

# **Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons**

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Commentary by Dr. John Burroughs

Executive Director, Lawyers' Committee on Nuclear Policy, New York

I appreciate very much the opportunity to be here today. Thanks to Stephen Schwartz and the Center for Nonproliferation Studies for organizing this.

And I am delighted to be commenting on Christopher Ford's analysis of Article VI of the NPT. The initiative he has launched of engaging in discussion – including at this year's NPT PrepCom - on how to achieve a nuclear-weapon-free world is most welcome. And coming to grips with NPT requirements for both non-proliferation and disarmament falls under the category of "taking international law seriously." That is something the United States and the world need to do, in nuclear and other spheres, to build a safer and more just world.

I also welcome Dr. Ford's reminder in his article of "just how frightening and dangerous the Cold War nuclear arms race was." I'm afraid, though, that I cannot draw the same comfort that he does from reductions in the U.S. and Russian arsenals from Cold War levels. The truth is that the detonation of just one or a few nuclear bombs was and would be abhorrent. As McGeorge Bundy, National Security Advisor to Presidents Kennedy and Johnson, observed: *"In the real world of real political leaders, a decision that would bring even one hydrogen bomb on one city of one's own country would be recognized in advance as a catastrophic blunder; ten bombs on ten cities would be a disaster beyond history; and a hundred bombs on a hundred cities are unthinkable."*

I'm going to talk about three main issues: 1) the validity of the statement of the disarmament obligation by the International Court of Justice (ICJ); 2) the relationship of nuclear disarmament to general and complete disarmament and 3) the status of the Practical Steps for disarmament agreed at the 2000 NPT Review Conference.

## **I. The Disarmament Obligation Stated by the International Court of Justice**

The burden of Dr. Ford's criticism of the ICJ's statement of the disarmament obligation is this: you cannot legitimately go from the Article VI requirement that states "pursue in good faith negotiations on effective measures relating to ... nuclear disarmament" to the ICJ's statement that states are obligated to "pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international control."

Let's start with prior ICJ cases relating to good faith negotiation. 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*". 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*".

So there is international case law supporting a strong interpretation of Article VI. Admittedly, those cases do not go as far as the Court did in the nuclear weapons case. As I'll get to in a moment, that is because the case was about nuclear weapons!

The Court's interpretation of Article VI has been endorsed by nearly all states. For a number of years through 2006, a vote was held on operative paragraph one of the General Assembly resolution following up on the ICJ opinion. That paragraph "underlines" the ICJ's statement of the disarmament obligation. It was Canada that instituted this practice. In 2006, 168 states voted for the paragraph; three voted no – Russia, the United States, and Israel; and five abstained, including France and Britain.

How to explain the fact that virtually all states voted for this paragraph – including states that have a very sophisticated view of international law, say Germany or Canada? How to explain the fact that the 2000 NPT Review Conference approved, without objection from the United States or any participating state, the "unequivocal undertaking" to eliminate nuclear arsenals – a formulation totally consistent with the ICJ's statement of the disarmament obligation?

Part of the answer lies, I think, in the strategic bargain that Thomas Graham identifies as underlying the NPT: forswearing acquisition of nuclear weapons in the expectation that states possessing them would eliminate them.

Part of the answer is found in the context of the ICJ opinion. The ICJ was asked by the General Assembly whether the threat or use of nuclear weapons is permissible in any circumstance. The Court concluded that threat or use is generally contrary to international law. The thrust of its analysis was well conveyed by a body very knowledgeable regarding the realities of nuclear weapons, the Committee on International Security and Arms Control of the U.S. National Academy of Sciences. In the 1997 book, *The Future of U.S. Nuclear Weapons Policy*, the Committee stated:

[T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force. Accordingly, any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military

objectives. In the committee's view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.

The Court, however, did not judge itself capable of ruling in the abstract on threat or use of nuclear weapons in all circumstances, in particular an extreme circumstance of self-defense in which the very survival of the state is at stake. The Court in effect determined that it is up to states to take the step of prohibiting and eliminating nuclear weapons, as has been done with biological and chemical weapons, and unanimously agreed on the strong statement of the disarmament obligation.

It was not only the risks posed by nuclear weapons that formed the setting for this statement. The Court also referred to the debilitating effect that legal possession of nuclear weapons by only some states has on the international order and international law. The Court said:

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. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

When viewed in context, then, the Court's statement of the disarmament obligation makes eminent sense. It's not just about the meaning of good faith negotiation; it's about the unacceptability of nuclear weapons in light of international humanitarian law, and the need for true international law – that is law that applies to all equally: no one is to have nuclear weapons.

## **II. The Relationship of Nuclear Disarmament and General and Complete Disarmament**

Dr. Ford revisits the argument, occasionally but not always relied upon by the United States, that the NPT contemplates that the elimination of nuclear weapons is to take place in the context of general disarmament. He invokes NPT preamble references to the easing of international tensions, as well as the reference in the second clause of Article VI to a treaty on general and complete disarmament.

My view is this: There will be practical issues of readjusting national security postures as nuclear weapons are reduced and eliminated, and they must be squarely considered and addressed. But there is no necessary *legal* linkage between nuclear disarmament and general disarmament.

It is often assumed that the reference to a treaty on general and complete disarmament in Article VI 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) has this meaning. But that does not mean that *a* treaty on GCD would embrace all major weapons.

It is well established practice in the UN context to consider a range of agreements and programs on weapons control – from small arms to landmines to chemical weapons – under the rubric of general and complete disarmament. That is the case in the General Assembly First Committee, as well as the General Assembly Special Sessions on disarmament.

The preamble of the NPT itself points towards the treaty referenced in Article VI as a treaty on *nuclear* disarmament. The preamble 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." Thus 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 GCD. Similarly, the Biological Weapons Convention and the Chemical Weapons Convention each is a treaty on GCD. As the preamble to the CWC says, they represent "*effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction.*"

This is consistent with how the International Court of Justice read Article VI of the NPT. And the 2000 Practical Steps support this view of Article VI. The unequivocal undertaking to eliminate nuclear arsenals (step six) is clearly separated from the reaffirmation of the "ultimate objective" of "general and complete disarmament under effective international control" (step 11).

As I mentioned, it is also the case that in certain respects there may be *practical* links between progress towards nuclear abolition and other disarmament measures. For example, a verification regime for the ban on biological weapons and a regime preventing the weaponization of outer space both would give the nuclear-armed states greater confidence in proceeding towards elimination of nuclear arsenals. Here the United States – which opposes both regimes - is in absolutely no position to lecture other states about meeting obligations of general and complete disarmament.

### **III. The Status of the 2000 Practical Steps for Disarmament**

In his article, Dr. Ford characterizes the 2000 Practical Steps as no more than a "political declaration". At the NPT PrepCom earlier this year, he called the outcomes of Review Conferences, like the Practical Steps, "recommendations," and a U.S. working paper went so far as to call them "suggestions."

Why should the Practical Steps be taken more seriously, as most of the world believes?

*First*, I don't think that governments, or NGOs like mine, would care so much if the Practical Steps now were irrelevant. But they are not. In their essential elements, they are as good a road map now for closing out the age of nuclear weapons as they were in 2000. Those elements include: a diminishing role for nuclear weapons in security policies; concrete agreed measures on reduction of the operating status of nuclear forces; application of the principles of verification, transparency, and irreversibility to reduction and elimination of nuclear arsenals; bringing the CTBT into force; negotiating a verified FMCT.

The continuing importance of the Practical Steps is clearly signaled in their incorporation in the 2007 UN General Assembly resolution sponsored by Japan and 15 other countries including Australia and Germany, "Renewed determination towards the total elimination of nuclear weapons." The resolution includes every one of the elements I just mentioned, except that in a bow to the U.S. position, whether an FMCT should be verified is left to negotiations. The resolution was adopted by a vote of 163 to three, with 10 abstentions. The only "no" votes came from India, North Korea, and the United States. And the United States referred to the resolution as "balanced" and "realistic," explaining that it voted "no" due to the inclusion of a call for CTBT ratification.

A *second* reason to take the Practical Steps seriously is obvious: states should abide by their commitments, whether "political" or "legal". If they do not, international cooperation is severely undermined. There is less incentive to make future commitments if past ones have been ignored. And it is harder for the United States to call other state to account for their past commitments if it ignores its own. For example, in 1995 and 2000 the NPT Conferences declared that exercise of Article IV rights is contingent upon fulfillment of Article III responsibilities – that is, safeguards agreements with the IAEA. But given its attitude towards those Review Conference outcomes, the United States cannot rely on the point about Article IV and Article III in relation to Iran.

*Third*, contrary to Dr. Ford's contention, the Practical Steps do inform proper legal interpretation of Article VI. Article 31(3) of the Vienna Convention on the Law of Treaties 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.*"

LCNP produced a paper explaining the legal significance of the Practical Steps under Article 31,<sup>1</sup> and we are not alone. In a 2004 opinion, Rabinder Singh, QC, and Professor Christine Chinkin of Matrix Chambers, London, cite the Vienna Convention and give considerable weight to the Practical Steps in analyzing the NPT.<sup>2</sup>

This 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, U.S. actions have rendered the references moot in

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<sup>1</sup> "Thirteen Practical Steps: Legal or Political?" (May 2005). Online at <http://lcnp.org/disarmament/npt/13stepspaper.htm>.

<sup>2</sup> Joint Advice, July 20, 2004, para. 20. Online at [www.acronym.org.uk/dd/dd78/78news02.htm#01](http://www.acronym.org.uk/dd/dd78/78news02.htm#01).

name, though not in substance. It is certainly possible to draw the essential principles and measures out of the Practical Steps, and that has been done in the Renewed Determination resolution I already talked about.

Dr. Ford offers various arguments against this view of the Practical Steps. One is that there could be other means of satisfying the disarmament obligation. Certainly, as I have already said, though all are desirable, not every commitment in the Practical Steps is necessary, for example the requirement of reporting to Review Conferences. But it is hard to see how we can achieve or have confidence in a nuclear-weapon-free world without diminishing the role of nuclear weapons in security policies or applying the principles of verification, irreversibility, and transparency or verifiably banning nuclear test explosions and the production of fissile materials for weapons.