

Notes for Remarks of John Burroughs, Lawyers Committee on Nuclear Policy

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Nuclear Non-Proliferation Treaty

The cornerstone of the current legal framework for nuclear disarmament remains the Nuclear Non-Proliferation Treaty (NPT). While discriminating in its very structure between the vast majority of states parties obligated not to acquire nuclear weapons and the states acknowledged to possess them (US, UK, France, Russia, China), the NPT sets out an obligation to pursue negotiations on the elimination of nuclear weapons. Four nuclear-armed states are outside the NPT: India, Pakistan, Israel, DPRK. The NPT also impacts global energy and environmental policy. Far from calling for limiting or eliminating reliance on nuclear energy, it promotes knowledge-sharing about and assistance in the use of nuclear power for “peaceful” purposes. In addition to this over-50-year-old treaty, other agreements, including regional nuclear-weapon-free zones, the Treaty on the Prohibition of Nuclear Weapons (TPNW), which I will talk about later, and New START, the US-Russian nuclear arms control agreement, shape the legal disarmament landscape.

I'll address three aspects of the NPT and the larger nuclear regime: non-proliferation, peaceful uses of nuclear energy, and disarmament, and then discuss the effectiveness of the NPT.

Non-proliferation

The International Atomic Energy Agency (IAEA), which predates the NPT and has its own statute, is responsible for verifying the obligation of non-nuclear weapon states not to acquire nuclear weapons. It does so through the system for safeguarding nuclear fuel for reactors. There is, however, no international organization or other body responsible for verifying disarmament of nuclear arsenals held by the acknowledged NPT nuclear weapon states pursuant to NPT Article VI, or by nuclear-armed states outside the NPT (India, Israel, Pakistan), except that the IAEA would play a role if DPRK denuclearizes.

The UN Security Council is effectively part of the nuclear regime because of its active role in addressing the potential or actual acquisition of nuclear arms by new states, such as the DPRK. Another element of the regime is an international organization that actively monitors nuclear explosive testing. It is formally called the Preparatory Commission for the Comprehensive

Nuclear-Test-Ban Treaty (CTBT) Organization, preparatory because the treaty has yet to enter into force.

Peaceful Uses

The NPT was negotiated at a time of great optimism about the potential of nuclear energy, and the treaty text reflects that.

Article IV:

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes
2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.

Though the optimism has dissipated, despite the revival now being attempted, non-nuclear weapon states have continued to insist on their right to access nuclear power technology, which is correctly portrayed as part of the bargain underlying the treaty. Indeed, a peaceful uses provision was included in the preamble of the TPNW!

Having a nuclear reactor powered by Low Enriched Uranium does not by itself enable a nuclear weapons program. The spent fuel has to be reprocessed to extract plutonium, or the uranium further enriched – or Highly Enriched Uranium or plutonium otherwise obtained, as by theft or secret deal. A key issue therefore concerns the spread of uranium enrichment facilities and reprocessing facilities that yield plutonium. So far only about a dozen countries have such facilities, the nine nuclear-armed countries plus a few others including Japan, Brazil, and Iran. Stopping that spread is important, and has been a priority of US policy for decades. Unfortunately it's possible that the proposed US-Saudi deal under discussion would include US support for building a uranium enrichment facility in Saudi Arabia; that's what Saudi Arabia has been demanding.

Disarmament

NPT Article VI requires states parties 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. The NPT preamble declares the desire to strengthen trust and cooperation among states to facilitate “the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament.” In its 1996 Advisory Opinion, the International Court of Justice authoritatively interpreted Article VI, together with other international law, as “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.”

A “treaty on general and complete disarmament” is exemplified by the Chemical Weapons Convention, providing for the verified elimination of chemical arms, and to a lesser extent, the Biological Weapons Convention, which prohibits such weapons but does not include verification provisions. In 1997, Lawyers Committee on Nuclear Policy released the Model Nuclear Weapons Convention, a model of how to comprehensively eliminate nuclear weapons, with provisions for verification, enforcement and so forth. Co-authoring groups were the International Network of Engineers and Scientists Against Proliferation, and the International Physicians for the Prevention of Nuclear War.

In relation to the NPT, states are obligated to act in accordance with the fundamental legal principle *pacta sunt servanda*: a treaty is legally binding and must be performed in good faith. The International Court of Justice has elucidated the requirement, stating that the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.” According to a leading commentary on the United Nations Charter, “Good faith forbids contracting parties to behave in any way that is intended to frustrate the meaning and purpose of a treaty.” The requirement of good faith is hard to reconcile with nuclear-armed states’ execution of plans to maintain their nuclear arsenals indefinitely while not engaging in multilateral nuclear disarmament negotiations. In future nuclear negotiations undertaken pursuant to existing obligations, good faith also requires, among other things, awareness of the interests of other parties; a persevering quest for an acceptable compromise, with a willingness to contemplate modification of one’s own position; and no undue delay or prolongation of the process.

Effectiveness of the NPT

The NPT-based regime has played a significant role, possibly a crucial role, in preventing the spread of nuclear arms to additional countries. However, it has fallen far short of its objectives of cessation of nuclear arms racing and of elimination of nuclear arsenals. A strong though general set of commitments was adopted at five-year NPT conferences following the end of the US-Soviet “Cold War,” in 1995, 2000, and 2010. Those commitments include reducing the role of nuclear weapons in security policies, bringing the CTBT into force, negotiating a fissile material cut-off treaty, and engaging in reductions of nuclear arms leading to their elimination.

Nuclear weapon states parties to the treaty have largely stalled, even regressed, in making any progress on the Article VI disarmament obligation and on commitments made at the five-year review conferences to implement that obligation. As I said, the argument that the treaty-recognized nuclear weapon possessors have engaged in good faith negotiation to eliminate

nuclear weapons is hard to maintain in the face of today's facts, including: modernization of weaponry, stagnation in US-Russian nuclear arms control, absence of any multilateral nuclear arms control/disarmament negotiations, an increase in size of at least China's arsenal, and reduction of transparency regarding stockpiles. Further, the salience of nuclear weapons in global power politics is on the rise, notably with the exchange of nuclear threats between the United States and North Korea in 2017 and Russia's threat to resort to nuclear arms should NATO states intervene militarily in defense of Ukraine against the Russian invasion.

I want to emphasize that since the conclusion of negotiations on the CTBT in 1996 no multilateral negotiations involving nuclear-armed states on the cessation of nuclear arms racing and nuclear disarmament have taken place. Relatedly, at no time have numerical targets for reduction of nuclear arsenals been adopted and recognized multilaterally. This is a simple but instructive contrast with the climate regime, in which nationally set targets for reductions of greenhouse gas emissions play a central role under the Paris Agreement.

In 2014, the Marshall Islands brought cases against each of the nuclear-armed states in the International Court of Justice, claiming a failure to comply with the NPT disarmament obligation and a universal disarmament obligation rooted in the NPT and other international law. I had the privilege of serving on the Marshall Islands legal team, and the extraordinary chance to work with Tony de Brum, then foreign minister and a hero in three arenas: decolonization, nuclear weapons/testing issues, and climate protection. The Marshall Islands was the site of 67 US above-ground nuclear weapons tests in the 1940s and 1950s.

The cases proceeded against the three countries that have accepted the Court's jurisdiction, the UK, India, and Pakistan; the others declined the invitation to voluntarily accept the Court's jurisdiction for these cases. The way the UK case unfolded, the Marshall Islands filed a memorial on the merits, available on the ICJ website. I recommend that highly if you want to see a well developed analysis of the nature of the disarmament obligation and the lack of compliance. However, none of the three cases reached the merits phase. By a narrow margin, the judges found that the Marshall Islands had failed to establish a dispute, as by an exchange of diplomatic correspondence. There was a change of government in the Marshall Islands, and the Marshall Islands did not pursue the cases further, which could have been done by establishing a dispute and refiling.

Treaty on the Prohibition of Nuclear Weapons

Frustration with the lack of implementation of the commitments made at NPT meetings, and of the underlying disarmament obligation, propelled the negotiation of the Treaty on the Prohibition of Nuclear Weapons by 122 non-nuclear weapon states in 2017. The parties and proponents of the TPNW highlight the power of the treaty to shift the discourse on nuclear weapons by

focusing on the humanitarian consequences of the production, testing, and use. There are now 70 states parties. They do not include any nuclear-armed states or NATO or other nuclear allies of the US.

The first article of the treaty prohibits the development, testing, possession, and use and threatened use of nuclear weapons, and also bars assistance in any way with prohibited acts. What is the significance? Development, testing, and possession of nuclear weapons are already prohibited for most states by the NPT. However, there is no treaty prohibition of use and threatened use that is universal in aspiration, so this is a new element of the ban treaty. Moreover, it could affect policies of nuclear allies that want to join the treaty. And all provisions would change the postures of nuclear-armed states if they join the treaty.

In Article 4, the treaty provides two pathways for nuclear-armed states to verifiably and irreversibly dismantle their nuclear arsenals, prior to joining the treaty or after doing so. Disarm then join, or join then disarm. The provisions are not very detailed; for example, there is reference to an agency to be named later that would verify disarmament. Nonetheless, there is a basis in the treaty for a disarmament process. The treaty also generally provides that measures for verified and irreversible elimination of nuclear weapons may be addressed at meetings of states parties. Non-states parties may attend meetings. So other approaches could be created for nuclear-armed states to disarm, such as a protocol to the treaty.

The treaty lacks any explicit provision or mechanism for ongoing monitoring of compliance by states that have disarmed, aside from IAEA safeguards agreements and reports to meetings of states parties. More importantly, the treaty lacks any mechanism for inducing or enforcing compliance, as by imposition of sanctions or use of force. On both counts, if nuclear powers were to join the treaty, mechanisms could be developed.

Article 6, consistent with the humanitarian nature of the treaty, requires affected states parties to provide assistance to victims of nuclear testing and use, and to take measures for environmental remediation of contaminated areas. Article 7 imposes obligations on other states parties “in a position to do so” to assist affected states parties and to provide assistance for victims. This is a part of the treaty to watch closely, because the obligations apply immediately upon entry into force for states parties and are the only ones that clearly require non-nuclear weapon states to take substantive actions.

The TPNW entered into force in 2021 and had its first meeting of states parties in 2022 and second in 2023. It has some features of a treaty regime. It seeks implementation of norms proclaimed to be universal; involves regular meetings of states parties; and is bolstered by a dynamic civil society organization, the International Campaign to Abolish Nuclear Weapons. Further, the treaty obligations of assistance to victims of nuclear testing and use and remediation of environmental damage caused by such testing and use require additional practical implementation that will be shaped and monitored by states parties at regular meetings and through a working group.

The TPNW has been received very coolly by the NPT nuclear-armed states, none of which are likely in the foreseeable future to join the treaty. Nonetheless, Austria and other leading states parties to the TPNW insist, with reason, that the TPNW is fully compatible with the NPT, serving as one means at least of implementation of the Article VI disarmament obligation. Without question, the TPNW has served to highlight what is supposed to be a “pillar” of the NPT, namely disarmament, and may over time at least stimulate progress on that pillar. Like the regional nuclear-weapon-free zone treaties, it also reinforces the NPT obligation of non-acquisition of nuclear weapons by non-possessor states. Importantly, it has for the first time focused global policy attention on the imperatives of victim assistance and environmental remediation. Meeting those imperatives surely is the right thing to do and a necessity for ending the nuclear age in a responsible manner. They connect the TPNW to human rights law, as I’ll briefly discuss now.

Human Rights Law and the TPNW

In 2018, the UN Human Rights Committee released General Comment No. 36 on the right to life as inscribed in Article 6 of the International Convention on Civil and Political Rights (ICCPR). The Committee stated (para. 66):

The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law.

The Committee further found, inter alia, that states parties must respect

their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control, and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.

In 2021 the Human Rights Council adopted a resolution recognizing a “human right to a clean, healthy and sustainable environment,” and in 2022 the General Assembly followed suit, adopting a resolution recognizing the right with no negative votes and few abstentions.

The TPNW relates specifically to the application of human rights law because one of its aims is essentially to uphold the human rights of victims of testing and use of nuclear weapons, as spelled out in Articles 6 and 7.

The TPNW also has significant elements relating to protection and restoration of the environment. While not framed in human rights terms, those elements resonate with the human right to a clean, healthy, and sustainable environment.

Conclusion

The legal regime for nuclear weapons is deteriorating due above all to the bad relationships between the US and Russia and the US and China. The disarmament obligation is essentially being ignored, and there is potential for additional countries to acquire nuclear weapons. However, assuming that the political will for disarmament can be mobilized, the NPT, TPNW, and other international law instruments and institutions provide the necessary tools.