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## **SOME LEGAL ASPECTS OF IRAN'S NUCLEAR PROGRAMME**

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### **Introduction**

1. Dear friends and colleagues. Let me first thank Professor Black-Branch and Fleck for putting together another productive meeting of the International Law Association's Committee on Nuclear weapons, non-proliferation and contemporary international law. We had a good set of discussions in Brighton, and I'm pleased that we are continuing that here in London today.
2. I also thank you for giving me the opportunity to participate in a panel with Daniel Joyner. Dan and I have known each other for many years. While we do not always agree with each other, it is always a pleasure to hear him argue his points. His latest book, *'Interpreting the Nuclear Non-Proliferation Treaty'*, has been well received by the legal community. I strongly suspect that this is not the last time we will hear from Dan.
3. This session will debate Iran's nuclear programme. This is not an easy debate, nor is it one that is straightforward, but one that nevertheless critically important. Let me be clear. What is at stake here is not fine matters of legal interpretation, but matters of war and peace, and issues relating to the very foundation of United Nations law.
4. The development of nuclear energy has important benefits and applications, most notably in electricity generation and medical science. However, the same technology and materials can also be adapted and utilised in nuclear weapons, to wreak havoc on an almost unimaginable scale. It is the Janus-like nature of nuclear research and technology (as well as the possibility of a severe nuclear accident) that create concern about the development of new nuclear power programmes. This is especially so if such programmes, for whatever reason, are established under a veil of secrecy. The current controversy surrounding Iran's nuclear plans is a case in point.

### **Iran and nuclear energy**

5. Let us be honest about this. Iran's secrecy has given rise to considerable suspicion and distrust of the country's intentions with regard to its nuclear technology. Consequently its programme may, even if it was always meant to be peaceful, have a profound impact on regional stability and,



indeed, international peace and security as a whole. This, of course, makes verification and transparency all the more important. I will come back to that.

6. Let me first say that I don't intend to dispute Iran's right to develop nuclear energy. The principles of free consent and good faith are universally recognized in international law. Together with the principle of the equal rights and self-determination of peoples, they form the bedrock of international relations. Iran is a sovereign state. As such, it has the right to enter freely into agreement on whatever subject matter it desires, and, under protection of the principle of non-interference in domestic affairs, to unilaterally develop nuclear energy.
7. However, the right to conclude treaties is not without restrictions. Nor is a state's sovereignty limitless: state sovereignty has been increasingly diminished through the establishment of inter-governmental or supranational organizations with various degrees of norm-creating power. The Security Council has, at several occasions, agreed legally binding resolutions limiting Iran's rights to develop the nuclear fuel cycle.
8. In my mind, therefore, the Iranian issue highlights the conflict between the principles of non-interference and self-determination and the collective security system of the United Nations. While insisting that other nations respect Iran's rights, the country has not fulfilled its own obligations under the United Nations Charter.
9. Iran argues that international law gives it an inalienable right to develop nuclear energy, as long as it does so for peaceful purposes and in conformity with the NPT. The reality, however, is that Iran's right to develop nuclear energy is constrained by its obligations under the UN Charter, and by the NPT itself.

### **The UN Charter as applied to the Iranian case**

10. Let us first and foremost turn to the UN Charter.
11. Article 103 of the UN Charter stipulates that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. This rule is repeated in article 30 of the Vienna Convention on the Law of Treaties. These provisions are designed to ensure that a state, a grouping of states, or an international organization cannot agree on something that would effectively circumvent the UN Charter.
12. Moreover, article 103 protects and upholds the authority of the Security Council, which has primary responsibility for the maintenance of international peace and security. And finally, all UN member states have agreed, in Article 25, 'to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

13. Individual member states do not have the right to judge the legality of Security Council decisions, although they certainly have the right to protest against them. If states could judge the validity of resolutions individually, the binding character of the Security Council's resolutions would be undermined. Article 25 would become meaningless.
14. The World Court has been rather reluctant to explore this further, however. In the absence of a ruling or an opinion, I'd like to refer you here to a 1994 book by Judge Mohammed Bedjaou, entitled *The New World Order and the Security Council: Testing the Legality of its Acts*. It very carefully explores this important issue. Now, as was pointed out in the previous session, we also have Dan's article in the Georgetown Journal of International Law to read as well.

### **The NPT as applied to the Iranian case**

15. Let me now turn to the 1968 Nuclear Non-proliferation Treaty.
16. In my opinion, it is essential not to be careless when we're debating the first paragraph of Article IV. It does not convey any rights to any state. Quite the opposite, it puts limitations to it. Let me explain.
17. The right to develop nuclear power remains intact as long as the party respects its central non-proliferation commitments. If the party does not respect its non-proliferation obligation, that right is forfeited—or at least subject to curtailment. There can be no other interpretation. If the opposite were true, the treaty's purpose would be seriously jeopardized.
18. We also need to be clear about what it means to manufacture a nuclear weapon. The argument that the word only applies to the last turn of the screw is flawed.
19. Dan, for instance, has argued, and I quote from his recent JURIST article, that 'the plain meaning of the term "manufacture" in Article II thus refers to the physical construction of a nuclear explosive device, or perhaps at its broadest reading, to the physical construction of the component parts of a nuclear explosive device.'
20. Let's first take this statement at face value. His interpretation means that activities such as conducting research and development into weapons would generally be considered lawful. That is an interesting observation in its own right.
21. Let's now assume that the use of a term should have consistent meaning throughout the treaty. If so, the interpretation also means that nuclear-weapon states, in theory, would be allowed to assist other states in weapons-related research, as long as they do not participate in the final assembly of the device. I need to ask myself what, if anything, then remains of the non-proliferation treaty.
22. Undeniably, state practice along those lines would seriously undermine the very objectives of the treaty as stated in the preamble, namely that 'the proliferation of nuclear weapons would

seriously enhance the danger of nuclear war'. Hence, this interpretation does not seem to match with the interpretation rules set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

23. A more functionally consistent interpretation of the treaty is simply that *any fuel cycle activity intended to support the acquisition of a nuclear device* would be a matter of non-compliance with the nuclear non-proliferation treaty. This interpretation is fully consistent with former ACDA director Foster's Congressional testimony on the intended meaning of the word manufacture, an interpretation that has not been challenged by any other party to the treaty.
24. I would submit to you, and to the Committee, that any other interpretation puts the functionality, indeed the very utility, of the treaty at risk. I think we need to seek consensus on this point.

### **Safeguards**

25. The importance of effective safeguards, from this perspective, cannot be understated. It was also highlighted during the negotiations of the treaty. For instance, Foster, for instance, noted that 'while the placing of a particular activity under safeguards would not, in and of itself, settle the question of whether that activity was in compliance with the treaty, it would of course be helpful in allaying any suspicion of non-compliance.'
26. The aim of verification is to establish or increase confidence that all parties are implementing an agreement fairly and effectively. However, no verification regime is ever going to be one hundred per cent effective. It is unreasonable to expect any verification system to detect even marginal instances of non-compliance, however defined.
27. At present, Iran implements what's referred to as comprehensive safeguards. It's a slightly misleading name, as these safeguards are not as comprehensive as you may assume. I would like to refer you, if I may, to my own publication *A reflection on the current state of non-proliferation and safeguards*, available for download from the Stockholm Peace Research Institute website. There, I go into considerable depth into the evolution and operation of safeguards, and highlight some challenges facing those systems now.
28. Under this system, the country declares certain types of nuclear material, over certain quantities, and also what nuclear facilities they have on their territory. The IAEA then verifies that the state declaration is correct. States do this under separate agreements with the International Atomic Energy Agency, and the objectives of verification are defined in those agreements. The Agency sometimes refer to this as verifying the *correctness* of the declaration. That's why the IAEA Director-General writes that there has been no diversion of *declared* material.
29. The obvious disadvantage with comprehensive safeguards is that the Agency is mostly confined to verifying what the state has declared. The easiest way to avoid safeguards is therefore to

simply not declare materials or facilities. States have done so in the past. Iraq did so in the 1980s, the DPRK attempted to do it, and Iran did so a couple of years ago.

30. Under an agreement called the Additional Protocol, the IAEA gets access to a larger information flow from the Agency. This enables them to draw conclusions as to whether all nuclear material and all facilities are being declared. Sometimes the Agency refers to this as verifying the *correctness* of the declaration. The IAEA has not done this in respect to Iran.
31. International trust in Iran's long-term intentions cannot be restored simply by making sure that no nuclear material is diverted; and this is why it is important that Iran, indeed all states, ratify the Additional Protocol.

### **Going beyond safeguards**

32. This may not be enough, as far as Iran is concerned. There are obvious difficulties in verifying the nature of certain types of activities, and in particular those that relate directly to the weaponization of a device. These difficulties are compounded by a perceived lack of mandate for the IAEA to verify weaponization. In my mind, they have a clear mandate to do this, as they have a mandate to verify nuclear disarmament. It's clearly stipulated in the IAEA Statute, in both Article III.A.5 and III.B.1. You may also want to look at Article VI (d) of the Treaty of Pelindaba.
33. Perhaps one way forward would be to think of additional verification measures, going beyond the additional protocol.
34. An interim, systemized and legally binding extra-safeguards approach would make IAEA activities in Iran more predictable and effective—to the benefit of all parties. This, in turn, would increase the likelihood that the IAEA's non-routine activities will be brought to a close with the minimum of cost and in a timely fashion.
35. Such a systematized extended-safeguards approach should, as a minimum, give the IAEA access to those information sources previously deemed necessary by the IAEA Board of Governors. Those are, amongst others, access to individuals; access to documentation relating to procurement; and access to documentation relating to research and development.
36. Thank you for your attention.