Justice and Fairness in the Nuclear Nonproliferation Regime

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Today, the nuclear regime is widely perceived to be in crisis. While part of this crisis has to do with direct challenges to the regime posed by the illicit nuclear programs of North Korea and Iran, from the perspective of much of the developing world, the issues facing the nonproliferation regime are overwhelmingly about the justice and fairness of the regime's norms, rules, and procedures. Indeed, it is difficult to identify a security regime today where equity issues are more central to debates about its future than the nuclear nonproliferation regime. Of the three regimes for controlling weapons of mass destruction (chemical, biological, and nuclear), it is in the nuclear regime that issues of justice and fairness appear most critical to long-term sustainability and viability.

At the core of the crisis is the fundamental asymmetry of the 1968 Nuclear Non-Proliferation Treaty (NPT) and looming doubts among nonnuclear states about whether this situation is destined to be permanent. Nonnuclear states have long castigated the double standard embedded in the treaty that permits the five "declared" nuclear states to possess nuclear weapons but denies such weapons to the majority of the world. In contrast, the nuclear powers, for their part, have generally seen the primary problems of the regime to lie in the weakness of the rules and enforcement mechanisms surrounding dual-use technology, which have allowed states such as Iran and North Korea, and earlier Iraq and Syria, to pursue nuclear weapons clandestinely under the veil of the treaty.

This essay focuses on two key questions: First, how do the issues of justice and fairness affect the stability, durability, and effectiveness of the nuclear

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nonproliferation regime? Second, what is the relationship of equity issues to conceptions of national security and "interests"?

These questions are not simply of theoretical interest. Whether issues of "fairness" in the nuclear regime actually matter for outcomes is a matter of dispute between liberal supporters of arms control and conservative critics. Liberals argue that perceptions of inequities in the NPT undermine its legitimacy and therefore its long-term viability.[1] Conservative critics of arms control, in contrast, argue that countries make their own decisions about acquiring nuclear weapons based on hard-nosed security considerations—not considerations of justice—and that the behavior of the United States and other nuclear powers with respect to nuclear policy is irrelevant to those decisions. They argue that countries such as India, Iran, and North Korea would have sought nuclear weapons whether or not the United States and other nuclear powers appeared to be upholding their obligations under the NPT.[2] According to some conservative critics, the nonnuclear states' arguments about the unfairness of the regime are simply "a cynical rationalization for the destabilizing pursuit of dangerous capabilities."[3]

This essay argues, in contrast, that issues of justice and fairness are unavoidably central to the future of the NPT. Grievances about injustice in the regime are not simply cynical rationalizations for nuclear weapons, since such grievances are regularly expressed by nonnuclear states that are not actively seeking nuclear weapons. The core of the justice and fairness problem of the NPT is that what was supposed to be a *transformation* regime—the transformation to a disarmed world—has become a *status quo* regime. That is, the nonnuclear states perceive that the NPT has become a regime for managing the nuclear status quo in the interests of the nuclear powers.

This essay begins by laying out how justice and fairness play a role in arms control agreements. I briefly summarize key elements of the nuclear nonproliferation regime and the often competing norms at the core of the regime. I then analyze the grievances about justice and fairness in the NPT and show how they shape conceptions of state interests. In conclusion, I summarize why issues of justice and fairness in the NPT need to be taken seriously for the long-term sustainability of the nonproliferation regime.

Justice and Fairness in Nuclear Arms Control

Justice can be defined as the principle that benefits and burdens should be distributed in an equitable way. Notions of justice are associated with a sense of moral

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rightness. Fairness refers to a lack of bias in treatment, where like cases are treated alike. At first glance, we might expect that issues of justice and fairness would take a back seat to considerations of national security when countries make decisions about nuclear weapons. Yet justice and fairness are important dimensions of nuclear arms control agreements for several reasons. First, most countries increasingly agree that security in the nuclear realm cannot be achieved unilaterally but requires taking into account the security requirements of others. As Cecilia Albin, author of a pioneering analysis of justice and fairness in international relations, notes, "Arms control agreements can only be durable when they balance the essential concerns of all parties, avoiding enhancing the national security of some at the cost of others, and are mutually beneficial."[4]

Second, Albin argues, "arms control is about mutual obligations and mutual rights." Compliance with obligations is very important for the credibility of an agreement; hence, "parties often associate justice and fairness not only with compliance in itself, but also with the establishment of verification procedures which detect and deter breaches and reflect the seriousness of their obligations."[5] Albin's own analysis of the NPT, which focused on the 1995 review and extension conference, argued that addressing issues of equity was essential to achieving a set of final decisions. At the conference, countries such as Egypt, Jordan, Syria, Kuwait, and Lebanon refused to agree to a permanent extension of the treaty unless Israel, which was suspected of possessing a small nuclear arsenal, became a party to the NPT and subjected its nuclear facilities to "safeguards"—which is diplomatic code for calling on Israel to give up its nuclear weapons and programs (thereby assuming the mutual obligations associated with treaty participation). Without the inclusion of a resolution calling for all states in the Middle East to join the NPT, Arab states would have refused to extend the NPT indefinitely without a vote.[6] In addition, Albin argued, disputes over progress toward Article VI (the disarmament provision) also reflected concerns about mutual obligations, and were "the single most important explanation behind the failure to reach agreement on a Final Declaration on the results of the review."[7] As Jayantha Dhanapala, the Sri Lankan president of the 1995 conference and later UN Under-Secretary-General for Disarmament, put it sharply in his memoirs of the conference, "There could be little hope for nonproliferation in a world structured by the rules of nuclear apartheid."[8]

More than eighteen years later, the issues that Albin identified continue to gnaw away at the legitimacy of the NPT, and with increasingly corrosive effects, because they remain largely unresolved.

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Key Elements of the Nuclear Nonproliferation Regime

It is often observed that nuclear weapons, with their tremendous destructive power and global reach, present a unique problem of order in the international state system.[9] The governance challenge in the nuclear nonproliferation regime is how to balance the legitimate demands of developing countries for access to nuclear technology with the legitimate interest of the international community in controlling the spread of nuclear weapons. The context is one of huge disparities in access to, and usage of, the technology.

The basic elements of the regime require that the so-called declared nuclear weapons states (NWS)—the United States, United Kingdom, France, Russia, and China—agree not to share military nuclear technology, while nonnuclear weapons states (NNWS) agree not to acquire nuclear arms. This asymmetry is supported by a "bargain" at the core of the regime: in exchange for the agreement of the NNWS to forgo nuclear weapons, the nuclear-armed states agree to pursue disarmament in good faith (Article VI). Additionally, the nonnuclear states will receive assistance and access to peaceful nuclear technology (Article IV), since under the treaty all states have an "inalienable right" to the benefits of peaceful nuclear activities.

More broadly, the regime is formally built on three "pillars" or norms: nonproliferation, disarmament, and the right to peaceful uses of technology. A fourth, unofficial pillar is deterrence.[10] Over time, however, the NWS and NNWS have disputed whether one or the other of these pillars is disproportionately emphasized or whether they should all receive equal emphasis.

The regime is thus one of formal inequality with regard to the military uses of nuclear energy. How can such an asymmetrical regime—which permits five countries to possess nuclear weapons for some unspecified length of time while the rest must abstain—have such widespread support (189 states are party to the treaty)? International rules need not be exactly equal in their requirements as long as a principled basis for the inequality exists. In the NPT, that principled basis is the so-called grand "bargain" between the haves and the have-nots (nonproliferation for most states, disarmament for the five declared nuclear powers). The inequities of the regime were tolerated during the special circumstances of the cold war, but after the end of the cold war the NNWS became impatient to see more progress on Article VI obligations. At the 1995 NPT extension conference, the Principles and Objectives document specified for the first time that

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the goal of the treaty is to actually eliminate all nuclear weapons, not just to negotiate in good faith.

Since then, criticism of the failure of the NWS to pursue their disarmament obligations has been a feature of every single meeting of the NPT. The low point was the disastrous 2005 NPT review conference. There, the United States and other nuclear weapons states refused to acknowledge their obligation to pursue the so-called "thirteen steps" to disarmament, which they had previously agreed to at the 2000 conference, thus suggesting that they no longer considered disarmament to be an obligation. Although the disarmament goal has ostensibly been resurrected in recent years under the Obama administration, widespread doubts remain about whether the nuclear powers are really committed to disarmament.

The Need to Balance Conflicting Norms

It is impossible to understand governance in the nonproliferation regime without understanding the conflicting norms at its foundation. Widespread consensus exists on a set of core principles to the regime. These are:

- Proliferation is bad.
- Use of nuclear weapons is bad.
- Inspections and monitoring (safeguards) are essential.
- Decision-making at NPT conferences is by consensus.
- Universal participation in the NPT is the goal (that is, all states will adhere to the norms of the regime).
- All NPT parties will comply with their nonproliferation obligations.

Nevertheless, despite consensus on core principles, the troubles of the NPT lie in its need to balance fundamentally conflicting norms:

Denial vs. nuclear sharing. The nuclear regime has a dual mandate: to promote the peaceful uses of atomic energy while also preventing the development or acquisition of military nuclear capabilities. Promoting the peaceful use of nuclear energy requires making nuclear technology more widely available, but preventing the proliferation of nuclear weapons requires making it less available. What should be shared, and what should be denied? Further, who should benefit from sharing, and who should be subject to denial? Why, for example, should countries share nuclear technology with India while denying it to Iran? Export controls are the central mechanism of the denial norm, but nonnuclear states remain eternally

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sensitive to measures that threaten to cut into trade and development. Some critics argue that, for select nonnuclear states, the benefits of technology transfer may come to seem more important than achieving the core nonproliferation goals of the regime.[11]

The dual mandate problem is especially acute in the International Atomic Energy Agency (IAEA), the institution charged with monitoring peaceful uses of nuclear technology. Founded in 1957, eleven years before the NPT was adopted, it grew out of President Dwight Eisenhower's 1953 "Atoms for Peace" initiative to promote the positive side of nuclear energy. It was set up not specifically for nonproliferation but rather to verify peaceful use, responsible nuclear sharing, and nuclear materials security. Following the adoption of the NPT in 1968, it acquired the nonproliferation mission as well. However, a commitment to "atoms for peace" continues to underlie the institutional culture of the IAEA, which raises questions about the agency's ability to fully promote nonproliferation norms.[12] This institutional contradiction became quite evident in the 2008 U.S.–India deal (see below).

The nonpossession norm vs. the norm of sovereign equality. As noted earlier, the nonproliferation regime enshrines a norm of nonproliferation (nonpossession) for a majority of states of the world while permitting the five declared nuclear powers to possess nuclear weapons. This asymmetrical arrangement appears to violate one of the bedrock principles of the international state system, namely, that sovereign states have an equal right to security, self-defense, and self-help, including in the possession of weapons. This infringement on sovereign equality can be tolerated as long as a principled basis for this inequality exists. If the principled basis is instead replaced by the naked self-interest of the powerful few, however, then the legitimacy of the arrangements will break down.

Inspection norm vs. sovereignty. A credible nonproliferation regime requires relatively intrusive inspections of nuclear facilities. In the NPT this is known as the safeguards system. It opens a state's domestic activities in nuclear technology to international scrutiny and comment, with the attendant economic burden of inspections and the risk that proprietary information could be revealed. Under the nuclear regime, *all* the nuclear facilities of a nonnuclear weapons state are subject to required safeguards. In contrast, for the declared nuclear powers, participation in safeguards is voluntary and only a tiny fraction of their facilities are inspected (whereas under the chemical and biological weapons treaties, all parties are subject to identical bans and requirements and to the same verification procedures).

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IAEA safeguards on the nuclear powers operate somewhat differently than on the nonnuclear states, with a less direct nonproliferation role (these states are already armed with nuclear weapons, after all). The nuclear powers' voluntary acceptance of a minimalist inspection regime is mainly important, therefore, as a symbolic measure to encourage widespread support for safeguards among other states. The inspection burden remains quite asymmetrical, though. At the 2010 NPT review conference, the nuclear powers were unable to persuade the nonaligned states to agree to enhanced inspection measures, which would have strengthened the nonproliferation component of the regime but would also fall disproportionately on the nonnuclear states.

Universality vs. particularism. The NPT regime aspires to universality, that is, the idea that all states should be party to its norms. Further, as a universalist legal regime, it should aim to treat like cases alike. The IAEA thus spends resources safeguarding countries such as Canada and Germany, even though they do not pose the greatest proliferation risks, because of the symbolic value of doing so. Yet the nonnuclear states perceive that some countries—India and Israel, for example, both of which are nuclear powers outside the NPT regime—get favorable treatment, while Iran, an NPT member, is treated harshly for trying to do more or less what Israel and India have done. These cases of "nuclear exceptionalism" undermine the ability of the regime to deal with noncompliance, sending the message that different rules apply to different states. It also suggests that there are benefits to staying outside the regime—not the message supporters of the NPT should want to send.

Norms of great power status. Finally, in addition to the need to balance conflicting norms internally, the NPT faces powerful competing norms from outside the regime. Perhaps the greatest challenge comes from norms that associate nuclear weapons with great power status. Such norms were sharply illustrated by the comments of Japan Restoration Party leader Shintaro Ishihara, who, in November 2012, argued that the diplomatic voice of countries without nuclear weapons is "overwhelmingly weak." He called for Japan to assess what steps would be required to develop a nuclear arsenal.[13] Ishihara is admittedly a hawkish nationalist who has long been open about his pronuclear views, but his comments reflect an enduring perception that nuclear weapons are essential for diplomatic clout and great power status. Such norms potentially hinder progress toward disarmament and make proliferation attractive.

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The Centrality of Equity Issues: The NPT Favors the Norms of the Nuclear Powers

In the norm-balancing game, the nonnuclear weapons states perceive that the implementation of the bargain has disproportionately favored the norms of the nuclear powers. They have four key grievances. First, as a result of the asymmetrical nature of the regime, the "benefits" of nuclear deterrence are unequally distributed. Some states possess nuclear weapons; others—such as NATO members—are protected by the nuclear deterrence threats of others; while the rest, which exist outside any nuclear "umbrella," must put their faith in norms, law, and morality to protect them against nuclear weapons. In other words, the larger problem is one of inequitable access to security globally.[14]

Second, enforcement mechanisms exist only for nonproliferation, not for disarmament. There is no institution to monitor disarmament the way the IAEA monitors nonproliferation. The Security Council is tasked with enforcing nonproliferation, but does not have a similar task with respect to disarmament. Nonnuclear states regularly offer proposals to set up formal mechanisms to monitor disarmament, but the nuclear powers firmly reject such proposals.[15]

Third, as noted earlier, IAEA safeguards are not applied equally. They are required (and more burdensome) for nonnuclear states, but voluntary for the declared nuclear powers. Violations of safeguards agreements have provided the basis for condemning Iran, since Iran's uranium enrichment activity is not inherently a violation of the NPT as long as it is for peaceful purposes.

Fourth, and finally, the meaning of the "right" to peaceful nuclear technology (enshrined in Article IV of the treaty and cherished by nonnuclear states) is now being reinterpreted. Specifically, controversy has arisen as to whether the realization of this right necessarily entails the right to an indigenous nuclear fuel cycle. Because plants that can produce commercial-grade uranium can also be used to produce weapons-grade uranium, widespread agreement exists among arms controllers that containing the spread of enrichment and reprocessing capabilities is necessary to preventing future weapons proliferation. Thus, a new "non-enrichment" norm may be emerging, in which nonnuclear states agree to forgo (once again!) domestic enrichment and reprocessing of nuclear fuel in exchange for ready access to fuel provided by multilateral fuel banks. This new norm was especially heralded by the 2009 nuclear cooperation agreement between the United States and the United Arab Emirates, the so-called

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U.S.–UAE 123 Agreement (named after Section 123 of the U.S. Atomic Energy Act of 1954, which governs the conditions for civil nuclear trade). As part of this deal, the UAE agreed to permanently forgo indigenous enrichment and reprocessing capabilities.[16] Nonproliferation advocates now view this agreement as the "gold standard" for future nuclear cooperation and trade agreements.

Nevertheless, however justified this effort at norm reinterpretation may be from a nonproliferation perspective, to the nonnuclear states it looks like a case of the "haves" pulling up the drawbridge behind them. At least eighteen countries, mostly rich and powerful, already engage in uranium enrichment and will likely continue to do so.[17] Once again, the burden of abstinence appears to fall most heavily on the have-nots. In December 2010, Iran's ambassador to the IAEA, Ali Soltanieh, denounced the IAEA's approval of a plan for a nuclear fuel bank as "nuclear apartheid," because it would infringe on a state's own nuclear fuel production.[18] While Iran, actively pursuing its own uranium enrichment program, has been the most outspoken state on this issue, the general sentiment is widely shared among nonnuclear states. In October 2010, for example, Argentina's president, Cristina Kirchner, announced the recommissioning of a uranium enrichment facility closed in the 1990s, arguing that her administration was "returning to Argentina a right that we should never have renounced, such as managing strategic nuclear resources that had been abandoned during the 1990s." Now, Kirchner declared, Argentina was "going to be able to manage the entire [nuclear] cycle from the production of uranium to the recycling of waste," while remaining committed to peaceful uses of nuclear energy.[19]

South Korea, a close U.S. ally, is currently at the forefront of the opposition to the emerging non-enrichment norm. In April 2013, South Korea and the United States decided to postpone the deadline for reaching a new "123" civil nuclear cooperation agreement after the two parties failed to agree on a compromise regarding South Korea's desire to enrich uranium and reprocess spent nuclear fuel. South Korea wanted a 1974 U.S. ban on these activities lifted in order to become a global nuclear supplier. While U.S. officials did not explicitly seek to apply the aforementioned "gold standard" here, they showed little willingness to permit South Korea to manage the full nuclear fuel cycle.[20] South Korean leaders found it deeply unfair that the United States allowed Europe and especially Japan —both also close U.S. allies—to have enrichment and reprocessing capabilities while South Korea was asked to forgo both nuclear weapons and the full rights to peaceful nuclear energy use. "It's an issue of mistrust," said Hahm Chaibong,

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the president of the Asan Institute for Policy Studies in Seoul. "To simply tell us right now that we don't have the right to do reprocessing and enrichment because we might be like the North Koreans—that's just unfair given our relationship and our standing within the global community."[21] *Chosun Ilbo*, South Korea's leading daily newspaper, dubbed Robert Einhorn, the U.S. negotiator on the 123 agreement, the "non-proliferation Taliban" for his unwillingness to budge on South Korean demands for the full nuclear fuel cycle.[22]

In sum, the nonnuclear states feel that the burdens and obligations of compliance fall disproportionately on them. In March 2010 the Egyptian ambassador to the UN and to the Conference on Disarmament, Hisham Badr, summarized a widely shared view: "We in the Middle East feel we have, short of a better word, been tricked into giving concessions for promises that never materialized." He argued that the nuclear powers have failed to meet their disarmament commitments while the treaty's provisions to secure nuclear nonproliferation have been unsuccessful in the Middle East. "There is widespread resentment in the region towards the NPT and what it seeks to achieve, its double standards and lack of political will," he said.[23] In response, the nuclear powers argue that the real challenge to security comes from the noncompliance of states such as Iran and North Korea, and that disarmament is not achievable until the proliferation problem is solved.

This discourse of double standards has become more pronounced since the end of the cold war. Dissatisfaction with the NPT regime has arisen because, in the eyes of the nonnuclear states, what was supposed to be a transformation regime has instead become a regime for managing the nuclear status quo in the interests of the nuclear powers. In the view of nonnuclear weapons states (or NNWS), more emphasis has been placed on nonproliferation than disarmament. Indeed, the problem of international security has been framed largely as one of proliferation and nuclear terrorism, while the nuclear powers' commitment to disarmament appears lackluster at best.[24]

The nuclear powers repeatedly insist that they are serious about disarmament, and the United States and Russia regularly tout their progress on nuclear reductions. Indeed, by 2013 the United States had cut its arsenal to 7,700 total warheads from a height of 32,000 in 1966, while Russia had cut its arsenal to an estimated 8,500 total warheads from its height of 45,000 in 1986.[25] Nevertheless, it could not have escaped the notice of nonnuclear states that the 2010 New START arms control treaty between the United States and Russia—a modest weapons reductions agreement primarily intended as a confidence-

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building measure for Russia—was ratified by the Obama administration, at the same time that it committed to spending $80 billion over the next decade to modernize the already large U.S. nuclear arsenal.[26] Likewise, the United Kingdom and especially France have acted as if they plan on preserving their nuclear arsenals in perpetuity. For example, in November 2010 the two countries signed a fifty-year pact to cooperate on maintaining their nuclear stockpiles.[27] Russia and China are also upgrading their nuclear forces. As one analyst observed, "a situation in which the leading nuclear weapon states will retain thousands of weapons and plan to spend heavily on nuclear modernization could reasonably be interpreted as reflecting something less than an unequivocal commitment to nuclear disarmament."[28]

In sum, the core of the problem of the nonproliferation regime is widely diverging understandings of the original bargain. For pragmatic and security reasons, most states continue to view a nonproliferation regime as in their national interest. However, the nonnuclear states widely perceive that implementation of the bargain has been wildly unbalanced, with negative consequences for their interests.

Normative Conflict: The Case of the U.S.–India Civil Nuclear Deal

The controversial 2008 agreement between the United States and India to engage in the trade of nuclear materials is a good illustration of the tensions posed by competing norms in the nonproliferation regime and the consequences of grievances about inequities. Justice and fairness considerations seem to cut several ways here.

India, which is not a member of the NPT, openly tested nuclear weapons in 1998. Indian leaders have long been vocal about the discriminatory nature of the NPT and have invoked it as a reason for remaining outside the treaty and acquiring their own nuclear arsenal. India has said that it will sign the NPT only if and when it binds the declared nuclear weapons states to a firm commitment and timeframe for eliminating their nuclear arsenals. Despite a thirty-year practice by the United States of not engaging in nuclear trade with countries that are not party to the NPT, in July 2005 President George W. Bush agreed to engage in nuclear trade with India if India agreed to separate its civil and military nuclear facilities and place all its civil nuclear facilities under safeguards. For the United States, much of the interest in the deal was driven by the desire to

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expand the market for the U.S. nuclear industry as well as cement strategic ties with India. The final agreement was concluded in 2008.

The U.S.–India deal invoked, somewhat disingenuously, the norm of cooperation on peaceful nuclear technology, and brought India partially into the IAEA safeguards system. Thus, IAEA Director Mohammed ElBaradei, with an organizational interest in having as many of the world's nuclear facilities as possible under safeguards, was a strong supporter of the deal.[29]

To the dismay of many supporters of the NPT, however, the agreement breached the rule against engaging in civil nuclear trade with states that were not party to the NPT (thus violating a long-standing norm). The Nuclear Suppliers Group (NSG), a 45-nation export control cartel, also had to grant India an exception to this principle, which was somewhat ironic since the NSG was founded in 1974 mainly as a response to India's first nuclear test. In dutifully rubber-stamping this deal in September 2008, the NSG failed to follow its own guidelines and uphold its own norms.

Most importantly, the deal undermined the core principle that proliferation is bad. Instead, it signaled that some proliferation is acceptable. The arrangement allowed for peaceful nuclear cooperation between the United States and India, while also allowing India to continue to maintain its existing stockpiles of nuclear weapons—and even add to them. This agreement reinforced the view among many nonnuclear states that the West's true position is not that nuclear weapons themselves are the problem; rather, the issue is who possesses them (what is acceptable for Israel and India, in other words, is unacceptable for North Korea and Iran).[30] In this case, the United States exploited the nuclear sharing and safeguards norms of the NPT to promote its strategic and trade interests and to get around the core nonproliferation norm.[31]

From the perspective of Indian leaders, the deal remedied a longstanding injustice—notably that, in the absence of "general and complete disarmament," the NPT denied India the same rights to security and access to civil nuclear power as the great powers enjoyed. Given the sometimes dismissive treatment of India's disarmament views by the nuclear powers in the past, there is some justification for India's position. But the deal also set an unfortunate precedent. Not surprisingly, Pakistan, which also possesses nuclear weapons outside the NPT, requested the same special exception that India received from nuclear suppliers.[32] Irritated by the India-specific waiver, Pakistan announced it would block any negotiations on a fissile materials cutoff treaty (FMCT). According to a

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Pakistani delegate, Pakistan "cannot agree to negotiations on a FMCT in the Conference on Disarmament owing to the discriminatory waiver provided by the NSG to our neighbour for nuclear cooperation by several major powers, as this arrangement will further accentuate the asymmetry in fissile materials stockpiles in the region, to the detriment of Pakistan's security interests."[33] As a result, Pakistan has played a key part in blocking the consensus-only Conference on Disarmament, the international community's main multilateral arms control negotiating forum, from engaging in any meaningful work for the last few years. Pakistan and, of course, Iran remain largely barred from the legitimate international nuclear marketplace.[34]

Recognizing the Centrality of Justice

In an interview in May 2009, Mohammed ElBaradei, director of the IAEA until November 2009, made clear that he believed the NPT regime was unfair and at risk of collapse. In his words, "Any regime . . . has to have a sense of fairness and equity, and it is not there. . . . We still live in a world where if you have nuclear weapons, you are buying power, you are buying insurance against attack. That is not lost on those who do not have nuclear weapons, particularly in [conflict] regions."[35]

President Obama appears to take the fairness critique of the NPT regime more seriously than his predecessors. During his important policy speech in Prague in April 2009, Obama argued that "the United States has a moral responsibility to act [to pursue disarmament]," since it was the only country to have actually used a nuclear weapon.[36] Obama's speech, in which he pledged to pursue a world free of nuclear weapons, set the stage for a much more successful NPT preparatory committee meeting the following month.

The following year, the NPT review conference in May 2010 made modest if important progress. In a crucial deal between the nuclear weapons states and the Arab League that was brokered by Irish diplomats, the conference adopted an action plan to implement the 1995 resolution calling for a zone free of nuclear weapons and other weapons of mass destruction in the Middle East (one of the original "fairness" issues identified by Albin as crucial to the successful outcome of the 1995 NPT extension conference), which had languished unaddressed for fifteen years. Led by the United States and Egypt, the parties agreed to hold a regional conference in 2012 and establish a process to pursue the denuclearization

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of the Middle East. As in 1995, without this breakthrough progress on the Middle East, which would squarely address the thorn of Israel's possession of nuclear weapons, it is likely that the review conference would not have achieved a consensus final document.[37]

Nevertheless, in November 2012, U.S. officials announced with regret that, despite the tireless efforts of Finnish facilitator Ambassador Jaakko Laajava, the Middle East conference would not be held by the 2012 deadline. Dismay was near-universal among NPT parties, but especially among Arab states and their non-aligned friends. The Arab League blamed the United States for failing to deliver Israeli participation, while U.S. officials cited the unwillingness of Arab countries to talk directly to Israel. Deeply frustrated, the Egyptian delegation abruptly walked out in the middle of the April 2013 NPT preparatory committee meeting (PrepCom) to protest the "lack of seriousness" about holding a Middle East conference. Egyptian Ambassador Badr stated that "the postponement was a flagrant non-fulfillment of agreed commitments" and "yet another step in a long history of unimplemented decisions" regarding a Middle East zone free of weapons of mass destruction. As he argued, "We cannot continue to attend meetings and agree on outcomes that do not get implemented, yet to be expected to abide by the concessions we gave for this outcome."[38]

The Middle East is not the only issue on the nonproliferation agenda, and to risk undermining the whole regime over this one issue would be shortsighted, as U.S. and other Western officials sought to point out. From their perspective, the more time that is spent at NPT conferences discussing the Middle East and disarmament—including the new issue of the humanitarian impact of nuclear weapons—the less time is spent discussing Iran's violations, a situation the Iranian delegation is undoubtedly happy about. But this could have dire consequences. As a high-level U.S. official argued in June 2013, "If, in a few years, the United States and Russia are continuing to make only slow progress on disarmament, that will be disappointing to many but it will *not* be a threat to the integrity of the NPT. If, on the other hand, Iran has acquired by that time a nuclear arsenal," *this* will constitute an "existential threat" to the regime.[39]

Nevertheless, the Middle East issue crystallizes the fundamental instability of a treaty regime based too obviously on haves and have-nots. Israel's free-riding on the NPT regime, under the diplomatic cover of the United States, is an ongoing irritation for Arab states. Egypt feels that it (unlike Israel) has both forgone nuclear weapons and made significant investments in the NPT over the years,

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including by bringing Arab and nonaligned support along at various key points, most crucially for making the NPT permanent in 1995. Egyptian leaders thus feel a deep sense of injustice and unfairness over this persisting inequity, in part because it violates the principle that arms control is about *mutual* security and obligations.

How Do Claims of Justice and Fairness Matter?

We can see at least two conceptions of justice at work here. First are issues of *procedural justice*: the enforcement, inspection, and compliance rules and mechanisms that focus disproportionately on the nonproliferation pillar rather than on disarmament, and thus fall much more heavily on the nonnuclear states than on the nuclear-armed states. Second are issues of *distributive justice*: the unequal access to nuclear security and to the benefits of peaceful nuclear technology, along with the sense of unequal rewards for disproportionate sacrifices.

How much do these claims of justice matter? On one hand, we can be struck by how much the issues of justice and fairness continue to pervade negotiations over the NPT. Not surprisingly, weaker parties appeal to fairness and justice considerations more often than stronger parties. On the other hand, the nonproliferation regime has continued to persist over forty-five years despite ongoing complaints about discrimination and unfairness. Perhaps the fairness discourse is simply "cheap talk" and the NPT regime could just continue to muddle along.

But as this essay has suggested, unaddressed grievances about inequities in the regime have real consequences for outcomes: nonnuclear states that actually support the NPT are reluctant to agree to additional nonproliferation obligations that would strengthen the regime, including stronger safeguards, strengthened provisions on withdrawal from the treaty, and proposals regarding multinational fuel-cycle arrangements. Most critically, the nuclear powers are unable to get the NNWS to care more about the noncompliance of Iran and North Korea, the issue of most importance to the United States and its allies.

Not all of this unwillingness can be traced to the nuclear powers' foot-dragging on disarmament, of course. Security threats or economic interests may also play a role in the reluctance of nonnuclear states to take on new obligations. Nevertheless, the evidence is strong that nonnuclear states withhold cooperation on nonproliferation because proposed new measures are perceived to impose unfair obligations, not because such measures would be ineffective. As the

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Brazilian delegate to the April 2013 NPT PrepCom stated, "The measure of success of any review cycle . . . is whether it contributes to reducing the basic asymmetry inherent in the NPT. . . . We should therefore shun attempts to further increase the imbalance between the rights and obligations of NWS and NNWS."[40]

With the asymmetry unaddressed, the legitimacy of the regime is in the process of eroding, as is quite clear from the hedging strategies of various middle powers. Legitimacy is the generally held belief that a particular institution or rule is valid, appropriate, or proper and thus ought to be obeyed.[41] Equity is a defining dimension of legitimacy. The legitimacy of the NPT is based on a principled justification of a temporary inequality, and a balancing of norms, rights, and obligations designed to limit, and ultimately eliminate, the fundamental discrimination of the regime. The time horizon for resolving the inequality may be distant, but it cannot be nonexistent. Progress toward disarmament is important, as Nina Rathbun argues, because it "strengthens the legitimacy of the regime by creating the expectation that the special rights of the nuclear weapon states will end at some point in the future."[42] For the majority of states, the legitimacy of further nonproliferation measures, therefore, is dependent on progress on disarmament.

Thus, the nonproliferation norm at the core of the treaty can only continue to be perceived as just *as long as* it is perceived to be part of a transformation regime, not a status quo regime. Efforts to strengthen the NPT regime in the future will need to reinforce the transformation aspect, that is, the disarmament pillar. It is clear that the burden of compliance must be distributed more equitably, which means in practice that it must fall much more heavily on the nuclear states than it has in the past.

What can be done? President Obama's June 2013 announcement that the United States would pursue further nuclear cuts with Russia was a positive though modest pledge, and one that also depends on Russian cooperation, which may not be forthcoming. However, recent scholarship suggests that it is not simply reductions in numbers of weapons that matter but also symbolic evidence that the nuclear-armed states do not intend to hold on to nuclear weapons forever.[43] Such measures would include ratifying the Comprehensive Test-Ban Treaty, forgoing nuclear modernization, reducing the role of nuclear weapons in defense doctrines, adopting no-first-use policies, and strengthening nonuse assurances. It will also be important to reduce the perception that nuclear weapons are essential to great power status. Active participation by the United States and other

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nuclear powers in efforts to delegitimize nuclear weapons is essential to severing this link.

Finally, justice and fairness issues are not separate from security concerns but are often central to them. A world permanently divided into nuclear haves and have-nots fosters both insecurity and instability. As shown by Pakistan's blockage of negotiations on a fissile materials treaty, Iran and South Korea's relentless insistence on their nuclear "rights," and deeply felt irritation over the perception of double standards in the treatment of the nuclear arsenals of India and Israel, grievances about injustice are undermining the willingness of nonnuclear states to do more for the NPT. If such grievances remain unaddressed, they will eventually erode the nuclear normative order that is in principle in the interest of all states.

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