

So Iran as a member state to the NPT has on the one hand the inalienable right to Nuclear Technology as Art.IV.1 of the NPT provides:

Nothing in this Treaty shall be interpreted as affecting the inalienable right of all Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I and II of this Treaty.

It is crucial to note that this is not a right granted by the NPT, but recognized by the NPT as inherent in state sovereignty.

On the other hand Iran as a non- nuclear- weapon State has the obligation to renounce nuclear weapons as provided in Art. II of the NPT:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons...

The Question is: What is meant by "to manufacture" a nuclear weapon and what are the rights and obligations of the Member States and the IAEA in this context.

To solve the problem one can chose a formal approach and say the rights of the IAEA are limited by the existing safeguard system and the IAEA is not tasked by its statute or by the NPT of verifying the compliance of states with their broader NPT

obligations. In the case of Iran this would mean the IAEA could only verify whether Iran is fulfilling its obligations stated in the “Agreement between Iran and the IAEA for the application of safeguards in connection with the NPT” which Iran has signed and ratified and which entered into force on 15 May 1974.

Under this agreement of the model INFCIRC/153 the tools of the IAEA to verify the absence of undeclared nuclear material and activities are very limited. They focus essentially on declared nuclear material and safeguard conclusions drawn at the facility level – not on the entire nuclear fuel cycle of the NNWS. These measures are based on material accountancy, complimented by surveillance techniques such as temper-proof seals, cameras installed by the IAEA and the taking of environmental samples. The inspections have to be preannounced.

The “Additional Protocol” of 1997 which enables the IAEA not only to verify the non-diversion of declared nuclear material but also to provide assurances as to the absence of undeclared nuclear material and activities has been signed by Iran but not yet ratified and thus is not applicable.

On the ground of this interpretation the findings of the Board of Governors are not consistent with the IAEA statute. A finding of non-compliance as the term is used in Art. XII.C, pertains to circumstances when nuclear material has been diverted for military purposes. In fact the Director General reported every time to the Board, that all nuclear activities and declared material had been accounted for and therefore there has been no diversion of material to unknown use or use in weapons. Absent evidence of a nuclear weapons program and absent the diversion of nuclear material it is difficult to argue that Iran has forfeited his rights under Article IV of the treaty and has to stop completely all fuel-cycle activities as it is demanded by the Security Council.

But even if one would prefer a broader interpretation of the rights and obligations of the IAEA without limitation on the safeguard agreement it would lead to the same result.

A binding legal interpretation of what is meant by manufacturing a nuclear weapon is still not available.

Some say the interpretation of “to manufacture” is easy. For the plain meaning of the term manufacture one need only consult a dictionary: “the making of goods from raw materials by manual labor or machinery”. Art. II NPT thus would refer to the physical construction of a nuclear explosive device or perhaps at its broadest reading, to the physical construction of the component parts of a nuclear explosive device. In fact the negotiating history of the treaty confirms this interpretation. The soviet draft of September 1965 also envisaged the undertaking by the States “not to prepare for the manufacture of nuclear weapons”. The fact that this term had been considered by the drafters but not been agreed upon confirms the limited meaning of the term.

According to this interpretation the sanctions against Iran are also lacking a legal basis, because there is no evidence for the manufacturing of a nuclear explosive device in Iran.

That is why the IAEA has made use of a reversal of the burden of proof. The focus is now on confidence building measures which Iran has to come up with, which can be changed and amplified from time to time and which are not exactly predictable. As El Baradei put it: "nothing would satisfy, short of Iran coming to the table completely undressed" (P. 313).

Moreover the Policy of sanctions against Iran is based on double standards:

1. The Safeguard system is already based on double standards.

1.1. The European Atomic Energy Community EURATOM

On strong requests of Germany and other States of the European Community the NNWS who are Members of the EURATOM have concluded a special safeguards agreement with the IAEA in 1973. INFCIRC/193 of 5 April 1973. Japan negotiated a similar agreement. This was an important precondition for Germany, Italy and Japan to sign the NPT. The European States have their own safeguard system and the role of the IAEA is limited to verify this EURATOM safeguard system. It was an act to protect European nuclear capacities and facilities from industrial espionage by the IAEA and its Member States.

In Germany for example the Dutch-German Company URENCO has a huge uranium enrichment facility in Groningen with cascades of centrifuges and in Garching near Munich Germany has a Research and Development facility which uses weapon-grade Uranium.

1.2 NWS

The NPT does not require the NWS to accept safeguards provided for in the NPT. Only on a voluntary basis they accept a restricted regimen for their civil nuclear sites, not for the military ones.

1.3. India, Pakistan and Israel

These three states have become nuclear weapon states outside the NPT, which they did not ratify.

They have concluded item-specific safeguard agreements with the IAEA, which cover only the nuclear material and facilities specified in the agreement.

2. Breach of Art. VI of the NPT by the NWS

Art.VI of the NPT states:

"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament."

The International Court of Justice has confirmed this obligation in his advisory opinion on the Illegality of Nuclear weapons in 1996. The NWS are not in compliance with this obligation.

### 3. Nuclear sharing and war clause

The NATO-States make use of the so called war clause, which says that the NPT is no longer applicable as soon as the decision to go to war has been made. Nuclear weapons which are held under US-American custody for example in Büchel in Germany shall then be handed over to the German Air Force. This makes the NPT completely obsolete.

What should be the next steps?

Iran must certainly ratify the above mentioned Additional Protocol. This would be in its own interest as a step to gain back trust and credibility. Iran's nuclear policy has too often been dominated by the concept of taqqiya. According to Shi'ite Theology it is sometimes acceptable to deceive for the right cause.

Iran should stop enriching Uranium up to 20% and accept a limit of 3.5 or 5%. Then Iran could claim that it has preserved its right to enrichment but it's very hard to weaponize from that level.

An agreement on a fuel swap should be negotiated. In 2010 such an agreement had nearly been reached with Turkey and Brazil. Iran would send 1.200 kilograms of low enriched Uranium to Turkey to be held in escrow while Iran's research fuel was being fabricated. According to ElBaradei Hilary Clinton has called the fuel swap deal with Turkey and Brazil a transparent ploy on Iran's part to avoid new sanctions. ElBaradei's comment: Once again the west has refused to take yes as an answer.

But there is no alternative to negotiate a peaceful solution.

All military options must be off the table!

A so called preemptive strike against Iran would be a clear breach of Art. II UN Charta. The bombardment of the Iraqi reactor in Osirak by Israel in June 1981 has been condemned with good reason unilaterally by the Security Council (Res 487, 19.6.1981).

Finally there is no reason to believe that Persians and Israelis are archenemies. It was the Persian King Kyrosh the Great who lead the Israeli People out of Babylonian Captivity.

Last week I read that young Israelis have started a campaign on Facebook. They send messages to Iranians in which it says: Iranians we love you! We will never bomb your country! The young Iranians send the same message back to Israel.

Let us take this as a hopeful sign!

