

Legal Requirements to Achieve Non-Proliferation and Disarmament
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Speaking to an audience perhaps most knowledgeable in the world on the subject of legal requirements for non-proliferation and disarmament, I feel a little like the proverbial carrier of coal to Newcastle where there's already plenty of coal. Let me assure you that I spend a lot of my time communicating with audiences in the United States that have much more need than you of enlightenment on this subject. Nonetheless, I hope to highlight some points worth considering in your deliberations. I will be drawing on the briefing paper, *The Legal Framework for Non-Use and Elimination of Nuclear Weapons*,¹ distributed at this forum. I'll begin with issues regarding disarmament, and end with a few thoughts about non-proliferation.

DISARMAMENT

The ICJ Opinion

We are now in the tenth anniversary year of the 1996 advisory opinion² on nuclear weapons of the International Court of Justice. As we meet here in The Hague, the Court's home, it is especially appropriate that we consider the opinion carefully. I want to focus on the Court's unanimous conclusion that: "*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*"

In large part, this was an interpretation of Article VI of the NPT. It has been directly endorsed by nearly all states. In the most recent General Assembly vote on the resolution following up on the ICJ opinion,³ 165 states voted for the paragraph containing the Court's statement of the obligation, including non-NPT states India and Pakistan. Only three states voted against it, the United States, Russia, and Israel; the four abstainers included France and Britain.

The Court's conclusion was dramatically reinforced by the adoption by the 2000 NPT Review Conference of the "unequivocal undertaking" to eliminate nuclear arsenals in accordance with Article VI.

What does the obligation of good-faith negotiation of elimination of nuclear weapons require of states? International law in general with respect to good faith negotiation requires that you enter into the negotiations, that you consider proposals of the other side,

¹ February 2006. Online at <http://lcnp.org/disarmament/Gpeacebrfpaper.pdf>.

² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, July 8, 1996, *ICJ Reports* (1996) 226. Access at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>.

³ A/RES/60/76.

and that you re-examine your own position, all in order to reach the objective of the negotiations.

For example, in the case involving a treaty commitment between Hungary and Slovakia to build a dam and carry out related environmental remediation, the ICJ directed the parties to go back and negotiate some more. The Court stated that the "*principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized*".⁴

In the *North Sea Continental Shelf Cases*, the Court said that the parties must conduct themselves so as to make the negotiations "*meaningful, which will not be the case when either insists upon its own position without contemplating any modification of it*".⁵

A World Trade Organization panel has stated that good faith "*implies a continuity of efforts It is this continuity of efforts that matters, not a particular move at a given time, followed by inaction.*"⁶

According to eminent international lawyer Antonio Cassese, when there is an obligation of good faith negotiation, even when the exact objective of negotiations has not been specified or its achievement mandated: "*both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty.*"⁷

In the case of Article VI, the Court relied on a distinction drawn in international law between two kinds of obligations, an obligation of conduct and an obligation of result. The ICJ said Article VI involves both kinds of obligation, stating:

The legal import of [Article VI] goes beyond that of a mere obligation of *conduct*; the obligation involved here is an obligation to achieve a precise *result*, nuclear disarmament in all its aspects, by adopting a particular course of *conduct*, namely the pursuit of negotiations on the matter in good faith.⁸

Where did the ICJ find these two obligations? In Article VI itself, there is some reference to a result – it refers to nuclear disarmament - as well as to the required conduct, that is good-faith negotiation. In addition, one of the Treaty's preambular paragraphs refers to "the liquidation of all [States'] existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery".

⁴ *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep. 1997, para. 142.

⁵ I.C.J. Reports 1969, p. 47.

⁶ Panel Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to article 21.5 of the DSU by Malaysia, GATT Doc. WT/DS58/RW (June 15, 2001), para. 5.60. The Panel Report was upheld by the Appellate Body Report dated October 22, 2001.

⁷ Antonio Cassese, "The Israel-PLO Agreement and Self-Determination," *European Journal of International Law*, vol. 4, no. 4, 1993, p. 567, access at <http://www.ejil.org/journal/Vol4/No4/>.

⁸ Para. 99 (emphasis supplied).

The Court's statement of the obligation of good-faith negotiation in the context of nuclear weapons was unusually strong. The far-reaching nature of the Court's analysis is based on three factors. One is the text of the Article VI and the preamble I just referred to.

The second factor was articulated in the hearings before the Court in 1995 by Gareth Evans, then Foreign Minister of Australia. He argued that a norm of non-possession of nuclear weapons is embedded in the NPT that "must now be regarded as reflective of customary international law".⁹ In conformity with that norm, Evans said, all states possessing nuclear arsenals must negotiate their dismantlement.

The third is that the disarmament obligation is bound in a reciprocal and mutually reinforcing relationship with the illegality and illegitimacy of nuclear weapons and their threat or use.

All this is not to say that the Court is enjoining the achievement of a particular outcome; it need only be one that accomplishes "nuclear disarmament in all its aspects." The Court undoubtedly would accept either a convention¹⁰ prohibiting and eliminating nuclear weapons, or the "framework encompassing a mutually reinforcing set of instruments" referred to in the 2000 New Agenda resolution. But it certainly is possible to identify criteria and measures for implementation of the disarmament obligation. For that, I turn to examination of Article VI and its application by NPT Review Conferences.

Article VI

The nuclear weapons states have long viewed the NPT as an asymmetrical bargain. In this view, the NPT imposes specific, enforceable obligations in the present on non-nuclear weapon states, while requiring of nuclear weapon states only a general and vague commitment to good faith negotiation of nuclear disarmament to be brought to fruition in the distant future if ever. The 1995 and 2000 NPT Review Conferences, and the ICJ opinion, decisively rejected that view. Assuming that these results are taken seriously, it is now established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to eliminate their arsenals.

The key question is, why are these results to be taken seriously?

As to the ICJ opinion, while advisory, it is an authoritative interpretation of law that states acknowledge as binding, Article VI.

As to the 1995 and 2000 Review Conference outcomes, first of all, states should abide by their commitments. If they do not, international cooperation is severely undermined.

⁹ Customary international law is universally binding law derived from a general and consistent practice of states accompanied by a sense of legal obligation.

¹⁰ For a model nuclear weapons convention with accompanying analysis, see Merav Datan and Alyn Ware, *Security and Survival: The Case for a Nuclear Weapons Convention* (Cambridge, MA: International Physicians for the Prevention of Nuclear War, 1999), available online at www.ippnw.org/IPPNWBooks.html#NWC. The model is based in part on the existing convention on chemical weapons, the most far-reaching disarmament measure ever adopted.

There is less incentive to make future commitments if past ones have been ignored. As Jonathan Granoff – a good lawyer among other things – has pointed out to me, at a minimum, good faith would require that if one set of commitments towards meeting a legal obligation is discarded, an alternative course would be proposed. That has not been done.

Second, as a matter of international law, the results of the 1995 and 2000 Review Conferences decisively inform the proper interpretation of the disarmament obligation.¹¹

Article 31(3) of the Vienna Convention on the Law of Treaties, entitled “General Rule of Interpretation,” provides that in addition to the text and preamble of a treaty, “*there shall be taken into account ... (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*”

So there are two factors, subsequent agreement and subsequent practice. The 1995 and 2000 outcomes fit both categories. The 2000 Final Document states that the “Conference agrees” on the Practical Steps. Further, the agreement was reached in the context of a proceeding authorized by Article VIII of the NPT “to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.”

In addition to constituting *agreements*, the Principles and Objectives and Practical Steps also are part of a *practice* of the parties to the NPT that has been consistent over the course of the treaty’s life, dating back to its inception. The agenda from the beginning included “*cessation of testing, the non-use of nuclear weapons, [and] the cessation of production of fissionable materials for weapons...*”¹² The 1995 Principles and Objectives echoed the original agenda in identifying the CTBT and a convention banning the production of fissile materials for nuclear weapons as important measures for the “effective implementation of Article VI.”

In short, under the Vienna Convention, the Practical Steps, as an application of Article VI, are an essential guide to interpretation of the disarmament obligation. That is not to say that every step is necessary; in some cases a step is a reasonable but not unique means of implementing the obligation. And in the case of the ABM Treaty and the START process, U.S. actions have rendered the references moot in name, though not in substance.

The “Renewed Determination” resolution (A/RES/60/65) sponsored by Japan in the 2005 General Assembly and adopted by a vote of 168 to two (United States, India), with seven abstentions, is an excellent guide to the elements of the Practical Steps that are essential to moving forward.

¹¹ See Peter Weiss, John Burroughs, and Michael Spies, “The Thirteen Practical Steps: Legal or Political?” (May 2005), <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>.

¹²ENDC/PV. 390, 15 August 1968, para. 93.

The resolution's adoption means that nearly all governments in the world, including close allies of the nuclear weapon states, are now on record as favoring application of the principles of transparency, irreversibility, and verification "in the process of working towards the elimination of nuclear weapons". While those principles are embedded in the 2000 Review Conference outcome, the resolution clearly and unambiguously declares that the principles, together, are inherent in effective reduction and elimination.

The resolution also acutely singles out two other general commitments from 2000 whose fulfillment would greatly facilitate progress towards abolition (and make for a safer world now): "the necessity of a diminishing role for nuclear weapons in security policies", and reduction of "the operational status of nuclear weapons systems".

The State of Compliance

I will not spend time before this group on the poor record of implementation of the disarmament obligation. It is detailed in the briefing paper. In brief, since the conclusion of negotiations on the CTBT in 1996, there is very little progress. No multilateral, plurilateral, or bilateral negotiations on any aspect of nuclear disarmament are now underway. The CTBT has not been brought into force, and no negotiations have begun on a fissile materials treaty. The principles of verification, transparency, and irreversibility have been abandoned in U.S.-Russian reductions. Modernization of nuclear forces by all nuclear armed states is ongoing. Large numbers of U.S. and Russian warheads – an estimated 3000 altogether - remain ready for nearly instantaneous launch, and reliance on nuclear weapons in declared security postures has not diminished, and in some cases, has expanded.

NON-PROLIFERATION

Let me now briefly touch on two important questions of current concern regarding non-proliferation: what constitutes non-compliance with NPT-related instruments? And, does Article IV grant a right to the acquisition of nuclear fuel cycle technology?

Article III requires non-nuclear weapon states to accept safeguards, "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons." It further requires "procedures for the safeguards" to be "followed." The IAEA model safeguards agreement provides that the objective of safeguards is "the timely detection of diversion of ... nuclear material from peaceful nuclear activities" to unknown use or use in weapons.¹³ It further provides that that if the Agency is not able to verify that there has been no diversion of nuclear material to nuclear weapons, it may make reports to the Security Council and the General Assembly.¹⁴

The emphasis on the prevention of diversion of nuclear materials to weapons supports a reading of the instruments to the effect that non-compliance occurs when a state is not

¹³ Para. 28.

¹⁴ Para. 19.

able to provide sufficient assurances that nuclear materials are being used for peaceful purposes.

The Iran situation, however, indicates that this is not altogether a satisfactory reading. Over many years, Iran engaged in a pattern of concealment of extensive activities involving all aspects of the nuclear fuel cycle. However, there is no evidence or contention that materials have been diverted to military purposes. On a common sense view, the concealment would nonetheless seem to constitute non-compliance, a failure to follow, in the words of Article III, safeguards procedures. A reason for not employing the term is to hold open the door for a state to rectify violations without potentially being subjected to penalties. Reliance is placed on a state's good faith and its desire to be in good standing in the international community.

Partly due to the increased sensitivity to the proliferation risk posed by the spread of nuclear fuel cycle technologies, it is urged that violations of safeguards reporting requirements can be the basis for forfeiture of Article IV rights. I think that in 2003, when Iran's pattern of concealment came to light, a reasonable case could be made that Iran indeed was in a state of non-compliance justifying denial of nuclear fuel cycle technology. It is true that Article IV refers to conformity with Article II of the NPT, barring acquisition of nuclear weapons, not to Article III regarding safeguards. But compliance with Article III is linked to compliance with Article II. And the 1995 Principles and Objectives conditioned Article IV rights on conformity with both Article II and Article III.¹⁵

Of course, it is no easy thing to deny any state something that it is determined to have. Partly in recognition of that reality, the EU3 engaged in negotiations with Iran aimed at agreeing on "objective guarantees" that its nuclear program is exclusively for peaceful uses. This seemed to contemplate that under proper conditions, an Iranian enrichment program would be acceptable. Given that history, if the remaining issues regarding Iran's past violations and current intentions are cleared up, it is difficult now to maintain as a legal matter that Iran must be denied fuel production technology.

How the Iran situation is resolved clearly will have important consequences for the non-proliferation regime. Just as one piece of that, I think that an understanding needs to be developed that pervasive, significant violations of safeguards reporting requirements can be regarded as non-compliance justifying restrictions of Article IV rights.

Turning to the second question, is there an Article IV right to acquire nuclear fuel cycle technology, my discussion so far has assumed that there is. And since Article IV says there is a right to "research, production and use of nuclear energy for peaceful purposes without discrimination," it is hard to argue otherwise. This is unfortunate, I believe: I think Oppenheimer had it right at the beginning of the nuclear age in maintaining there needed to be international control of the production of nuclear materials. But this is the

¹⁵ Para. 14: "Particular importance should be attached to ensuring the exercise of the inalienable right of all the parties to the Treaty and to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I, II as well as III of the Treaty."

law that we have. Accordingly, it would seem that the Bush administration's policy of denying nuclear fuel cycle technology to additional states, already adopted by the G8, is contrary to Article IV if it prevents a particular state from acquiring that technology.

The implications for policy are evident. If the further spread of nuclear fuel cycle technology is to be prevented, as it should be, it should be done through reciprocal, cooperative, negotiated arrangements. These arrangements may involve non-nuclear weapon states which already have nuclear fuel cycle technology accepting additional constraints. And certainly their achievement would be greatly facilitated by progress on a fissile materials treaty, and more generally by progress on the disarmament front.

CONCLUSION

In closing, the attentive listener will have noticed that I spoke of the failure to *implement* the disarmament obligation and the possible *non-compliance* with Article III safeguards by Iran. This distinction is not intelligible to the ordinary citizen.

The difference in terminology reflects the difference in specificity of the treaty obligations. It also reflects the fact that institutional mechanisms for compliance assessment regarding disarmament are lacking. There is no IAEA equivalent for Article VI. Finally, the difference in terminology reflects the structure of international politics. What are the consequences for failure to meet the disarmament obligation? The Security Council as presently constituted is not going to impose sanctions on the permanent members, all nuclear-armed.

The problem of disarmament can therefore be viewed as requiring movement towards a world in which we can properly speak of compliance assessment and enforcement regarding the disarmament obligation as well as the non-proliferation obligation.