

## Legal Requirements to Achieve Non-Proliferation and Disarmament

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I approach this topic with humility. I am speaking to the 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 coals 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*, distributed at this forum. I'll begin with issues regarding disarmament, and end with a few thoughts about non-proliferation.

### DISARMAMENT

In its 1996 advisory opinion,<sup>1</sup> the International Court of Justice on nuclear weapons concluded unanimously 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."

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<sup>1</sup> *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>. References in this briefing paper are to paragraphs of the opinion.

The Court's interpretation has been directly endorsed by nearly all states. In the most recent General Assembly vote on the resolution following up on the ICJ opinion,<sup>2</sup> 165 states voted for the paragraph containing the Court's statement of the obligation. The yes votes included 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.

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 clearly requires that you enter into the negotiations, that you consider proposals of the other side, and that you re-examine your own position, all in order to reach the objective of the negotiations.

For example, in the ICJ case involving a treaty commitment between Hungary and Slovakia to build a dam and carry out related environmental remediation, the Court 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".<sup>3</sup>

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".<sup>4</sup>

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<sup>2</sup> A/RES/60/76.

<sup>3</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep. 1997, para. 142.

<sup>4</sup> I.C.J. Reports 1969, p. 47.

A World Trade Organization panel in the *Certain Shrimp* case 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.”<sup>5</sup>

According to eminent international lawyer Antonio Cassese, when there is an obligation of good faith negotiation: “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.”<sup>6</sup> The latter requirement would seem to bar nuclear weapon states from taking steps like resumption of testing or development and deployment of modified or new-design warheads with increased military capabilities.

In the case of Article VI, the Court relied on a distinction drawn in international law between two kinds of obligations. There is an obligation of conduct, which refers to performing or refraining from a specific action. The second kind of obligation is an obligation of result; a state by some means of its choice is required to bring about a certain outcome. The ICJ said Article VI involves both kinds of obligation, stating:

The legal import of that obligation 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.<sup>7</sup>

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<sup>5</sup> 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.

<sup>6</sup> 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/>.

<sup>7</sup> Para. 99 (emphasis supplied).

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 elimination from national arsenals of nuclear weapons and the means of their delivery."

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. As we have already seen, one is the text of the Article VI and the preamble.

The second is that there is already an agreement – the NPT – requiring non-possession of nuclear weapons by most states. In the hearings before the Court in 1995, Gareth Evans, then Foreign Minister of Australia, 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"<sup>8</sup> In conformity with that norm, Evans said, all states possessing nuclear arsenals must negotiate their dismantlement. In its statement of the disarmament obligation, the Court essentially accepted Australia's argument.

The third basis for the strength of the Court's statement 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

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<sup>8</sup> Customary international law is universally binding law derived from a general and consistent practice of states accompanied by a sense of legal obligation.

disarmament in all its aspects.” For example, the Court undoubtedly would accept either a nuclear weapons convention<sup>9</sup> prohibiting and eliminating nuclear weapons, or a “nuclear-weapon-free world [underpinned] by a universal and multilaterally negotiated . . . framework encompassing a mutually reinforcing set of instruments” referred to in the 2000 New Agenda resolution. But it certainly is possible to identify nuclear weapons-specific criteria and measures relevant to assessing whether the disarmament obligation is being met. For that, we 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, imposing 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, as set forth in Article VI, to be brought to fruition in the distant future if ever. The 1995 and 2000 NPT Review Conferences, and the 1996 International Court of Justice opinion discussed above, 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. Again assuming that the results are taken seriously, the means by which a nuclear-weapon-free world is to be achieved have been identified, in the 1995 Principles and Objectives and the 2000 Practical Steps for Disarmament.

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<sup>9</sup> 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](http://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.

The key question, then, 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; 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 and a policy objective is discarded, an alternative course should be proposed. That has not been done.

Second, as a matter of international law, the results of the 1995 and 2000 Review Conferences decisively informs the proper interpretation of Article VI and the disarmament obligation as stated by the ICJ. Under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the Practical Steps together with the Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT authoritatively applying and interpreting Article VI.<sup>10</sup>

Article 31(3) of the Vienna Convention, 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

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<sup>10</sup> 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>.

establishes the agreement of the parties regarding its interpretation.” The 2000 NPT Review Conference 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." This is the most natural setting for states to make authoritative applications and interpretations of the NPT. Further, the 2000 Practical Steps concern implementation of the Principles and Objectives adopted in connection with the legal decision pursuant to the treaty’s terms to extend the treaty indefinitely. Consequently, the Practical Steps have added weight because they are inextricably bound up with a decision that is both legally binding and of supreme practical importance.

In addition to constituting an agreement, 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. After the treaty was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today's Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including "the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles ....”<sup>11</sup> Disarmament measures have been the subject of

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<sup>11</sup>ENDC/PV. 390, 15 August 1968, para. 93.

discussion at every Review Conference since then. Notably, in addition to committing to "systematic and progressive efforts to reduce nuclear weapons globally," the 1995 Principles and Objectives echoed the 1968 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, the Practical Steps, as an application of Article VI, are an essential guide to its interpretation. They identify criteria and principles that are so tightly connected to the core meaning of Article VI as to constitute requirements for compliance with the NPT and more generally the disarmament obligation stated by the ICJ. That is not to say that every step is necessary to compliance; 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 (step 7), 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 in implementation of Article VI.

Its 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 NPT 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”.

In addition to reiterating these and other commitments (e.g. the CTBT and a fissile materials treaty) made in 2000, the resolution acknowledges the changes in U.S.-Russian relations since 2000, omitting references to START and the ABM Treaty and instead calling for full implementation of the 2002 Moscow Treaty and for further reductions. In addition, in a provision applicable to all nuclear-armed states, it calls for “deeper reductions in all types of nuclear weapons”.

Drawing on the “Renewed Determination” resolution and other sources, including contributions of civil society groups like the Middle Powers Initiative, it can be said that at a minimum, the key general criteria and principles for compliance with Article VI contained in the Practical Steps include (but are not necessarily limited to):

- 1) The reduction and elimination of nuclear arsenals are to be accomplished pursuant to principles of verification, transparency, and irreversibility.
- 2) Implementation of the disarmament obligation is facilitated by a diminishing role of nuclear weapons in security policies and reduction of their operational status.

3) The process of nuclear disarmament must involve all nuclear weapon states as soon as appropriate in the reduction and elimination of nuclear arsenals and related measures as well as multilateral deliberations and negotiations involving non-nuclear weapon states.

4) The obligation is to achieve the complete elimination of nuclear weapons, without any precondition of comprehensive demilitarization.

Let me dwell on the final point. It is often noted that the 2000 unequivocal undertaking to eliminate nuclear arsenals is separated from the affirmation of the ultimate objective of general and complete disarmament. Still, how are we to understand the Article VI reference, in its second clause, to a treaty on general and complete disarmament under strict and effective international control?

Some seem to assume that this refers to a treaty on comprehensive demilitarization, including major conventional weapons (tanks, aircraft, etc.). It is true that the objective of general and complete disarmament (GCD) does have this meaning. But that does not mean that a treaty on GCD would embrace all major weapons. Indeed, the preamble of the NPT points towards the treaty referenced in Article VI as a treaty on nuclear disarmament. It refers to "the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control." That is, the preamble seems to refer to a treaty on elimination of nuclear forces as an instance of a type of treaty, the type being treaties on general and complete disarmament, or GCD. Other examples of course are the

Biological Weapons Convention and the Chemical Weapons Convention.  
All of this is consistent with the way the ICJ read Article VI.

### The State of Implementation

I will not spend the time of this audience on the poor implementation of the disarmament obligation. It is detailed in the briefing paper available at this meeting. In brief, since the conclusion of negotiations on the CTBT in 1996, there has been 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

I will not attempt a comprehensive discussion of legal requirements for non-proliferation. But let me touch on two important questions of current concern: 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 of the NPT 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.<sup>12</sup> It further provides that if the Agency is not able to verify that there has been no diversion of nuclear material required to be safeguarded under the Agreement to nuclear weapons, it may make reports to the Security Council and the General Assembly.<sup>13</sup>

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 able to provide sufficient assurances that diversion has not occurred – in other words, when diversion is established or there is uncertainty about diversion.

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<sup>12</sup> Paragraph 28.

<sup>13</sup> Paragraph 19.

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 NPT Article III, safeguards procedures. The reason for not employing the term is to hold open the door for a state to rectify violations without potentially being subjected to penalties; to rely on good faith and a state's 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, this approach is losing support. It is further 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 to conformity with both Article II and III.<sup>14</sup>

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

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<sup>14</sup> Paragraph 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."

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, and given the fact that, in my opinion, Iran negotiated in good faith, it is difficult now, I think, to maintain as a legal matter that Iran must be denied that technology, full stop, if the remaining issues regarding its past violations and current intentions are cleared up. However, that is what some states seem determined to do.

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 are 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 needs to be international control of the production of nuclear materials. But this is the 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 a violation of Article IV if it prevents a particular state, in compliance with Article III, 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 imposing additional requirements on the non-nuclear weapon states which already have nuclear fuel cycle technology. 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

Especially in international relations, the law is not a magic tool box, into which we can reach and produce solutions to knotty problems. Nonetheless, understanding of legal requirements, and respect for them, is essential to having a safer world now, and to building the kind of world succeeding generations deserve.