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The Need for a Coherent Nuclear Non-Proliferation/Disarmament Regime

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The CWC and the NPT: a brief comparison

A useful way to think about the current nuclear non-proliferation/disarmament regime is to compare it to the regime for chemical weapons.

For chemical weapons, there is a global convention providing for their prohibition and elimination. It establishes an implementing agency, the Organisation for the Prohibition of Chemical Weapons (OPCW), which carries out monitoring and verification tasks. An Executive Council of States Parties, based on reports, makes determinations concerning compliance. The Conference of States Parties is empowered to take collective enforcement measures, *e.g.* economic sanctions. In cases of particular gravity, the Conference is required to refer the matter to the UN General Assembly and Security Council.

For nuclear weapons, the International Atomic Energy Agency predated the Nuclear Non-Proliferation Treaty. It monitors implementation of safeguards agreements, and in cases of non-compliance where issues of international peace and security are implicated, refers the matter to the UN Security Council.

While the NPT incorporates the safeguard system via its Article III, NPT states parties are not empowered by the treaty to assess compliance or undertake enforcement or refer matters to the UN Security Council, or General Assembly. There is no Executive Council or like body. There is no annual meeting of states parties.

There are five-year Review Conferences. However, historically they have not assessed non-proliferation compliance or taken or recommended enforcement measures. Nor have they done so regarding disarmament. No disarmament agency exists, of course, and there is no multilateral mechanism at all for assessing compliance with nuclear disarmament obligations and commitments. Review conferences have served as forums for development of norms and articulation of commitments as to non-proliferation and disarmament. As is well known, however, since the 1995 Review Conference, many of those commitments have not been respected.

This is true for non-proliferation as well as disarmament commitments. The 1995 and 2000 conferences stated that compliance with Article III – the safeguards system – is a requirement for exercise of Article IV rights. But with respect to the Iran situation, this important commitment is

now rarely if ever cited. Similarly, the 1995 and 2000 conferences committed to engaging in nuclear commerce only with states with full-scope safeguards. The Nuclear Suppliers Group exemption for India ignores that commitment.

In summary, NPT states parties have very restricted means and practices for ensuring compliance, unlike CWC states parties. The real action regarding non-proliferation takes place in the IAEA and its Board of Governors and in the Security Council. As to disarmament, there is nothing in place at all except for an important forum – the review conferences - for securing commitments.

To have a coherent non-proliferation/disarmament regime, and to achieve the nuclear-weapon-free world promised by Article VI, the framework for governance needs to be revised. A starting observation is that it is very likely that such revision will need to encompass disarmament as well as non-proliferation. Non-nuclear weapon states parties are not likely to support institutional changes that enable more pressure on compliance with respect to non-proliferation only.

Nuclear Weapons Convention Preparatory Process

One obvious path is to create for nuclear weapons a regime similar to that now in place for chemical weapons. And an obvious difficulty is that while the climate of discussion has changed dramatically, states with nuclear arsenals for the most part do not seem ready to embark on this path. In response, civil society increasingly is advocating that at least a preparatory process begin. This could be launched by an NPT Review Conference or the General Assembly, or it could be undertaken by like-minded states.

Let me give you a couple of examples of this thinking. As you know, the Secretary-General has referred to the model Nuclear Weapons Convention he circulated to UN member states at the request of Costa Rica and Malaysia as a “good starting point” for negotiations. My organization and its international body with others drafted the model Convention, and also a book explaining it, *Securing Our Survival*. The recent report of the International Commission on Nuclear Non-Proliferation and Disarmament states: “Work should commence now, supported by interested governments, on further refining and developing the concepts in the model convention now in circulation, with the objective of having a fully-worked through draft available to inform and guide multilateral disarmament negotiations as they gain momentum.”¹

Another example: At a January consultation of governments and NGOs in preparation for the Review Conference, the Middle Powers Initiative recommended in the briefing paper I prepared that governments “support an NPT commitment to commence preparatory work, deliberations and negotiations on a convention or framework of instruments for the sustainable, verifiable and enforceable global elimination of nuclear weapons.”

I would suggest that the Secretary-General, UNIDIR, and UNODA could support and facilitate such a preparatory process. An observation of High Representative for Disarmament Affairs Sergio Duarte is pertinent here. In his remarks yesterday at Fordham University Law School, he said: “In my opinion, it is never ‘too early’ to start thinking about the architecture and legal obligations that will be needed to achieve global nuclear disarmament—it is far better to do this work early, than too late.”

One objection is that even a preparatory process is premature. But from Global Zero, Mayors for Peace, and others, support for a global agreement is growing. A notable recent contribution to civil society development of this approach has come from Barry Blechman of the Stimson Center. He edited a book entitled *Elements of a Nuclear Disarmament Treaty* and wrote an excellent op-ed in the February 19 New York Times arguing that after the START replacement treaty should come negotiations on a global disarmament agreement. He said: “Piecemeal agreements between two nuclear powers to reduce, but not eliminate, their atomic inventories are insufficient; as the United States and Russia leisurely reduce their stocks, other states are building up arsenals, and still others are gaining the technical skills to advance their own programs.”

Unquestionably, there are major challenges to overcome in developing an institutional system that would reliably provide for verified and enforceable elimination of nuclear warheads and delivery systems and successfully manage nuclear power. The challenges can in part be addressed through measures on the standard international agenda—the CTBT, FMCT, regulation of nuclear fuel production and supply, *etc.*—so long as they are negotiated and implemented with the objective of a nuclear weapon free world in mind. It is also important, however, to squarely address the nature of the overall framework; the challenges will not go away just because they are ignored.

Moreover, measures now apparently within reach may in fact remain unattainable while a nuclear weapon-free world is not even on the horizon. In that circumstance, they may be perceived as primarily aimed at preserving the advantage of powerful states and deemed unacceptable. It must be clearly enunciated and intended that the steps are meant to lead to a world free of nuclear weapons, not to maintain an unsustainable two-class nuclear world. That intention is best conveyed by creation of a process expressly devoted to achieving the global elimination of nuclear forces. This does not mean that other measures should be neglected. Over the lengthy period of negotiation of the Chemical Weapons Convention, the United States and Russia also bilaterally negotiated concerning their large stockpiles. Preparation for, and negotiation of, a convention can proceed in parallel with, and inform and stimulate, negotiation and implementation of other measures.

Reform of NPT Governance

A second path worth pursuing is reform of NPT governance. Proposals have been put forward by Canada, Ireland and other governments that would remediate at least some of the deficiencies of the nuclear non-proliferation/disarmament regime as compared to the chemical weapons regime. An annual meeting of NPT states parties empowered to assess and take action regarding non-compliance with non-proliferation and disarmament obligations, an Executive Council or like body able to act at any time, and a small secretariat are the main elements of the proposals. What is lacking even with such additions is any agency comparable to the IAEA or the OPCW to monitor disarmament. It is worth seriously considering whether such a function could be given to the IAEA or possibly some other entity. An excellent place to begin would be with US-Russian reductions: why not have international monitoring along with bilateral verification?

The question could be raised: why devote time and effort to reform of NPT governance if the real solution is creation of a new framework along Nuclear Weapon Convention lines? If near-term

progress is made towards such a new framework, it may be that reform of NPT governance will lose appeal. But absent such a development, reform of NPT governance should be a high priority.

Developing Capabilities for Disarmament Assessment

One of the 2000 Practical Steps provides for “regular reports, within the framework of the NPT strengthened review process, by all States parties on the implementation of Article VI.” At NPT review meetings, nuclear weapon states have provided general statements regarding, *e.g.*, reductions of deployed weapons, and some have also declared their arsenal size and fissile material holdings. However, there is nothing even resembling a comprehensive authoritative international accounting of warhead and fissile material stockpiles, nuclear weapons delivery systems, and spending on nuclear forces. Non-governmental researchers make valiant efforts to fill the gap, but their assessments are for the most part estimates based only partly on official information.

The need for an authoritative accounting system is obvious: it would provide baselines for evaluating progress in disarmament, and enable the identification of objective benchmarks for progress. Nuclear arms control and disarmament for too long has depended on commitments and intentions, with the exception of US-Russian/Soviet bilateral arms control agreements, which do set objective limits. It is time for benchmarks to be set, as the WMD Commission recognized, and establishing an accounting systems is a first step in that direction.

In his 24 October 2008 five-point proposal for disarmament, Secretary-General Ban Ki-moon stated: “The nuclear-weapon States often circulate descriptions of what they are doing to pursue these goals, yet these accounts seldom reach the public. I invite the nuclear-weapon States to send such material to the United Nations Secretariat, and to encourage its wider dissemination. The nuclear Powers could also expand the amount of information they publish about the size of their arsenals, stocks of fissile material and specific disarmament achievements. The lack of an authoritative estimate of the total number of nuclear weapons testifies to the need for greater transparency.”

The Middle Powers Initiative has accordingly recommended that governments support an NPT commitment to establish a comprehensive, UN-based accounting system covering size of nuclear arsenals, nuclear weapon delivery systems, fissile material, stockpiles, and spending on nuclear forces.

I would suggest that the Secretary-General continue to emphasize the need for reporting – or a more ambitious approach, as the Middle Powers Initiative recommends – and the willingness of the Secretariat to facilitate its creation.

Here again it is true that an accounting system would inherently be part of a Nuclear Weapons Convention type approach. But its establishment in the near future would greatly assist and stimulate progress on disarmament – including by unilateral and politically coordinated means. That is true regardless of how formal negotiations proceed on all aspects of disarmament.

In this connection, I would also note, without attempting to evaluate, the complementary proposal of the International Commission on Nuclear Non-Proliferation and Disarmament for a “Global Centre” that would serve as clearing house for research and monitoring activities around world, assess the current state of play on nuclear weapons issues, and issue annual “report card” findings.

Good Faith and the Rule of Law

We greatly appreciate the role the Secretary-General has taken in stimulating disarmament discourse and initiatives, and particularly his emphasis on the importance of the international rule of law in achieving a safer world free of nuclear weapons. The International Association of Lawyers Against Nuclear Arms has been developing a deeper understanding of the legal concept of “good faith” in the NPT context, and in closing I would like to provide you with a summary of our findings.

“Good faith is a fundamental principle of international law, without which all international law would collapse,” declared Judge Mohammed Bedjaoui, former President of the International Court of Justice, at a conference held in connection with the 2008 NPT Preparatory Committee.² Good faith is the guarantor of international stability, he explained, because it allows one state to foresee the behavior of its partner. States acting in good faith take into account other states’ legitimate expectations.³

The Vienna Convention on the Law of Treaties provides: “*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*.”⁴ The Vienna Convention is relatively young, dating back to 1969, but the concept is not. Thus the Roman jurist Justinian observed: “What is so suitable to the good faith of mankind as to observe those things which the parties have agreed upon.”⁵

The International Court of Justice has elucidated the requirement, stating that the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.” The Court also said that “it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.”⁶

In addition to implementation of existing obligations, good faith governs the creation of new ones,⁷ as discussed below with regard to negotiations.

Essentially, good faith means keeping promises in a manner true to their purposes and working sincerely and cooperatively to attain agreed objectives.

Regarding the general obligation to perform Article VI in good faith: negotiations must be pursued. The first step is to commence them. That follows from the International Court of Justice’s unanimous conclusion, largely interpreting Article VI, that: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspect under strict and effective international control.”⁸ Negotiations obviously cannot be brought to a conclusion if they are not even commenced!

There are currently bilateral negotiations on a START replacement treaty, and it's possible there will be soon multilateral negotiations on a fissile materials treaty. As to negotiations on these matters, and when the international community finally gets down to negotiations on global elimination of nuclear arsenals, "good faith" comes into play in a more specific fashion. Article VI indeed reflects this in stating that negotiations are to be conducted in "good faith." There is a great deal to be found in international case law and scholarly commentary on the meaning of "good faith" in the context of negotiations.⁹ It can be summarized under four headings.¹⁰

1. Meaningful Negotiations

Good faith negotiations must be meaningful in nature. In *North Sea Continental Shelf*, the International Court of Justice stated that negotiating parties should "not merely . . . go through a formal process of negotiation" but rather "are under an obligation so to conduct themselves that the negotiations are meaningful."¹¹

2. Willingness to Compromise

Good faith negotiations require willingness to compromise. The *Aminoil* Arbitral Tribunal declared that good faith requires "awareness of the interests of the other party; and a persevering quest for an acceptable compromise."¹²

3. Temporal and Procedural Requirements

States must not unjustifiably delay negotiations or adoption of the agreement. In *Lake Lanoux*, the Arbitral Tribunal stated that good faith would be violated "in case of unjustified breaking off of talks, of abnormal delay, [or] of failure to follow agreed procedures."¹³

4. Serious Efforts to Achieve Agreement

In *Gulf of Maine*, the International Court of Justice held that parties are under a duty to negotiate with a genuine intention to achieve a positive result.¹⁴ In the NPT context, the Court explained, Article VI requires good faith negotiations as an obligation of both conduct and result.¹⁵ NPT states parties must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must actually achieve that result.

¹ *Eliminating nuclear threats: a practical agenda for global policymakers*, Report of the International Commission on Nuclear Non-proliferation and Disarmament, 2009, p. xxvi.

² Mohammed Bedjaoui, Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, May 1, 2008, Geneva, p. 18, at <<http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>>. He was President of the ICJ when it gave its 1996 advisory opinion on nuclear weapons.

³ Keynote Address, *supra*, at pp. 19-20.

⁴ Article 26 (emphasis supplied).

⁵ Justinian, *Digest* (529-565 A.D.), Book II.XIV, in S.P. Scott, *The Civil Law* (Cincinnati, 1932).

⁶ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), I.C.J. Reports 1997, at ¶ 142.

⁷ As stated by the International Court of Justice: "One of the basic principles governing the *creation* and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are

inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.” *Nuclear Tests* (Australia v. France), I.C.J. Reports 1974, p. 268, at ¶ 46 (emphasis supplied).

⁸ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226, at ¶ 105(2)F.

⁹ See generally Judge Bedjaoui, Keynote Address, *supra*; Elizabeth J. Shafer, “Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice,” presented January 26, 2008 at seminar in San Jose, Costa Rica entitled Abolition of Nuclear Weapons, War and Armed Forces sponsored by the University of Costa Rica Faculty of Law and the International Association of Lawyers Against Nuclear Arms, available at <http://www.lcnp.org/wcourt/goodfaith-shafer.pdf>.

¹⁰ See “Good Faith Obligations,” Chapter 7 of *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice*, 2009, International Association of Lawyers Against Nuclear Arms and International Human Rights Clinic at Harvard Law School.

¹¹ *North Sea Continental Shelf* (FRG v. Den.), I.C.J. Reports 1969, p. 3, at ¶ 85(a).

¹² *Aminoil Arbitration* (Kuwait v. American Int’l Oil) 66 Int’l L. R. 578 (1982).

¹³ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 R. Int’l Arb. Awards 281 (1957).

¹⁴ *Gulf of Maine* (Can. v. U.S.), I.C.J. Reports 1984, p. 246, at ¶ 87 (Oct. 12).

¹⁵ *Legality of Threat or Use of Nuclear Weapons*, at ¶ 99.