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The United States Unilateral Withdrawal from the Restrictions of Iran's Nuclear Program in JCPOA 2015 under International Law

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Abstract

In 2015, Iran with the P5 + 1 countries (China, France, Germany, Russia, Britain and the United States, as well as the European Union High Representative for Foreign Affairs and Security Policy) agreed on a JCPOA (Joint Comprehensive Plan of Action) which deals with Iran's nuclear program. The Joint Comprehensive Plan of Action 2015 (JCPOA) is a controversial agreement. First, the JCPOA's status in international law is debated and is not considered as an international treaty. In the midst of the uncertainty over the status of the JCPOA, on May 8 2018, the United States unilaterally declared that it was withdrawing from the JCPOA. Even though the JCPOA has been endorsed by UN Security Council Resolution 2231 (2015). Thus, other JCPOA participating countries view the withdrawal of the United States as an act that is against international law. This article aims to determine whether the JCPOA is an international treaty and whether the withdrawal of the United States from the JCPOA is justified under international law.

Keywords: JCPOA, UN Security Council Resolution, Withdrawal

Penarikan Diri Amerika Serikat Secara Sepihak dari Pembatasan Program Nuklir Iran dalam JCPOA 2015 Berdasarkan Hukum Internasional

Abstrak

Pada tahun 2015, Iran dengan negara-negara P5+1 (China, Prancis, Jerman, Rusia, Inggris dan Amerika Serikat, serta Perwakilan Tinggi Uni Eropa untuk Urusan Luar Negeri dan Kebijakan Keamanan) menyepakati JCPOA (Joint Comprehensive Plan of Action) mengenai pembatasan program nuklir Iran. Joint Comprehensive Plan of Action 2015 (JCPOA) merupakan perjanjian yang mengundang kontroversi. Pertama, status JCPOA mendapat perdebatan karena dianggap bukan perjanjian internasional. Kemudian pada 8 Mei 2018, Amerika Serikat secara sepihak menyatakan menarik diri dari JCPOA. Padahal JCPOA telah dimasukkan ke dalam Resolusi Dewan Keamanan PBB 2231 (2015). Sehingga peserta JCPOA lainnya menganggap tindakan Amerika Serikat sebagai perbuatan yang bertentangan dengan hukum internasional. Artikel ini bertujuan untuk mengetahui apakah JCPOA merupakan suatu perjanjian internasional dan apakah penarikan diri Amerika Serikat dari JCPOA dapat dibenarkan berdasarkan hukum internasional.

Kata kunci: JCPOA, Penarikan Diri, Resolusi Dewan Keamanan PBB

A. INTRODUCTION

The massive development of Iran's nuclear program has long been suspected by various countries. Iran's nuclear program is considered to have violated the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Iran is suspected of developing nuclear weapons secretly, even though Iran's status is non-nuclear weapon states (NNWS).¹ As a result of its nuclear program, Iran has been subjected to various sanctions both by the United States, the European Union, and the UN Security Council

On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union (EU), and Iran reached a Joint Comprehensive Plan of Action (JCPOA) to ensure that Iran's nuclear program will be exclusively peaceful. The JCPOA is a 159-page manuscript, consisting of 37 articles and an attachment of 5 chapters. October 18, 2015 marked Adoption Day of the JCPOA, the date on which the JCPOA came into effect and participants began taking steps necessary to implement their JCPOA commitments.

After the JCPOA was agreed by the parties, there are two views on the position of the JCPOA. First, JCPOA is seen as an international agreement (hard law). Second, JCPOA is seen as a non-binding international agreement (soft law). According to the United States, JCPOA is not an international agreement and has no legal binding power. The United States insists that the JCPOA is not a signed agreement and shows political commitment. This was confirmed by Assistant Secretary for Legislative Affairs of the United States Julia

Frifield in her letter to Congress, that the JCPOA is not an international agreement.

*"The Joint Comprehensive Plan of Action (JCPOA) is not a treaty or an executive agreement, and is not a signed document. The JCPOA reflects political commitments between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union".*²

The United States argument has been challenged by some experts. One of them is by Michael D. Ramsey (Professor of Law at the University of San Diego Law School) in his writing which shows several things that show that the commitment in the JCPOA can bind Iran's recognition, namely: JCPOA guidance is very specific with respect to the revocation carried out by the United States, contains detailed about dispute resolution mechanisms, and it is unclear whether United States negotiators made it clear to either party that the agreement was non-binding because Iran stated otherwise.³

On May 8, 2018 the President of the United States Donald Trump decided to stop his commitment to the JCPOA and withdraw his participation from JCPOA participants. In his statement, President Donald Trump underlined two points of the United States withdrawal, which are Iran's bad faith and bad actions. "Iran negotiated the JCPOA in bad faith, and the deal gave the Iranian regime too much in exchange for too little".⁴ Indeed, the issue of US withdrawal has emerged since Donald Trump changed as president to replace Barack Obama.

¹ See Article 2 of Treaty on The Non-Proliferation of Nuclear Weapons, 1970.

² See Letter from Julia Frifield, Assistant Secretary for Legislative Affairs to Mike Pompeo, U.S. Representative, U.S. Congress, 2015. Available at <http://www.humanrightsvoces.org/assets/attachments/documents/11.24.2015.state.dept.letter.jcpoa.pdf>, accessed on 6th of April 2020.

³ Michael D. Ramsey, "Evading the Treaty Power? The Constitutionality of Non Binding Agreements", *FIU Law Review*, Vol. 11, No. 2, 2016, p. 379.

⁴ The White House, 2018, "President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal", <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/>, accessed on 6th of April 2020.

The withdrawal of the United States was accompanied by the reimposition of sanctions against Iran which were suspended after the United States agreed to the JCPOA. These sanctions were reimposed after President Donald Trump signed the presidential memorandum on May 8, 2018. In this presidential memorandum the President of the United States mandated "The Secretary of State and the Secretary of the Treasury shall immediately begin taking steps to re-impose all United States sanctions lifted or waived in connection with the JCPOA".⁵

Iranian Foreign Minister Mohammad Javad Zarif responded to United States withdrawal from the JCPOA by stating "US persistent violations & unlawful withdrawal from the nuclear deal". Several prominent legal experts have also opposed the United States' withdrawal from the JCPOA. One of the experts who oppose the actions of the United States is Matthew Bolton (Professor of Political Science Pace University) who states "In international law, it is a custom that you keep your word. This is a violation of the international norm".⁶

In this study the author tries to describe the status of the 2015 Joint Comprehensive Plan of Action in international law. The author will also analyze the withdrawal of the United States from the 2015 Joint Comprehensive Plan of Action, and see whether the United States has violated international legal obligations of withdrawal or not.

B. STATUS OF THE 2015 JOINT COMPREHENSIVE PLAN OF ACTION ACCORDING TO INTERNATIONAL LAW

In some cases, negotiating an agreement between countries can result in an agreement that does not impose any legal obligations. This agreement creates moral or political obligations and does not require legal obligations for the participants.⁷ Instruments that contain this kind of political commitment are generally referred to as "soft law". According to Michael John Allen and Brian Thompson,

"In international law, political commitments are referred to as non-binding agreements, honorable or decency agreements and such obligations are not legally binding, which of course, does not undermine the legal effects of such measures".⁸

Soft law is the answer to the difficulties faced by countries to make an international agreement. Making the process of international agreements takes a long time, and requires complicated negotiations to reach an agreement. The concept of "soft law agreement" refers to the agreement and the terms of the agreement that do not set out to create legal obligations, imprecise in language, and flexible in context.⁹ In practice, law scholars began to divide international treaties into 2 forms, namely soft law and hard law.

"Hard law, as an ideal type, refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of

⁵ White House, 2018, "Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon", <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>, accessed on 25th April 2020.

⁶ Pace University, "Newsweek Featured Dyson Professor Matthew Bolton in Did Trump Break the Law? U.S. Leaves Iran Deal, Violates World Order and Risks War,

Experts Say", <https://www.pace.edu/news-release-topics/matthew-bolton>, accessed on 1st of May 2020.

⁷ Mojtaba Mireh Gini and Maryam Sedaghat, "A Review of Inconvertibility of Iran Nuclear Deal into an International Treaty", *Budapest International Research in Exact Sciences (BirEx) Journal*, Vol 1 No. 2, 2019, p. 90.

⁸ *Ibid.*

⁹ Ilhami Alkan Olsson, *Four Competing Approaches to International Soft Law*, Stockholm: Stockholm Institute for Scandinavian Law, 2013, p. 180.

*detailed regulations) and that delegate authority for interpreting and implementing the law. [t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation."*¹⁰

One of the reasons why the United States rejects the status of the Joint Comprehensive Plan of Action (JCPOA) as an international agreement is because United States believes the JCPOA does not contain a legal obligation for its participants.¹¹ In addition, the JCPOA is also seen as not meeting the criteria as an international agreement because it was not signed by the participants. The view of the United States shows the tendency that the JCPOA is a soft law. On the other hand, Iran believes that the JCPOA is an international treaty and is binding on the United States through UN Security Council Resolution 2231.

The issue of the JCPOA as an international agreement is hit by several problems. First, from the point of view of its formation, JCPOA participants prefer to use less formal methods than conventional international agreements. Once agreed, the document was not signed by any participants. Based on this, the United States Department of State emphasizes that the JCPOA agreement is a document without signature and not binding under international law.

In fact, a country's consent to be bound by an international treaty can be expressed in various ways under the Vienna Convention 1969. This provision formulated in article 11 which reads:

"The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty,

*ratification, acceptance, approval or accession, or by any other means if so agreed."*¹²

When referring to the JCPOA text, it cannot be found regarding the provisions governing the way participants are bound to international agreements (consent to be bound). Even though this kind of requirement is important to mark the start of the commitment of the agreement participants. Malcolm N. Shaw stated that,

*"The consent of the states parties to the treaty in question is a vital factor, since states may (in the absence of a rule being also one of customary law) be bound only by their consent. Treaties are in this sense contracts between states and if they do not receive the consent of the various states, their provisions will not be binding upon them."*¹³

The next debate is whether the JCPOA meets elements of international agreements. There are at least 2 elements of international agreements that are debated against the JCPOA. The first element is based on the form of the JCPOA instrument. The 1969 Vienna Convention on the Law of Treaties mentions the phrase "whatever its particular designation" in describing international treaties. The 1969 Vienna Convention does not further explain the meaning of the phrase. The Vienna Convention also does not limit its participants to determining the titles of the documents to which they agree.

The name of an international agreement can vary widely, including: "covenant; agreed minutes; charter; notes verbales; memorandum of understanding; convention and agreement". So it is

¹⁰ Gregory C. Shaffer dan Mark A. Pollack, "Hard Versus Soft Law in International Security", *Boston College Law Review*, Vol. 52, No. 4, 2011, p. 1160.

¹¹ Julia Frifield Letter, *Loc.cit.*

¹² Article 2 of Vienna Convention on the Law of Treaties, 1969.

¹³ Malcolm Shaw, *International Law*, Sixth Edition, New York: Cambridge University Press, 2008, p. 817.

possible for Iran and P5 + 1 to establish the Joint Comprehensive Plan of Action as an international agreement. For an example can be seen in the case of Qatar versus Bahrain. The International Court of Justice ruled that, "the Minutes of 25 December 1990, like the exchanges of letters of December 1987, constitute an international agreement creating rights and obligations for the Parties".¹⁴

The element of international agreement that needs to be considered next is the element of "governed by international law". *"According to the International Law Commission's Commentary (ILC), the phrase 'governed by international law' embraces the element of an intention to create obligations under international law"*.¹⁵ This means that the parties to an agreement agree to legally bind themselves to the agreement under international law.

To prove that the element of "governed by international law" is fulfilled, it is necessary to prove the intention of the JCPOA participants. According to the International Court of Justice, the intention is shown by considering "drafting history, the language of the agreement and the circumstances of its conclusion as well as the subsequent practice".¹⁶ Anthony Aust said,

"Intention must therefore be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention".¹⁷

Based on the drafting history, the JCPOA was spearheaded by Iran's violation of the Non-Proliferation Treaty (NPT) and

Iran's failure to implement the IAEA Additional Protocol. As a result, Iran has been subjected to various sanctions, including sanctions from the United States, sanctions from the European Union, as well as sanctions given through UN Security Council Resolutions. This factor is related to the terms used in the JCPOA. The terms or terminology can be a differentiating factor between international treaties and soft law which do not have binding legal force. For example, the term "wishes, may or intentions are used in non-binding instruments and those such as undertakes or shall are reserved for treaties".¹⁸

The Vienna Convention does not regulate the terms that should be used in international treaties, but the practice of forming international agreements so far describes terms that are often used by the parties in establishing legal obligations. According to Anthony Aust,

*"On the contrary, using 'will' instead of 'shall', no employment of terms such as 'undertake' and 'agree' or expressions such as 'come into effect' or 'come into operation' and naming the instrument a 'memorandum' or similar titles can imply the intention of creating gentlemen's agreement."*¹⁹

JCPOA parties emphasized the use of the term voluntary action. The term appears in several parts of the JCPOA. First, the term voluntary can be found in the JCPOA Preamble and General Provisions which reads: *"The International Atomic Energy Agency (IAEA) will be requested to monitor and verify the voluntary nuclear-*

¹⁴ ICJ Reports *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* 1994, p. 122, para. 30.

¹⁵ Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2007, p. 20.

¹⁶ Nader Mardani dan Mohammad Mehdi Hooshmand, "JCPOA; A Dialectical Paradigm of Treaty and other International Instruments", *Journal of Politics and Law*, Vol. 9, No. 3, 2016, p. 75.

¹⁷ *Ibid.*

¹⁸ Claude Schenker, *Practice Guide to International Treaties*, Swiss: Directorate of International Law DIL, 2015, p. 7.

¹⁹ Anthony Aust, "The Theory and Practice of Informal International Instruments", *ICLQ*, Vol. 35, No. 4, 1986, p. 800.

*related measures as detailed in this JCPOA.*²⁰

This terminology is also reused in several articles of the JCPOA. On Article 1 of the JCPOA, it says that "Iran will abide by its voluntary commitments, as expressed in its own long-term enrichment and enrichment R & D ..."²¹ Next, in Article 15 of the JCPOA, it says that "Iran will allow the IAEA to monitor the implementation of the voluntary measures for their respective durations".²²

In fact, the provisions of the JCPOA are a reaffirmation of Iran's commitment based on the NPT. This can be found in the Preamble and General Provisions Joint Comprehensive Plan of Action, which reads "Iran reaffirms that under no circumstances will Iran ever seek, develop or acquire any nuclear weapons".²³ This provision does not create new obligations towards Iran, but rather reaffirms the provisions in the NPT which prohibit Iran as a (Non-Nuclear Weapon States) from developing nuclear weapons.

*"Each non-nuclear-weapon State Party to the Treaty undertakes... not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices".*²⁴

In this regard, one of the instruments that can be used as a comparison in the JCPOA case is the 1994 Agreed Framework. Like the JCPOA, the 1994 Agreed Framework is also a nuclear-related agreement. This agreement was signed by North Korea and the United States. Although signed, the 1994 Agreed

Framework is not an international agreement because it does not create a legal obligation for the parties. The provisions of the Agreed Framework reaffirm North Korea's obligation under the NPT not to develop nuclear weapons because of its status as Non-Nuclear Weapon States (NNWS).

*"The DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and will allow implementation of its safeguards agreement under the Treaty"*²⁵

Other JCPOA participants have indirectly emphasized that Iran's legal obligations are born under the NPT. This can be seen in a joint meeting between three JCPOA participants representing European representatives in E3- / EU-Statement on the JCPOA of 4 May 2019. The meeting discussing the JCPOA was attended by High Representatives of the European Union, French Foreign Minister, German Foreign Minister, and the British Foreign Minister. The results of the meeting stated that;

*"We call upon Iran to continue implementing in full its commitments under the JCPOA as well as its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons".*²⁶

The final factor that can determine the intention of JCPOA participants is based on the circumstances of its conclusion as well as the subsequent practice. This factor relates to the actions taken by the agreement participants after the instrument was agreed upon. The act of registering international treaties with the UN Secretariat is a good example of

²⁰ Para. (x) Preamble and General Provisions Joint Comprehensive Plan of Action, 2015.

²¹ *Ibid.*, Article 1.

²² *Ibid.*, Article 15.

²³ *Ibid.*, para. (iii) Preamble and General Provisions.

²⁴ Article 2 of Treaty on The Non-Proliferation of Nuclear Weapons, 1970.

²⁵ Para. (iv) Agreed Framework Of 21 October 1994 Between The United States of America and The Democratic People's Republic of Korea, 1994.

²⁶ Federal Foreign Office, 2019, "E3- / EU-Statement on JCPOA", <https://www.auswaertiges-amt.de/en/newsroom/news/e3-eu-statement-on-jcpoa/2215416>, accessed on 10th April 2020.

demonstrating the parties' intentions in making international treaties. In the case of the JCPOA, the participants do not register the agreement with the UN Secretariat as stipulated in Article 102 of the UN Charter, which reads:

*"Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."*²⁷

Based on the previous explanation, the JCPOA did not meet the criteria as a binding international agreement. German Foreign Minister Michael Roth said that, "The Joint Comprehensive Plan of Action, as the JCPOA is officially called, is not a treaty under international law, but an action plan".²⁸ Based on these facts, the intention of the JCPOA participants was more towards political agreement and not aimed at making legal obligations.

*"In other words, the intention of joint plan of action document in the use of certain terms and expressions indicates that this discretion does not mean the term freedom of wills in concluding a contract and implies that each party, by doing so, prepares and stage for conclusion of the final treaty and legally, failure to implement these obligations does not create any effect".*²⁹

The problems arising from the JCPOA actually do not stop at the question of whether the instrument is an international agreement or not. If investigated further, it is necessary to pay attention to whether the JCPOA can become a source of international

law or not, especially after it was adopted by UN Security Council Resolution 2231.

The JCPOA participants brought their agreement at the 7488th UN Security Council meeting which resulted in UN Security Council Resolution 2231. The UN Security Council resolution itself is one of the authorities of the UN Security Council in order to take the necessary steps to maintain international peace and security. The UN Security Council Resolution was formed under Article 41 Chapter VII of the UN Charter, namely:

*"The Security Council may decide what measures not involving the use of the armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures..."*³⁰

Before the UN Security Council Resolution 2231 was issued, the UN Security Council had already issued 6 resolutions related to Iran's nuclear, namely UN Security Council Resolution 1696 (2006), UN Security Council Resolution 1737 (2006), UN Security Council Resolution 1747 (2007), Resolution United Nations Security Council 1803 (2008), United Nations Security Council Resolution 1835 (2008), and UN Security Council Resolution 1929 (2010). UN Security Council Resolution 2231 was adopted at the 7488th UN Security Council meeting on July 20, 2015. This resolution consists of 104 pages, including two annexes, one of which encloses the overall JCPOA text.

UN Security Council Resolution 2231 has a major impact on the implementation of the JCPOA. This resolution also marks the lifting of the previous UN Security Council sanctions and an ending to the six UN Security Council resolutions mentioned above.

²⁷ Article 102 of Charter of the United Nations 1945.

²⁸ Stefan Talmon, 2020, "Germany Finally Comes Clean about The Legal Status of The JCPOA: No More Than Soft Law", <https://gpil.jura.uni-bonn.de/2020/03/germany-finally-comes-clean->

[about-the-legal-status-of-the-jcpoa-no-more-than-soft-law/](#), accessed on 9th of April 2020.

²⁹ Mojtaba Mireh Gini dan Maryam Sedaghat, *Op.cit.*, p. 92.

³⁰ Article 41 of Charter of the United Nations 1945.

*"Decides, acting under Article 41 of the Charter of the United Nations, that, upon receipt by the Security Council of the report from the IAEA described in paragraph :5 (a) The provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015) shall be terminated"*³¹

The UN Security Council basically has a function to maintain international peace and security.³² This function is shown by the UN Security Council in UN Security Council Resolution 2231. In this resolution, the UN Security Council ensures that Iran's nuclear program is aimed at peaceful and not military purposes, so as to prevent disturbances to international peace and security.

It should be noted that the preliminary provisions in the UN Security Council Resolution explain the scope, object and purpose of the resolution, which in this case is "affirming that full implementation of the JCPOA will contribute to building confidence in the exclusively peaceful nature of Iran's nuclear program".³³ Furthermore, the UN Security Council reiterated that,

"Emphasizing that the JCPOA is conducive to promoting and facilitating the development of normal economic and trade contacts and cooperation with Iran, and having regard to States' rights and obligations relating to international trade".³⁴

In order to achieve the objectives of the resolution as referred to above, the UN Security Council "endorses the JCPOA, and

urges its full implementation on the timetable established in the JCPOA".³⁵ The UN Security Council also asks every member state of the United Nations as well as regional and international organizations to take actions that can support the implementation of the JCPOA. This is stated in the second paragraph of UN Security Council Resolution 2231 which reads:

*"Calls upon all Members States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA."*³⁶

The whole text of JCPOA is appended to Resolution 2231 as Annex A.³⁷ This further demonstrates the linkage of the JCPOA as an instrument attached to UN Security Council Resolution 2231. As the Secretary General said, "The Joint Comprehensive Plan of Action is only one part of resolution 2231 (2015)".³⁸ Without UN Security Council Resolution 2231, the JCPOA cannot be operated. Meanwhile without the JCPOA, UN Security Council Resolution 2231 would lose its meaning, object or purpose. So that the UN Security Council Resolution 2231 and the JCPOA as its attachments must be seen as one unit, unless the resolution states otherwise.

However, there are still different views regarding the binding strength of UN Security Council Resolution 2231. Some views argue that UN Security Council

³¹ Para. 7 of UN Security Council Resolution 2231, 2015.

³² Article 24 of Charter of the United Nations, 1945.

³³ Preamble of UN Security Council Resolution 2231, 2015.

³⁴ *Ibid.*

³⁵ Para. 1 of UN Security Council Resolution 2231, 2015.

³⁶ *Ibid.*, para. 2.

³⁷ James Crawford (et.al), *The International Legal Order: Current Needs and Possible Respons*, Leiden: Koninklijke Brill, 2017, p. 33.

³⁸ United Nations, "Fifth Report of the Secretary-General on the implementation of Security Council resolution 2231", <https://www.undocs.org/S/2018/602>, accessed on 20th of April 2020, para. 6.

Resolution 2231 does not create an international legal obligation for JCPOA participants. UN Security Council Resolution 2231 is also considered not obliging its member countries to implement the provisions of the JCPOA. Brian Hook stated that "Resolution 2231 did not transform the JCPOA from a nonbinding political arrangement".³⁹

This problem was raised from the term used by the UN Security Council in this resolution. Terms such as "calls upon, urges, and demands" are not considered to create legal obligations. "It is generally understood that when the Council uses other verbs, such as 'calls upon' or 'urges' or even 'demands', 'it is not imposing legally binding obligations'".⁴⁰

One of the most against that UN Security Council Resolution 2231 creates a legal obligation is John Bellinger (former Legal Adviser for the U.S. Department of State and the National Security Council). John Bellinger rejected the binding power of this resolution based on the terminology used in this resolution. The choice of the term used by the UN Security Council is seen as merely creating voluntary action, because the Security Council has avoided using stronger terms such as mandate or decisions.

"The UNSC 'calls on' all UN member states to support implementation of the JCPOA, but it does not obligate the United States to do so as a matter of international law".⁴¹

In this regard, it is not correct to interpret UN Security Council Resolution 2231 based only on the terminology in the

text. Another consideration that must be considered is the context and purpose of the resolution. In other words, UN Security Council Resolution 2231 must be viewed in its entirety, from its preamble to its annex, and take into account the subsequent statements and practices of members of the UN Security Council and the countries that are subject to this resolution.

One of the examples about interpretation of the term UN Security Council Resolution can be found in the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY emphasizes that a UN Security Council resolution must be interpreted literally and logically. As described by the ICTY as follows:

"The Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account".⁴²

John Bellinger's opinion against the legal obligations generated by UN Security Council Resolution 2231 is incorrect. The argument is not in accordance with the practice of the UN Security Council Resolution that has been running so far. The term "calls upon" is no stranger to both Iran

³⁹ U.S. Department of State, 2020, "Press Briefing with Brian Hook, Special Representative for Iran and Senior Advisor to the Secretary of State", <https://www.state.gov/press-briefing-with-brian-hook-special-representative-for-iran-and-senior-advisor-to-the-secretary-of-state/>, accessed on 1st of May 2020.

⁴⁰ Passblue, 2020, "The United States Has an Explicit Right to Initiate Snapback under United Nations Security Council Resolution 2231", [https://www.passblue.com/wp-content/uploads/2020/08/LEGAL-BRIEF-The-United-](https://www.passblue.com/wp-content/uploads/2020/08/LEGAL-BRIEF-The-United-States-Has-an-Explicit-Right-to-Initiate-Snapback-under-UNSCR-2231-233144249.pdf)

[States-Has-an-Explicit-Right-to-Initiate-Snapback-under-UNSCR-2231-233144249.pdf](https://www.passblue.com/wp-content/uploads/2020/08/LEGAL-BRIEF-The-United-States-Has-an-Explicit-Right-to-Initiate-Snapback-under-UNSCR-2231-233144249.pdf), accessed on 2nd May 2020.

⁴¹ John Bellinger, 2015, "The New UNSCR on Iran: Does it Bind the United States (and future Presidents)", <https://www.lawfareblog.com/new-unscr-iran-does-it-bind-united-states-and-future-presidents>, accessed on 11th of April 2020.

⁴² *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Dusko Tadic a/k/a "Dule")*, ICTY Appeals Chamber Decisions, [1995], para. 71-72.

and the United States. Referring to the UN Security Council Resolution 1737 of 2006, the use of the phrase has been used several times in this UN Security Council decision. For example in paragraph 8 it is stated that "calls upon Iran to ratify promptly the Additional Protocol".⁴³

UN Security Council Resolution 276 (1970) is an example that can be used as a comparison to the terms in UN Security Council Resolution 2231. UN Security Council Resolution 276 addresses the presence of South Africa in Namibia (Namibia Case). This resolution contains phrases that are deemed not to create legal obligations, including: "strongly condemns, declares, considers, calls upon, requests".⁴⁴ The International Court of Justice in the Namibia Advisory Opinion 1971, considered that the terms "declares" in paragraph 2 and the terms "calls upon" used in paragraph 5 of UN Security Council Resolution 276 are binding.⁴⁵

The International Court of Justice opinion illustrates that the terms used in UN Security Council Resolutions do not automatically limit their binding power. According to the International Court of Justice, it is also necessary to pay attention to circumstances which may help to demonstrate legal obligations. Likewise in the case of UN Security Council Resolution 2231, the use of the term "calls upon" does not limit the legal force of the Security Council Resolution.

"As stated by the ICJ, the terms of the Security Council Resolution should be interpreted considering 'all circumstances that might assist in determining [their] legal consequence'".⁴⁶

The International Court of Justice noted in the Kosovo Advisory Opinion that, "resolutions of the Security Council must be read in conjunction with the general principles set out in annexes".⁴⁷ In this case, the JCPOA as an annex of UN Security Council Resolution 2231 cannot be ruled out. Both are instruments that are interrelated with each other. The success of this resolution depends on the implementation of the parties to implement their commitments in the JCPOA.

UN Security Council Resolution 2231 and the JCPOA are sources of binding international law for JCPOA participants. This is based on Article 25 of the UN Charter which states, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council".⁴⁸ Although the Security Council was not aimed to be a legislative body, it does have a lawmaking function and its decisions are binding under international law.⁴⁹

Based on the explanation above, even though the JCPOA cannot stand alone as an international agreement. However, the presence of UN Security Council Resolution 2231 which adopted the JCPOA created the obligations contained in the JCPOA binding as law. Therefore, based on UN Security Council Resolution 2231, JCPOA participants must comply with the commitments contained in UN Security Council Resolution 2231 and be bound by the obligations arising from the JCPOA.

⁴³ Para. 8 of UN Security Council Resolution 1737, 2006.

⁴⁴ Bailliet, Cecilia and Larsen, Kjetil Mujezinović, *Promoting Peace through International Law*, Oxford: Oxford Press, 2015, p. 183.

⁴⁵ *Ibid.*

⁴⁶ Katayoun Hosseinnejad, 2018, "The International Community and the Challenge to the Rule of Law: The Future of Iran Nuclear Deal", <http://opiniojuris.org/2018/05/21/the-international-community-and-the-challenge-to-the-rule-of-law-the-future-of-iran-nuclear-deal/>, accessed on 3rd May 2020.

future-of-iran-nuclear-deal/, accessed on 3rd May 2020.

⁴⁷ *International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para 95.

⁴⁸ Article 25 of Charter of the United Nations, 1945.

⁴⁹ Alan Boyle dan Christin, Chinkin, *The Making of International Law*, Oxford: Oxford University Press, 2007, p. 233.

C. UNILATERAL WITHDRAWAL OF THE UNITED STATES FROM THE JOINT COMPREHENSIVE PLAN OF ACTION ADOPTED BY UN SECURITY COUNCIL RESOLUTION 2231

The issue of US withdrawal from the JCPOA began to emerge since Donald Trump was elected president of the United States in 2016. During the United States presidential election campaign, Donald Trump strongly criticized the JCPOA. After taking office as president of the United States, a new policy of maximum pressure on the Iranian economy was created to force Iran to end its destabilizing activities in the Middle East and to permanently end its missile and nuclear weapons program.

The United States has gradually begun to reduce their commitment to the JCPOA. The United States is also seeking to renegotiate the Iran nuclear issue, because the JCPOA is deemed incapable of limiting Iran as a non-nuclear country but only delaying Iran becoming a nuclear state.⁵⁰ However, the United States' attempt to renegotiate failed because it did not receive support from other JCPOA participants.

On May 8, 2018, the United States declared its withdrawal from the JCPOA. This was conveyed directly through President Donald Trump's state address at the White House. In his speech it is said "I am announcing today that the United States will withdraw from the Iran nuclear deal".⁵¹ Not long after the presidential speech, Donald Trump signed a presidential memorandum.

Based on the presidential memorandum, the United States not only

ended its participation as a participant in the JCPOA, but also reimposed sanctions against Iran that were previously suspended.⁵² There are two types of sanctions that the United States has imposed on Iran. The main sanctions are those that apply to activities that have links between Iran and the United States, including transactions involving US citizens or overseas subsidiaries of US companies.⁵³ Since the United States declared its withdrawal on May 8, 2018, the United States has no longer participated in meetings or activities related to the JCPOA framework.

The second type of sanction is secondary sanctions. Secondary sanctions target foreign legal entities that carry out transactions with Iran. These sanctions have a major impact on various industrial sectors in the world, especially the JCPOA participating countries. For example in Germany, these US sanctions affected major German companies, such as: Volkswagen, Daimler and Siemens.⁵⁴ Since the United States declared its withdrawal on May 8 2018, the United States has no longer participated in meetings or activities related to the JCPOA framework.

Based on the JCPOA Preamble and General Provision, the Joint Commission is a commission consisting of P5 + 1 countries and Iran that will monitor the implementation of the JCPOA and will carry out the functions provided in the JCPOA. One of the functions of the Joint Commission is the authority to discuss issues regarding dispute resolution arising from the implementation of the JCPOA.⁵⁵

⁵⁰ Paul K. Kerr dan Kenneth Katzman, 2018, "Iran Nuclear Agreement and U.S. Exit", <https://fas.org/sgp/crs/nuke/R43333.pdf>, accessed on 6th of April 2020.

⁵¹ White House, 2018, "Remarks by President Trump on the Joint Comprehensive Plan of Action", <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-jointcomprehensive-plan-action/>, accessed on 6th of April 2020.

⁵² Jean Galbraith, "Contemporary Practice of the United States Relating to International Law", *The American*

Journal of International Law, Vol. 112, No.3, 2018, p. 517-518.

⁵³ Latham dan Watkins, 2018, "Top 10 Things to Know About Expanded US Sanctions on Iran", <https://www.lw.com/thoughtLeadership/lw-top-10-things-to-know-expanded-us-sanctions-iran>, accessed on 6th of April 2020.

⁵⁴ Stefan Talmon, *Loc.cit.*

⁵⁵ Para. (ix) Preamble and General Provision Joint Comprehensive Plan of Action, 2015.

In the case of the United States, it is known that the United States has never brought its dispute with Iran to the Joint Commission as required in article 36 of the JCPOA. On the other hand, the United States declared its unilateral withdrawal on May 8, 2018. Then the United States proposed to reform the JCPOA replacement agreement. On May 21, 2018, United States Secretary of State Mike Pompeo, stated that the United States Government is open to new agreement-making steps with their allies, including Iran, if Iran is willing to accept major changes in the new agreement.⁵⁶ This step did not get a positive response from other JCPOA participants, they refused to form a new agreement to replace the JCPOA.

Responding to the withdrawal of the United States from the JCPOA, Iran immediately expressed its objection through a letter from Foreign Affairs Minister of Iran Mohammad Javad Zarif. The letter was then forwarded to Majid Takht Ravanchi (Permanent Representative of the Islamic Republic of Iran to the United Nations) which was addressed to the Secretary General of the United Nations. The letter contains Iran's objections to the United States unilateral withdrawal and reimposing sanctions against Iran. The activities of the United States are considered to have violated international law.

"Through the letter, he has brought to your kind attention several matters related to the unlawful withdrawal of the United States of America from the Joint Comprehensive Plan of Action and the unlawful imposition of its unilateral sanctions against the people and Government of the Islamic

*Republic of Iran, in clear violation of its obligations under international law, including Security Council resolution 2231 (2015)".*⁵⁷

Iran considers that the United States unilateral withdrawal from the JCPOA is a violation of UN Security Council Resolution 2231.

*"The unlawful United States act of unwarranted withdrawal from the JCPOA and the reimposition of its sanctions entail United States responsibility under the Charter and international law. The United States has violated resolution 2231 (2015), which was in fact submitted by the United States itself and was adopted unanimously by the Security Council on 20 July 2015".*⁵⁸

According to Mohammad Javad Zarif, Iran has tried to comply with all of its commitments in the JCPOA. Reports issued by the International Atomic Energy Agency (IAEA), which monitors Iran's nuclear program, have also demonstrated Iran's compliance with the JCPOA.

*"Indeed, it is the first time in United Nations history that a permanent member of the Security Council punishes United Nations Members for complying with a Security Council resolution".*⁵⁹

The United States has the opposite argument with Iran. United States Secretary of State Michael R. Pompeo considered that the JCPOA and UN Security Council Resolution 2231 are completely separate

⁵⁶ U.S Department of State, 2018, "After the Deal: A New Iran Strategy", <https://www.state.gov/after-the-deal-a-new-iran-strategy/>, accessed on 6th of April 2020.

⁵⁷ Letter dated 8 May 2020 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General,

A/74/850-S/2020/380, available at <https://digitallibrary.un.org/record/3863953>, accessed on 6th of April 2020, p.1.

⁵⁸ *Ibid.*, p. 2.

⁵⁹ *Ibid.*, p. 3.

documents.⁶⁰ So that the United States does not need to convey its withdrawal from the JCPOA to the UN Security Council. Likewise, the United States has again given sanctions to Iran. Michael R. Pompeo assessed that the actions of the United States have followed the rules established by Security Council Resolution 2231.⁶¹

Brian Hook (Representative for Iran and Senior Policy Advisor to The Secretary of State) stated that UN Security Council Resolution 2231 and JCPOA are mutually exclusive instruments. According to Brian Hook, the United States has the right to withdraw its commitment as a participant in the JCPOA and re-impose sanctions on Iran.

"One of the points I think it's important for people to understand is, JCPOA participants are free to stop performing nonbinding political commitments at any time without violating international law. Now, they still have to comply with international obligations that are independent of the Iran nuclear deal, and that includes their legal obligations under 2231".⁶²

The arguments made by the United States to justify their actions are inaccurate. First, the United States considers that the JCPOA and UN Security Council Resolution 2231 are separate instruments, so that the United States can withdraw from the JCPOA without violating its obligations under that resolution. As previously explained, the JCPOA and UN Security Council Resolution 2231 are inseparable instruments. UN Security Council resolutions must be viewed as a whole, including attachments that are

attached to them and cannot be separated. The JCPOA text itself has been adopted into Annex A to UN Security Council Resolution 2231.⁶³

UN member states have an obligation to comply with Security Council decisions adopted under Article 25 of the UN Charter. Based on Article 25 of the UN Charter, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".⁶⁴ Article 25 of the UN Charter is reinforced by the provisions of Article 48 of the UN Charter.

"The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine".⁶⁵

Under the provision of the UN Charter, the United States has an obligation to carry out its commitments under the JCPOA which have been adopted by UN Security Council Resolution 2231. "Endorses the JCPOA, and urges its full implementation on the timetable established in the JCPOA".⁶⁶ In fact, the UN Security Council has specifically included Article 25 of the UN Charter into UN Security Council Resolution 2231. It is said that, "Underscoring that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Security Council's decisions".⁶⁷

The JCPOA and UN Security Council Resolution 2231 do not explicitly mention the withdrawal clause. However, by looking

⁶⁰ U.S. Department of State, 2020, "Secretary Michael R. Pompeo At a Press Availability", <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-11/>, accessed on 6th of April 2020.

⁶¹ *Ibid.*

⁶² U.S. Department of State, 2020, "Press Briefing with Brian Hook, Special Representative for Iran and Senior Advisor to the Secretary of State", [https://www.state.gov/press-briefing-with-brian-](https://www.state.gov/press-briefing-with-brian-hook-special-representative-for-iran-and-senior-advisor-to-the-secretary-of-state/)

[hook-special-representative-for-iran-and-senior-advisor-to-the-secretary-of-state/](https://www.state.gov/press-briefing-with-brian-hook-special-representative-for-iran-and-senior-advisor-to-the-secretary-of-state/), accessed on 6th of April 2020.

⁶³ Michael C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law Online*, Vol. 2, No. 1, Jan 1998, p. 86.

⁶⁴ Article 25 of Charter of The United Nations, 1945.

⁶⁵ *Ibid.*, Article 48.

⁶⁶ Para. 1 of UN Security Council Resolution 2231, 2015.

⁶⁷ *Ibid.*, para. 15 Preamble.

at the objectives UN Security Council Resolution 2231, so the United States action clearly contrary to the purpose set by the UN Security Council. The United States itself is a country that is directly involved in the process of drafting and negotiating UN Security Council Resolution 2231. It is the responsibility of the United States to uphold the dignity and authority of the UN Security Council, including implementing UN Security Council Resolution 2231.

The United States claims that although it is no longer a JCPOA participant, the United States maintains its status as a "JCPOA participant State". This was done by the United States to return all UN sanctions against Iran (snapback mechanism). This attitude was shown by the United States on August 16, 2020. The United States through Mike Pompeo submitted a letter of application for a "snapback mechanism" to the UN Security Council to return all sanctions against Iran. In addition, the "snapback mechanism" carried out by the United States also did not comply with the provisions in Security Council Resolution 2231, namely through the Joint Commission.

Snapback mechanism in UN Security Council Resolution 2231 can be found in paragraphs 10-15 in the "Application of Provisions of Previous Resolutions" section. This provision can be used if one of the parties in the JCPOA feels that the other party is not fulfilling its obligations. If the Joint Commission fails to resolve the dispute, then one member of the Security Council has 10 days to submit a new resolution to the Council which reaffirms the agreed sanctions lift process. If no member submits such a resolution within 10 days, the Security Council President can do so.⁶⁸ In both cases, the Council will have 30 days to debate and approve a resolution

mandating the lifting of further sanctions.⁶⁹ If permanent members of the UN Security Council fail to reach agreement, the previous sanctions will be reinstated.

The other JCPOA participants strongly rejected the various arguments of the United States. Russia as a member of the JCPOA states that there is no reason for the United States to withdraw its commitment from the JCPOA, because Iran has strictly complied with its obligations which are regularly confirmed by the IAEA. According to Russia, UN Security Council Resolution is an international law and must be implemented by all UN member states. Permanent Representative of Russia to the UN Vassily Nebenzia stated:

*"US officially pulled out from its resolution 2231 and JCPOA obligations, closed the door behind and engaged in unilateral pressure by re-imposing and reinforcing national sanctions against Iran, which are contrary to the aims of both the JCPOA and the resolution 2231."*⁷⁰

British Prime Minister Theresa May, German Chancellor Angela Merkel and French President Emmanuel Macron issued a joint statement discussing the sustainability of the JCPOA. These countries made sure to keep their commitments in the JCPOA and reminded again that the JCPOA has been ratified through UN Security Council Resolution 2231 which has the force of law.

"This resolution remains the binding international legal framework for the resolution of the dispute about the Iranian nuclear programme. We urge all sides to remain committed to its

⁶⁸ Andrea Berger, 2015, "Explaining UN 'Snapback' in the Iran Deal", <https://rusi.org/commentary/explaining-un-snapback-iran-deal-0>, accessed on 6th of April 2020.

⁶⁹ Para. 11 of UN Security Council Resolution 2231, 2015.

⁷⁰ Permanent Mission of the Russian Federation to the United Nation, 2020, "Statement by Vassily Nebenzia,

Permanent Representative of Russia to the UN, at an open VTC of UNSC members under agenda item Non-Proliferation", https://russiaun.ru/en/news/nonproliferation_300620, accessed on 6th of April 2020.

*full implementation and to act in a spirit of responsibility.”*⁷¹

The High Representative of the European Union also emphasized the importance of participants' compliance with UN Security Council Resolution 2231 and the JCPOA by stating, “for the sake of our own collective security, not only the European Union is determined to preserve the deal, but also expect the rest of the international community to continue to do its part to guarantee that it continues to be fully implemented”.⁷²

As requested by the UN Security Council, the Secretary General will provide a report to the UN Security Council every six months on the implementation of UN Security Council Resolution 2231 (2015). In the 7th Report of the Secretary General on the implementation of UN Security Council Resolution 2231 states that,

*“These actions are contrary to the goals set out in the Plan and resolution 2231 (2015). These actions may also impede the ability of the Islamic Republic of Iran to implement certain provisions of the Plan and of the resolution.”*⁷³

Overall, based on the evidence previously described, it is known that the withdrawal of the United States from the JCPOA accompanied by the return of sanctions against Iran and other state entities is contrary to the objectives of the Security Council in UN Security Council Resolution 2231. This resolution fully supports the ongoing cooperation between Iran and the P5 + 1 in implementing the JCPOA. Moreover, decisions issued by the UN Security Council are binding under

Article 25 of the UN Charter. So that UN member countries are required to fulfill their obligations in implementing this decision. Therefore, the United States as a permanent member of the UN Security Council that has agreed to UN Security Council Resolution 2231 should be able to maintain its commitment.

D. CONCLUSION

The JCPOA and UN Security Council Resolution 2231 are interrelated instruments. The purpose of UN Security Council Resolution 2231 is to maintain international security and security, especially regarding Iran's nuclear power. Without UN Security Council Resolution 2231, the JCPOA cannot be implemented. Meanwhile without the JCPOA, UN Security Council Resolution 2231 will lose its meaning, object, or awareness. UN Security Council Resolution 2231 and the JCPOA as its attachments should be seen as a single unit and as a source of binding law for JCPOA participants.

The United States unilateral withdrawal from the JCPOA resulted in 2 things. First, the United States ceases its participation as a participant in the JCPOA and second, violates UN Security Council Resolution 2231. The United States claims that they have the right to withdraw from the JCPOA and reinstate sanctions unilaterally. In fact, the JCPOA and UN Security Council Resolution 2231 are two inseparable instruments. American action contrary to the objectives of UN Security Council Resolution 2231. The withdrawal of the United States from the JCPOA is a violation

⁷¹ GOV.UK, 2018, “Joint statement from Prime Minister May, Chancellor Merkel and President Macron following President Trump's statement on Iran”, <https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran>, accessed on 6th of April 2020.

⁷² European Union, 2018, “Remarks by HR/VP Mogherini on the statement by US President Trump regarding the

Iran nuclear deal (JCPOA)”, https://eeas.europa.eu/headquarters/headquarters-homepage/44238/remarks-high-representative-vice-president-federica-mogherini-statement-us-president-trump_en, accessed on 6th of April 2020.

⁷³ United Nations, “Seventh Report of the Secretary-General on the implementation of Security Council resolution 2231 (2015)”, <http://undocs.org/S/2019/492>, accessed on 6th of April 2020, para. 2.

of its obligations under Article 25 of the UN Charter.

It is better to establish clearer rules regarding the position of international instruments outside the source of the law stipulated in Article 38 (1) of the Statute of the International Court of Justice. Including the establishment of clearer legal provisions regarding the formation of developed international treaties, because the provisions of the 1969 Vienna Convention have several deficiencies to resolve problems regarding current international treaty practices.

The United States must consistently implement the provisions of the JCPOA until it expires on October 18, 2025. United States withdrawal and sanctions are not consistent with UN Security Council Resolution 2231. Therefore, it takes an active role from another members of the UN Security Council to keep the United States implements for its commitments

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