

Is it Still Time to Strengthen IAEA Safeguards?¹

Pierre Goldschmidt*

22 December 2006

Introduction

The greater the number of States possessing nuclear weapons, the greater the risk that, one day, by design or accident they will be used or will fall into the hands of non-state actors with catastrophic consequences.

We must therefore reject, as irresponsible, the idea that the international community should get used to the fact that sooner or later more countries will possess nuclear weapons, and that we can do nothing about it.

Rather, it is essential to take all the necessary steps to “dissuade” and “deter” non-nuclear weapons States (NNWS) from acquiring such weapons.

“**Dissuasion**” entails persuading a State (both the leaders and the people) that it is not in that State’s best interest to acquire a nuclear weapons capability

The most remarkable achievement in recent years has been the success of secret diplomacy in convincing Libya’s leadership that abandoning its WMD and missile programmes would increase the security and improve the economic development of the country.

“Dissuasion” can mainly, if not exclusively, be achieved through bilateral and multilateral negotiations, in order to create the necessary geo-political environment, including first of all appropriate security guarantees. To be most effective persuasion efforts should be undertaken well in advance of any anticipated crisis. We will not dwell further on this important facet.

“**Deterrence**” plays its role when a NNWS cannot be persuaded that acquiring a nuclear weapons capability is not in its best interest.

It is essential for any such State to know:

- First, that any undeclared nuclear weapons programme has a high probability of **early** detection, and
- Second, that if detected, extremely negative consequences would be **inevitable** (and not simply possible).

¹ This paper was presented at an NPEC Conference in Paris on 13 November 2006, and at Wilton Park on 19 December 2006. This version contains, in addition, an Appendix with “Answers to possible objections about the proposed generic UNSC Resolutions”.

* Former Deputy Director General of the IAEA, Head of the Department of Safeguards, presently non-resident scholar at Carnegie Endowment for International Peace

Unfortunately, neither of these two deterrents is credibly in place today, and it is therefore essential to take the practical steps necessary to improve the situation.

For that, we need to draw on the lessons learned from previous nuclear proliferation crises.

Strengthening the IAEA verification system

In the wake of the First Gulf War, when it was discovered that Saddam Hussein had secretly been developing nuclear weapons at undeclared sites, the IAEA adopted in 1997 the “Model Protocol Additional” designed to enable the Agency to confirm that there are no undeclared nuclear materials and activities in a NNWS. To date, however, some 20 NNWS with known nuclear activities have no Additional Protocol in force, including at least three -Argentina, Brazil, and Iran- that are known to have uranium enrichment activities.

The international community should demand much more forcefully that such States sign and ratify the Additional Protocol (AP), and the IAEA should mention them explicitly in its annual report.

The Nuclear Supplier Group (NSG) could also play a significant role in this respect by adopting a rule that no nuclear material, equipment and know-how would be transferred to any country having conversion, enrichment or reprocessing activities unless they have an Additional Protocol in force and unless these and all other nuclear facilities are covered by an INFCIRC/66-type safeguards Agreement².

For its part, the IAEA Secretariat has recently made a number of very valuable recommendations to the so-called IAEA “Committee 25” *“to further improve the effectiveness and efficiency of the safeguards system”*. They fall into two main categories:

- recommendations based on existing legal obligations, and
- recommendations regarding voluntary actions.

Among the existing legal obligations one should add to the Secretariat’s list, that, as foreseen in the IAEA Statute, inspectors *“should have access at all times [...] to any persons [...] as necessary [...] to determine whether there is compliance with the undertaking against use in furtherance of any military purpose.”*

The second category, regarding voluntary actions, includes the particularly important recommendation that the BoG *“requests all States to provide to the Agency relevant information on exports of specified equipment and non-nuclear material, procurement enquiries, export denials and relevant information from commercial suppliers in order to improve the Agency’s ability to detect possible undeclared nuclear activities”*.

I have some doubts that the BoG, in the present circumstances, will adopt such a recommendation any time soon.

It would be much faster and effective for the Director General to circulate a note (INFCIRC) to all Member States wherein he would draw their attention to the fact that the above-mentioned information is most valuable for the Agency to fulfil its mandate and that the

² A Comprehensive Safeguards Agreement remains in force only for so long as the state remains party to the NPT, whereas under a INFCIRC/66-type agreement, all nuclear material supplied or produced under that agreement would remain under safeguards, even if the state withdraws from the NPT, until such time the IAEA has determined that such material is no longer subject to safeguards

Agency would expect Member States to provide such information on a regular basis under Article VIII.A. of the IAEA Statute³.

There is another very important recommendation that should be added to the Secretariat's list: it is to request all Member States to provide to the Agency, on a regular basis, information regarding each **import** of specified equipment and non-nuclear material (listed in Annex II of the AP), without any need for the Agency to issue a specific request as is the case today.

But clearly, none of these recommendations, even if they were adopted, would be sufficient to meet the two goals of early detection of a nuclear weapons programme and inevitable negative consequences in such a case.

So, what can be done?

In the present geo-political environment and considering in particular the frustration of most NNWS regarding the lack of progress in nuclear disarmament by the 5 NWS, any attempt to amend the NPT or Comprehensive Safeguards Agreement (CSA) or the Model Protocol Additional⁴ would be doomed to failure, if not counter-productive.

One should definitely avoid penalizing all Member States because a couple of them have violated their commitments. It is therefore important to focus our attention on those States that have been in **non-compliance** and those which are **withdrawing or threatening to withdraw** from the NPT.

Non compliance

If a State has been found by the IAEA to be, deliberately, in non-compliance with its safeguards undertakings, experience with both North Korea and Iran has shown that, in order to conclude in a **timely** manner that there is no undeclared nuclear material and activities in the State as a whole, the Agency needs verification rights extending beyond those of the Comprehensive Safeguards Agreement and Additional Protocol.

This appears clearly from the Director General's report of 28 April 2006 to the IAEA Board of Governors, where it is stated that "*the Agency is unable to make progress in its efforts to provide assurance about the absence of undeclared nuclear material and activities in Iran*", nor can it assess "*the role of the military in Iran's nuclear programme*"⁵

Already in September 2005 the Board of Governors adopted a resolution urging Iran "*to implement transparency measures which extend beyond the formal requirements of the Safeguards Agreements and Additional Protocol*".

The problem here is that such IAEA Board resolutions do not provide the Agency with any additional legally binding verification authority.

³ Article VIII.A. states that: "*Each member should make available such information as would, in the judgment of the member, be helpful to the Agency*".

⁴ Except that "*The list of activities specified in Annex I, and the list of equipment and material specified in Annex II, may be amended by the Board upon the advice of an open-ended working group of experts established by the Board. Any such amendment shall take effect four months after its adoption by the Board. (Art.16.b.)*"

⁵ This report also states that: "*Additional transparency measures, including access to documentation, dual use equipment and relevant individuals, are, [...], still needed for the Agency to be able to verify the scope and nature of Iran's enrichment programme, the purpose and use of the dual use equipment and materials purchased by the PHRC [Physics Research Center] and the alleged studies which could have a military dimension*".

The most effective, unbiased and feasible way to establish the necessary measures is for the UNSC to adopt (under Chapter VII of the UN Charter) a **generic** (i.e. not State specific) and legally **binding** resolution stating that if a State is reported by the IAEA to be in **non-compliance**:

- a. the non-compliant State will have to suspend all sensitive nuclear fuel cycle activities for a specified period of time,⁶ but could continue to produce electricity from nuclear power plants,
- b. if requested by the IAEA, the UNSC would automatically adopt a **specific** resolution (under Article 41 of the UN Charter) making it mandatory for the non-compliant State to provide the Agency with the necessary additional verification authority until it has been able to conclude that there is no undeclared nuclear material and activities in the State and that its declarations to the Agency are correct and complete, and
- c. no nuclear material would henceforth be delivered to that State without the guarantee that all nuclear material and facilities declared to the IAEA would remain under Agency's safeguards⁷ even if the State withdraws from the NPT.

Possible objections to this proposal are analyzed in the Appendix. None appears to be decisive and to justify not pursuing the implementation of the proposed generic resolution.

On the contrary, if such a generic resolution had been adopted before November 2003, when the Director General reported to the BoG that Iran was “*in breach of its obligation to comply with its safeguards undertakings*”⁸, it is most likely that Iran would have been reported at the time to the UNSC because the main if not the only consequence would have been to make the “suspension” mandatory. It would have made clear that, contrary to what many Member States feared, no “sanction” would have been envisaged at that stage. Therefore, there would have been no incentive for France, Germany and the UK (the so called EU-3) to agree to delay referring Iran's non-compliance to the UNSC in exchange for the temporary and voluntary suspension of enrichment activities in Iran.

In the particular case of Iran, the request to suspend all sensitive nuclear fuel cycle activities is all the more justified in that Iran has violated Article II of the NPT⁹ and has thereby forsaken its rights under Article IV of the Treaty.

With regard to the necessary additional verification authority mentioned under point b. above, there are five main areas where the Agency would need such expanded authority.

⁶ At least as long as the IAEA has not drawn the conclusion that the State declaration is correct and complete, or possibly longer, in line with what Dr. ElBaradei has called a “*rehabilitation period*” or a “*probation period, to build confidence again, before you can exercise your full rights*”. (cf. interview with Newsweek- January 23, 2006)

⁷ Under an INFCIRC/66- type Safeguards Agreement

⁸ which, as confirmed in the Board resolution of 24 September 2006, constituted “*non-compliance*”

⁹ The Agency revealed, in November 2005, and confirmed in January 2006 that Iran had been found in possession of documents for “*the casting of enriched and depleted uranium metal into hemispheres, related to the fabrication of nuclear weapon components*”, in violation of Article II of the NPT.

These are:

- 1) Prompt access to persons
- 2) Broader and prompt access to locations
- 3) Access to original documents and copies thereof
- 4) Broader and faster access to information
- 5) Lifting other types of restrictions, e.g. on the use of Agency equipment (including wide area environmental sampling), recording meeting, limitations on the number of designated inspectors, visas etc...

Withdrawal from the NPT

The current crisis in Iran appears to be a repetition of the earlier (and ongoing) crisis in North Korea.

Since 1993 North Korea has repeatedly been declared by the IAEA to be in non-compliance with its safeguards agreement, and has been reported to the UNSC without the latter deciding to take any action.

In 2003, North Korea gave notice that it was withdrawing from the NPT, and in 2004 declared that it possessed nuclear weapons, without any move from the UNSC because China was threatening to use its veto right against any resolution adverse to North Korea.

It is only after North Korea's nuclear test of October 9, that the UNSC finally adopted a resolution, under Chapter VII of the UN Charter, deciding that all Member States shall, inter alia, take a number of targeted measures aimed at preventing any direct or indirect contribution to North Korea's nuclear, ballistic or other WMD-related programmes. It remains to be seen to what degree these measures will be implemented in practice by all Member States.

The incapacity of the UNSC for 13 years to take any dissuasive measure against North Korea's nuclear weapons programme until it was too late has considerably undermined the credibility of the nuclear non-proliferation regime.

If the international community does not seem to have learned the lessons from the crisis in North Korea, Iran has.

There are signs that it may be preparing to follow the same steps as North Korea if the development of its nuclear programme is threatened by the UNSC or any of its members.

While the international community was debating what to do, Iranian leaders have made stunning advances in mastering all technological aspects of uranium conversion and enrichment without incurring any negative repercussion.

Although it has no use for domestically produced low enriched uranium (LEU) for peaceful purposes for at least the next 10 years, Iran is nonetheless busy installing centrifuge enrichment cascades at Natanz.

By ignoring the repeated requests of the IAEA Board of Governors and recently of the UNSC to suspend these activities, Iran is jeopardising any chance of concluding a broad cooperation

agreement with the EU that would open the door to large foreign investments, high tech transfers and security guarantees.

By cleverly using to their advantage the divisions among the major powers, by fuelling the fears of a rapid rise in oil prices and by threatening to share their sensitive nuclear know-how (including uranium enrichment) with other states and to increase their support to terrorist movements in the region, Iran's leaders seem confident that the UNSC will be unable to agree on any significant sanction and that if, eventually, it does, it will further increase the popular support for Iran to carry on its nuclear programme.

Isn't Iran's deliberately provocative attitude a step to prepare for its withdrawal from the NPT, as is the letter addressed on 21 March 2006 to Secretary General Kofi Annan, complaining about the fact that senior US officials have publicly threatened to resort to force against Iran "*in total contempt of international law and the fundamental principles of the Charter of the United Nations*".

Also on May 7, 2006, the Iranian Parliament in a letter to Secretary General Kofi Annan, threatened to force Iran's government to withdraw from the NPT if pressure continues for Tehran to suspend uranium enrichment activities.

More recently, on September 5, it was announced that the Iranian Parliament's National Security and Foreign Policy Commission is considering a bill which would suspend all IAEA inspections in Iran, in clear violation of Iran's safeguards agreement and tantamount to withdrawing from the NPT.

Similar threats have been repeated a number of times since then.

It is therefore essential for the international community not to wait for Iran's withdrawal from the NPT¹⁰ and for the UNSC to adopt (under Chapter VII of the UN Charter) a **generic** and legally **binding** resolution stating that if a State **withdraws** from the NPT (an undisputed right under its Article X) **after** being found by the IAEA to be in **non-compliance** with its safeguards undertakings:

- a. such withdrawal constitutes a threat to international peace and security as defined under Article 39 of the UN Charter; and
- b. all materials and equipment made available to such a State, or resulting from the assistance provided to it under a Comprehensive Safeguards Agreement will be forthwith removed from that State under IAEA supervision and remain under Agency's Safeguards¹¹.

As for the specific case of Iran, and considering inter alia its numerous threats to withdraw from the NPT, it would be irresponsible for Russia to deliver fuel assemblies to Busher, if that nuclear power plant (as well as all other facilities where Russian fuel would be stored or used) is not subject to an INFCIRC/66-type Safeguards agreement with the IAEA. Also, the fuel for

¹⁰ or similar actions such as denying IAEA inspectors access to its territory, facilities or locations which would make it impossible for the Agency to fulfil its verification mandate.

¹¹ This is not a new concept. Under Article XII.A.7 of the IAEA Statute, the Agency has the right to "withdraw any material or equipment made available by the Agency or a member" in furtherance of an Agency project in the event of non-compliance and failure by the recipient State to take fully corrective action within a reasonable time. Article XII.C. has also a similar provision.

the Buser NPP should only be delivered under the condition suggested above that in case of withdrawal from the NPT the fuel would have to be forthwith removed from the country and returned to Russia.

In my view, it is most regrettable that the UNSC in its resolution 1696, and presently while discussing what kind of sanctions should be imposed on Iran for not complying with IAEA and UNSC resolutions, is not defining, as a matter of priority, which additional mandatory verification authority should be granted, on a temporary basis, to the IAEA.

It remains to be seen if deciding (under Article 41) that Iran shall provide such access and cooperation as the IAEA requests in order to resolve all outstanding issues will, in practice, enable the Secretariat to implement fully the Additional Protocol, interview relevant individuals, take copies of documents and access promptly military owned workshops and locations where fuel cycle related R&D is taking place.

The fear was expressed that, if Iran refuses to comply with such requests, it may lead to an escalation scenario similar to what has happened in Iraq.

Isn't it illogical for the IAEA to repeatedly state that Iran needs to provide the Agency *"transparency that goes beyond the measures prescribed in the Safeguards Agreement and Additional Protocol"* [and that *"the Agency remains unable to make further progress in its efforts to verify the correctness and completeness of Iran's declarations with a view to confirming the peaceful nature of Iran's nuclear programme"*] while at the same time refraining from explicitly requesting from the UNSC the necessary legally binding additional verification authority?

Could it be that those States that have contributed most to Iran's undeclared nuclear activities may fear that, with more investigation rights, the Agency could discover so far unknown and possibly embarrassing evidence of their previous collaboration?

Some have objected that, under pressure, Iran could withdraw from the NPT. If this were to happen it is doubtful that Russia would still be willing to deliver fresh fuel to Buser and it would be a clear indication that nuclear electricity is not Iran's priority. If Iran's endgame is to withdraw from the NPT, isn't it better now rather than in 5 or 10 years?

Conclusion

The very much publicized divisions among the five veto-wielding members of the UN Security Council, on how the Council should deal with the crisis in North-Korea and Iran is profoundly damaging the credibility of the non-proliferation regime and encourages States found to be in non-compliance with their safeguards agreements to defiantly ignore the resolutions adopted by the IAEA Board of Governors and the UN Security Council.

Adopting the generic resolutions suggested in this paper would be a step in the right direction in order to restore the credibility of the nuclear non-proliferation regime.

Einstein said: *"The world will not be destroyed by those who do evil, but by those who let them do and refuse to intervene"*.

APPENDIX

Answers to possible objections about the proposed generic UNSC Resolutions

1. Some Member States (MS) may object to the idea of adopting generic resolutions for the reason that the UNSC is not and should not become a legislative body. Some fear that the proposal made in the paper could set an embarrassing precedent for other similar cases.

Answer:

The limitations and the loopholes contained in the NPT and safeguards agreement (including the Additional Protocol) should be corrected one way or the other if the credibility of the non-proliferation regime is to be saved.

In the present geo-political environment, any attempt to amend the NPT or Comprehensive Safeguards Agreement (CSA) or the Model AP would be doomed to failure and most likely counter-productive.

For the same reason one should avoid any measure that could be seen as penalizing MS in good standing with their safeguards undertakings because a couple of States has violated their commitments.

This is why the proposed generic UNSC resolutions are dealing exclusively with the case of NNWS that have been in non-compliance and those which, in addition, are withdrawing from the NPT.

It is hard to see how such resolutions (if properly drafted) could constitute a more embarrassing precedent than for instance Resolution 1540.

Would the alternative of doing nothing be preferable?

2. The 5 veto-wielding NWS will never accept to give up their veto right on any UNSC Resolution. Doing so could undermine their political leverage or their ability to protect an allied country.

Answer:

The generic resolutions proposed do **not** deprive the 5 NWS of their veto right on any State specific resolution. What these generic resolutions do achieve is to make sure that the UNSC will consider the matter without undue delay and will not avoid discussing it even when a State, such as the DPRK, violates its safeguards agreement and thereafter withdraws from the NPT.

3. It is not appropriate for the UNSC to decide on sanctions outside any State specific case.

Answer:

- Making sure that all nuclear material and facilities declared to the IAEA would legally remain under IAEA Safeguards (cf. INFCIRC/66-type Safeguards agreement) even if the State withdraws from the NPT cannot be considered to be a sanction.

- The question is then whether the temporary suspension of sensitive fuel cycle activities (if any) in a non-compliant State should be qualified as a “sanction” or simply seen as a “precautionary” measure, or to put it in Dr. ElBaradei’s words: a “*rehabilitation period*” or a “*probation period, to build confidence again, before you can exercise your full rights*”. (cf. interview with Newsweek- January 23, 2006).
- Providing, temporarily, to the IAEA additional verification authority should not be considered to be a sanction. In any case that measure would not be automatic and would require a State specific resolution that could be vetoed by any of the 5 veto-wielding members of the UNSC.

A more delicate point may be the “removal” of nuclear material and equipments delivered to a NNW under a CSA if the State, **after** being found in non-compliance, decides to withdraw from the NPT. As mentioned in the paper this is not a new concept¹². It should not be seen as a “sanction” but as a normal and predictable consequence of a State’s behaviour.

4. Adopting the proposed generic resolutions would deter States -such as Brazil or Egypt- to sign and ratify the Additional Protocol (AP).

Answer:

States like Brazil or Egypt have so far refused to sign the AP for reasons that have nothing to do with the proposed resolutions.

It is difficult to see how they could use these generic resolutions as a pretext for not signing the AP since the resolutions deal only with States in non-compliance.

5. The concern was expressed that adopting the proposed generic resolutions could make it even more difficult for the IAEA Board of Governors (BoG) to declare that a State has been in non-compliance under Article XII.C. of the Statute.

Answer:

First of all, one should not forget that no Member of the IAEA Board of Governors has a veto right, and that Board resolutions need only a simple majority to be adopted.

Also, it is most likely that, if such UNSC generic resolutions had been adopted before November 2003, when the Director General reported to the BoG that Iran was “*in breach of its obligation to comply with its safeguards undertakings*”¹³, Iran would have been reported at the time to the UNSC because the main if not the only consequence would have been to make the “suspension” mandatory. It would have made clear that, contrary to what many Member States feared, no “sanction” would have been envisaged at that stage.

¹² This is not a new concept. Under Article XII.A.7 of the IAEA Statute, the Agency has the right to “withdraw any material or equipment made available by the Agency or a member” in furtherance of an Agency project in the event of non-compliance and failure by the recipient State to take fully corrective action within a reasonable time. Article XII.C. has also a similar provision.

¹³ which, as confirmed in the Board resolution of 24 September 2006, constituted “*non-compliance*”.

Therefore, there would have been no incentive for France, Germany and the UK (the so-called EU-3) to agree to delay referring Iran's non-compliance to the UNSC in exchange for the temporary and voluntary suspension of enrichment activities in Iran.

With regard to the risk of sanctions if and when a country is referred to the UNSC, one should recall that on 10 March 2004 the IAEA BoG adopted a resolution finding that Libya's past failures to meet the requirements of the relevant Safeguards Agreement constituted non-compliance and, in accordance with Article XII.C. of the Statute, requested the Director General to report the matter to the Security Council **for information purpose only**, with no negative consequence for Libya, quite the contrary.

6. The question has also been raised about what type of safeguards failure or violation would trigger a report to the BoG and what kind of failure will be considered by the BoG to be a "non-compliance" that needs to be reported to the UNSC under Article XII.C of the Statute.

Answer:

Article XII.C. of the IAEA Statute states that:

- *"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 report the non-compliance to all members and to the Security Council and General Assembly of the United Nations."*

It would not be advisable to try to define what constitutes non-compliance. Indeed it should be left to IAEA's inspectors and the Director General (DG) to decide what kind of finding and/or failure of a State to comply with its Safeguards Agreement justifies reporting the matter to the BoG under Article XII.C. of the Statute, and what kind of failure, anomaly, discrepancy, question or inconsistency will only be reported by the Secretariat in its annual Safeguards Implementation Report (SIR).

Any such state specific report to the BoG, whatever the language used to describe the failure, breach or access denial, should by definition, be considered as a report on non-compliance and would therefore have to be reported to the UNSC.

The IAEA Secretariat's reports to the BoG on the implementation of Safeguards Agreement in a State are factual and objective. Transmitting these reports systematically to the UNSC can only improve confidence in the effectiveness and transparency of the IAEA's verification system. One should avoid the risk of setting precedents similar to what happened with regard to "special inspections" which makes the implementation of such inspections so problematic today.

One could object that since a state specific report to the BoG would automatically entail the temporary suspension of sensitive fuel cycle activities (if any) in that State, IAEA inspectors and the DG would be more reluctant to report failures and breaches outside the SIR. I believe that the inspectors and the DG, being the only one to have at their disposal all the facts and detailed first-hand information available, are by far in the best position to make an objective and non-discriminatory judgement about what needs to be specifically reported to the BoG. It would thereafter be up to the BoG, in a State specific resolution requesting the DG to report

the matter to the Security Council, to express as it deems appropriate its degree of concern with regard to the reported non-compliance and possibly its satisfaction with the corrective actions taken by the State and the cooperation provided to the Agency¹⁴.

7. The adoption of the proposed generic resolutions would make it even less likely that a country would voluntarily admit some previous wrongdoing because of the consequences and the risk of sanctions.

Answer:

On the contrary, it would make clear to such a State that if it voluntarily admits previous breaches, and fully cooperates with the IAEA (as Libya did), there would be no economic or political sanctions.

The only consequence would be a temporary suspension of sensitive fuel cycle activities (that needs to be coupled with strong nuclear fuel supply guarantees for any operating nuclear power plant) until such time the IAEA has concluded that there is no undeclared nuclear material and activities in that State and that its declaration is correct and complete.

¹⁴ As an example, in its resolution of 10 March 2004 (GOV/2004/18), the BoG finds Libya in non-compliance and, *"in accordance to Article XII.C., requests the Director General to report the matter to the Security Council for information purposes only, while commending [Libya] for the actions it has taken to date, and has agreed to take, to remedy the non-compliance "*.