

# Iran's Countermeasures to US Withdrawal from JCPOA and the Trigger Mechanism

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## Abstract

The Joint Comprehensive Plan of Action or JCPOA<sup>2</sup> can be considered the main source of new political tensions between Iran and the United States during Donald Trump's administration. After Donald Trump's unilateral withdrawal from the Iran nuclear deal and official reimposition of all sanctions lifted as part of the deal, the Islamic Republic continued to remain committed to the deal. However, following cancellation of a multitude of commercial contracts and the failure of the INSTEX<sup>3</sup> to meet Iran's needs, the Islamic Republic of Iran took some gradual steps to reduce its nuclear commitments under the JCPOA. With the fifth step, Iran shall no longer consider itself bound to any restrictions imposed upon it under the JCPOA. In addition, Iran has often considered closing the Strait of Hormuz as a viable option among its security countermeasures. Despite Iran's absolute right to respond in kind to violation of commitments by the US, the fact remains that such a course of actions by Iran would have significant international consequences and grave ramifications, such as re-imposition of all UN sanctions (consistent with Clause 8 of Security Council Resolution 2231), new additional measures/sanctions (according to Articles 41 & 42 of UN Charter), negative impact and adverse effects on the litigation Iran

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<sup>2</sup>Joint Comprehensive Plan of Action (JCPOA); Agreed upon between Iran and the P5+1 (China, France, Russia, the UK, U.S. and Germany) on 14 July, 2015; endorsed by UN Security Council Resolution 2231, adopted on 20 July, 2015, implemented on 16 January, 2016 (suspension of sanctions); unilateral re-imposition of sanctions and withdrawal by the US on 8 May, 2018. See the JCPOA at: <https://www.europarl.europa.eu/cmsdata/122460/full-text-of-the-iran-nuclear-deal.pdf>.

<sup>3</sup>INSTEX: Instrument in Support of Trade Exchanges.

pursues against the United States (based on the Treaty of Amity, Economic Relations, and Consular Rights 1955) in the International Court of Justice (ICJ). Therefore, Iran's best response strategy against violations of US commitments would be a legal one, such as taking action through the Joint Commission per clause 36, referring the dispute to the ICJ according to an agreement<sup>4</sup>, and pursuing its Treaty of Amity case<sup>5</sup>.

**Keywords:** Joint Comprehensive Plan of Action (JCPOA), UN Security Council Resolution 2231, Strait of Hormuz, United Nations Security Council, International Court of Justice.

## Introduction

The legal and political disputes between Iran and the United States have a long history, going all the way back to before the 1979 revolution in Iran. The turning point of this conflict was after the 1979 revolution when the American Embassy in Tehran was attacked and its staff was taken hostage<sup>6</sup>, which resulted in the first round of sanctions against Iran. The first US reaction to that incident was Executive Order 12170<sup>7</sup> issued by President Jimmy Carter which froze all assets of Iran and its central bank on US soil. This was the first round of sanctions, which was followed in later years by a series of escalating sanctions targeting Iran's oil, investment, nuclear and other industries until 2011. Other than sanctions imposed by the US, Iran had to face sanctions by UN and European Nations rooted in their concerns and skepticism towards the peaceful nature of Iran's nuclear

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<sup>4</sup>Voluntary recognition of the International Court of Justice.

<sup>5</sup>Despite US withdrawal from the Amity Treaty on 3 October 2019, all US violations before that date are legally suable.

<sup>6</sup>Goodarz Eftekhari Jahromi, "International Court of Justice, Iran and the United States and its Performance on the Field of International Law" [Persian] (1993) *International Law Journal*, Vol. 16&17 at 6.

<sup>7</sup> See Executive Order NO. 12170 at: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/Executive%20Order%2012170.pdf>.

program, These sanctions were inflicting serious blows to the Iran's economy.

With the election of President Hassan Rouhani, the drive for negotiation and resolution of disputes with the purpose of lifting the sanctions picked up considerable momentum. Ultimately, after decades of tension and years of negotiations the JCPOA was signed, assuring concerned participants about Iran's nuclear program. The UN Security Council also passed Resolution 2231, codifying the agreement and removing all UN sanctions against Iran. The first dispute over the JCPOA however arose over different interpretations of Iran and the US of article 3 under Annex B of Resolution 2231<sup>8</sup>. According to that article Iran was required to refrain from any operation or testing of ballistic missiles capable of delivering nuclear weapons for a period of 8 years after Adoption Day or until the IAEA could reach a Broader Conclusion that all nuclear material in Iran remained in peaceful activities, whichever came earlier<sup>9</sup>. As interpreted by John Kerry (former US Secretary of State) and subsequently the US administration, this article prohibited Iran from engaging in, purchasing, selling or testing of ballistic missiles<sup>10</sup>. On the other hand, Iran's Foreign Minister Mohammad Javad Zarif insisted that the clause applied only to development and testing of ballistic missiles with nuclear payloads. Therefore, Iran did not

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<sup>8</sup>Instead of interpreting the text in a narrow, strict and exact manner within the scope of the Resolution, the parties utilize broad meanings and definitions, expanding them towards their own national interests.

<sup>8</sup>Resolution 2231, (2015).

<sup>10</sup>"Different interpretations of Tehran and Washington in regard to the controversial clause of the resolution" Fars News Agency (28 July 2015), Online: Fars News Agency, Accessed September 15, 2019, <http://fna.ir/b9f>.

consider its entire missile program curtailed or limited by Resolution 2231<sup>11</sup>.

Based on its own interpretation of Resolution 2231, Iran continued its missile program and did not consider them banned. After winning the 2016 US presidential elections, Donald Trump took US out of the agreement based on Iran's continued missile program and two more cases of alleged violation of the JCPOA by Iran in 2016, and in face of national interests of the United States, and re-imposed unilateral sanctions against Iran on May 8, 2018. In response to US breaches, Iran first decided to create a legal case, but failed to create a proper legal case due to the nature of the JCPOA (more on that later). Consequently, on July 16, 2018, citing the violation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, Iran took its case against the US directly to the International Court of Justice at The Hague. A preliminary injunction in favor of Iran was issued by the ICJ on October 3, 2018<sup>12</sup>. However, due to the excessive length of

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<sup>11</sup>“Iran Ministry of Foreign Affairs, Zarif Statement” Islamic Republic of Iran, Ministry of Foreign Affairs (14 September 2015), Online: Islamic Republic of Iran, Ministry of Foreign Affairs. Accessed September 15, 2019, <http://astana.mfa.ir/index.aspx?fkeyid=&siteid=1&pageid=2011&newsview=357785>.

<sup>12</sup>THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

The United States of America, in accordance with its obligations under the 1955 Treaty of

Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any

impediments arising from the measures announced on 8 May 2018 to the free exportation to the

territory of the Islamic Republic of Iran of

(i) medicines and medical devices;

(ii) foodstuffs and agricultural commodities; and

(iii) spare parts, equipment and associated services (including warranty, maintenance, repair

services and inspections) necessary for the safety of civil aviation

this legal process and the significant damages inflicted on the Iranian economy and people, Tehran decided to respond with countermeasures. Those measures included the five-step plan of reducing nuclear commitments under JCPOA, and other rhetorical actions such as threatening to close the Strait of Hormuz. Presenting an analysis on the possibility of closing the Strait of Hormuz by Iran is important because after US withdrawal from the JCPOA and re-imposition of oil and economic sanctions, Tehran demonstrated more determination to close off the Strait of Hormuz and announced that no other nation was to be allowed to export its oil through the Strait of Hormuz if Iran's petroleum exports were blocked<sup>13</sup>. This action was therefore a countermeasure to US withdrawal from JCPOA and oil sanctions against Iran, and is directly related to the topic at hand.

After reviewing the historical background, it is time to focus on the main hypothesis of this article. The two fundamental questions are: (1) Can Iran use a measure such as reduced nuclear commitments as leverage in convincing the opposite side to bow to its expectations? And (2) Will Iran ever be capable of closing off the Strait of Hormuz and stop oil exports from the region unilaterally or with the cooperation of the Sultanate of Oman, the two countries on both sides of the strait?

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The United States of America shall ensure that licenses and necessary authorizations are

granted and that payments and other transfers of funds are not subject to any restriction in so far as

they relate to the goods and services referred to in point (1);

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

<sup>13</sup>“Iranian President Repeats Threat on Closing the Strait of Hormuz” Ilna News Agency (4 December 2018, Online: Ilna News Agency, Accessed May 11, 2019, <https://www.ilna.news/fa/tiny/news-699354>).

The assumption of this paper is based on two separate analyses: (1) as long as the UNSC has not concluded that Iran has committed a major violation based on IAEA reports, the situation is not dangerous for Iran. If, however, the UNSC or any other party to this dispute claims otherwise, the Trigger Mechanism may be activated by US or any other participant, as stipulated in Clause 8 of Security Council Resolution 2231, the case may be referred to the Security Council again, which could lead to snap-back of all UN, EU and other sanctions suspended thanks to the JCPOA, which could be quite detrimental for Iran and its economy. (2) The second assumption or analysis is that Iran's main goal in threatening to shut the Strait of Hormuz is to retaliate to unilateral oil and economic sanctions and violations of its rights by the US. In Tehran's view, the shutting of the Strait of Hormuz will block oil exports of all other Persian Gulf nations, and it considers this a legitimate countermeasure. However, such an action by Iran would have no legal standing under international law. Furthermore, the assumption that the Sultanate of Oman would agree or remain quiet to such an action by Iran does not bring any legitimacy or legal grounds to such a measure. Therefore, neither of the two countries is able to close the Strait of Hormuz completely alone, or even by mutual agreement. Either of these two countries may only impose their sovereignty over their own designated territorial waters, and not outside of that area. Under international law neither of these two countries or both can close down an internationally recognized waterway that many other countries – such as Iraq, Saudi Arabia, United Arab Emirates, Bahrain, Qatar, and Kuwait – use for commerce. Since its closure would have severe negative economic impacts on those countries, it would be followed by legal ramifications and repercussions if such an act is committed. Moreover, such a step would be a clear violation of the temporary ruling issued on October 3, 2018 by the International Court of Justice (ICJ), which strictly warned all parties against taking

any actions that would exacerbate tensions. Hence, Iran's decision to carry out such threats would bring more harm than good, since it is against international law, its legitimacy is denied as a countermeasure.

After the assassination of the Iranian general by US forces on Iraq soil and the increased tensions that have engulfed the region in clouds of clash and war. Research into the issue and searching for the best legal and diplomatic solutions to the conflicts with the purpose of protecting the peace, stability and international security is of utmost significance. The present paper is a critically necessary endeavor for the same reason.

The present study takes a meta-analysis approach to the topic at hand. Since the topic is rather new and there are few resources, the author searched for other first-hand sources such as books, articles, relevant dissertations, reports by international organizations on related subjects, etc.

## **I. Nature of JCPOA**

Before entering the main debate, it is essential to first get familiar with the nature of the JCPOA and its legal framework. The main purpose behind signing the JCPOA was to ensure the permanent members of the UNSC, UN and the international community about the peaceful nature of Iran's nuclear program, which was supposed to be achieved by means of comprehensive and verifiable actions against suspension of all UNSC and international sanctions related to the same issue.

There are two distinct views of the JCPOA. Some believe it to be an international treaty, which makes it eligible for adjudication by the ICJ (compliant with sub-article 1 of article 36 of the statute of the International Court of Justice) In such a case, Iran would have the option of litigation against the US before the ICJ not only for violations of the 1955 Treaty of Amity, Economic Relations, and

Consular Rights, but also for violation of the JCPOA. To verify this view of the JCPOA, It is necessary to first define the treaty.

As defined by sub-articles 1 & 2 of article 2 of the 1969 Vienna Convention on the Law of Treaties, a “treaty” is “an international agreement signed between states in written form and governed by international law”. One of the main stages of a treaty being formed is ‘ratification’, when a country bounds itself to its terms by means of legislative action.

In view of the above definition and the fact that the JCPOA was not ratified in parliaments of the member states, it is evident that the views of this group, who consider the JCPOA as a treaty, are in fact in direct contradiction with international law and doctrine, and the very definition of treaty by the Vienna Convention of the law of Treaties. The other groups, who form the majority, believe that the JCPOA is only a political agreement because it was only signed by representatives of some states and not ratified by legislative parliaments of signatory nations. The JCPOA thus cannot be considered as an international treaty. Due to the highly sensitive nature of the issues included in the JCPOA, the participants, for political reasons, were disinterested in elevating the deal into a formal treaty that would require parliamentary ratification. Moreover, the very text of the JCPOA says that “all of the terms and actions quoted in it are only meant for execution between the 5+1 Group and Iran, and they shall not constitute any precedence for any other state or for the fundamental principles of international law, terms and obligations of the NPT and/or other relevant instruments or accepted and established international principles or procedures.” It is therefore quite clear that such an agreement cannot serve as a treaty, but only as a political agreement .

Concerning the legally-binding nature of the JCPOA there are two distinct views again. Some believe that JCPOA is legally binding because of UNSC resolution No. 2231. Others say that the UNSC



Resolution 2231 was not drafted to make the JCPOA binding, but to suspend the previous sanctions imposed against Iran for its nuclear program under Chapter 7 of the UN Charter. Since JCPOA is not considered a treaty and has not been ratified by parliaments of signatory states, it can be concluded that the JCPOA is not legally binding on its own, and that was exactly the reason why the UNSC passed that resolution to codify the agreement and suspend the sanctions. Undoubtedly, the JCPOA and Resolution 2231 are independent documents with different natures, yet interdependent and with mutual impacts. Thus, they should each be treated separately. However, in case of a contradiction between the two, in view of article 103 of the UN Charter, commitments resulting from the Charter (e.g. Resolution 2231) supersede other commitments between nations (e.g. JCPOA, even if it is considered to be a treaty). Thus, violation of the Resolution is not equal to violation of the JCPOA, but violation of the JCPOA may also constitute a violation of the Resolution, because it was the basis for passing the resolute.

The Conflict Resolution Mechanism foreseen under article 36 of the JCPOA stipulates that conflicts shall be referred to a Joint Commission. The commission shall be composed of members from all JCPOA signatory states, each having one vote. If the issue is not resolved by the Joint Commission, it shall be handled by a Foreign Ministers Council or an Advisory Committee. The difference between these two is that the decisions made by the Advisory Committee shall not be binding. Ultimately, the unresolved disputes shall be referred to the UNSC, where any JCPOA participant may refer the case to the Security Council based on major breaches of the agreement. If the case is referred to the UNSC by members of the P5+1 group, they may apply for return of UN sanctions against Iran.

The above mechanism is foreseen to handle major violations and fundamental breaches of commitments, and to prevent participants to take countermeasures such as re-imposing sanctions or reducing their

commitments, etc. The simplest legal way for Iran, and other participants, is to resort to the conflict resolution mechanism, which is done by the remaining participants of the nuclear deal. Moreover, though it was not possible to refer the dispute to the International Court of Justice initially, due to the fact that its jurisdiction is not recognized in the JCPOA and also because it is not recognized as a treaty, the participants may still refer the case to the ICJ for an impartial procedure by means of an agreement signed between them with explicit consent of all participants. The ICJ is duty-bound (according to article 38 of its statute) to address and resolve such a dispute. Any ruling by the ICJ shall have a higher chance of enforceability over the decisions of the Joint Commission, and all UN members are obligated to abide by it. It must be noted that this solution includes more legal complications and takes much more time than the previous option .

It is notable even though the US has pulled out of the JCPOA and is no longer a party to the deal; it still has the prerogative of activating the trigger mechanism and referring Iran's case to the Security Council. This is due to fact that the US is a permanent member of the Security Council, and has thereby the authority to directly involve itself in any issue related to global peace and security. It should be noted though that the US lacks the right to activate the trigger mechanism on its own, and it has to make other UNSC members vote in its favor; otherwise, a consensus on fundamental breach of commitments will not exist and any decision made by the UNSC may be vetoed in favor of Iran. Hence, in order to gain the favor of other UNSC members and remaining JCPOA participants, it would be advisable for Iran to take a more peaceful approach, i.e. to remain committed to the deal.

## **II. Roots of the Conflict and Violations of Participants Definition and Terminology**

The withdrawal of the United States from the nuclear deal was due to special disagreements rooted in JCPOA and Resolution 2231. As already mentioned in the introduction, the disputes are rooted in the widely different interpretations made by the parties in favor of their own national interests. The US says Iran's missile tests are in violation of UNSC Resolution 2231, and also Iran has failed to allow IAEA inspectors to visit its military sites, and based on IAEA reports Iran has committed two fundamental breaches of JCPOA commitments in 2016<sup>14</sup>.

Iranian officials have insisted on the peaceful nature of their nuclear program, as Deputy Foreign Affairs Minister Abbas Araghchi said in a parliament meeting that: "None of the missiles made by the Islamic Republic of Iran are designed to carry a nuclear warhead, therefore, all other missiles fall outside of the scope of newly-passed resolution of UNSC<sup>15</sup>." Moreover, according to Mikhail Ulyanov, Director of the Department for non-proliferation and arms control of the Russian Federation: "Missiles tested by Iran were not nuclear-capable and no evidence to the contrary that proves these missiles or their warheads were nuclear has been presented. Additionally, Resolution 2231 only places restrictions on nuclear missiles and not

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<sup>14</sup>"Alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights 1955," International Court of Justice, P1, accessed July 13, 2019, <https://www.icj-cij.org/files/case-related/175/175-20181003-SUM-01-00-EN.pdf>.

<sup>14</sup>"Different interpretations of Tehran and Washington in regard to the controversial clause of the resolution" Fars News Agency (28 July 2015), Online: Fars News Agency, Accessed September 15, 2019, <http://fna.ir/b9f>.

on other missiles”<sup>16</sup>. Also, it must be noted that at the request of the UNSC from Iran under clause 3 of Annex B to Resolution 2231 concerning ballistic missiles is not according to article 41 of the UN Charter, thus the request is not technically binding. Even if the request is considered to be binding in nature, it still does not mean that Iran's missile tests constitute a violation of the deal, because the missiles were not of the type prohibited in the resolution.

According to clause 3 of Annex B of the Resolution<sup>17</sup> as well as the text of the JCPOA itself, it can be concluded there is absolutely no mention of Iran's missile program, neither in the Resolution or the JCPOA. Hence, the Iranian side is right, since the prohibition stipulated in Resolution 2231 is only for ballistic missiles with nuclear payloads and in no way covers the defensive missile program of Iran or it's the tests thereof, and furthermore, Resolution 2231 removes all restrictions quoted in previous resolutions against Iran's missile program - specifically Resolution 1929 - and only places limitations on ballistic missiles with the capability to carry a nuclear warhead.

Concerning the second US claim, it is notable that from the outset of JCPOA until US Withdrawal from JCPOA, the IAEA quarterly reports clearly show that Iran was in full compliance with its obligations under the deal, including timely issuance of visa for inspectors, giving unfettered access to key sites, letting IAEA experts to monitor and inspect all of its peaceful nuclear operations. Specifically, in its reports dated February 22, 2018 and May 24,

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<sup>16</sup>“No Restrictions on Iran Missile Testing” Ilna News Agency (27 July 2017), Online: Ilna News Agency, Accessed August 24, 2019, <https://www.ilna.news/fa/tiny/news-540622>.

<sup>17</sup>Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.

2018<sup>18</sup>, i.e. only 16 days after the May 8, 2018 Executive Order<sup>19</sup>, the IAEA reiterates Iran's commitment and compliance with the JCPOA and its annexes (article 27 of both reports)<sup>20</sup>.

The third US claim regarded two major violations by Iran in 2016, shortly after which the US unilaterally exited the JCPOA and imposed sanctions against Iran, while Article 36 of the JCPOA unequivocally stated that any dispute between the participants had to be referred to the Joint Commission, so that the commission could find appropriate solutions, form suitable responses, and determine whether or not a major violation or fundamental breach had occurred. Also, according to clause 19 of UN Resolution 2231<sup>21</sup> the IAEA is designated as the competent authority to report on the JCPOA<sup>22</sup>. Additionally, clauses 3 & 4<sup>23</sup> of the resolution define specific duties and responsibilities for

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<sup>17</sup> See those files at: <https://www.iaea.org/sites/default/files/18/06/gov2018-24.pdf> & <https://www.iaea.org/sites/default/files/18/03/gov-2018-7-derestricted.pdf>.

<sup>18</sup> See Executive Order no. 13846 at: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13846.pdf>.

<sup>20</sup> Verification and Monitoring in Iran. (2016-2019), International Atomic Energy Agency (IAEA).

<sup>21</sup> Under Article 19 of Resolution: Requests from the IAEA and the Joint Commission to consult and exchange information, where appropriate, as specified in the JCPOA, and requests further that the exporting states cooperate with the Joint Commission in accordance with Annex IV of the JCPOA. (JCPOA, 2015).

<sup>22</sup> According to Article 52 of JCPOA: Iran will abide by its voluntary commitments as expressed in its own long-term enrichment and enrichment R&D plan to be submitted as part of the initial declaration described in Article 2 of the Additional Protocol. The IAEA will confirm on an annual basis, for the duration of the plan that the nature and scope and scale of Iran's enrichment and enrichment R&D activities are in line with this plan.

<sup>23</sup> Article 3 of Resolution 2231: Requests from the Director General of the IAEA to undertake the necessary verification and monitoring of Iran's nuclear-related commitments for the full duration of those commitments under the JCPOA, and reaffirms that Iran shall cooperate fully as the IAEA requests to be able to resolve all outstanding issues, as identified in IAEA reports.

the IAEA Director General on Iran's case. The IAEA uses monitoring, period reports and inspector visits as the means to perform its duties and determine whether or not the nuclear program of a given country has a peaceful nature. The IAEA said in its report of February 17, 2016 that Iran's stockpile of heavy water had reached 9 metric tons (equivalent to 900 kg), surpassing the amount permitted under the JCPOA<sup>24</sup>. A week later, the IAEA reported that 20 metric tons (equivalent to 20,000 kg) of heavy water were sealed and shipped out of Iran. In clause 16 of its report on February 26, 2016 the IAEA said: "Iran has continuously kept the IAEA in the loop and informed about its production of heavy water at its heavy water production plant, and has pledged to continue this practice"<sup>25</sup>. Therefore, Iran's cooperation with the IAEA has been quite transparent.

The other Alleged violation by the US against Iran dates back to October 15, 2016 when Iran's allowable capacity of heavy water under the JCPOA was at 13 metric tons (equivalent to 13,000 kg). On November 8, 2016 the level exceeded the maximum permitted capacity by 100 kg. Exactly one day later, Iran announced it is in the final stage of preparing to ship out 5,000 kg of heavy water out of the country. In clause 14 of its report on November 9, 2016<sup>26</sup>, the IAEA

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Article 4 of Resolution 2231: Requests the Director General of the IAEA to provide regular updates to the IAEA Board of Governors and, as appropriate, in parallel to the Security Council on Iran's implementation of its commitments under the JCPOA and also to report to the IAEA Board of Governors and in parallel to the Security Council at any time if the Director General has reasonable grounds to believe there is an issue of concern directly affecting fulfilment of JCPOA commitments. (UN Security Council Resolution 2231, 2015).

<sup>24</sup>Permitted capacity of Iran's heavy water stockpile according to JCPOA is 13 metric tons (equivalent to 13,000 kg).

<sup>25</sup>Verification and Monitoring in Iran. (2016-2019), International Atomic Energy Agency (IAEA).

<sup>26</sup>See this document at: <https://www.iaea.org/sites/default/files/16/11/gov2016-55.pdf>.

states: “Iran is pursuing and conducting its enrichment activities consistent with a long-term research and development plan it has submitted to the IAEA on January 16, 2016”<sup>27</sup>. Hence, the IAEA, which is the designated organization to determine whether Iran has complied with or violated the JCPOA, clearly verified that Iran was fully adhering to its commitments and obligations under the nuclear agreement. Another other issue is the remarks given by the then US Secretary of State Rex Tillerson on September 20, 2017 during a JCPOA Joint Commission meeting, in which he said: “Iran has complied with the JCPOA, and from a technical perspective, the IAEA has regularly attested to Iran’s compliance with the deal, and none of the other parties present at the meeting denied this”<sup>28</sup>. All of the above facts stand as proof to the veracity of Iran’s case and to the fact that it has cooperated with the IAEA, has adhered by the terms of the JCPOA, and that its nuclear program is peaceful in nature. Thus, it is the United States that has by imposing new sanctions, going back on the rule of not re-imposing previous sanctions, and retroactively applying the sanctions to all contracts signed after the JCPOA, violated the Resolution 2231 as well as section VIII [Preamble], clauses 21, 26, 28, 29, 30, 36, 37<sup>29</sup> of the JCPOA and the principle of ‘good faith’ about the JCPOA and its commitments to the deal.

### **III. Reduction of Nuclear Commitments as Countermeasure**

Countermeasures are legal means of getting executive guarantee, and the most common method of retaliation against breaches of commitments at international level. A country falling victim to breach

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<sup>27</sup>Verification and Monitoring in Iran. (2016-2019), International Atomic Energy Agency (IAEA).

<sup>27</sup>“Tillerson: JCPOA has been inadequate” Fars News Agency (21 September 2017), Online: Fars News Agency. Accessed August 24, 2019, <http://fna.ir/a0z46g>.

<sup>29</sup>See Appendix section.

of commitments by another country may use countermeasures to persuade the renegeing party to accept its responsibility for the international commitments, stop the breach, and take compensatory actions. Thus, Iran started to reduce its JCPOA commitments as a countermeasure against the breaches of JCPOA by the US .

The first step was taken on May 8, 2019 by which Iran no longer complies with limitations on storage of enriched uranium and heavy water. The second step, on July 5, 2019 saw Iran set aside limitations on enrichment levels and restrictions on modernization of Arak Heavy Water Reactor. With the third step on September 6, 2019 Iran restarted its nuclear research and development in line with its technical requirements and irrespective of its JCPOA commitments. On November 6, 2019 Iran began re-injecting gas into its centrifuges at its Fordow Facility, as part of its fourth step of reducing its nuclear commitments.

The fifth step was announced on January 5, 2020 by which Iran declared it no longer considered itself bound to any restrictions in its operations including enrichment levels and reprocessing to the number of active and operational centrifuges and research and development activities. In light of the fact that the JCPOA is a political agreement in nature and not a legal one, total withdrawal or reduction of commitments is possible for US and European powers, while the JCPOA does not grant the same right to Iran, because as soon as Iran exits the deal or reduces its commitments in such a way that is construed as exiting the deal, a quick conclusion will be reached that Iran has committed a major breach and violation which will naturally be followed by return of all sanctions and the reinstatement of all UNSC resolutions against Iran.

It is not possible to ignore commitments resulting from the UN Charter (e.g. UNSC resolutions). According to article 103 of the UN Charter all member states are obligated to give precedence and priority to commitments stemming from UN Charter over all of their



other political agreements and contracts. Also, article 25 of the UN Charter binds all member states to accept and carry out the decisions of the Security Council. Hence, although the United States has violated the UNSC resolution by ignoring its paragraphs 14 & 15 prohibiting a retroactive application of sanctions to contracts signed through the JCPOA, not abiding to the JCPOA, and violating the principle of “Good Faith”, if Iran’s violation of JCPOA commitments is considered or construed as a major breach of the JCPOA by its remaining participants, such a breach shall be a violation of Resolution 2231 which was adopted to codify JCPOA in the first place . A breach of the resolution by Iran will be construed as a major and fundamental violation, which is much bigger than the breaches of the US, because the issue of Iran’s nuclear program is intertwined with international peace and security, and is hence a very sensitive international subject. The trigger mechanism is a plan of action designed to be used in case of a major violation of the JCPOA. If the trigger mechanism is activated according to paragraph 8 of Resolution 2231, since it has not yet been 10 years from signing of the JCPOA, Iran’s case will still be open at the UNSC, and activation of the trigger mechanism by any JCPOA participant will bring back all previous UN and UNSC sanctions against Iran, let alone the new ones that may be passed. Also, as the issue is related to international peace and security, taking of other measures according to articles 41 and 42 of the UN Charter it is not totally out of the question, which may include new sanctions and increased risk of Iran’s nuclear and military sites being targeted by military strikes. Thus reduction of nuclear commitments and suspension of obligations by Iran and not cooperating with the IAEA will not be a proper response, because activation of the trigger mechanism which shall be the result of reducing commitments and major violation of the JCPOA, will take Iran back to where it was before the Resolution 2231 was passed.

#### **IV. Closure of the Strait of Hormuz as Countermeasure**

The threat to close the Strait of Hormuz is a possible step by Iran in response to the unilateral sanctions imposed by the United States, and these unilateral oil-related and economic sanctions are in turn the result of US withdrawal from the nuclear deal. Therefore, closure of the Strait of Hormuz is deemed an appropriate and legitimate countermeasure by Iran towards the material breaches of the JCPOA and UN Resolution 2231 by the US. From Iran's perspective, considering the location of the Strait of Hormuz and Iran's dominance over this waterway, the move would be legitimate. However, the legality of such an action is a different matter altogether, which will be addressed and delved into further hereafter.

An international strait is a waterway suitable for international shipping. As Ziaei Bigdeli has noted:

“The Strait of Hormuz is an international waterway that connects the free waters of the Indian Ocean to the “exclusive-economic” Persian Gulf region. This strait is shared by Iran and Oman. This crescent-shaped waterway is 104 miles long, 20-52 miles wide, and between 32 and 144 meters deep”

The legal regime of the Strait of Hormuz is public or shared, and its legal sources consists of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the 1982 Convention on the Law of the Sea and other common and public laws. Since the Strait of Hormuz is used for international shipping purposes and the most important oil chokepoint in the world and connects one part of international waters (exclusive economic) to another part of international waters (exclusive economic), the right of transit on this strait is based on the concept of “Transit Passage” as defined under international law.

Article 38 of the 1982 law defines “Transit Passage” as: “All ships and aircrafts (military or commercial) shall enjoy the right of transit

passage without any obstacle”; it goes on to specify that such transit shall be “continuous and expeditious” except during force major events or wars Article 44 of the Convention states in unequivocal terms that: “states bordering straits (in this case Iran and Oman) shall have no right to hamper transit passage”.

The permission withheld for suspension of transit passage only applies to the international section of the strait, and it has to be understood that both countries of Iran and Oman have the right to apply transit limitation on their own territorial waters, but blockage of international waters is contrary to the laws, legal norms, and principles of free unencumbered international shipping, and thus unacceptable.

The act of fully closing the Strait of Hormuz by the use of military power shall be construed as threat or use of force which is against clause 4 of article 2 of the UN Charter and shall be followed by serious international consequences for Iran. Moreover, such as action may serve to increase international tensions in the region and worsen the already complicated disputes and conflicts, and may have negative ramifications the temporary ruling issued by the International Court of Justice in favor of Iran on October 3, 2018 based on the Treaty of Amity, Economic Relations, and Consular Rights of 1955. According to clause 3 of that order: “both states shall avoid any kind of action or step that would exacerbate tensions and further complicate the situation.” Any kind of legal leverage Iran might have in that case could be neutralized by such a countermeasure. Also, it has to be noted that according to clause 1 of article 49 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, since the Strait of Hormuz leads to a region where many countries coexist and perform their commercial activities through the same strait, the closure of the strait will be harmful to their interests, and a legitimate countermeasure by definition cannot result in damage to a third country, but has to target only the country violating the commitments.

Hence, a full closure of the Strait of Hormuz would be legally detrimental to Iran's interests.

### **Conclusion**

As is clearly evident, the US has unilaterally violated many aspects of JCPOA. Moreover, the US violated paragraphs 14 & 15 of UN Resolution 2231 on non-retroactive application of sanctions, and despite the decisions of the UNSC imposed unilateral sanctions against Iran which resulted in many of the commercial deals and contracts (oil, gas, aircraft, etc.), which Iran had signed thanks to the JCPOA, to be cancelled. The contracts for purchase of passenger aircrafts, oil, gas and other contracts are Iran's best strategy in taking a legal approach to the issue. Although the Joint Commission is still officially deliberating and deciding the fate of JCPOA and the implementation of the Trigger Mechanism has been delayed by EU3, but in view of the latest changes in the IAEA and the statements of its new director general saying Iran had withheld permission to inspect two nuclear sites,<sup>30</sup> the EU3 and/or IAEA may at any moment decide and declare that Iran has committed a major violation, the JCPOA is terminated and the Trigger Mechanism has been activated. Thus, Iran's best choice would be to pursue the dispute through the Joint Commission. If the conflict resolution mechanism of the JCPOA, known as the Joint Commission and the Foreign Ministers Committee, fails to resolve the disputes, according to article 38 of the ICJ's Statutes the participants may refer the case to the ICJ for a fair procedure. If the International Court of Justice issues a ruling in the current dispute, it would have the advantage that the ICJ is considered an impartial international tribunal with more credibility, heft and

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<sup>30</sup>See this Statement at: <https://www.iaea.org/newscenter/news/iaea-director-general-calls-on-iran-to-cooperate-immediately-and-fully>

influence than the JCPOA Conflict Resolution Mechanism. Hence, its verdict, which is binding on all participants, can be enforced more easily.

Furthermore, Iran better follow-up its case filed against the United States in the ICJ on July 16, 2018 to get compensation for damages it has sustained as a consequence of the US abrogating its obligations under JCPOA and UN Resolution 2231. That is because the ICJ stated on page 1 of its temporary ruling issued on October 3, 2018 that the main source of dispute in this litigation was the JCPOA<sup>31</sup>. Hence the ICJ is fully aware of the issue. If, however Iran decides to ratchet up tensions with measures similar to reduction and suspension of nuclear commitments and or full closure of the Strait of Hormuz as a countermeasure to US breaches of commitments and imposition of unilateral oil and economic sanctions against it, it will not only lose its leverage in the ICJ, but also legitimize all unilateral US sanctions and additionally invite more punishing sanctions by the European Union, the Security Council, etc. What's more, in light of the gravity of the situation on international scales, the Security Council can authorize military action against Iran consistent with Article 42.

It is recommended that Iran accepts and recognizes the ICJ's authority and designate it as its preferred source for settlement of legal disputes when it comes to any future agreements, since its enforcement mechanism is far stronger than any joint commission. Resolutions 3232 and 3283 (Settlement of International Disputes) by the UN General Assembly plus the adoption of the Manila Declaration<sup>32</sup> all attest to the fact that the ICJ should become the main source of arbitration among countries in international disputes, and,

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<sup>31</sup>See this document at: <https://www.icj-cij.org/files/case-related/175/175-20181003-SUM-01-00-EN.pdf>.

<sup>32</sup>Resolution 10/37.

nations would be well-advised to include it in all their agreements with other countries<sup>33</sup>.

It is also recommended that any prospective agreements be ratified in the parliaments of all countries involved, codifying them as treaties, and hence making them stronger and more enforceable in case of violation by any participant. In such case, an impartial entity will arbitrate any future dispute and its rulings shall be binding for all parties involved; otherwise, they shall face legal and international consequences, and it is only in such conditions that countermeasures would be in line and completely consistent with legal precedents. This is while Iran, despite falling victim to obvious violation of its rights by the US, has no practical option except the Joint Commission of JCPOA and the 1955 Treaty of Amity. Nevertheless, as described, the above two courses of action offer the best possible solutions toward a peaceful resolution to this conflict, and in case the ICJ issues a ruling concerning the abrogation of commitments of the 1955 Treaty of Amity similar to the pro-Iran preliminary injunction, the United States will be left with no recourse or excuse and must abide by the verdict.

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<sup>32</sup>Fardin Rostami Amani, "Iran and conditions for mandatory or voluntary recognition of International Court of Justice" [Persian] (2002) Masters Dissertation, Shiraz University, at 204