

International Frameworks for Cooperation on Nuclear Abolition and Climate Protection
Dr. John Burroughs, Lawyers' Committee on Nuclear Policy
Conference on Nuclear Abolition, Climate Protection, and Our Cities' Future
October 23, 2008, Des Moines

1985 Vienna Convention on the Protection of the Ozone Layer

A good example of a successful international framework for cooperation is the 1985 Vienna Convention on the Protection of the Ozone Layer. It made general commitments for action by individual countries, but also provided for further negotiations of specific commitments. This was done in the Montreal Protocol and amendments to it.

There was a scientific consensus that action was needed; it turned out to be economically feasible to substitute for harmful aerosol products; and governments successfully worked together to solve the problem.

Basic ingredients for successful international cooperation

Respect and effectively use international law and institutions.

In the United States, remember that treaties under the US Constitution, Article VI, clause 2, are part of the supreme law of the land along with federal statutes and the Constitution itself.

Show good faith: Keep your promises, and to do so in a way true to the purposes of the promises.

Article 26 of the Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

"Good faith is a fundamental principle of international law, without which all international law would collapse," declared Judge Mohammed Bedjaoui at a conference we organized earlier this year. Bedjaoui was President of the International Court of Justice when it gave its 1996 advisory opinion on nuclear weapons.

I'll return to good faith when talking about the Nuclear Non-Proliferation Treaty

The International Framework for Climate Protection

The 1992 UN Framework Convention on Climate Change is like the Vienna Convention on the Protection of the Ozone Layer. It sets out general commitments and also envisages further cooperation action, including the adoption of additional agreements. But success has been lacking, partly, of course because it's a bigger problem.

Article 4 (2). The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

- (a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.

Pursuant to the UNFCCC, in 1997 the Kyoto Protocol was adopted. Also a treaty, a supplementary agreement to the UNFCCC. It provides that industrialized countries will reduce their collective emissions of greenhouse gases by 5% by 2010 compared to the year 1990. Compared to the emissions levels that would be expected by 2010 without the Protocol, this limitation represents a 29% cut.

Climate change experts regard the amount of reduction as inadequate, but governments are finding the targets hard to meet.

Meanwhile, the US never ratified the agreement. (Over 850 US mayors, though, have committed their cities to working toward meeting Kyoto objectives).

If the United States had found other ways to meet its UNFCCC obligations, that would be one thing. But it has not, at least in terms of actual reduction of emissions, which have climbed. So simply the failure to join in Kyoto, which the US helped negotiate and signed, is a strike against US good faith.

Now there is a process to create a post-Kyoto agreement, still under the umbrella of the UNFCCC. The US signed on at the last moment to the 2007 Bali plan of action, which establishes a process expected to culminate in a new agreement in Copenhagen in December 2009. The next meeting in this process is in Poznan, Poland this December.

The International Framework for Cooperation on Nuclear Non-Proliferation and Disarmament

The NPT requires most countries in the world not to acquire nuclear weapons and to accept IAEA monitoring of their research and electricity-generating nuclear reactors and other nuclear facilities to ensure that materials are not diverted to weapons. These are specific, verified obligations, subject to enforcement by the UN Security Council.

As part of the NPT bargain, five states with nuclear weapons – US, UK, France, China, Russia – agreed to negotiate nuclear disarmament in good faith.

Article VI of the Nuclear Non-Proliferation Treaty (NPT) obligates each state party to the treaty to “*pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.*”

Both UNFCCC and the Vienna Convention on Protection of the Ozone Layer are framework agreements. NPT partly imposes specific, verifiable obligations on states parties re non-acquisition. Partly it's a framework agreement re nuclear disarmament.

That general obligation was given specificity in 1995 and 2000 NPT Conferences.

At the 2000 NPT Review Conference, the United States and other nuclear powers gave “*an unequivocal undertaking ... to accomplish the total elimination of their nuclear arsenals*” and agreed to take specific steps towards that end. They include:

- bringing the Comprehensive Test Ban Treaty into force;
- negotiating a verifiable ban on production of plutonium and enriched uranium for weapons;
- applying the principles of verification, irreversibility and transparency to the reduction and elimination of nuclear forces;
- preservation and strengthening of the Anti-Ballistic Missile (ABM) Treaty;
- diminishing the role of nuclear weapons in security policy, to minimize the risk of their use and to facilitate their elimination;
- and reducing the operational status of nuclear forces.

Since 2000, however, the United States has failed to work to implement these measures and principles, for example. In some cases it has even gone backwards, as by declaring its opposition to the CTBT withdrawing from the ABM Treaty, abandoning verification of U.S.-Russian reductions, more emphatically articulating doctrine on use of nuclear

weapons, and modernizing its nuclear weapons complex to be capable of maintaining and upgrading the U.S. arsenal for many decades to come.

Good faith

This ignoring and repudiating of commitments made to implement the NPT legal obligation of disarmament hardly exemplifies good faith.

What would good faith involve? It certainly means meeting your commitments. Beyond that, consider the ICJ's interpretation of the NPT disarmament obligation.

The International Court of Justice unanimously concluded that the NPT obligation requires that states not just pursue in good faith but also "*bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*"

This raises the question of what good faith means in the context of negotiations. It means to negotiate honestly and sincerely to reach the objective of the negotiations.

Judge Bedjaoui explained that general legal principles governing good faith negotiation as applied in the NPT context include:

- sustained upkeep of the negotiation; awareness of the interests of the other party; and a persevering quest for an acceptable compromise, with a willingness to contemplate modification of one's own position

Apply for example in negotiating an agreement on fissile materials, or US-Russian reductions. This also applies to negotiations on climate protection, as on the post-Kyoto agreement.

- refraining from acts incompatible with the object and purpose of the NPT; proscription of every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty.

This means not to plan and prepare for maintenance of modernized nuclear forces for decades to come! In the climate context, not to undermine the aims of UNFCCC by increases in greenhouse gas emissions.

Why Should Nuclear Weapons Be Abolished? International Law Considerations

It's useful to look at the ICJ's reasoning in answering this question. The Court held that threat or use of nuclear weapons is generally contrary to international law, most centrally

the prohibition of the infliction of indiscriminate harm. However, the Court felt its information was insufficient, and the law not solid enough, to rule on all circumstances. When the Court made its strong statement of the disarmament obligation – bring to a conclusion negotiations on nuclear disarmament – it was clearly moved by the risks posed by the weapons, and also by the need to move beyond the general illegality of threat or use found by the Court.

Another fascinating factor was this: The Court also referred to the debilitating effect that legal possession of nuclear weapons by only some states has on the international order and international law. The Court said:

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

And this points to an important point: It's not only because nuclear weapons pose totally unacceptable risks – it's also because an equitable global order in which no one has nuclear weapons is needed for effectively managing the other grave problems faced by the human species. The current two-tier regime, with nuclear haves and have nots, does not give rise to a viable global political and legal order. So elimination of the two-tier system, along with elimination of weapons themselves, is needed in order to effectively tackle the other serious problems facing the world: climate change and other threats to the environment, poverty, disease, etc.

Success in global nuclear abolition is also essential for preservation of the system of collective security and international law centered on the United Nations Charter. Absent success, that system may be fatally undermined by the doctrine of preventive war against allegedly emerging but not imminent nuclear weapons threats employed to rationalize the invasion of Iraq and possible military action against Iran. Preventive war is contrary to

the UN Charter, which permits use of force only in self-defense against actual or imminent attacks or by authorization of the Security Council. It also is extremely dangerous. Wars are unpredictable; they may give rise to dire circumstances in which one side or the other would consider resort to use of nuclear weapons. Further, the United States retains the option of use of nuclear weapons against another state's nuclear, biological or chemical weapons capabilities. Especially in combination, the doctrine of preventive war and the doctrine of preemptive or preventive use of nuclear weapons are fundamentally incompatible with the existence of international legal constraints on the use of force; they imply a world of chaos and nihilism. The path of promoting and complying with the UN Charter, and with disarmament and non-proliferation obligations is incomparably superior.

Conclusion

International frameworks for cooperation on both nuclear abolition and climate protection exist. The United States needs to become a responsible partner in making the best possible use of those frameworks.