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*IEER Conference: Nuclear Disarmament, the NPT, and the Rule of Law
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Questions and Answer Session: Rule of Law and Nuclear Disarmament

April 25, 2000

Question: One of the things that has always bothered me about the ICJ opinion was that it does not speak about outlawing nuclear weapons, but merely deals with the use or threat. The word "threat" is a word I never understood there. This is not a dual-use technology. You can't say that a nuclear weapon is like a knife, which you can either use well or use badly. There is only one use for a nuclear weapon. The mere possession implies the probability that it is being held in readiness for use. The first time I ever heard my concern dealt with was in something that Merav just read, not from Judge Weeramantry's opinion, but from someplace else. And I wondered where that had come from - where there is the recognition of the fact that use implies threat.

Merav Datan: This was something that the Court said. The Court confirmed that if use is illegal, then threat is illegal. It talked about an inference of possible use through possession, but it didn't make this very explicit. It said that it did not want to deal with deterrence, which I think is due to political considerations. The Court's own existence depends on the support of the nuclear weapons states, the permanent members of the Security Council, which is why I say that the court went as far as it could, but didn't actually follow through on some of the reasoning that it put forward. But the language I read, about possible inference of use, is from the Court's opinion.

Question: At the recent case at Greenwich, it was argued successfully by Professor Francis Boyle that it's not just a question of possession, but of deployment together with stated conditional intentions to use under certain circumstances. So, mere use is not the problem, it's deployment. For instance, the British Trident submarine, one of them is continuously on patrol, or it's supposed to be anyway. I think this sort of argument goes quite a long way toward meeting the threat-use problem.

Question: My question is regarding the NPT Article VI obligations. The Tokyo Forum on non-proliferation and disarmament and international experts forum, convened by the Japanese government, issued a report containing 17 recommendations last summer. One of the recommendations is to establish a permanent secretariat of the NPT and also a consultative

commission of the NPT to observe the fulfillment and implementation of the obligations of the treaty. Do you think it would be an effective or realistic proposal to observe nuclear weapons states to fulfill their obligations under Article VI?

John Burroughs: This seems to me to be something well worth pursuing - basically trying to set up the institutional ability between review conferences to monitor and carry out the purposes of the NPT, both non-proliferation and disarmament. Now you won't be surprised to learn that such a step would be opposed by the nuclear weapons states. After all, the nuclear weapons states didn't even want a strengthened review process, which concerns the issuance of documents at review conferences assessing progress on disarmament and nonproliferation. So they are not particularly interested in having some sort of institutional structure that might begin at some point to monitor the fulfillment of disarmament obligations and also might become a competitor to the Security Council or to the United States. When you look at current or recent cases of non-compliance, such as Iraq and North Korea, it was the Security Council and the United States that were dealing with these issues. So there is going to be resistance to changing that sort of structure of power. But, nonetheless, it does seem something worth pursuing. I heard one New Agenda diplomat say, more or less, that we really should have thought more about this in 1995, which is when the bargaining leverage was at its greatest. But still, it is something that should be pursued.

Question: The United States is attempting to legitimate and also develop the technology to carry out limited uses of nuclear weapons under the purported rationale that they are being used to prevent the use of other weapons of mass destruction and that they would minimize collateral damage from other types of attacks of weapons of mass destruction with other kinds of weapons. One of the things that can be found in, for example, the current initiatives of the Defense Threat Reduction agency of the United States government is research into using various kinds of weapons to minimize the collateral damage from attacks on facilities having weapons of mass destruction. There is research, for example, on nuclear weapons use against biological and chemical agents. This is clearly a line of research and technology development aimed at this specific kind of nuclear weapons use, as opposed to general nuclear war. And many of the broader arguments made against the legality of nuclear weapons tend to assume, in some ways, a broader context. I would be interested in both panelists commenting on the legal status of this rationale.

John Burroughs: That gives me an opportunity to say something about negative security assurances that I didn't get a chance to say earlier. Negative security assurances are assurances that nuclear weapons states will not use nuclear weapons against non-nuclear weapons states. In my opinion, they are already legally binding. They were essentially made by the nuclear weapons states as part of the NPT bargain, not only in 1995, but back when the NPT was negotiated. That doesn't mean that it's not worthwhile to try to formalize - in some fashion, not necessarily by a treaty - the existing negative security assurances, but I think that NGOs and governments should be talking about the existing assurances as being legally binding.

This, however, does not really solve the problem of the use of nuclear weapons, as the United States likes to say, against chemical and biological weapons. The Chemical Weapons Convention says something like the following: chemical weapons shall never in any

circumstances be used. There is no language like that in the negative security assurances, so, it's not clear as a matter of law that the negative security assurances protect non-nuclear weapons states, certainly not non-nuclear weapons states who actually use chemical or biological weapons. This is partly because there is a doctrine of reprisal in international law, which says that if one party does something illegal, then another party may be able to do something illegal if the second act of illegality will prevent further acts of illegality by the first party. That sounds a little bit like Groucho Marx, but I hope that that made sense. So this is the problem with respect to chemical and biological weapons, but it gets more subtle. The United States refers to the possibility of the use of nuclear weapons in retaliation against use of a chemical or biological weapon, but it also refers to the possibility of a pre-emptive use. Legally, I don't think that a pre-emptive use is permitted or could be plausibly argued to be permitted under a security assurance. So pre-emptive use is different than a retaliatory use.

I think that the United States has a \$35 billion a year nuclear weapons infrastructure. So one of the things that happened with the end of the Cold War is that the infrastructure was lacking in justifications for itself, and it started generating more justifications for its existence. One of the justifications for its existence was found to be the possibility of use of nuclear weapons in relation to chemical and biological weapons facilities or weapons themselves. Probably the best solution to decades more of very subtle and elaborate justifications for possible nuclear weapons use will be a firm, clear, international rule that never in any circumstance can you use a nuclear weapon.

I think in most, perhaps all, conceivable circumstances, you could make a very good argument that a nuclear weapon cannot be used, even in a circumstance of reprisal, because of indiscriminate effects on civilians either at the time or because of the spread of radioactivity and the effects on future generations. There is also a provision that a nuclear weapon, or any weapon, cannot be used to cause unnecessary suffering. Because of the radioactivity effects, there's going to be unnecessary suffering in the combatants involved in any such situation, or in their descendents. So there is a very good argument to be made under humanitarian law for illegality in all circumstances. The ICJ didn't really, as we all know, address every single possible circumstance, so we ourselves have to make these arguments and we are making these arguments.

Merav Datan: Adding to what John said, I would also look at the law of self-defense. As you know, there is a debate as to how to read Article 51 and what the words "if an armed attack occurs" mean, but they certainly do seem to include a pre-emptive act in the name of self-defense, which is something controversial. We also know that self-defense has to meet the criteria of proportionality and necessity. And that's where I think I would look to argue that this is an illegal process of planning and preparation.