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Article VI Versus Declared Nuclear Policies

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Article VI of the Nuclear Non-Proliferation Treaty provides:

Each of the Parties to the Treaty undertakes 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, and on a treaty on general and complete disarmament under strict and effective international control.

One question we must ask is, what does it mean to pursue negotiations in good faith?

Negotiation in Good Faith in International Law

Under US labor law, negotiating in good faith in the context of a relationship between a union and an employer is only procedural in nature. It only means that the union and the employer must meet regularly, must behave reasonably towards each other, must not take actions such as strikes or lockouts or firings that undermine the negotiations, that undermine the relationship that pre-exists and that they are trying to keep going.

International law, in contrast, goes beyond the requirement of procedural good faith. International law says, when you are assessing whether there has been good faith in negotiations, you also look to the results achieved. You look to the substantive outcome. There was a case at International Court of Justice (ICJ) concerning a treaty commitment to build a dam and carry out related environmental remediation, a case involving Hungary and Slovakia. In deciding the case and telling the parties to go back and negotiate some more on the dam issues, the Court said 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".¹ So good faith required looking to the purpose of the treaty.

In the *North Sea Continental Shelf Cases*, which involved a question of boundaries (many of the cases decided by the ICJ have concerned boundaries), 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".²

International law in general with respect to good faith negotiations requires first of all that you enter into the negotiations, that you consider proposals of the other side, and that you re-examine your own position in order to reach the objective of the negotiations. Here I'm drawing on some excellent research done by IALANA lawyers and law students in the Netherlands,³ some of whom are here today. IALANA is the International Association of Lawyers Against Nuclear Arms, and the Lawyers' Committee on Nuclear Policy is its US affiliate.

Now for Article VI. A distinction is sometimes 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. For example, there may be an obligation of conduct requiring negotiations. The second kind of obligation is an obligation of result. There is an obligation in a treaty or other instrument that requires a state by some means to bring about a certain outcome. In interpreting Article VI in its advisory opinion, the International Court of Justice said that Article VI involves both kinds of obligation: an obligation of conduct, that is engaging in negotiation, and an obligation of result, that is achieving complete nuclear disarmament. The Court stated regarding Article VI:

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.

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 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 pursuant to a treaty on general and complete disarmament under strict and effective international control". So that's the narrow answer to where the Court found the obligation of result - the obligation, as stated in the Court's unanimous formal conclusion, to "bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

The larger answer is that the Court really felt that the issue, the legality of threat or use of nuclear weapons, could not be satisfactorily addressed, that the law was not good enough to allow the Court to reach a definitive conclusion. I'm sure people know that the Court said that the threat or use of nuclear weapons is generally illegal. But obviously the Court itself was not satisfied with this outcome and so it went on to say, in our view and applying the law, the best solution is to go forward to complete nuclear disarmament and, furthermore, this is what is required by a proper interpretation of the NPT.

Non-Compliance With Article VI

For this audience, I do not need to go into detail why the Lawyers' Committee on Nuclear Policy would say, and most NGOs would say, that the obligation set forth in Article VI, which was affirmed by the ICJ, is not being met. Let me review briefly the elements of that analysis.

First, there are no multilateral negotiations on nuclear disarmament or any aspect of nuclear disarmament going on at the Conference on Disarmament in Geneva or anywhere else. This winter in Geneva, the United States said that beyond negotiations on a fissile materials treaty it is prepared only "to *discuss*, in a suitable context, outer space issues and questions related to the long term goal of nuclear disarmament" and that "proposals for negotiations now in these fields are clearly not a basis for consensus".⁴ The United Kingdom, the United States, Russia, and France all say they are not prepared to start negotiations in Geneva on a program for the elimination of nuclear weapons within a timebound framework. Also in the General Assembly, those states have voted against the resolution following up on the ICJ opinion calling for multilateral negotiations leading towards the early conclusion of a convention prohibiting and eliminating nuclear weapons.

A second point is the inadequacy of US-Russian negotiations. Even if START II and START III enter into force, which is very much in doubt because of the ABM Treaty issues, and are implemented, a decade from now Russia and the US will retain on the order of 2,000 deployed strategic warheads each, plus thousands of additional tactical, spare and reserve warheads.

The third point is perhaps not as well known. In authoritative national policy statements, not of the kind that we hear at the UN, the United Kingdom, France, the United States, and Russia make very clear that they intend to retain sizeable nuclear forces and to hold to the policy of deterrence for the foreseeable future.

The 1998 British Strategic Defence Review says that "nuclear deterrence still has an important contribution to make in ensuring against the re-emergence of major strategic military threats, in preventing nuclear coercion and in preserving peace and stability in Europe", that the United Kingdom is going to "retain and exercise the manufacturing skills that will be needed to maintain Trident warheads for the next 20 to 30 years", and that "it would be premature to abandon a minimum capability to design and produce a successor to Trident should this prove necessary".

France has ratified the Statute of the International Criminal Court on the purported and wholly insupportable understanding that its war crimes provisions "relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons".⁵

The 2000 Annual Report of the US Secretary of Defense goes on at some length about the policy of deterrence, stating:

The U.S. nuclear posture also contributes substantially to the ability to deter aggression against the United States, its forces abroad, and its allies and friends. Although the prominence of nuclear weapons in the nation's defense has diminished since the end of the Cold War, nuclear weapons remain important as one of a range of responses available to deal with threats or use of NBC [nuclear, biological, and chemical] weapons. They also serve as a hedge against the

uncertain futures of existing nuclear powers and as a means of upholding U.S. security commitments to U.S. allies.

After reaffirming US nuclear participation in NATO, the report then states that "for the foreseeable future, the United States will retain a robust triad of sufficient nuclear forces." It goes on to say that the goals of deterrence can be achieved at lower force levels.⁶ In other words, and I want to emphasize this point, the US government is perfectly clear that the START process is not going to lead to the end of deterrence in any respect and that the United States is planning to retain force levels sufficient to carry out all the missions it associates with deterrence.

Reflecting the national commitments of the United States, the United Kingdom, and France, NATO's 1999 Strategic Concept says that NATO "will maintain for the foreseeable future an appropriate mix of nuclear and conventional forces based in Europe and kept up to date where necessary" and that nuclear weapons "make a unique contribution in rendering the risks of aggression against the Alliance incalculable and unacceptable".

The Russian National Security Concept of January 10, 2000, states that Russia "should possess nuclear forces that are capable of guaranteeing infliction of the desired extent of damage against any aggressor state or coalition of states in any conditions and circumstances."

There is much more to be said about how the nuclear weapons states are not complying with Article VI and that can be found throughout NGO documents at this NPT Review Conference, so I'm not going to go into that point further. I do want to mention that the Lawyers' Committee on Nuclear Policy has put together a collection of national policy statements showing a commitment to maintaining nuclear deterrence and nuclear forces for the foreseeable future.⁷

Nuclear Weapons' Distorting Effects on International Law

Now I want to turn, briefly, to a broader question: what is the effect of nuclear weapons on the larger structure of international law? This is something that is perhaps not as familiar to people here today. The ICJ opinion is very carefully written and warrants close reading. Paragraph 98 says:

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.

Let me give you a couple of examples. In World War II, the international law governing the conduct of warfare, humanitarian law, was totally inadequate to the kinds of strategic bombing that were being carried out. In Protocol I to the Geneva Conventions, most states in the world sought to rectify this deficiency in international law. Protocol I was concluded in 1977. However, the Red Cross, in order to persuade the United States, France, the United Kingdom, and Russia to go along with these negotiations, had to make a statement essentially to the effect that the negotiations on Protocol I were not intended to broach questions relating to nuclear, chemical and biological weapons. This was the price for getting negotiations underway. Protocol

I as negotiated is a comprehensive codification of humanitarian law, among other things protecting civilians from the effects of warfare. It's really quite good. But the aforementioned nuclear weapons states have insisted that provisions of Protocol I not reflecting pre-existing international law do not apply to nuclear weapons. So before the International Court of Justice they argued that the Protocol's prohibitions on reprisals against civilians and on damaging the environment do not apply to nuclear weapons. The United Kingdom and Russia have ratified Protocol I, and France is reportedly poised to do so, but the United States still has not. One of the reasons - not the only reason, but a significant reason - is the Pentagon's fear of the effects of Protocol I on the US nuclear posture. So you can see, as the ICJ said, that nuclear weapons are introducing uncertainty and instability into humanitarian law generally.

We saw the same problem in the summer of 1998 when the Statute of the International Criminal Court Statute was negotiated. The United States, United Kingdom, France and Russia, of course, refused proposals that were supported by most non-nuclear weapon countries in the world that would have expressly criminalized the use of nuclear weapons. This was an ongoing controversy throughout the five weeks of the negotiations. Finally, when it came down to the end, some non-nuclear weapons states said that if nuclear weapons aren't going to be expressly criminalized by the Statute, then we don't want references to the criminalization of chemical and biological weapons, as they are defined in the Chemical Weapons Convention and the Biological Weapons Convention. Fortunately, and I won't go into the details, the ICC Statute as written still does expressly apply to chemical weapons, but whether it does so with respect to biological weapons is in doubt. So again, very distorting and disturbing effects on international law generally. I should add here that while the Statute does not expressly criminalize the use of nuclear weapons, its general provisions on war crimes and crimes against humanity do apply and would make use criminal in most or all circumstances.⁸

With respect to the United Nations Charter, there is the unfortunate identification of the NPT nuclear weapons states (US, UK, France, Russia, China) with the Permanent Five. I think this is a historical accident. The UN Charter was finalized before the United States even tested a nuclear weapon, but nonetheless this identification has evolved. It means that there is a tendency for elements in some countries to think, "If we want to be a permanent member, we better get some nuclear weapons." Or there's a tendency for elements in Britain or France to think, "If we want to stay permanent members, we'd better not give up our nuclear weapons." The identification of the P-5 with the Nuclear Five also erodes the legitimacy of the Security Council and the United Nations, undermining the central international institutional arrangements for global security.

¹ *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep. 1997, para. 142; http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm.

² I.C.J. Reports 1969, p. 47; summary at <http://www.icj-cij.org/icjwww/idecisions/isummaries/icssummary690220.htm>.

³ André Nollkaemper, Professor of Public International Law, University of Amsterdam; Phon van den Biesen, international lawyer and secretary of IALANA; Martina Siegfried and Marija Davidovic, law students, University of Amsterdam. All worked on a draft application to the International Court of Justice to compel the nuclear weapon states to comply with Article VI, an executive summary of which is available from the Lawyers' Committee on Nuclear Policy.

4 Statement of Ambassador Robert T. Grey, Jr., February 17, 2000 (emphasis added).

5 See "The French 'Interpretative Declaration' Regarding Nuclear Weapons," July 5, 2000, <http://www.lcnp.org/global/french.htm>.

6 <http://www.dtic.mil/execsec/adr2000/chap1.html> (emphasis added).

7 "Policy Statements Contradicting Article VI of the Nuclear Non-Proliferation Treaty," April 20, 2000, <http://www.lcnp.org/disarmament/polsta4.htm>.

8 See generally "The French 'Interpretative Declaration' Regarding Nuclear Weapons," July 5, 2000, <http://www.lcnp.org/global/french.htm>; "The International Criminal Court, Weapons Of Mass Destruction, Ngos, and Other Issues: A Report on the Negotiations and the Statute," rev. April 1999, <http://www.lcnp.org/global/icc.htm>.