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Transcript

International Law, Nuclear Non- Proliferation and the Middle East

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Elizabeth Wilmshurst:

Well, welcome to this afternoon's meeting with the International Law Programme on 'International Law, Nuclear Non-Proliferation and the Middle East.' This subject was arranged some months ago, but we could guarantee that it would be topical, as, of course, it is unfortunately. We are not under the Chatham House rule. We are *not* under the Chatham House rule, and a transcript of this event will be available on the web subsequently. Please turn your mobiles off.

We are very glad indeed to have two speakers with such expertise on this subject. On my left is Sir Richard Dalton, who is now as associate fellow in the Middle East and North Africa Programme here at Chatham House, but before that he had a distinguished career in the British diplomatic service. He was the UK ambassador to Iran between 2002 and 2006, before that ambassador to Libya, and various other matters too long to mention. And since he has left the foreign office, he has served as the director general of the Libyan-British business council.

On my right is Dan, Daniel Joyner, professor of law at the Alabama School of Law, and visiting academic at the Oxford School of Law, here at Oxford University. He has written extensively on nuclear non-proliferation law, including a book in 2009, *International Law and the Proliferation of Weapons of Mass Destruction*, and in 2011, *Interpreting the Nuclear Non-Proliferation Treaty*.

Sir Richard is going to set the scene for us with an overview of the current situation, and then Dan is going to speak on the principles of law related to the nuclear issue.

Richard, you can either stand or sit as you wish, provided you...no, you are wired up, so you don't even have to speak into the microphone.

Sir Richard Dalton:

Thank you very much, Elizabeth, for your introduction.

The subject matter, of course, is quite wide, but I believe the interest is chiefly in how law over the current Iranian nuclear programme. I will make some remarks on that subject. First, how I perceive the current state of the negotiations, or approaches towards negotiations with Iran; and, secondly, a little bit about how I see the Iranian internal scene. And I won't just confine my remarks to the Iranian internal scene, I hope in the course of either the first or the second part of what I say I will reflect a little on the domestic pressures on

those seeking to negotiate with Iran, because internal affairs is almost as relevant to eventual outcomes in that side of the negotiating equation as they are in the other.

So, there is undoubtedly, at present, an opening for resumed negotiations. As I am sure you have picked up, there are two avenues, which are showing just a little bit of possibility. One is the dialogue between Iran and the International Atomic Energy Agency (IAEA) director general [Yukiya Amano] and his staff; and the other is the dialogue between Lady [Catherine] Ashton on behalf of the six countries [US, UK, France, Russia, China, and Germany], and [Saeed] Jalili on behalf of Iran.

The IAEA has been responding since the middle of last year to a decision taken by the Iranian system – and I use that word advisedly – the system as a whole to try and confront the remaining issue in the long series of issues that have been addressed over the years by the IAEA with Iran. And the one set of issues that remain unresolved, namely the potential military dimensions of Iran's nuclear activities, all set out in the annex to the November report by Mr [Yukiya] Amano. And the Iranians recognize that they will never normalize their situation in the IAEA and the UN Security Council until they have set international minds at rest.

So, the haggling continues on an agenda for the IAEA to deal with Iran. As I understand it, a sticking point is how open-ended such enquiries by the IAEA might be. Iran wishes to close off discussion, the IAEA needs to assure itself that Iran's information under its safeguards agreement on nuclear and nuclear-related matters is full, complete, and accurate. So, they need to be able to investigate, in accordance with their mandate as they interpret it, not just matters related to nuclear materials, but also nuclear-related matters, which include the potential military dimensions. And they are not prepared to close off their enquiries if, in the course of making them, matters get thrown up which they need to investigate thoroughly. Iran may be interpreting the mandate of the IAEA more restrictively, and I believe that is the point on which the current discussions turn.

The set back in the February visit of the IAEA was not the end of the story. Recently, the Iranians have made clear publically that it would be possible for the IAEA to visit this particularly sensitive site, Parchin, provided that the modalities, namely the agenda and method of proceeding for the overall enquiry into potential military dimensions is agreed first. So, let us hope that both sides show will and flexibility to reach an agreement, and allow those indispensable enquiries by the IAEA to go forward.

Secondly, on the exchanges between Lady Ashton and Jalili, it appears that the Iranians have dropped the preconditions they set in Istanbul in January 2011, namely that the discussion of the nuclear programme would only be possible if sanctions were unwound, and if, upfront, Iran's right to enrich uranium was admitted not just in distant theory but in actual practice by the opposing side. I say 'appears' because, naturally enough, both sides are keeping their cards close to their chests. Such press reports of Baroness Ashton's reply that we have seen, it is very recent, and so the full text hasn't leaked yet – if any of you have got it, perhaps you would slip me a copy afterwards – but, it appears that she is standing on the letter of the United Nations Security Council resolutions, namely that the end product of the negotiations should be suspension of Iran's enrichment activities. If that is the case, this is going to be a poor start because as one leading commentator here in London said recently, to think that Iran will surrender by admitting now, at long last, that it should renew its suspension, voluntary suspension – which it ended in mid-2005 – of enrichment activities is delusional. So, it is far too soon to know whether this potential opening towards the resumption of the negotiating track involving Iran and the six countries is a real one or not.

Of course, the background noise in [US] Congress, in our [UK] parliament, in public debate, tends to be not these fine points about a potential diplomatic solution, but about the prospects for a war. I think last week was, or maybe it was this week, anyway, the AIPAC [American Israel Public Affairs Committee] week in Washington has been fascinating in this regard because President Obama seems to have pulled off quite a diplomatic achievement in presenting the US, as ever, as a firm security ally of Israel, but without prejudicing his future negotiating stance, or committing himself to being alongside Israel, if Israel chose to attack in a pre-emptive manner, in other words without there being an actual threat to Israel.

So he seems to have preserved the position that containment of Iran remains an option, that the US has the same autonomy in its defence decisions as Israel claims for itself, and politicking with making war with a third country in the Middle East in a short period is not the name of the game, it is about where US security and political interests actually lie. And, he has not acceded to requests by some pro-Israel lobbies for the terms of any future negotiations to be so tightly defined that a potential outcome in which both sides win is ruled out in advance. I am referring to the ideas that have been put about by many seasoned commentators, including those from Chatham House, that rather than expecting coercion to yield an Iranian surrender, or expecting that a military attack could be a solution, the territory that needs to be explored

combines addressing the underlying reasons for instability in the Middle East and for hostility between the US and its partners, and Iran, together with the search for an inspection, monitoring, and limitation-based assurance that Iran will not take the decision to use its undoubted abilities in aspects of military nuclear technology to actually build a bomb.

So, Obama has resisted the temptation to define the red line as 'nuclear weapons capability', he has stuck with 'possession of a nuclear weapon'. And bearing in mind that three years ago the US was ambiguous on that point, I think this represents quite a significant formulation. It is out there in the open, it is in the face of certain pro-Israeli lobbies in US and elsewhere. And it does, at least, give the possibility that a package building on past offers from the six countries could be negotiated, under which Iran is given incentives *not* to take that decision to build a weapon; but, at the same time, not only deals with the legacy issues, such as the potential military dimensions, but also provides access to give assurance to the international community, particularly the US and Israel, that it would not be able to divert nuclear material for military purposes, and would not be able to surprise the world with a breakout based on covert and undeclared facilities.

I'm going to wrap up in a minute, but I would simply say that from the political and security point of view there is no risk-free option. There is no way of being certain that at some point in the future Iran will not develop a nuclear weapon and deploy it. But, among the considerations that need to be born in mind are that Iran lives in a situation where it faces threats, it is not just threatening in itself. Secondly, the resources of international law can and should be used to constrain Iran's potential, in other words to keep it within the Non-Proliferation Treaty [NPT] regime. And disregarding international law, which is all too easy for hawks, is something which those who favour a peaceful outcome must continue to contest. So, it is great to have Elizabeth and Dan mounting this meeting. And, thirdly, as Obama has been saying, there is still time for a negotiated solution, bearing in mind that the horizon for Iran apparently obtaining its weapons capabilities as a result of technical issues largely, and Iranian political decision. And we are not facing a situation in which it is likely that Iran will suddenly produce capability for a nuclear weapon in 2012. We are still looking at a range of 2013 to 2015 on the worst estimates, under which Iran might be able to do it, should it decide to do so.

So, there is time to try and assemble a credible negotiating strategy by the six countries, and to nudge a highly sceptical Iran towards a more cooperative frame of mind, and more forthcoming actions to address the justified concerns of the international community.

Elizabeth Wilmshurst:

Thank you very much indeed, Richard.

Dan?

Daniel H. Joyner:

Yes, thank you, Elizabeth, and Sir Richard, for allowing me to be here today, it is a great privilege.

What I will do in my time is discuss some of the international legal issues that are... that have been involved in the diplomatic standoff to this point, and I will end with some thoughts about ways forwards. My comments will be necessarily brief on these legal issues. I would be pleased to go into more detail during question time, if desired.

First, on the relevance of international law to the Iran nuclear crisis... It is certainly true that both sides, meaning the P5+1 [the P5 are the five permanent members of the UN Security Council – the US, UK, France, Russia, and China – and the +1 is Germany] and on one side – or really more accurately, the US, Britain, France and Germany on one side – and Iran on the other side, that both sides have used international legal argumentation to attempt to provide legitimacy to their positions and to their actions. And it is in that light that I think understanding international law, accurately interpreted, accurately applied, can help to set the parties' positions correctly, and to help them toward a peaceful resolution.

I will begin with the arguments that Western states, and the four specifically that I mentioned, have mustered in support of their efforts to sanction and otherwise criticize Iran's nuclear programme. These began – and, again, I'll be very brief about this – with the revelation in 2002 of the non-disclosed clandestine facilities at Natanz and Arak, after which there was a determination by the IAEA board of governors that Iran was in non-compliance with its safeguard agreement with the IAEA. After that determination of non-compliance, the board of governors determined that Iran was therefore under a positive obligation – I'm paraphrasing, but – a positive obligation to clear up any outstanding IAEA questions regarding its nuclear programme, and essentially to prove that there was no unsafeguarded, undeclared nuclear activities going on inside Iran. And, I would say that 'positive obligation' as the IAEA board of governors understands it, has extended, as Sir Richard said, not only to the location of fissile materials, but also to dual-use goods, as Sir Richard said, 'nuclear-related' activities. So,

this is the position now of the board of governors of the IAEA, that Iran is under a positive obligation to, as I have sometimes put it, prove the negative – that there are no unsafeguarded activities, there are no undeclared activities.

And, so, it is according to this standard that the IAEA board of governors and then eventually the Security Council have proceeded in their deliberations on what to do about Iran, and Iran's 'failure' as perceived by the board of governors of the IAEA and the Security Council to meet this standard, this burden of evidence, has led to UN Security Council sanctions beginning in 2006 with Resolution 1696, which commanded Iran to cease all uranium enrichment. After that resolution there have been four rounds of sanctioning now, and various UN Security Council resolutions, which tend to take the form of financial sanctions on persons and industries involved in Iran's nuclear programme. Most recently...the most recent sanctions, however, have been applied unilaterally by the US and by the European Union, and these have been placed directly on Iran's central bank, which has made it very difficult for Iran to trade in oil... we know about these.

So, all of this though goes back to the determination by Western governments that Iran has been in breach of its safeguards agreements. This, they argue, is also argue is also in breach of Article 3 of the Nuclear Non-Proliferation Treaty [NPT]; I will talk about that more in a minute. In November, as Sir Richard said, there was an IAEA director general's report to the board of governors, which discussed in the most detail yet these 'possible military dimensions', as the report put it, of Iran's nuclear programme. One has to be careful when describing this report. It is often described in the media as saying that the IAEA has discovered that Iran does indeed have elements of a nuclear weapons programme, or words to that effect. Really what it found was that there were scientific, industrial experiments, research applications going on inside Iran – or at least that national intelligence agencies have reported as such – and that these scientific and industrial applications and research could in fact be used in a nuclear weapons development programme if they were applied to such. And that is really all the report said, that there were capacities in place inside Iran that could be applied to the production of nuclear weapons, and it listed in detail some of these.

That then raised the spectre in the minds of some in the West that there might not be just an Article 3 breach going on inside Iran, meaning with regard to safeguards, but also, potentially, an Article 2 breach of the NPT, meaning that there was 'manufacturing of nuclear weapons', as the treaty puts it, going on inside Iran. Those have been the primary arguments – legal arguments – of

the West in then prosecuting through the UN Security Council, and also unilaterally, a regime of sanctions against Iran.

Let us move then to Iran's arguments, legal arguments. On the safeguards issue: Iran tends to argue that they have been in full compliance with their safeguards agreements, at least since 2002, since the disclosure of the Natanz and Arak facilities. Iran disputes, as Sir Richard mentioned, the IAEA's understanding of its mandate to go beyond, in its monitoring and verification activities, the monitoring and verification of the location of fissile materials inside Iran, because if one reads Iran's safeguards agreements with the IAEA that is all the IAEA is mandated to do: to account for the fissile materials inside Iran. And Iran is of the view that in producing, in particular the November 2011 report, the IAEA has far exceeded its mandate. They also argue that the board of governors of the IAEA has in applying this, what I referred to earlier as the 'positive obligation to prove the negative', Iran argues that the board of governors has also acted outside its mandate.

The board of governors has certainly acted in that way for the first time, one can say that. The board of governors has never, in any other case of non-compliance, observed such a positive obligation to prove the negative, as I have described it, upon any country. Take, for example, South Korea in 2002, where it was discovered that there had been uranium enrichment experiments going on for decades, undisclosed to the IAEA. It is unlikely that nobody in this room, or very few, knew anything about that because it was not widely reported, and very little was done in the IAEA. So, Iran would point to a case like that to say that something similar was going on to what was undisclosed here, and yet the standards applied by the IAEA board of governors in then determining whether safeguards compliance has been restored are quite unique in the case of Iran, and they would say discriminatorily applied.

And, so, talking about that level of cooperation – and Sir Richard talked about that – what is then the level of cooperation that the IAEA board of governors demands in order for it to be satisfied that Iran is in compliance with its safeguards agreement? The answer is no one knows, because it is not in the IAEA statute, it is not in the NPT, it is nowhere, it is not even in the case law, so to speak, the precedential cases that the IAEA has covered, as I say they have never done this before. But that has real, meaningful implications because then no one, neither Iran nor the IAEA board of governors, knows what Iran must do to satisfy the board of governors that it is in compliance with its safeguards. Imagine trying to live up to that standard, meaning no standard.

So, what Iran sees is a very subjectively applied standard for determining cooperation, and this can be seen, for example, in the visit to Parchin, which... a couple of weeks ago when the IAEA inspectors went to the country for the first time in a long time. They wanted to go to the Parchin facility, this is a military facility. It had not been agreed in advance that the IAEA inspectors would go. What nation on earth would allow that, I ask you? And I think that one might, then, understand the Iranian perspective.

Moving on then to... so that is about safeguards. On the NPT issues, the NPT core legal interpretive issues. I told you that Western arguments have been that Iran is in breach of Article 3. I can't go into the full detail here, please read my newest book. But, the basic idea is the West argue that Iran is in breach of Article 3 because Article 3 says 'you must have safeguards agreements.' If you actually read Article Three, what it says in Article 3.4 is that you must maintain, you must 'enter into and maintain a safeguards agreement'. Let me put it this way: non-compliance with an IAEA safeguards agreement, according to the IAEA statutory language, is not equal to a breach of NPT Article Three. The two standards do not map onto each other at all.

So, breach of an IAEA... I mean, non-compliance, that is the word, with an IAEA safeguards agreement, for example, can happen by very technical omissions, if you fail to report exactly the amount of uranium in one of your facilities, that could be non-compliance with your safeguards agreement. That does not at all map on to Article 60 of the Vienna Convention on the Law of Treaties on 'material breach', for example, so the one is not the same as the other. So, Iran argues that they are not in breach of Article 3. They also maintain that Article 4 of the NPT, which provides for an inalienable right to peaceful uses of nuclear energy, is not made conditional, as those in the West have argued, upon full and demonstrated compliance with Articles 1, 2 and 3 to the satisfaction of the IAEA board of governors. This is the legal interpretation of Western governments, that the right to peaceful use in Article 4 is a conditional right, is a derivative right, derivative from full and demonstrated compliance with Articles 1, 2, and 3 of the NPT.

Iran argues that this is incorrect, and they will point, for example, to Article 51 of the UN Charter, which gives an inherent right to self-defence; however, one must report it to the Security Council, one must then stop the unilateral right of self-defence while the Security Council is seized of the matter, and so analogously, if one were to argue one's right of self-defence is extinguished if one fails to report that act of self-defence to the Security Council, well that would be accepted by no one. Inherent rights are not extinguished by – what shall we say – conventional limitations.

Alright, I know I am running out of time, so I am going to move on. The new IAEA report, very briefly. As I said, Iran argues that the IAEA exceeded its mandate. It would also point to all of the technical capabilities that the report alleged were present in Iran, that all of these technical capabilities are possessed by many non-nuclear weapons states, Japan is a prime example, Germany is a prime example. All of the capabilities that were noted in that November IAEA report are possessed by all advanced, industrial, non-nuclear weapons states. And so they would say that the idea those capabilities somehow raise a spectre of an Article 2 violation in and of themselves is quite incorrect, and it does not bare up under scrutiny.

Alright, I will move on now. My legal assessment. One of the frustrations that we often experience in international law is so many of the most interesting legal issues never get adjudicated, jurisdictional and other reasons for that. But, in my opinion, on the core NPT, IAEA legal issues, Iran has been mostly correct in its interpretation of the NPT, interpretation of its IAEA safeguard obligations, interpretation of what the IAEA board of governors has done. However, UN Security Council Resolutions, by virtue of Articles 25 and 103 of the UN Charter, do take precedent over all other rights and obligations in international law. Therefore, Iran is under an obligation, pursuant to Resolution 1696 and following resolutions, to cease uranium enrichment. So, that is the legal position we find ourselves in. It is a difficult one because, again, on the substantive issues, I think Iran is quite correct, largely, but it is under an obligation to cease uranium enrichment because the Security Council has said so.

Let us move on quickly to what are the options... I'm not going to go through these because I am running out of time. What I want to say is that there is a way through this that allows everyone to save face; it is an option that everyone will hate, and that is why you know it is the right option. [Laughter] And it goes something like this: If – and the thing is, this is not just academic, it has already been proposed by Turkey a couple of years ago – it is the idea that, in essence, Iran would be allowed to keep its uranium enrichment activities at Natanz, and at Fordo, and the other facilities; but it would ship its low enriched uranium produced by those processes out to a third party, almost certainly Russia, who would act then to take the materials, account for the materials – there is the transparency, the accountability – account for the materials engaged in the fuel fabrication, and then send it back to Iran for use in the Bushehr reactor, in the Tehran reactor, and in any other nuclear facilities necessary. And then the material would be sent back to Russia for disposal, either through re-processing or otherwise.

What would this do? This would allow Iran to keep enrichment, that part of the nuclear fuel cycle that it considers to be most important, and as Sir Richard said it really is just unrealistic to think that that will not be kept in Iran. But...so that is their victory. For the West, the victory would be a compromise in greater transparency, greater accountability for the declared nuclear material.

Who would hate this the most? Israel. Because, I guess Sir Richard alluded to it, there really is nothing, in my perception, that will satisfy Israel short of Iran completely giving up any nuclear energy aspirations, and I think this is just unrealistic. So I do think that Israel will have to come to terms with an Iran that is at least capable of making nuclear weapons, and that is a situation that is inevitable. But I do think that a negotiated diplomatic resolution that is at this technical level – because that is really all that is in dispute, is Iran's fuel cycle activities – and I do think that a negotiated diplomatic resolution is possible.

Sorry if I have gone over time.

Elizabeth Wilmshurst:

No, thank you very much indeed, Dan.

Before I open this up, Richard, that proposal that Dan mentioned, the one of Turkey, was that the one Brazil and others joined as well? A couple of years ago it was rejected, ignored, whatever by the Security Council. Do you have any comments on that?

Sir Richard Dalton:

There have been many formulations of that proposal in different forms involving different formulae for limiting the level of enrichment inside Iran, for limiting the quantity, for including an export obligation, for linking that export obligation to different end uses involving different countries. So, this material is out there and has been for sometime for negotiators to pick up if they have a mind to do so.

The specific initiative you referred to in which Turkey worked with Brazil was to try and rescue something from the 2009 wreck of the negotiations between Iran and the US and its partners for finding a way to fuel the Tehran research reactor, which is used primarily for the generation of medical products. The proposal was that the amount of low enriched uranium to be held in Escrow outside for Iran be moderated in a slightly different way from the US and its

partners' proposal. It was rejected... the Turkish and Brazilian formulation was rejected largely because of lack of confidence that the arrangements would actually stick.

Secondly, the original motivation behind the US proposal was to extract a sufficiently large quantity of low enriched uranium from Iran, so that Iran would not have, for a certain period of time, a sufficient quantity to enrich to the higher levels needed for a bomb, should it be minded to do so. Because the Turkish and Brazilian reformulation didn't provide sufficient assurance, - and, I believe, also because it hadn't been made in - it wasn't found favour with. And, the clinching reason as explained in Trita Parsi's book about the evolution of Obama's diplomacy with Iran [*A Single Roll of the Dice: Obama's Diplomacy with Iran* (2012)], which I do recommend to people, is that by the time the Brazilians and the Turks had got an agreement, the US was already well on the way to promoting the next round of sanctions and did not wish to be diverted from that.

So, instead of seeing this proposal as, in essence, confidence building, as not doing much, if anything, to inhibit Iran from enriching to the higher level later should it have a mind to, it was seen as an arms control measure rather than as a confidence building measure. My stance at the time was that any agreement with Iran was better than no agreement; but, that was not the view taken in Washington [DC] and other capitals, they were only prepared to have an agreement on their original terms. So, an ability to show the hardliners on both sides that it was possible to reach an agreement that would cooperate, in mutual interest, was lost.

Elizabeth Wilmshurst:

Thank you. Right, from the back, and if you wouldn't mind giving your name and affiliation.

Question 1:

[Incoherent] Are we looking at Iran directly threatening the UK?

Elizabeth Wilmshurst:

Thank you. Do you want to just deal with that...?

Sir Richard Dalton:

I don't believe is an imminent threat to the United Kingdom from Iran, and the only circumstance in which Iran might seek to harm Britain militarily would be if we, in the UK, joined in an attack on Iran, if we made war on Iran. Clearly, in those circumstances, a long-range missile capability, with or without extra especially nasty things in the warhead would be a threat to the UK, but I regard this as a hypothetical threat at present. I think the Prime Minister was cherry picking from the worst-case scenario in order to argue backwards to the imposition of sanctions as a valid means of trying to coerce Iran.

So he wasn't... this worst-case scenario must be something that any defence planner has to consider, but I think that he was only conveying part of the current story.

Elizabeth Wilmshurst:

Thank you. Now, I see we have a microphone, so could you bring it up to the front, please? Because there are three people here... Thank you.

Question 2:

We are fortunate to have the legal opinion from across the ocean because just yesterday I came across this UN Security Council Resolution 487 [1981], which was passed 15-0, including the US and the others. And, I would like you to tell me, one, is there a statute of limitations on UN Security Council... that is a little thing... he is shaking his head, that is a 'no'. Well, it says, number five, 'Calls upon Israel urgently to place its nuclear facilities under IAEA safeguards.' So, you put your finger on the button that it is actually Israel that is the driving force here, I think the rest of the world might forget it. But, what I would like to ask you is that the world has changed even since a few months ago after... we had the Arab Revolution, we have a strong Turkey, a strong Egypt – more or less – a much, much stronger Persia than we have had for a long time, and a huge China which for the first time in its history has sent warships through the Suez Canal. The last time it was in East Africa and it was given that Giraffe for a present, there was no Suez Canal.

So, all these matters have changed so much, that the final thing that I would just like you to address if you could, is this sanctions business, especially the very strict sanctions on the central bank in Persia, and that has the consequence – unexpected consequences, I suppose – that China is going to pay for the crude oil in yuan, India is going to pay in rupees, and no self-

respecting Indian would accept rupees, but they are going to, and so is Pakistan, and Japan is using the yen. So the one thing that the US is regarded as anathema, is that the dollar will be left out of the fence.

Elizabeth Wilmshurst:

Thank you very much, and could you pass on your microphone and we'll come back afterwards.

Question 3:

Thank you very much. I wonder if both speakers could please comment on the sanctions strategy – I think Sir Richard alluded to this – because personally I see a disconnect between the logic employed to justify increased sanctions and, as our visiting speaker, the lawyer [Daniel H. Joyner] has just explained to us they are for the most part unilateral sanctions, or EU/US sanctions. Do they have any comments, please, on what possesses our policymakers to present this policy of increased sanctions as likely to produce the desired result the way it is being applied?

Elizabeth Wilmshurst:

Thank you very much. And just one more in the front... thank you.

Question 4:

I wrote *America's Children* on the Manhattan Project, and have represented *Index of Censorship* with the release of [Mordechai] Vanunu and the Israel supreme court's role in that. But, more interestingly we interviewed [Rolf] Ekéus in 1996 over the UNSCOM episode in Iraq, which was unique in history in oversight by the world body over a state. Unlike Iran, it was a subjected state in many ways, but these legal systems do not reflect the nature of nuclear weapons, which are an international issue. And if you are in the UN you often hear people say that in fact nuclear and all of its balance are strategic, and the discourse which goes on, which were so eloquently put by you is, in a sense, some way an evolution towards a world government, towards a larger...

This law which [sic] we are discussing here is the 'haves' telling the 'have nots' not to have, basically, which is usually what the law devolves into. But eventually we will have a law, which will embrace people, in which everybody

can come out, everybody will participate in this thing, and it will become a different kind of governance. Is this discussion in Iran actually producing this kind of evolution? Is it creating precedent? Are there new kinds of discourse emerging from this which can apply, on a larger scale, in many different jurisdictions?

Elizabeth Wilmshurst:

Thank you very much.

Okay, Dan, you are going to tell us about Security Council Resolution 487, and what has changed since then. And you are going to begin on sanction strategy, reference to central bank in particular. And you are going to speculate on whether the whole of the regulation of nuclear energy is a step towards world government, or at least a discourse towards world government. So, these are small things for you to do. [Laughter]

Daniel H. Joyner:

I'll do what I can, Elizabeth.

Well, the case of Israel's nuclear weapons is... there are expressions about the 800lb gorilla in the room, I don't refer to anyone in particular here, the idea that... that is one of the core issues that motivates states in what is sometimes called the 'non-aligned movement' to fight tooth-and-nail against what they perceive to be discriminatory of the NPT, because, in the back of their minds they are always thinking, 'how could you possibly turn the screws into Iran for what appear to be very small inconsistencies over its treaty obligations, when there are states – Israel, Pakistan, India, – who have not even acceded the NPT, and are therefore not in violation of the letter – because there is no letter – but are flouting the spirit of the global non-proliferation legal system?' Even more, the US has concluded a special agreement with India to provide nuclear technology to India even though it is not a member of the NPT.

The non-aligned movement sees cases like this and thinks that it is further evidence of – and I will go ahead and link it to the last question – further and further evidence that the Nuclear Non-Proliferation Treaty is in decline in terms of its perceived legitimacy, it has, you now, been the corner stone legal instrument. And I will say this, going to the last question now: the NPT was never supposed to be the final word. If you go to the negotiating history, it was never supposed to be the final word on nuclear weapons. The inequity

that was built into the treaty... the inequality that was built into the treaty between as you put it the 'haves' and the 'have nots' was never supposed to be the final answer. There was always the thought that there would be a return to a general and complete disarmament treaty, at least with regards to nuclear weapons.

And, so, like with the World Trade Organization, we were stuck with the GATT for 60 years before we finally came up with the WTO, we have been stuck with the NPT for 40 years when we were never meant to be. And it is definitely time to go back to the negotiating table and work towards what we should have had all along, which is what we have in the chemical and biological weapons area, which is a full disarmament treaty. So, if anything, I think the Iran dispute strengthens these views in the non-aligned movement/developing world that the NPT has outlived its legitimacy and usefulness, and it is time to move on.

Let me go then back to sanctions. Sanctions on the central bank have been done, as it has been said, largely unilaterally. From a legal perspective one can't say too much on that, they are not illegal, it is not illegal to impose sanctions unilaterally; so, I don't have much to say about that from a legal perspective. What I will talk about is that sanctions... I will put on my political science hat a little bit here, because if... if one studies empirical literature on sanctioning, economic sanctions, one finds that for a case like Iran, which is an autocratic regime, and an issue area like nuclear weapons, or nuclear energy, which is perceived to be very closely associated with the identity of the state, and very high on the sensitivity ladder, there is just almost zero likelihood that sanctions from the outside will influence the state to change its behaviour in the manner desired by the outside. That is what the empirical literature tells us about sanctioning. It is a small end kind of a world, so you never know, but, I think.

In light of that, then, why do we do it? You often hear people say, 'because it is all we can do.' It is a way to show we are doing something. It is often, I think, more addressed to domestic constituencies, those constituencies, for example in the US, the hawkish right that wants something to be done about... an Iran, or a North Korea, or a Syria. So, in a way sanctions are a catharsis, it is at least doing something, but with very, very little hope in the real world that they will actually influence in the direction that they are to.

Elizabeth Wilmshurst:

Thank you. So far as Israel is concerned, do you want to say a word about nuclear weapon-free zone?

Daniel H. Joyner:

Sure, I will mention that briefly. I will mention that briefly.

There is to be...okay, in the 2010 review conference for the Nuclear Non-Proliferation Treaty it was decided that there would be, this year, 2012, a conference, an inter-governmental conference on establishing a WMD-free zone in the Middle East. And they are still trying to work out where it is going to be, what is the date, who is going to come. But that could be one of the next big moments in Middle East international law and nuclear weapons issues, because it will, at the very least, force the issue to the foreground. And, Israel, as well as Iran and all the other states in the Middle East will have to say whether or not they are coming, and not, I think as Israel prefers to do, just to not talk about the whole thing. They will be forced to say whether they are coming or not; I seem to remember they have said that they will come, and if they do, exactly what the agenda looks like will be very interesting. So, that is... I mention this only because that is a data point in international law in the Middle East may be nuclear weapon... the WMD-free zone in the Middle East conference that will be held this year.

Elizabeth Wilmshurst:

But maybe not leading to law, actually?

Daniel H. Joyner:

I highly doubt it.

Elizabeth Wilmshurst:

Okay, Richard do you want to say something about sanctions, the strategy of sanctions?

Sir Richard Dalton:

Yes. Could I say something else?

Elizabeth Wilmshurst:

You can say whatever you want.

Sir Richard Dalton:

A little bit, about the legal angles, although, of course, I am not a lawyer. There are two key phrases that stick in my mind about what the IAEA is up to with respect to Iran. The [Nuclear] Non-Proliferation Treaty imposes obligations voluntarily entered into. And the phrase 'exclusively peaceful purposes' keeps on cropping up in my mind when people ask themselves exactly what it is that are the legal obligations are in terms of Iran cooperating with the IAEA. The second phrase is that the information provided under the safeguards agreement should be 'correct and complete.' Now, I believe the IAEA case is that you can't be confident about the 'correctness and completeness' of information provided under the safeguards agreement with respect to nuclear material, if, at the same time, there is so much circumstantial evidence about research and development which indicates that nuclear-related activities are possibly not exclusively peaceful. So, the two concepts do come together. Maybe they create a legal case that justifies what is being done, but I would leave that to the lawyers. I certainly would say that there is an extraordinarily strong political case, and it is not simply a case beloved by Western countries, it is, I believe, very widely shared by the international community, that where there are such serious doubts about both 'exclusively peaceful purpose' and the 'correctness and completion' of the information provided, the IAEA, which is the only forensic arm of the international community, should chase these issues down.

On sanctions, we have never seen any case made by British government ministers that sanctions could have the desired political effect with regard to Iran decision-making on its nuclear programme. It is an assertion of faith that coercion is our best option. Now, I believe sanctions always have two affects on a nation and on a political leadership. The first is to generate defiance, 'we won't submit to this kind of foreign aggression, hostility'. And the second is 'we are in a bind, how do we get out of it?' And certainly as far as citizens are concerned you get the same two reactions, and quite possibly in entirely different proportions from the proportions of those two reactions within the leadership.

In Iran, though, as well all know, and indeed in most countries, it is the view of the elite that matters, not the view of the ordinary citizens. And at present, the affect of sanctions... those two affects are present in the Iranian elite, but the

affect of defiance is certainly much more powerful, particularly in the mind of the real decision maker in Iran, Ayatollah [Seyed Ali Hosseini] Khamenei, the supreme leader. But, my guess is that the pressures on the economy and subsequently on society that are building up in Iran, and which may get significantly worse in 2012 and on into next year, are such that the supreme leader is prepared to authorize his negotiators to *tâter le terrain*, to feel what it is on the other side, that the other side is really after, to see whether there is scope for conflict resolution using diplomatic means.

It wouldn't be the first time that he has done such a thing. Those who have catalogued the negotiating episodes in Iran's difficult history with the West and others, find 12 or 13 such episodes. In my experience since 2002, they clearly include the initiative in response to the E3 countries on the nuclear question in 2003, and then in 2005 onwards the discussions between the Iranian government and the US over Iraq, for the period going back a little, from the period of the Bon conference through to 2003 there was some cooperation and a good deal of discussion over Iraq. So, the idea that Iran just on this one nuclear issue, is forever beyond the sphere of negotiation, and is simply going hell-for-leather for a nuclear programme is facile.

But, the fact is my head tells me that currently... I beg your pardon, my heart tells me that ultimately defiance isn't going to do the trick; my head tells me that actually the six countries have got themselves some negotiating leverage. I remember Nicholas Burns, the negotiator for the US on American affairs saying sometime in 2006, when Condoleezza Rice was trying to soften the American position, successfully as it happens, saying 'we are just trying to get Iran's attention.' The fact is, six years later I think they have got Iran's attention, but we don't know whether there is sufficient will or flexibility on either side for this opening to be translated into serious progress.

Elizabeth Wilmshurst:

Thank you very much. And if I might just add a word on what you said about the extent of the IAEA mandate. I think Dan would agree that your own views, or what I suspect are your own views about the mandate and their powers, your views are not uncontroversial, I think I could say.

Daniel H. Joyner:

Not much that I say is uncontroversial, so yes I will concede that.

Elizabeth Wilmshurst:

But we would have to have a lot of international lawyers to beat that out. Now, we've got a question over here.

Question 5:

Thank you. I'm a former journalist who wrote about many of these issues. I have two comments, rather than questions, but they go to the heart of the legal matter in a way. There has been the point made that Iran has been asked to prove a negative, and that is very hard. In actual fact, now every member of the NPT is being asked to prove a negative, in that, after it was discovered how far Iraq got covertly towards a nuclear weapons programme despite being a member of the treaty and the safeguards, there was the devising of the additional protocol, which, when adopted voluntarily by states, gives the IAEA many more rights, and gives states more responsibilities, and allows inspectors to test what is going on in different ways. Iran agreed to accept this, and then refused to ratify it and now does not apply it. It has also pulled out of an agreement unilaterally that was to allow inspectors to have early information about new facilities. But, all other treaty members are invited to sign up to the additional protocol; so, if Iran wanted a mechanism to prove the negative, there is one ready-made.

My second comment is about the inequity of fingering Iran. Yes, it is certainly true that South Korea was discovered to have been doing lab experiments which offended against the treaty. And it is certainly true that Japan and Germany have a lot of nuclear technology and capability, but the difference is that those countries open themselves up to intrusive inspection in every possible way, and Iran does not. And if Iran wanted a model of how to go about things, then South Africa, which wanted to join the NPT but had nuclear weapons, and had to prove it had dismantled them, went through that process. And I think the inspectors would tell you that it is very hard to prove a negative, it was very hard to get to the basis of what had gone on in South Africa, even with the full cooperation of the South African government. But you know when a government is trying to help you rather than hinder you. And there are other examples, Argentina and Brazil, for example.

So, it is not that this is *tabula rasa*, the inspectors have a lot to draw on, and at the moment they are deeply unhappy with Iran for reasons that have been discussed by the speakers.

Elizabeth Wilmshurst:

Thank you very much for that. Two others here.

Question 6:

I would like to ask Sir Richard about his views regarding the recent parliamentary elections and the results. You know, the demise of [Mahmoud] Ahmadinejad and the coming in of a new group of politicians who are supposedly conservative, but who had, in the past, much better relations with the US in terms of negotiations. So, will that have an effect on the success of the negotiations, you will probably know more than I do? I mean, William Burns knows most of the characters like [incoherent], and all of the others, you know. Your assessment, not mine.

Elizabeth Wilmshurst:

Thank you, and in the front please.

Question 7:

Sir Richard, you used the term 'undoubtable [sic] capability' of Iran to produce the weapon, and you used the term that it is just a political will that prevents it, unless I understood wrongly. But if other countries in the region are understanding it wrongly as well, wouldn't that be perceived as a huge threat from a country with Iran's relations with the Gulf countries, with Israel of course?

Elizabeth Wilmshurst:

Thank you. And just one more in the front, sorry... thank you.

Question 8:

Thank you. I just wanted to ask for comment on the question of pretext and the extent to which the nuclear weaponization question can be assumed to be a pretext. And the evidence for this, which one might argue is pretty overwhelming, starting with the point that there have been accusations that Iran has been two years away from a deliverable nuclear weapon since 1982, and 1984, and then regularly, it has always been 'two years away'. And then you look at some of the other aspects of how the issue has been portrayed,

including, you know, more recent things such as the treatment of this...the game around Parchin and how that has developed because it is the centre of the ballistic weapons industry, the missile industry.

And all the other factors, and as how the 8 November report has been portrayed, and the fact that General Amano's letter to the Security Council, you know, referred to the fact that the Iranian abandoned their embryonic weaponization programme in 2003, which agreed with the 2007 NIE from the US and so on and so on, right to a couple of days ago in the UK for example, the briefing from the external security services to ministers was extraordinarily, kind of, hawkish, than the White House or [incoherent] would ever do. So, I was asking for comment on that.

Elizabeth Wilmshurst:

Thank you. Richard?

Sir Richard Dalton:

Three questions, if you don't mind. First the internal scene, results haven't been announced yet. Many constituencies have to have a second round. We can be pretty sure that the overwhelming majority will be conservatives because non-conservatives were not allowed to run, broadly speaking. How the eventual make-up of the parliament will divide between the different factions who have been scrapping over the last few years, nobody knows yet. I suspect that those who hue closely to Ayatollah Khamenei's line will be the big winners, and Ahmadinejad will end up with a significant following, but not a controlling majority in the Majles-e [National Consultative Assembly of Iran], he didn't have a controlling majority from 2005 onwards. But, how much influence the new Majles-e will have on policymaking is an open question, I suspect not much.

There is a favourable interpretation, as follows: if the result of the election – which, after all, is not a totally free election – is that there is more harmony behind Ayatollah Khamenei, there is good news and bad news. The bad news would be that the Majles-e would echo and re-enforce his extreme caution and his view that Iran would simply have to give more and more and more if Iran gave any, even minor, concessions. Or, on the other hand, the good news would be if Iran and Ayatollah Khamenei and other decision makers felt there was more harmony in the Majles-e, and therefore less chance of a...more adventurous and potentially flexible nuclear policy being continually

sniped at within the parliament. I'm inclined to think that there is more likely to be a positive than a negative effect on any future negotiations, but that is a tentative because, as I say, we don't know the results.

Thirdly, I am not sure whether I said Iran had an undoubted capability to produce a weapon; I did say they had undoubtedly undertaken much of the research and development on the components of a weapon that would be necessary, ultimately, to produce a weapon should they decide to do so. But nobody knows how far down the track they have gone. So, yes, I agree [that] potential development of a nuclear weapon in Iran does constitute a future, significant security threat within the region which other countries would be entitled to take measures to counter.

Thirdly [sic], on the issue of whether all this is just a pretext for getting at Iran. I don't believe that it is. I think there are genuine non-proliferation concerns, that the issue have exclusively been peaceful purpose and correct and complete accounting, and assurance that there are no undeclared materials and activities are vital for regional peace, and it is utterly justifiable for these issues to be pursued. The fact is that some of those who would share that point of view also think that they should not rest until the Iranian regime is toppled, and some of those who advocate a war with Iran hope that the outcome would be a change of regime. So, to an extent they see the nuclear issue as a pretext, or rather a stalking horse, for an even wider policy than merely trying to limit Iran's nuclear activities. But the fundamental drive through the IAEA is legitimate in non-proliferation terms.

Elizabeth Wilmshurst:

Thank you. Dan, do you want to comment on the first one?

Daniel H. Joyner:

I do, actually, yes. The questioner on my left raised a couple of points that I would like to respond to. I believe she said that the additional protocol, the IAEA additional protocol, presents a template for proving the negative, in a sense, and that all states have been invited to join the additional protocol, and that here is a ready-made method for proving the negative. In my view that is an overly simplistic way of looking at the additional protocol, I think it's... The additional protocol does allow, if it is entered into voluntarily by a state, the IAEA to have greater access to facilities and quicker access to facilities. Those are the two primary axes: wider range, and quicker. But, it is still

limited essentially to nuclear installations, meaning those installations that handle fissile materials, because that is what the IAEA is mandated primarily to do.

And so to say that, 'well if Iran would only have an additional protocol it would clear up all of these issues', I don't think that is correct. And I would raise as an example the Parchin attempted inspection; here is a military installation on which it is suspected there has been these scientific experiments, and I don't think that that would be at all, necessarily, included in an additional protocol inspection. It is not with other states with an additional protocol, they don't open up all of their military installations, all of their industrial sites, that is not what the additional protocol does.

And, similarly, you were talking about Japan, Germany, South Korea, how they open themselves up. And so if Iran would only be like Japan and open itself up to the extent that Japan does, all of this would go away. Well, there's a couple of points there. You said you know when a government is being friendly to you and you know when they are not, and I think that is a two-way street. Japan, South Korea, and Germany are all on good terms with the US, with the IAEA, and so they don't have too many qualms about opening up some of their facilities, but they know... rather Iran comes from quite a different perspective in knowing what is behind the requests. So, I don't think that is the right analogy. So, for example, do IAEA inspectors then visit all the industrial sites and military sites in Japan and Germany? All of the scientific research sites in Japan where they do hemispherical explosion studies, or the sort of things that were in the November IAEA report? No they do not, they do not visit all of the scientific industrial sites. So, again, I think that these analogies are just not correct for saying that Iran should do this.

Okay, I will move on... the pretext one, can I do that, or not? Shall I not?

Elizabeth Wilmshurst:

Let's just have one final round, and then you can round up.

Daniel H. Joyner:

Alright.

Elizabeth Wilmshurst:

Here, just fairly quickly if you would.

Question 9:

Thank you very much. I have a question for Professor Joyner. In an ideal world, international law is something that is above with a halo of neutrality and looking down upon everybody with a yardstick, which is not biased this way or the other. We know from experience of the world with the world with the ICC that that is never the case. That the crime of aggression, for example, was not included in the Goldstone Report and [with regard to] Iraq and so many other things. Do you think that dropping the illusion that international law is neutral and above with a halo over its head, with a even-handed to everybody, if we drop that, and in this case, for example, that one option could be a nuclear-free Middle East, which would include Israel, Iran, and everybody else? Thank you very much.

Elizabeth Wilmhurst:

That is great, and I think Professor Joyner did mention a nuclear-free Middle East as a possibility. There is... there are two, actually, back here.

Question 10:

Thank you. My question is about Iran's threats to close the Strait of Hormuz because the EU tighter sanctions will come into force in July, and recently there have been reports that India is also considering to diminish its oil imports from Iran. So if Iran acts upon these threats, can such an act be constructed then that invokes the right of self-defence? And if so, which states would be allowed to invoke that right?

And I would also ask you then to reflect upon the self-defence of Iran considering things such as the Stuxnet virus, and the killing of several nuclear scientists. And, does Iran have any right of self-defence for those actions? Thank you.

Elizabeth Wilmhurst:

Thank you. Another one here and do you want to be the penultimate?

Question 11:

I just have a comment actually about the Middle East nuclear-free zone, which is to say that there was a poll taken in Israel within the last month in

which 64% of the Israeli population approved of a Middle East nuclear-free zone, even though it was made clear that Israel would have to give up its nuclear weapons to obtain it.

Elizabeth Wilmshurst:

Thank you very much for that comment. And there is one more, sorry, this has to be the last, there is one more right at the back.

Question 12:

A slight cheeky question, possibly, but if these negotiations go ahead what is your assessment of the likelihood of their success?

Elizabeth Wilmshurst:

And what negotiations are those?

Question Twelve:

Just if there are future negotiations between Iran and the West about giving up... or about future negotiations, rather.

Elizabeth Wilmshurst:

Alright, okay.

Question 12:

And really what I would like to ask is also, do you think that the West is more amenable now to a Turkey-led solution, or at least Turkey-proposed, now that relations between Turkey and the US are somewhat improved from 2010?

Elizabeth Wilmshurst:

Thank you very much.

Yes, please begin.

Daniel H. Joyner:

Okay, I will be really brief and talk about the things that I really want to talk about.

Let us talk about the Hormuz question. I would direct you to Douglas Guilfoyle who has written a really nice piece on this for the blog 'EJIL: Talk!' Douglas Guilfoyle is a law of the sea expert who wrote a really nice piece about whether or not closing the Strait of Hormuz would be lawful, so I will direct you to that. ['Iran and the Strait of Hormuz: some initial thoughts', February 2, 2012, can be found at: <http://www.ejiltalk.org/iran-and-the-strait-of-hormuz-some-initial-thoughts/>]

But I will address your question about self-defence because I had thought to do that before, but I skipped over it. I would not put the issue in terms of 'self-defence' because that requires an 'armed attack', and I don't think... I mean, I know very well what you are talking about with the Stuxnet virus and the killing of the Iranian nuclear scientist, but I don't think that would meet an Article 51 definition of 'armed attack'. However, there is another way to put that, and that is under the rubric of 'counter-measures'. If there has been a breach of a rule of international law the ILC draft article of state responsibilities do provide for the possibility of 'counter-measures', they have to meet certain conditions which I can't go into here.

I wrote, actually, a piece on this in response to Doug's piece, so if you find that piece you will find my piece too. The short version is that it may, in fact, be lawful to impose 'counter-measures' upon private vessels operating under the flag of states that it considers to have breached rules of international law with regard to it, in harm of its interests. Something like, for example, seizing vessels going through the Strait, could be a lawful counter-measure. I am not saying that is a good idea, I think that is a bad idea, but you asked for a legal opinion, and I think under the rubric of counter-measures not self-defence could proceed.

Elizabeth Wilmshurst:

So that is counter-measures not amounting to the use of force, isn't it?

Daniel H. Joyner:

Of course, that is one of the conditions. And seizing of a ship is, I think, *not* an act of force under that definition.

Sir Richard Dalton:

Gosh. [Laughter] Oh.

Elizabeth Wilmhurst:

Dan, you did preface your remarks by saying that everything you said was controversial, and we obviously don't have time to go into all of these points, but please consider this an umbrella, a legal umbrella – this is controversial.

Daniel H. Joyner:

Okay... so I can say whatever I want now. [Laughter]

Iran negotiations, will they be successful? A Turkey-led proposal, I would like to address that. Nothing will be done in 2012 because, primarily because of the domestic US political situation. In January 2013, though, there may well be prospects for something like what I outlined to be agreed. I am a lawyer, I'm not going to get into the sort of prospects, really, but I think that if there is going to be a resolution, it will be after the installation of the new president of the United States, and it will probably be President Obama. And I think then there are real prospects... there are real prospects of a deal being reached, and it is really just a matter of political will.

Elizabeth Wilmhurst:

That is great, are you thinking of Alabama? [Laughter]

Daniel H. Joyner:

No! I'm a little blue dot in a big red state. [Laughter]

Elizabeth Wilmhurst:

Thank you. Sir Richard.

Sir Richard Dalton:

I would agree about 2013 being more likely than 2012, and I would say that the chances of success within the next two year period are one in three,

which is rather higher than I've ever been able to put it in terms of statistics for success for a negotiated outcome.

On the Strait of Hormuz, I don't believe Iran will act unless it could not export oil in very significant quantities. In other words, if it was facing a blockade or such an effective international embargo – footnote: highly unlikely – that it could not sell significant quantities of oil anywhere, in those circumstances it might retaliate, but it would only do so if its back was really against the wall.

That's it.

Elizabeth Wilmshurst:

Thank you very much.

I apologize to those who wanted to make comments and raise questions, we need to finish on time. Please join me in thanking our speakers; the questions have not all been answered or litigated on [laughter], but I, for one, am wiser. So, join me in thanking our speakers. [Applause]