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BRIEFING SERIES

The United Nations and Regime Compliance: Prospects and Challenges

February 8, 2001

Ambassador Jayantha Dhanapala

Under Secretary General for Disarmament Affairs, United Nations

This is the second in a series of seminars on multilateral and regional institutions as they relate to arms control and security regimes and treaties pursuant to a CNS-MIIS project under the direction of Professor Lawrence Scheinman (right).



There is a link between maintaining the rule of law and treaty regimes. The United Nations (U.N.) plays an important role in these treaties. In some cases, such as with the Comprehensive Test Ban Treaty (CTBT), the U.N. is the depository of the treaty. In the Millennium Declaration of September 2000, heads of states made commitments to ensure the implementation of treaties in arms control and disarmament by state parties. The maintenance of global norms depends not only on the universality of these treaties but also on the ability to face challenges to those norms. The U.N.

has been involved in playing a leading role in these situations. Under Chapter 7, the Security Council enforces norms of securing the peace. The U.N. Charter permits the use of force but past experience has shown that the use of force alone does not restore compliance. In instances of non-compliance, the international community has recognized the need to use sanctions as an alternative means to the use of force. But it cannot rely solely on sanctions. Therefore opportunities for constructive engagements must be encouraged, as was done in the case of the DPRK. This can be done by the U.N., bilaterally or on a sub-regional basis.

Some treaties contain specific measures for cases of non-compliance, such as the Nuclear Weapons Free Zone (NWFZ) treaties. Article 12 in the Chemical Weapons Convention (CWC) indicates procedures to be followed in case of non-compliance, as well as the CTBT, which include sanctions. Whereas the CWC allows for the conference of state parties to recommend collective measures and to bring the matter to the attention of the U.N. Security Council, the CTBT refers to the U.N. more generally. The Nuclear Nonproliferation Treaty (NPT) does not contain specific provisions in the event of non-compliance except for the IAEA procedures. When the DPRK announced its withdrawal from the NPT, the issue was addressed by the U.N. Security Council. The Security Council adopted a resolution calling on the DPRK to reaffirm its commitment and comply with the Treaty. The IAEA's agreements with state parties to the NPT provide the Agency with measures to be taken in case of non-compliance. According to Article 19, the agency can suspend the membership of a non-complying member.

The International Court of Justice (ICJ) has an important role in establishing global norms. Article 14 of the CWC refers to the ICJ in the event of disputes in interpretation of the Convention.

There should be a build-in mechanism for non-compliance in the treaties. Unlike in the CWC and the CTBT, the NPT does not have such a mechanism. None of the existing bodies are creations of the NPT itself. The speaker proposes the establishment of an executive council in the NPT, along the lines of the executive council of the CWC. He believes that such a Council will allow a peer group review. It does not need to be a

permanent mechanism, but the group can be gathered at a review conference when there are allegations of non-compliance. This could be a forum where parties will present information regarding non-compliance and will give the accused party an opportunity to respond. In addition, the executive council will provide a new body to refer to before proceeding to the Security Council. This will enhance decisions taken by the Security Council and will give it more legitimacy. It will sustain the actions of the Council in the eyes of the international community.

There is increasingly a lack of confidence in the Security Council itself in the international community, which is the reason for a push for Council reform. The size of the Council remains unchanged while there is an increased number of members in the U.N., and there is a perception that the Council does not fully represent the international community. There are pressures for increasing the number of members in the Security Council but there is no international consensus yet. As a result, there is lack of confidence in the decisions that emerge from the Council. Politically, the acceptability of the Council has been undermined. It is necessary to acknowledge this push and a reform needs to take place. There are also serious political differences among the five permanent members with regard to WMD.

The experience of the U.N. with sanctions is not an inspiring one. They are seen as a blunt instrument, and it is difficult to ensure their success in changing the behavior of a state when it comes to non-elected or authoritarian regimes. They mostly punish the civilian populations of these regimes. Ideas are being generated at the U.N. to devise "smart sanctions" that are targeted at the elites, such as monitoring bank accounts and individual travel. The question is also what should trigger sanctions, what should be the standard. A report on sanction reform is under way at the U.N.. The need for secondary sanctions is also becoming apparent.

There is also a question of individual culpability in the case of non-compliance with WMD regimes. The international criminal court might be looked at as possible means to enhance compliance with WMD treaties. There are talks about the criminalization of biological weapons. It can have a deterrent value in terms of ensuring compliance. Similarly, we can take it one step further with regard to other regimes and make non-compliance a culpable offense. In order to make individuals responsible for their actions, nation states will have to translate non-compliance of international law into an offense. Although in the case of export controls, the penalties have not always matched the offenses and detection was not always very efficient, some exploration of individual culpability may help with compliance. This may be the case especially with regard to sub-national groups acting without the knowledge of states. It will give a stronger control internationally on violations of WMD treaties.

In order to ensure international commitment to compliance we have to be objective about non-compliance and assure that violations by all states will be treated equally. The criteria of non-compliance are also important factors. Material breaches of WMD treaties need to invite an array of actions, including sanctions. Other minor breaches are also possible, and gray areas for action to be taken in those cases have to be assessed. Internal mechanism in the treaties will be best equipped to make the distinction between a minor and a material breach.

It is important to note that withdrawal from a treaty does not necessarily constitute non-compliance. The NPT allows withdrawal. The real issue with regard to withdrawal is what action may be taken? There should be established criteria for international action for consistency reasons. Any intervention or enforcement mechanism for restoring compliance should be done through the Security Council.

The CWC and the Biological Weapons Convention (BWC) have de-legitimized those categories of weapons. In the NPT there is tension between the disarmament element and the non-proliferation element, which is stronger. This tension leaves room for some degree of non-compliance.

Preventive diplomacy is extremely important for regime re-enforcement. The DPRK is a good example for that. But it requires international consensus. The U.N.'s role is one of advocacy with regard to the rule of law and compliance. The review conferences that the U.N. helps to organize are also important means to establishing the norm of regime compliance. The role of the CD is also important. The Millennium Declaration expressed the shared responsibility of the state parties of upholding the network of treaty regimes. We need to try to address this goal collectively.

Q & A

Q. I see a problem with the role of the proposed executive council for the NPT. The question is of political will. The cases of the DPRK and Iraq were easy ones. But while India violated a norm it did not violate a treaty. Therefore, it is also important to have a rigorous understanding of why compliance is so important.

A. This understanding would come from the executive council. An objective scientific decision could make an important difference. An executive council will make it easier for the Security Council to make a decision and easier for the international community to accept this decision. It will also make it easier to pass those decisions domestically.

Q. On the issue of making individuals culpable, there needs to be a continuing discussion to define aggression.

A. Perhaps we need to redefine the use of WMD or a violation of a regime or treaty relating to WMD as a crime. We could also make this an offense with the ICC, which will have a deterrent value.

Q. First, please elaborate on the UNSCOM experience and what lessons are being drawn in the U.N. as far as the role of international organizations as they relate to non-compliance. Second, in the CTBT there is no referral to the Security Council but rather a more general referral to the U.N.. What are the implications?

A. Resolution 1284 and UNMOVIC represent lessons learned. For example, the fact that UNMOVIC employees should be U.N. employees. Another example is the way intelligence is treated. The Security Council is being perceived as unrepresentative. This is why there is a more vague reference to the U.N. in the CTBT. Influential developing countries were against any specific reference to the Security Council and it took some time to work a formula which will have only the U.N. referred to. But situations of non-compliance will have to be referred to the Security Council.

Q. Regarding the sub-national or individual problem of WMD use, we may need to look at the national tool rather than the international one. Nation states need to implement domestic legislation that are harmonized throughout the globe.

A. The two approaches are complementary and we should do both. The national approach is important especially in developing countries where the U.N. is conducting workshops in order to explain what national legislation they need to adopt.

Q. The NPT does not prevent a country from doing R & D on nuclear weapons as long as its nuclear materials are under safeguards. But a country that does that needs to be considered suspect. For example, many nuclear suppliers were trading dual use equipment with Iraq when there was intelligence information that Iraq might be pursuing nuclear weapons. This was a violation of Article 1 of the NPT on their side. How would an executive council deal with the issue of trade with a suspect country with regard to the major nuclear suppliers, who would be the strongest countries in that council?

A. The executive council will not be free of the problems that any international organization is susceptible to. But the fact that an issue will be surfaced at that level would give the issue more visibility internationally. In addition, if issues will be presented in the executive council it will have an impact on the domestic populations in the problem countries--the suppliers. In the future it could be one way to have greater mobilization of public opinion and international action. Finally, sharing intelligence within the executive council can be very valuable.

Q. Can you identify the single area where we could do the most good in shoring up norms, and the single most important potential breach that we need to direct resources towards.

A. We need to re-enforce the authority of the Security Council. The international community needs to acknowledge the Charter and its provisions and accept that the Council has authority to act in cases of non-compliance with regard to WMD treaties. The Council also needs to act together in order to do that. The lack of unity in the Security Council is a major drawback. In addition, a BWC verification system is lacking. Finally, we need to strengthen the NPT in terms of the final document from April-May 2000. We may have a slippage in the confidence that parties have in the NPT.

Q. Can you please elaborate on the specific kinds of violations that the NPT's executive council would address, which the IAEA would not be able to address.

A. For example, with regard to the issue of Russian assistance to Iran, this may not be a breach of the NPT but it is a breach of the spirit of the Treaty. The Iranians would probably like to vindicate themselves in some forum. The issue could be discussed in the executive council and the charges can be evaluated. Similarly, with regard to the alleged transfer of a nuclear submarine to India. The executive council would allow for a forum for open discussion rather than spreading allegations in the media.

Prepared by Merav Zafary

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