MIXED REGULATION IN INTERNATIONAL SECURITY POLITICS:

The Case of Iran's Nuclear Program

Paul Rusman

1 Introduction

How does the world's government interfere in world society with legal instruments? This question is obviously wrongly posed. There is no world government. On the other hand, there is a plethora of international regulatory instruments that impact on international relations, and the number is growing by the day. Are states in the final analysis the issuers of these instruments? Are the trends governing this process comparable with the ones at the national level? Such questions we cannot even begin to answer, given the state of research into the matter. Yet a case study of a contentious piece of international rulemaking can lay bare some of the essential characteristics of present-day international regulation, and hopefully the changing role of the world of states that accompanies it.

It is assumed here that a concentration on a joint public-nonpublic product would too much restrict the subject matter. This contention is explored in some detail in the first paragraph. After dealing with that question, the concept of international regime is introduced. The case studied concerns the crisis over Iran's apparent plans to acquire the know-how and equipment critical for nuclear weapons production, while purportedly staying within the nonproliferation regime. It is argued that, since Iran denied to be bound by the relevant regulations, an international-legal obligation for Iran to change course in this matter had to be specifically created. This part of the chapter starts by explaining the nonproliferation regime in some detail, in order to demonstrate what additional regulation was called for. It then lays out the Iran case in broad strokes, concentrating on the 2002-2007 period.
Concluding remarks attempt to highlight some differences and similarities with domestic mixed regulation.

2 Mixed regulation in international politics

If, domestically, mixed regulation fans out from ex post consultation to ex ante consultation via forced co-regulation and co-regulation proper, to self-regulation in its pure form, all forms of consultation, and possibly also co-regulation, presuppose the existence of a capable and strong state to do the consulting and co-regulating. In the international sphere itself, that quasi-statal capability and strength are more often than not lacking, certainly outside the domain of well established international institutions like the EU. Ever since the Westphalian Peace of 1648, state sovereignty has been absolute and indivisible, and all regulation self-

regulation by the state. Only explicit exceptions in the form of international agreements are recognized. Yet again, practice yields a different picture. Economic globalization, the rise of global electronic networks, and especially the freeing of global finance after the cold war, have undercut government control of the national economy and national life. New regulators have sprung up. They range from intergovernmental to nongovernmental international organizations to private organizations and companies. Subjects that have seen important regulatory inputs of the latter are as diverse as the post-cold war sale of superfluous weapons by Western defence ministries (successfully taken up by the British NGO Campaign Against Arms Trade), the trade in blood diamonds by African rebels and thugs (resulting in the so-called Kimberley Process, an initiative by governments, industry and civil society to stem the flow of blood diamonds), but also global warming (the scientific evidence of which is assessed on a continuous basis by the Intergovernmental Panel on Climate Change, basically a band of independent researchers), the release of bioaccumulative toxins into the environment (successfully campaigned against by the World Wildlife Fund), or unacceptable labor conditions in the sweatshops of the apparel industry (successfully targeted by the International Labor Organizationas a cause in need of regulation).[1] Hence, an important role is played by grassroots organizations.

But an overconcentration on regulatory cases with marked nongovernmental input threatens to miss vital points. Some of these are (1) Most international regulation is firmly controlled by governments, and subject principally to the international distribution of power. This means that some states occasionally do lay down the law for other states, either by virtue of their leadership of a defensive alliance or their economic and cultural hegemony. An alliance leader usually shouldering part of the defence burden of others, cementing his claim to leadership. An economic hegemon usually bribes third countries by opening up his home market for them. With leadership comes a dominance in regulatory activities: think only of the US role in composing the IMF and UN Charters as examples. (2) Governments themselves increasingly speak for special interests, so why should direct rather than indirect contributions by these interests to international arrangements represent a fundamental difference? The fact that direct contributions may be on the rise results more from a need to control the costs of cooperation than anything else: governments simply lack essential know-how of the low-politics issues they seek to regulate (3) International regulations typically suffer from relative under-provision, non-participation by important parties, a lowest common denominator-approach, and a lack of enforcement mechanisms.[2] Does 'private'regulation fare any better? In many cases it does not, one may think e.g. of the poor record of the Kimberley process in halting the trade in blood diamonds. (4) In many areas of international regulation, network analysis would appear to be more fruitful than analyses strictly along private-public lines. Already in the case of highly institutionalized international decisionmaking like that of the EU, scholars advocate arena analysis and deemphasize the public-private divide[3], and this may be even more true in some less highly institutionalized settings. (5) In roughly half the number of a sample of regimes, substantial roles are played by non-state actors. However, the state is almost always involved in regime formation[4], thus there is at least co-regulation, never privatization of rulemaking.

1 a.o. Lipschutz and Fogel 127-129

2 Barrett, 2007

3 Van Schendelen….

4 Spector 2003, 68

The case at hand is chosen for a few reasons. It is a case of rulemaking which, in spite of general agreement on the need for these rules, designing, making and implementing them may be extremely difficult. Iranian nonproliferation cries out for regulatory activity because the political costs of no regulation appear sufficiently high to warrant a large amount of political activity to avoid these costs. Thus regulatory output, if any will result, will be the product of coercive diplomacy rather than negotiation. It is also a showcase for the ability of the planet to solve its most pressing problems. It also is a rich case, with global players involved, and fierce turf battles of domestic and international bureaucrats. Hopefully some insights will emerge that serve our understanding of mixed regulation per se.

3 The nuclear nonproliferation regime

Ever since the cold war ended, calls for an improved international regulation of nuclear nonproliferation have grown louder. Evidently, the international legal order, though reasonably adequate to the task in a world divided into two camps, has had difficulty preventing the spread of nuclear weapons once the stalemate was ended. The results of this crisis in the legal order have been devastating. Neither of the two wars with Iraq since 1990 might have been fought, had not this country implicitly threatened to upset the balance, and dominate the Middle East, by trying to acquire weapons of mass destruction. Similarly, there have been two nuclear crises since 2002, over Iran's apparent plans to acquire the know-how and equipment critical for nuclear weapons production, and North Korea's open efforts to obtain these weapons. Other than in the Iraq case, an international-legal obligation for Iran to change course in this matter had to be specifically created. This chapter deals with that process.
The legal basis for the world's efforts in this field is the nonproliferation regime. In order to explain the meaning of this concept, we use the most often cited definition, the one offered by Stephen Krasner, which reads:

'International regimes are defined as principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.'[5] Note that this definition meshes well with Black's definition of self-regulation as cited in the Introduction: 'A situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority', a description that deliberately extends the scope of self-regulation beyond ruled that are legally binding. as long as the regime works, it is relevant. This has to do with the very basic truth that in international relations there is no overarching authority from whom legal power emanates. If at all there is an international Rex acting as law-giver it is the community of states. Only on limited grounds can the United Nations Security Council make binding decisions. But in these cases it is questionable whether the Council can create new rules. As a rule, international regulation is created by states that voluntarily enter into obligations. In international relations, regulation is principally self-regulation. Coercion is a problematic strategy to achieve rule-creation, since aggressive war is illegal (according to the UN Charter), costly and too blunt an instrument, and sanctions are notoriously difficult even to ensure compliance, let alone voluntary self-regulation. Co-regulation is therefore the normal state.

5 Krasner 1982

International regimes are constructs designed to overcome such game theoretical anomalies as the Prisoner's Dilemma and the Chicken Game, which severely hamper perfect information (under the aggravating circumstance of the ultimate lack of world political authority and the huge costs of the functioning of the world system, i.e. the costs of regulation, security, bribery and extortion, all that it takes to make the world turn socially; cf. Coase 1960). Without international regimes, outcomes are bound to be suboptimal, at least theoretically. International regimes seem to flourish as a breed, since their number has been exploding after WWII. Evidently, globalization is responsible for much of this, as the density of today's world's issues calling for transnational regulation increases continuously. But how do they come about? There are broadly two views on this. Some believe that, to have regimes, you must have a hegemon with sufficient power resources and ambition to bring them about. Others point out that regimes may spring up between states that find one another essentially trustworthy, which, it can be demonstrated, may be entirely the product of the interaction between self-interested parties [Axelrod 1984]. In both cases, international regimes are the product of historical happenstance, and, like gardens or good marriages, need constant attendance. One lesson learned from the study of existing international regimes is that 'comprehensive and fair agreements that enjoy wide participation and acceptance in the beginning tend to break down over the course of the regime's life and need to be renewed and renegotiated' [6]

Being an artifact of international relations, a regime is a stand-alone construct, that carries the genetic instructions needed for its own reproduction. It does not only contain the prerequisites of rules, i.e. principles, norms and decision-making procedures according to Krasner's definition, but can be defined even broader. It presupposes a domain consisting of a welter of guidelines, interfaces between different groups working on the problems from different angles which creates the differentiated interpretation, guidance and feedback needed with respect to the rules in real life [An example being the seminars of civil servants, international bureaucrats and university researchers set up to interpret and assess UN Security Council resolution 1540]. As these things are part of a layer of interactions and culture that is never in doubt on the national level (indeed, national rules are written with these practices in mind), they must exist on the international plane as well for regulations to be effective [7]

How can the nonproliferation regime be characterized? It is composed of distinctive hard and soft law elements, betraying its pedigree as a regime that experienced several historically and politically distinctive phases. At least the distinction can be made between the phases of bipolar, East-West confrontation, and of the post-cold war, multipolar, North-South competition.

6 Spector 2003, 79

7 Spector and Zartman 2003, 284ff

Cold War post-Cold War

COCOM (1949)
NPT (1968)
NSG (1974), INFCIRC/254 Trigger List (1978)
Zangger List (1978)
Dual-Use List (1991)
Additional Protocol (1993)
PSI (2003)
UNSC Res.1540 (2004)

The Trigger List was drawn up in response to the Indian nuclear test explosion of 1974. It lists goods and know-how essential for nuclear engineering, with an eye to regulating their flow unilaterally on the part of the nuclear *haves*. The Dual-Use List replaced the COCOM list and was drawn up to regulate the flow of technologies with both civilian and military applications. The Additional Protocol produces control mechanisms and obligations additional to those created in the Nonproliferation Treaty. It was drawn up for NPT parties to enter into as a response to the Iraqi efforts to acquire weapons of mass destruction, that had fully come to light after the 1991 war over Kuwait. The Proliferation Security Initiative (PSI) of 2003 is a collaboration mechanism of seafaring nations in order to facilitate the interdiction of seaborne proliferation actions (the concentration of shipping within a few insignificant flag states makes this a worthwhile exercise). UN Security Council Resolution 1540 of 2004 tasks al UN member states to create effective controls against proliferation of NBC weapons and delivery means (these controls are of course useful for nonproliferation measures against states as well). Both measures were reactions to the North Korean and Iraqi efforts after the Iraqi war of 2003. All but the NPT, its Additional Protocol and Resolution 1540 were unilateral measures taken by the nuclear 'haves' to control nuclear technology. This means that much of the necessary flesh on the bones of the treaty consists of unilateral rules that are nonbinding on the countries suspected of proliferating behavior. During the cold war this was the second-best solution, but after the cold war it made for a glaring weakness in the nonproliferation regime.

The traditional distinction made in international law between soft law and hard law is not very helpful in this case. Soft law elements are both older and younger than the hard law ones. Positive law elements are essentially the NPT and to a lesser degree its Additional Protocol and Res. 1540. All other arrangements could be called soft law, but their rigor varies. For instance the COCOM List was the most typically non-positive-law and thus soft of all these regulations, but in reality it proved the most rigorous of all, being an cold war product of the Western alliance and meticulously policed by its American leader. Although not initially designed to regulate nuclear transfers, national legal instruments drawn up to implement COCOM because of their flexibility could be made to accommodate regulation of all strategic transfers. The lists with proscribed goods and technologies based on COCOM were essentially instruments to guard the 26 Western members' oligopoly of militarily critical technologies. The number of their adherents changed greatly after 1990, when these countries were joined by countries of the former East. It made them broader in scope and thus 'harder', but the point can still be made that only the NPT qualifies entirely as hard law. This however does not make the NPT a perfect treaty.

A useful tool to investigate the degree to which regulations are actually fit to play the roles they are designed for is the concept of legalization. According to criteria drawn up by Abbott et al. [2000, 401-419; see also Jojarth, 2009, 29-58], the point at which a particular set of rules finds itself on the hard-soft law continuum is gauged with the aid of three dimensions: obligation, precision and delegation.

The *type of obligation* entered into when a country joins. The NPT is legally binding, its obligations are specific and unambiguous, and its scope is well-defined. However, withdrawal from the treaty is relatively easy and can be done on short notice (6 months). And although there is independent regular monitoring by the International Atomic Energy Agency (IAEA), for compliance mechanisms such as sanctions the treaty depends on ad hoc measures taken by the UNSC.

The *precision* of the NPT is generally good, as most of its provisions are nonambiguous. However, the IAEA Council, the multi-nation authority that oversees its operations, is not authorized to settle disputes. The NPT also has an element of incoherence, as its rules regarding denuclearization of the five nuclear weapon powers, vital for its nondiscriminatory character, are ambiguous and declaratory rather than precise. Although they go further than merely serving as 'recommendations', they contain no rules, conditions or time-paths for denuclearizing activities.

The *delegation* contained in the NPT is unprecedented. The IAEA is an important international organization with a large expert staff. Up to a point it is capable of setting its own agenda, albeit in accordance with the potentially powerful Council, which operates by majority vote and has a rotating membership and is therefore difficult to stalemate by the great powers. Its Director-General has a reasonably long term of office. However, its decisions are not legally binding upon the parties in matters of dispute and non-state actors cannot be plaintiffs. Also, the IAEA is not independently funded and it funds are at present inadequate fully to discharge its responsibilities. It follows that in many respects the NPT's level of legalization can be described as moderate.

The IAEA has nevertheless been successful throughout in carrying out its chief function of NPT watchdog. There are manifold possible reasons for this, including:
By being branded a proliferator, a country is conspicuously singled out, while gaining little by doing so. The NPT is almost universally adhered to. India e.g. has never succeeded in convincingly explaining why it should on moral grounds be able to single itself out as a non-party, and certainly as a nuclear weapon possessor. The discriminatory character has not met with major criticism on the part of the vast majority of possible possessors. When in 1995 the treaty came up for a statutory review, not a single country abrogated it.

Some 35 countries can be regarded as possible NWS [the preamble to the Comprehensive Test Ban Treaty defines 44 countries as having sufficient nuclear know-how to be regarded as at least an outside risk of becoming a NWS; 35 of this number are not currently NWS], but most of these possible possessors are content with being virtual rather than actual NWS, as actual use of NW is pretty unthinkable (making time being less of the essence), and extended deterrence looks reasonably secure.

The mechanism of the NPT is stronger than it looks, as uranium possession is virtually impossible outside the NPT framework.
The proliferation of NW technology, including enrichment, must be very broad and deep for an actual NW design to stand a chance of becoming reality, unless the receiving country illicitly obtains drawings, blueprints, and specialized technologies especially designed for the purpose of being incorporated into NW.

Only a country that can negotiate these barriers can become a proliferator. Iran and North Korea can. They have uranium deposits, they are aided by specialist technology proliferators, chiefly Pakistan (in particular the maverick scientist Khan) but also China, and have been able to use that opportunity. They also have a strong security motive: both have a long history of feeling militarily insecure. Psychologically they are willing to defy the rest of the world, as both are revolutionary regimes. They have a proven track record in this regard. Iran has almost demonstratively shot itself in the foot, by refusing to make peace with Iraq in 1982, and subsequently by ignoring the technical demands of its oil and gas sector. In fact, only with Western, and specifically American support will Iran be able to keep its oil output at reasonable levels, and its gas reserves will not be exploited if Western technology and capital remain unavailable. But Iran's strength is also a weakness, as the rest of the world is likely to regard its acquisition of NW as a major problem.

4 The iran case: coercive diplomacy in the service of rulemaking

In August 2002 a clandestine Iranian opposition group disclosed the existence of a large, seIcret Iranian nuclear program, the components of which pointed in the direction of a nuclear weapons program. It turned out that Iran worked on uranium enrichment, using ultracentrifuge technology it had obtained from Pakistan. It had started building an underground factory in Natanz, where both engineering research and large-scale enrichment operations, using over fifty thousand centrifuges, were planned. Centrifuge enrichment is technically very difficult and is done in but a few places in the world. Iran had also developed two uranium mines, together with a uranium conversion plant in Esfahan, slated to produce UF6, the gaseous feedstock for the enrichment plant. Combined, these plants would give Iran a closed nuclear fuel cycle, but also an independent capability to build uranium bombs. Iran also planned a heavy water plant and a 40 MW rated power plant in Arak, with construction starting in June, 2004, the only feasible object of which was to obtain plutonium for Nagasaki-type atomic weapons (Iran unconvincingly said that it planned to export the heavy water). There were also subterranean laboratories which the IAEA was not, or only, partially, allowed to inspect, while one suspicious installation was erased before an inspection was granted. Past programs included one for Polonium-210, used almost exclusively in some nuclear weapon designs, and one for uranium enrichment using lasers. US intelligence later found indications that Iran even had had a specific nuclear weapons technology program, which was however probably halted in 2003. On top of all this, Iran had a broad array of missile programs, all of which were only marginally useful militarily except as nuclear weapon carriers. As of 2002, no nuclear weapons (NW) design was known to be going on, but from a nonproliferation point of view the crucial step is the acquisition of an enrichment capability. Western intelligence had earlier concluded that Iran headed for a NW capability, a.o. on account of a nuclear power station being under construction in Bushehr and of Iran's program for advanced mis-

siles, which were only marginally useful militarily. But the newly bared projects, their having been kept secret for eighteen years, and Iran's advanced missile program, pointed towards a willingness to breach the NPT's chief rule not to acquire nuclear weapons. However, the NPT neither supplies the authority nor the coercive means to halt such a full-scale weapons program in its tracks. It does not even provide for inspections of nuclear installations that do not yet have uranium feedstuff introduced to them. Technically Iran was in violation of the NPT because it should have notified several of the activities to the International Atomic Energy Agency (IAEA), the executive arm of the NPT. For example, to get an early start, the country had imported 1.8 tons of uranium shale, together with an unknown quantity of UF6 from China, neither of which had been reported to the IAEA, as they should have.[8] At the heart of Iran's legal position lay its interpretation of the IAEA rules covering members' duty to report nuclear installations with an eye on the Agency's ability to monitor them. in 1978 Iran had signed the standard safeguards agreement, under the so-called subsidiary arrangements of which, a bilateral document stating rules between the Agency and Iran, which obligated it to notify the Agency of an impending introduction of nuclear material into an installation no later than 180 days in advance.[9] In the early 1990's the IAEA had brought this obligation forward to the point where the design had been made. Iran had agreed to the new rule, Code 3.1, in a letter exchange in 2003, after the Natanz factory had been accidentally discovered before nuclear material had been introduced into it, but had withdrawn from Code 3.1 in 2007.[10] Since the safeguards agreement and subsidiary arrangements did not contain a procedure for unilateral withdrawal, one can argue that the non-notification of Natanz was difficult to fault legally, and that only the non-notification of the uranium enrichment installation in Qom, brought into the open in September 2009 by the Western powers, represented an actual breach of the obligations under the NPT.

The West, already suspicious about Iran's nuclear ambitions, reacted to the Natanz program with an effort to stop it in its tracks. The strategy was to approach Iran with coercive diplomacy in lieu of direct military threats. Coercive diplomacy, i.e. backing up diplomacy with an at least implied threat, has worked against the Soviet Union in the framework of the cold war competition, but not quite as well in other contexts. The motivation and commitment of the coercer and the credibility of its threats are vital to his success[11]. Initially the Iraq war had served as an exemplary use of force to Middle Eastern proliferators like Libya and Iran. Libya had succumbed to the pressure and made a turn to the West, terminating its entire program of weapons of mass destruction. Iran according to later US intelligence analyses, had at least terminated the direct weaponization part of its nuclear program. But the later US mishaps in Iraq threw doubt on its motivation and credibility to push through its wishes in Iran. While the West regarded its coercive diplomacy against Iran's proliferating behavior as defensive in nature, Iran started portraying it as blackmail, thus offensive in character, as aggressive elements gradually gained the upper hand in the Iranian leadership. It did so chiefly to shore up its domestic credibility. The trouble in Iraq also informed the strategies of Iran's opponents, the US, the EU, Russia and China. There are several strategies in coercive diplomacy: ultimatum, tacit ultimatum, "try-and-see" approach, "gradual turning of the screw," and " While the US preferred an ultimative approach, calling the bluff of the other permanent members by

8 IAEA 1974

9 IAEA 1972

10 [IAEA 2007]

11 [George 2000, 70-71]

bringing the matter immediately to the level of the UN Security Council (UNSC), with the implied threat of harsher methods whenever coercive diplomacy would prove to be unworkable, European countries preferred the carrot and stick- approach of, essentially, negotiating with Iran.

The IAEA Board of Governors (IAEA BoG) is the competent body to handle apparent violations of the NPT. It cannot sanction violators, but is statutorily obliged to refer violations to the United Nations Security Council (UNSC) when they are not suitably explained and redressed. The UNSC has several sanctions at its disposal and can even use force when international peace is threatened. However, no statute explicitly gives the Council the right to deny member states the employment of uranium enrichment technology. Through its infractions against the NPT Iran was technically in breach of its obligations, but in proliferation terms they were in fact minor compared to its legally harmless enrichment plans; neither did the planned plutonium production plant in Arak in itself constitute a breach of the treaty. One would have to define Iranian enrichment as an act likely to endanger peace under Title VII of the United Nations Charter, in order to be able to restrain Iran's right to indulge in it. That is not an impossibility (after all the UNSC in 1977 instituted a mandatory arms embargo against South Africa's Apartheid policies for the preservation of regional peace and security) but it would be a departure from normal practice. During the second half of 1990's, France and Russia made pleas for the lifting of the embargoes on Iraq, in spite of that country's non-cooperation with the various committees instituted by the UNSC to monitor the mandatory destruction of its weapons of mass destruction programs. The fact that the US and UK as permanent UNSC members vetoed lifting the embargo probably contributed much to Russia's reluctance to cooperate with the US in the matter of Iran. For Russia, although it had no intention of helping to create new nuclear states, Iran was an important regional power with which it wanted to establish a good relationship. Russia has powerful incentives to follow the US on nonproliferation issues, for instance to protect its equal standing with the US as a nuclear power. Yet this does not mean that nonproliferation is the top priority in its foreign policy[12].

As happens in domestic legal settings where the judiciary usurps the power of lawmakers to legislate when the latter fail to do so, the UNSC was essentially asked to create an extension of the NPT, a rule saying that whoever was distrusted could not obtain enrichment technology. It would come down to applying the unilateral parts of the nonproliferation regime to all subscribers of the multilateral part, i.e. all parties to the NPT. This would put the UNSC under suspicion of assuming legislative powers that it does not really possess. Not that the UNSC is adverse to doing so when there is a demonstrable need to. Its resolution 1540, which demands of all countries active engagement to contain the spread of nuclear technology to terrorists, testifies to that, but it is criticized for abusing the Charter[13]. Proscribing enrichment would prove harder, as it deems to constrict governments, not terrorist organizations. Brazil and South Africa, countries with independent enrichment capabilities have resisted proposals made in subsequent years by the US and the IAEA to freeze enrichment capabilities and concentrate the technology in 'neutral' hands, a kind of Baruch Plan revisited, and these same countries tacitly supported Iran in its case against the IAEA and the UNSC. Japan only went

12 Wallander 2006

13 Joyner 2006

along in principle because its own position would not be at stake. But Iran all along clearly stated it would never relinquish its 'right' to enrich. Formerly, American coercive diplomacy against would-be proliferators like Brazil, Argentina and Taiwan had worked, but Iran had escaped the US sphere of influence in 1979. The two countries did not have diplomatic relations, and the US had long tried to isolate Iran. Neither could Russia be trusted to coerce Iran, for the reasons mentioned above. The US even distrusted Russia re Iran until it had become convinced that Iran had acquired its technology via the Khan route. Particularly after the 2003 Iraq invasion, the US could no longer take unilateral preemptive military action that did not meet the "global test" of world legitimacy [14]. Thus it needed the UN to put Iran in the wrong legally, broaden the unilateral strategic and trade embargo, and if need be sanction military action. Moreover, since, in VP Cheney's notorious words, the US did not "talk to evil", others had to do the talking. This task befell the European Union, which created a steering committee consisting of Britain, France and Germany, the EU3. Germany's cooptation was natural, since it was the EU's largest country, had the largest trade interests by far with Iran, and advocated foreign policy principles that left little if any room for the use of force. This in fact widened the circle of the permanent members of the UNSC, the P5, to a P5+1. The US did not applaud the creation of the EU3 channel. It preferred multilateral action in the UNSC, for which purpose it planned to ask for a referral by the IAEA B0G. But the EU3 channel foreclosed this avenue for an extended period, during which European rather than American policy options prevailed. Although Iran policy was coordinated within the Western bloc, it would take all of the Bush Administration's first term to arrive at a reasonably common policy. Germany and France had declined to support the Iraq war in the UNSC, and the prime minister of the third country, Tony Blair, suffered irreparably from his decision to support Bush and left Iran policy almost completely to his foreign minister, Jack Straw, who enjoyed the support of the left wing of the governing Labour party. As a result, Germany's traditional strong advocacy of a foreign policy without the use of force gained credibility. The EU3 was in fact set up to demonstrate that serious disputes of this nature could be solved peacefully, yet effectively. The next step was to get Russia and China, the non-Western permanent members of the Security Council, on board, and since the IAEA BoG as a matter of habit works on the principle of unanimity it even took a major effort on the part of the US to get the Board to refer the matter to the UNSC. Russia was fully aware that Iran very likely conducted a weapons program in the guise of a civilian effort, but could comfortably clothe its reluctance to act in the demand that this time around, the proof would have to be entirely convincing. I say 'comfortable' because Russia could always count on the willingness of the US to take swift and decisive military action, should Iran be proven to be in the wrong.

The next two and a half years, from July 2003 to January 2006, were spent in trying to find a solution by the EU3. In 2003 a 164-centrifuge cascade had been installed at Natanz, but at the urge of the EU its operations had twice been 'postponed'. Instead, talks had been held in the intervening 30 months with the object to accomodate the EU's objections[15]. It took almost the entire period for the EU3 to get the US on board. Only in the spring of 2006 did Washington consent to cooperate in a joint offer to Iran, after an earlier EU-only offer, unsubstantial because the US had been unwilling to back it, had failed. While from the beginning Iran had made clear that the halt in its 'research program' would only be temporary, the newly elected

14 So called by e.g. John Kerry in a 2004 election debate with Bush; Bolton 2008, p.131

15 Albright and Hinderstein 2006

president Ahmadinejad had made it even clearer that compromise was out of the question. Iran had also clearly negotiated in bad faith, reneging on its obligations several times. In the intervening period Russia had laid out a detailed plan for Iran to do its enrichment in Russia, but Iran had insisted that some small-scale enrichment would still have to be conducted in Iran itself, so that the larger nonproliferation issue, the acquisition of the enrichment technology itself if not the industrial capacity, would be decided in Iran's favor.

Before Iran even had in so many words rejected the new offer, the UNSC in June 2006, acting under Article 40 of Chapter VII of the United Nations in order to make mandatory the IAEA requirement that Iran suspend its uranium enrichment activities, the Security Council issued resolution 1696 threatening Iran with economic sanctions in case of non-compliance. The balance had at the same time tilted slowly against Iran. India, an important potential ally, had deserted Iran and voted with the West in the decisive vote in the IAEA BoG, after the US had agreed in principle in July 2005 to sell nuclear technology to India. The great majority of countries within the region that harbored potential nuclear ambitions, like Turkey, Egypt, Saudi Arabia and the other members of the Gulf Cooperation Council in 2006 made known their intention to set up nuclear research or energy programs. Saudi Arabia leaked none too subtly that it would activate its Pakistani connection, Egypt turned to the US for support for a pilot nuclear program. And the US had finally convinced Russia and China that Iran had been conducting actual weaponization work, using a wealth of data on the harddisk of laptop acquired by US intelligence. But this had taken many months of behind the screen bargaining. Even Resolution texts containing elaborately veiled threats like "continued enrichment-related activity would add to the importance and urgency of further action by the Council", and an even tamer follow-up proposal ("continued Iranian enrichment-related activity would intensify international concern") had been deemed unacceptable by Russia. In the end, Resolution 1696 completely avoided any implication of use of force in the future. In December 2006, the UNSC finally issued Resolution 1737 which contained a minimum of punitive sanctions but again did not include a statement that use of force would be warranted in case of non-compliance. In each of the following years, other UNSC Resolutions were adopted, with additional sanctions representing a very slight turning of the screw that put the coercive diplomacy intended in very low gear. To make up for this, the US and its Western allies have added unilateral measures that had more bite, particularly financial and investment sanctions, but these will take a few years to show their ultimate impact. Thus the 2003-2009 period has shown the weakness of coercive diplomacy as a means to change legal regimes, even if virtually all participants find them of basic importance.

5 What does this teach us about mixed regulation in international relations?

It is useful to repeat what was said earlier about the weaker forms of mixed regulation, such as consultation: these appear functional when a strong quasi-statal apparatus is the driver, such as the European Union. Co-regulation, the stronger form of mixed regulation, is more typical in international relations, where the issuing institutions and governments have relatively little grip on matters at hand.

What do these co-regulators do? According to modern regime theory, the interfaces between the regime and national implementation are often not very elaborate, and communities of in-

terested parties must build networks which can play coordinating roles[16]. How does this play in the nonproliferation regime? First, you have international civil servants like the director-general of the IAEA, Mohamed ElBaradei and the High Representative for the Common Foreign and Security Policy, Secretary-General of the Council of the European Union Javier Solana. They have much freedom to play a personal role. ElBaradei edited the reports of the IAEA to the BoG, and thus subtly steered the direction the discussion took in the all-important matter of whether, and to what degree, Iran had broken its obligations, inadequately informed the IEAE, and the like. He also undertook a major effort in the summer of 2007 to get all outstanding questions, which had bogged the discussions for so long, off the table before it would be too late and the bombs started falling. It did not touch the main point however of whether or not Iran was allowed to enrich uranium. Solana paid many visits to Tehran and inevitably, through his intimate knowledge of the dossier, made his mark in the appreciation of the matter by the EU3, and must have made a definite impression in Tehran of a restless seeker of opportunities to engage. Secondly, you have the inner circle of the IAEA Board of Governors and the governments that issue instructions to the members of this Board. They may seem inconsequential, but in the case of Iran the fact that the American member did not see eye to eye with the more radical neoconservative elements in the Bush administration was of importance in that it made it easier for the other players to continue on their chose paths. Third, you have the inner circle of governments, the ones with real power like the P5. Typically the hegemonic player among them orchestrates the action taken. Here, too, the fact that international institutions are rather sparse, and much of the action must come from national governmental an non-governmental inputs, plays a role. Fourth, the hegemonic player is usually given a lot of leeway to create and implement rules, by political and other means of pressure. In this case, however, it met with a lot of opposition or downright indifference, even from trusted allies like Tony Blair. Yet the US was still a hegemonic player, as is most clearly witnessed by the fact that the bottom line of the Bush administration that an Iranian atomic bomb was ruled out entirely as a possible outcome was never challenged even indirectly by the other players.

An important form of coregulation is the administration by the International Atomic Energy Agency of its relationship with the NPT state parties. The states that have nuclear installations have to enter into bilateral agreements with the Agency, which regulate the IAEA's rights to move through the country, enter nuclear premises, take samples, etc. As said before, the IAEA, its DG and the BoG in fact have semi-judicial (and thus semi-legislative) powers in that their finding that a particular country is in conflict with NPT-based rules cannot be contradicted, only overruled by the UNSC.

In many international security questions the UNSC principally works with a delegation of authority, usually empowering a national government to take the lead in a specific operation. The UN is simply too sparsely equipped and too underfunded to be able to deal with actual emergencies. Particularly the intelligence capabilities of the great powers are all-important in assessing whether a country is in the wrong. Although after 9/11 cooperation between intelligence agencies has increased dramatically, the intelligence assets of almost all countries are dwarfed by those of the US, and the same is true for other pertinent capabilities. Particularly the US expertise in nuclear weapon affairs outruns that of all others, including Russia (alt-

16 Spector and Zartman 2003, 285

hough it must be said that part of this is gradually being lost with the reductions in and ageing of the nuclear arsenal). The US already plays a pivotal role in the unilateral portions of the nonproliferation regime, like the Nuclear Suppliers Group; as said it also uses bilateral relations with most countries to influence their behavior. Last of all, it is an interesting outcome of this case that the UNSC is in danger of becoming rudderless in nonproliferation affairs when the hegemonic leadership of the US is in doubt.

The nonproliferation regime revolves around trust. The regime is not well endowed with enforcement means, indeed like most regimes it knows few sanctions or inducements to comply (Barrett 2007) A party to the regime that risks, even encourages, distrust, in a away has already abandoned the regime. Only one maverick country has up till now abrogated the NPT, or any treaty banning weapons of mass destruction for that matter. It is more comfortable to allow yourself to be regarded a fence-sitter or virtual weapon possessor, since you can do many of the things possessors can do, like deterrence, without having to bear the brunt of generalized criticism or even ostracism that possessors are exposed to. It therefore pays off to examine why a country like Iran would want to become at least a virtual possessor. According to most theorists, not only strategic but also psychological motives play a role here. Strategically, Iran's decision to acquire nuclear weapons was more understandable at the time the first step towards it was taken (around 1985) than it is today. After all the 2003 Iraq war eliminated the threat of Saddam Hussein, an exceptionally well-entrenched dictator and former aggressor against Iran, and replaced him with a Shiite majority government. It also ended the rule of the Taleban in neighboring Afghanistan. The US is on its way out of Iraq and will be less of a threat. Russia has been forthcoming in its policy towards to Iran. Iran's strategic and political position in the Gulf would be much improved, but its reputation would suffer damage. Thus the psychological motive to breach the nonproliferation regime probably carries much weight. Iranian culture despises being told what to do (William O. Beeman). The fact that Iran construes itself as being up against the most powerful country in the world (instead of the world community, acting through the UNSC), which because of its central position has a lot of sway in the UNSC, could reflect genuine dissatisfaction by a culture that normally already despises being told what to do (Beeman 2000). Interestingly, the Iranian regime in its domestic dealings has particularly stressed elements such as pride (in Iran's technological achievements) and being victimized (as Iran's inalienable right to enrich uranium is in danger of being breached by the US, which desires to keep Iran underdeveloped). It could be worthwhile to investigate further how these psychological constructs change the way in which the rules regarding nonproliferation are experienced psychologically. Ahmadinejhad's populism may reside in the fact that he himself shares these feelings and experiences which other, more cynical and manipulative, government officials may only feign. It is also interesting to note that ayatollah Khamenei, the Iranian, who as Faqi or Chief Jurisprudent has final responsibility for foreign and security policy, is said to have been aggrieved by the European accusations of double-dealing after Iran had resumed its enrichment program, purportedly because Iran had made clear on several occasions that it had halted it only temporarily.

As put in the Introduction to this book, regulation beyond the state will often take place in the shadow of state activity. This proves to be true at the international relations level as well. States are the life-givers (and life-takers) of international regimes. Their task is to either keep post-agreement negotiation processes going in order to maintain regime effectiveness (Spector and Zartman, 4) and/or provide institutions with resources. Because states are the end-all

of international relations, possessing authority, power and a resource base, their role is continuous. This confirms the view of the role of the state in international relations as a hybrid body, embracing both state and non-state sources of regulation. It takes a separate theory of globalization, though, to understand the role of the state in future international relations.

Looking back, we identify at least four meanings of 'selfregulation': (1) the national state makes the rule although the problematic clearly is transboundary and asks for an internationally binding rule (2) an international rule is fleshed out at the national level, usually by civil servants with much freedom (3) an international rule is fleshed out at the international level, sometimes by civil servants, sometimes by a hegemonic power, or a group of influential states or even a cartel of states (4) 'free radicals' (e.g. temporary project functionaries flesh out the rules). A second level of agents competing in the rulemaking business can be found in countries where jurisdictions are shared between domestic actors, like Congress and the administration, or between the administration and the judiciary. The fact that civil servants are predominant in examples 3 and 4 is important, since it can be argued that their peer groups contain many academically trained people in other walks of life who do similar work in other capacities (journalism, academic, parliament, think tanks, action groups). These people are sometimes brought on board via seminars, brainstorms, workshops, etc., or work is farmed out to them under short-term contracts.

REFERENCES

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravscik, Anne-Marie Slaughter, Duncan Snidal, The Concept of Legalization, *International Organization* (54,3) 2000, 401-419

David Albright, Corey Hinderstein, *Iran's Next Steps: Final Tests and the Construction of a Uranium Enrichment Plant*, Washington, D.C.: Institute for Science and International Security, January 12, 2006

Kenneth J. Arrow, *Social Choice and Individual Values*, 2nd. Ed. (New York: Wiley), 1963

Robert Axelrod, The Evolution of Cooperation, London: Penguin, 1984

Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods*, Oxford: Oxford U.P., 2007.

William O. Beeman, *The "Great Satan" vs. the "Mad Mullahs". How the United States and Iran Demonize Each Other*, Chicago: U. of Chicago Press, 2005, 211.

John Bolton, *Surrender Is Not An Option. Defending America at the United Nations and Abroad,* New York: Simon and Schuster/Threshold Edition, 2008.

Ronald Coase in *J. of Law and Economics* 3, October 1960.

James M. Enelow, Cycling and majority rule, in: Dennis C. Mueller (ed.), *Perspectives on Public Choice*, Cambridge: CUP 1997.

Kurt Taylor Gaubatz, Intervention and Intransitivity: Public Opinion, Social Choice, and the Use of Military Force Abroad, *World Politics* 47 (July 1995) 534-554.

Alexander George, *Forceful Persuasion. Coercive Diplomacy as an Alternative to War,* Washington, D.C.: United States Institute of Peace Press, 1991; Alexander George, Coercive Diplomacy, in: Robert J.Art and Kenneth Waltz (eds.), *The Use of Force,* Lanham,MD: Rowman & Littlefield, 2004, 70-83.

Andrea Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes,* Cambridge: Cambridge University Press, 1997.

IAEA, notification to the agency of exports and imports of nuclear material, infcirc/207 26 july 1974

IAEA, the structure and content of agreements between the agency and states required in connection with the treaty on the non-proliferation of nuclear weapons, infcirc/153 (corrected) june 1972

IAEA, Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran, *IAEA Gov/2007/22*, 23 May 2007.

Alirezah Jafarzadeh, *The Iran Threat*, London: Palgrave Macmillan 2007.

Christine Jojarth, *Crime, War, and Global Trafficking. Designing International Cooperation*, Cambridge: Cambridge University Press, 2009, 29-58

Daniel Joyner, *U.N. Security Council Resolution 1540: A Legal Travesty?* Paper presented at the University of Georgia on June 1, 2006, at the inaugural conference of the International Export Control Association.

Stephen Krasner, Structural causes and regime consequences: regimes as intervening variables, *International Organization* 36, 2 Spring 1982; reprinted in Stephen D. Krasner (ed.), *International Regimes*, Ithaca: Cornell U.P., 1993 (1983), 1.

Ronnie Lipschutz, Cathleen Fogel, "Regulation for the rest of us?", in: Rodney Bruce Hall, Thomas J. Biersteker (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge: CUP, 2002.

Paul Rusman, Wapenbeheersing uit de loop van een geweer, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek Vrede en Veiligheid 2003. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Nijmegen: Centrum voor Internationaal Conflictanalyse & Management KU Nijmegen, 2003, 96-117.
Paul Rusman, Proliferatie en non-proliferatie in 2004, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek

Vrede en Veiligheid 2004. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Nijmegen: Centrum voor Internationaal Conflictanalyse & Management Radboud Universiteit Nijmegen, 2004, 32-49.

Paul Rusman, Het non-proliferatiebeleid aan de tand gevoeld: de kwestie-Iran, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek Vrede en Veiligheid 2005. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Nijmegen: Centrum voor Internationaal Conflictanalyse & Management Radboud Universiteit Nijmegen, 2005, 80-98.

Paul Rusman, Non-proliferatie en de multilaterale orde: weer de kwestie-Iran, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek Vrede en Veiligheid 2006. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Amsterdam: Rozenberg Publishers, 2006, 71-89.

Paul Rusman, Non-proliferatie in Iran en Noord-Korea, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek Vrede en Veiligheid 2007. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Amsterdam: Rozenberg Publishers, 2007, 44-65.

Paul Rusman, De nucleaire kwestie-Iran: wachten op Obama, in: Bert Bomert, Theo van den Hoogen, Ramses A.Wessel (eds.), Jaarboek Vrede en Veiligheid 2008. Internationale Veiligheidsvraagstukken en het Nederlands Perspectief, Amsterdam: Rozenberg Publishers, 2008, 142-168.

John Sawers, note to Stanislas de Laboulaye, Michael Schaefer, Nick Burns, Robert Cooper, published in 'Leaked letter in full: UK diplomat outlines Iran strategy', *The Times* 22 March 2006.

Bertram Spector, "Deconstructing the negotiations of regime dynamics", in: Bertram I. Spector and I. William Zartman (eds.), *Getting it Done. Post-agreement Negotiation and International Regimes,* Washington, D.C.: United States Institute for Peace, 2003, 51-87, at 79.

Bertram Spector and Wiliam Zartman, Regimes in motion: analyses and lessons learned, in: Bertram I. Spector and I. William Zartman (eds.), *Getting it Done. Post-agreement Negotiation and International Regimes,* Washington, D.C.: United States Institute for Peace, 2003, 271-292.

Celeste Wallander, Russian Transimperialism and Its Implications, *The Washington Quarterly* 30, 2 Spring 2007 107-122.