

# The ICJ on the Nuclear Disarmament Obligation

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In today's world, the regimes and rules intended to prevent and regulate war and to control and eliminate nuclear weapons are under intense stress. That is all the more reason to insist on the fundamental international obligations limiting resort to force and requiring the disarmament and non-proliferation of nuclear arms. A key resource in this regard is the advisory opinion of the International Court of Justice on the legality of threat or use of nuclear weapons, delivered nearly 30 years ago, on 8 July 1996.

One of the most important results of the opinion was the Court's interpretation of the nuclear disarmament obligation. In a unanimous conclusion, the Court declared: "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."

The Court justified the conclusion in just a few, closely reasoned paragraphs. I want to highlight three key elements of the conclusion and underlying analysis: the relationship of nuclear disarmament and general disarmament; the obligation to achieve the *result* of nuclear disarmament through negotiation; and the universality of the nuclear disarmament obligation. I will draw upon the arguments set out by the Marshall Islands in its [memorial](#)—brief—on the merits in its 2014 case in the ICJ against the United Kingdom concerning the nuclear disarmament obligation (I had the privilege on being on the Marshall Islands' legal team).

## **Nuclear disarmament and general disarmament**

There are three prongs of Article VI: cessation of the nuclear arms race, nuclear disarmament, and general and complete disarmament. The third prong requires the pursuit of "negotiations in good faith ... on a treaty on general and complete disarmament under strict and effective international control." When the NPT was negotiated, such a treaty was understood, as set out in General Assembly resolution 808(A) of 4 November 1954, as providing for the prohibition and elimination of nuclear weapons and other weapons of mass destruction, the limitation and reduction of armed forces and conventional armaments, and the establishment of effective international control through an organ.

However, subsequent to entry into force of the NPT, the practice of states has been to negotiate separate conventions on prohibition and elimination of weapons of mass destruction, with the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. The ICJ took note of this practice, stating, "The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments."

In light of this history, complete nuclear disarmament can be considered both an “effective measure” under the second prong of Article VI concerning nuclear disarmament, and as partial fulfilment of the objective of general and complete disarmament of the third prong.

The NPT Review Conference Final Documents in 1995, 2000, and 2010 accord with this view. Thus in the Practical Steps adopted in 2000, step 6, “An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals” is set out separately from step 11, “Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.”

That from a legal point of view nuclear disarmament is not contingent upon general disarmament remains a highly relevant proposition. For example, in its 29 April [statement](#) at this NPT Review Conference, Russia came close to asserting the opposite, stating that “the ultimate objective of building a nuclear-weapon-free and safer world for all must be pursued through a fundamental approach that ensures that such efforts are seamlessly integrated into the framework of general and complete disarmament.” From a policy point of view, it is likely true that the elimination of nuclear arms will require some limits on non-nuclear military capabilities such as missile defenses and non-nuclear-armed missiles. But this is not a legal requirement arising from the reference to a treaty on general and complete disarmament in Article VI.

### **The obligation of result**

The ICJ has noted in general that when there is an obligation to negotiate, the legal principle of good faith requires “meaningful negotiations” but does not require that an agreement be reached. In the context of the NPT, however, the Court found that under Article VI there “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.”

The Court did not explain its approach in strictly legal terms. But it did provide a broader perspective, reflecting the fact that it felt unable to fully resolve disputes over the legality of threat and use: “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.”

While not discussed by the Court, there is much in the language and structure of the NPT that supports its finding of an obligation of result, achieving nuclear disarmament. The preamble contains action-oriented language: “to *achieve* cessation of the nuclear arms race,” “to *undertake* effective measures” of nuclear disarmament. The preamble also leaves no doubt whatever concerning the objective of complete nuclear disarmament: “the elimination from national

arsenals of nuclear weapons and the means of their delivery.” Moreover, subsequent to the opinion, there is the 2000 NPT Review Conference “unequivocal undertaking by the nuclear-weapon States to *accomplish* the total elimination of their nuclear arsenals”. Note “accomplish”—not only negotiate—elimination.

As to the structure of the treaty, it creates a vehicle for the establishment of a nuclear weapons-free world. Most states are barred from acquiring nuclear weapons, providing a stable environment for nuclear disarmament to proceed. Cessation of the nuclear arms race at an early date was understood when the NPT was negotiated to centrally involve a cap on strategic arsenals held by the United States and the Soviet Union, a ban on nuclear explosive testing, and a ban on producing fissile materials for nuclear weapons. Ending nuclear arms racing was seen as setting the stage for negotiations on nuclear disarmament, meaning the elimination of nuclear arms.

There is thus a logic to the NPT: prevent the spread of nuclear arms—horizontal proliferation; stop the nuclear arms race—vertical proliferation; and negotiate the elimination of nuclear weapons. The structure of the NPT supports the conclusion that the disarmament obligation is not only to negotiate, but also to achieve, a world free of nuclear weapons.

### **The universality of the nuclear disarmament obligation**

While the Court did not expressly say that the rule contained in Article VI of the NPT has customary and therefore universal status, applying to non-NPT states parties, the recognition of such status can be inferred from the Court’s reasoning. In particular, the Court appeared to base such a view mainly on the norm-creating character of Article VI and on the unanimous adoption of UN General Assembly resolutions concerning nuclear disarmament.

Regarding Article VI, the Court observed: “This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the [NPT], or, in other words, the vast majority of the international community.” At a later point, after referencing a UN Security Council resolution calling on *all* states, not just NPT states parties, to fulfill Article VI, the Court concluded its discussion of the disarmament obligation by stating that nuclear disarmament “remains without any doubt an objective of vital importance to the whole of the international community today.”

Concerning General Assembly resolutions, the Court stated: “Virtually the whole of [the international] community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.”

Taken all together, this adds up to a very strong implication that the nuclear disarmament obligation applies universally.

In conclusion, in all three respects discussed here—the non-dependence of nuclear disarmament on general disarmament, the obligation to achieve nuclear disarmament through negotiation, and the universality of the obligation—the Court’s analysis of Article VI remains highly relevant to the defense of the fundamentals of international law.