

COMPLIANCE ASSESSMENT AND COMPLIANCE ENFORCEMENT: THE CHALLENGE OF NUCLEAR NONCOMPLIANCE

*Dr. Christopher A. Ford**

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Good morning.

The question posed for this panel, about the relationship between weapons of mass destruction (hereinafter “WMD”) related noncompliance findings and what you have tactfully described as exceptional actions by states acting together or acting unilaterally, is a provocative and important one. In order to help enrich your deliberations, I would like to offer some observations upon these matters from the perspective of an official whose job it is at the State Department to do compliance assessments. To begin with, I’d like to say a few words to outline what we mean when we talk about a noncompliance finding.

I. THE COMPLIANCE ASSESSMENT PROCESS

I serve as Principal Deputy Assistant Secretary and as Deputy Assistant Secretary for Compliance Policy in something called the Bureau of Verification, Compliance, and Implementation at the U.S. Department of State (hereinafter “VCI”). VCI is a very young bureau, having been established by statute only in 1999,¹ but it is in some ways the direct descendent of the

* Dr. Ford is the Principal Deputy Assistant Secretary of State, Bureau of Verification, Compliance, and Implementation, U.S. Department of State. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2005, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2005.

1. Pub. Law No. 106–113, 113 Stat. 1501A-486), § 1112(c)(1) (creating Assistant Secretary of State for Verification and Compliance to have “principal responsibility [for] the overall supervision (including oversight of policy and resources) within the U.S. Department of State on all matters relating to verification and compliance with international arms control, nonproliferation, and disarmament agreements or commitments”). The new Assistant Secretary, the statute specified, was to “participate in all interagency groups or organizations within the executive branch of Government that assess, analyze, or review United

Intelligence, Verification, and Information Support Bureau (hereinafter “IVI”) of the former Arms Control and Disarmament Agency (hereinafter “ACDA”). Among our responsibilities is taking the lead role within the U.S. Government in arriving at compliance findings for arms control, nonproliferation, and disarmament agreements and commitments. This includes, most prominently, drafting the President’s congressionally-mandated annual report to Congress that identifies instances of noncompliance with such agreements and commitments, and outlines compliance concerns related thereto. The most recent report—the longest and most detailed ever, running to a total of over 700 pages in three versions published at different levels of classification—was just issued in August. You can find the unclassified version on our Bureau’s website.²

States planned or ongoing policies, programs, or actions that have a direct bearing on verification or compliance matters, including interagency intelligence committees concerned with the development or exploitation of measurement or signals intelligence or other national technical means of verification.” *Id.* § 1112(c)(2)(A). The Assistant Secretary was also to be “the national policy community representative to the intelligence community on verification and compliance matters.” *Id.* § 1112(c)(3). Congress had disagreed with the State Department’s reorganization plan—which had proposed to divide the verification staff functions of the former Arms Control and Disarmament Agency (ACDA) between a “Special Advisor” to the Under Secretary for Arms Control and International Security and a Deputy Assistant Secretary within the then-Arms Control Bureau—and opted instead to give “the verification and compliance aspects of arms control agreements . . . a voice at the most senior level of the Administration” by creating a purpose-specific Assistant Secretary. *Id.* “A true commitment to vigorous enforcement of arms control and nonproliferation agreements and sanctions,” said the Senate Foreign Relations Committee report, “cannot be maintained by submerging compliance analysis within other bureaus.” S. REP. NO. 106–43, at 28 (1999); *see also* Jesse Helms & Joseph R. Biden, Jr., Letter to William J. Clinton, at 1 (Feb. 24, 1999) (expressing concern that “under your plan, the function of verification and compliance or arms control treaties would not be carried out by a separate bureau”). The leadership of the Senate Select Committee on Intelligence had also expressed similar concerns. *See* Richard C. Shelby & J. Robert Kerrey, Letter to Madeleine K. Albright, at 2 (Sept. 15, 1997) (urging creation of separate “Assistant Secretary of State for Verification and Compliance to maintain the integrity of the verification and compliance process, and to protect the credibility within the Senate of the Department’s assessments in this area”).

2. U.S. DEPARTMENT OF STATE, BUREAU OF VERIFICATION, COMPLIANCE, AND IMPLEMENTATION, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS (2005), available at <http://www.state.gov/t/vci/rls/rpt/c/15720.htm> (last visited Feb. 16, 2006). The report is drafted by the Department of State, Bureau of Verification, Compliance, and Implementation but by law is a Presidential report. *See* 22 U.S.C. § 2593a(a)(4) (requiring President to submit “a detailed assessment of the adherence of other nations to obligations undertaken on all arms control, nonproliferation, and disarmament agreements or commitments, including the Missile Technology Control Regime, to which the United States is a participating state, including information on actions taken by each nation with regard to the size, structure, and disposition of its military forces in order to comply with arms control, nonproliferation, or disarmament agreements or commitments” including “a specific identification, to the maximum extent practicable in unclassified form, of each and every question that exists with respect to compliance by other countries with arms control, nonproliferation, and disarmament agreements with the United States”). The President has delegated authority to the Secretary of State to sign the report and submit it to Congress on his behalf. *See* Delegation of Certain Congressional Reporting Functions, Exec. Order No.

Anyway, we do compliance assessments for a living, and I'd like to talk a little bit about what goes into them. In our diplomatic engagement with other governments on compliance-related matters, it has become apparent that many do not understand the complexity and rigor of the U.S. compliance assessment process. They sometimes seem to assume that we reach compliance findings as mere issues of policy preference—as if we just sit around a table and someone declares that “I don't like that country, so they must be guilty of noncompliance with something.” In fact, I fear that is how some governments probably make such decisions. But we certainly don't.

The U.S. process, as shown in the preparation of the annual Noncompliance Report, is a long and complex one that involves the entire interagency community and detailed clearance procedures in which officials sometimes argue at length over subtle nuances of phrasing and, yes, even punctuation. The text of the report is cleared by all relevant parts of the policy community—including the Departments of State, Defense, and Energy and the National Security Council staff—as well as by the U.S. Intelligence Community. This elaborate and often difficult process is quite appropriate; the report is, by law, the President's report and it represents the findings of the U.S. Government as a whole, not just one or more components of it.

Conceptually, the process begins with trying to ensure that we have a clear understanding of the obligations in question. These obligations can come in many forms, ranging from formal treaties such as the Nuclear Nonproliferation Treaty (hereinafter “NPT”), to informal, voluntary arrangements among a group of countries such as the Missile Technology Control Regime (hereinafter “MTCR”), to United Nations resolutions such as UNSCR 1540, which commits nations to undertake efforts to stem the proliferation of WMD.

It is often imagined that compliance analysts spend most of their time arguing over facts and over interpretations of intelligence information, but interestingly, it is often the meaning of the underlying obligation that causes intense discussion and debate. This highlights the point that compliance analysis is different from intelligence analysis. To be sure, compliance analysis depends upon intelligence, which must be assessed and understood. But compliance analysis also involves legal analysis, because one needs to be able to explain what a country is required to do before one can judge whether that country has done it. Ultimately, all this requires a policy judgment as to whether the facts constitute a violation when held up against a promise or an obligation.

It's also worth noting that for compliance assessment purposes, some of the things over which intelligence analysts spend their time arguing are not

always of primary importance. There may be different views, for instance, about when a certain country will have come into possession of a workable nuclear weapon, or how many weapons they currently have. Those are vital questions for the Intelligence Community, and for policymakers whose job it is to reduce or counter the national security threats represented by such capabilities. For a compliance analyst, however, the key may often simply be whether the country in question is trying to develop nuclear weapons at all, which, for NPT non-nuclear weapons states, is the key to identifying a potential Article II violation.³

II. NONCOMPLIANCE AND ENFORCEMENT

So that's the compliance assessment process. But for today's purposes, the most interesting discussions will likely be about the implications of noncompliance. And this is indeed where some of the most important challenges lie in our world of verification and compliance.

Dr. Fred Icklé, who went on to become head of the Arms Control and Disarmament Agency, wrote an article in 1961 for *Foreign Affairs* magazine which made a very important point that holds true today. The title of his article was *After Detection . . . What?*,⁴ and this title nicely summarizes his point. Verification capabilities are clearly crucial in the arms control, nonproliferation, and disarmament world. One needs to be able to detect violations in time to be able to do something about them. But that's the rub. Detection alone is of little value. Detection serves its purpose only by providing a foundation for, and warning timely enough to permit, effective action in compliance enforcement. There is no way around the need for taking action to counter the threat posed by a violation, return the violator to compliance, and deter others from following in his footsteps.

This is a lesson unfortunately underscored by recent events. Even though the world has long since learned of Iran's flagrant noncompliance with its nuclear safeguards obligations and with Article II of the NPT, the international community is still having a difficult time making such noncompliance costly and unattractive—either to Tehran or to any country that might contemplate following Iran's path in the future. The international community is also

3. See Treaty on the Non-Proliferation of Nuclear Weapons art. II, Apr. 22, 1970, 729 U.N.T.S. 161 ("Each non-nuclear weapons State Party to the Treaty undertakes . . . not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.") [hereinafter Non-Proliferation Treaty]. See also NOTIFICATION TO INT'L ATOMIC ENERGY AGENCY (IAEA) OF TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS MAR. 5, 1970 ENTRY INTO FORCE, available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc140.pdf> (last visited Mar. 1, 2006).

4. Fred Charles Icklé, *After Detection—What?*, 39:2 FOREIGN AFFAIRS 208–20, Jan. 1961.

struggling to agree upon how to provide a “what” in response to North Korea’s even more obvious violations of the NPT. Dr. Icklé was, I believe, right to suggest that it can often be even harder to mount an effective response than it is to detect violations in the first place.

But what sort of response is appropriate, and when is it permitted?

A. *Finding the Balance*

You will probably find our Bureau second to none in advocating firm responses to compliance problems. After all, it is important that all violations—or at least all deliberate ones, anyway⁵—elicit some compliance pressure aimed at making noncompliance expensive, difficult, annoying, or dangerous. The proliferators of today have learned lessons from how the international community has handled noncompliance in the past, and it seems clear that tomorrow’s would-be proliferators will learn from the choices we make in responding to today’s proliferation challenges. Not taking violations seriously, wherever they occur—thereby sending the message that compliance is not important, or is negotiable—can have grave consequences in undermining our ability to stand firm when it matters most. As a result, we believe it important for the U.S. to be a stickler for compliance rigor, and to engage in vigorous efforts to ensure compliance enforcement—a role, incidentally, which we feel to be the responsibility of all members of the international community, jointly and severally.

But it is also clear that not all failings are equally dangerous. South Korea, for instance, engaged in a few undeclared uranium enrichment and plutonium-separation experiments inconsistent with its obligations under its nuclear safeguards agreements with the International Atomic Energy Agency (hereinafter “IAEA”). In stark contrast, Iran carried on a twenty-year clandestine program to develop a full nuclear fuel cycle capable of producing, and clearly intended to produce, fissile material usable in nuclear weapons. Clearly, Iran’s activities are far more threatening to international peace and security.

Both cases represented compliance difficulties, but the dangers they present—and the responses these different efforts should therefore elicit—vary enormously. South Korea quickly cleaned up its act when the IAEA brought the problem to its attention, so no response beyond mere chastisement was

5. I do not address here the problem of a state that fails to comply with an obligation on account of error, incompetence, or forces beyond its control. In some such cases (*e.g.*, those of simple error), mere detection of noncompliance may, alone, lead to redress. In others, remedying noncompliance may present capacity-building challenges (*e.g.*, it may take time and money to fix things). These problems, however, are different from the challenges presented by a willful violation—with which both Dr. Icklé and I are principally concerned.

needed. Iran, however, seems intent upon retaining the fuel-cycle capabilities it secretly acquired as part of its nuclear weapons effort, while North Korea actually brags about achieving a weapons capability. Both Iran and North Korea appear to need a good deal more compliance pressure than mere admonishment.

Another interesting comparison is the case of Libya. The Libyans clearly violated Article II of the NPT by engaging in a program to manufacture nuclear weapons—which they aimed to do with the help of gas centrifuges for uranium enrichment, and even nuclear weapons designs, acquired from the A.Q. Khan proliferation network. Their program included undeclared possession of uranium hexafluoride centrifuge feedstock in noncompliance with their Comprehensive Safeguards Agreement with the IAEA, and therefore in noncompliance with Article III of the NPT.⁶ As a nuclear weapons development program, this effort constituted a very serious noncompliance problem indeed. But the context in which we learned the full details of these problems, however, was one in which it was clear that Libya was on the road to reforming its proliferating ways and eliminating its WMD programs.

So while noncompliance is always bad and should always elicit compliance pressure in response, context is critical. Decisions about appropriate responses to noncompliance can raise very complex and difficult questions, and they require all sorts of policy, and sometimes legal determinations. There is no substitute for good judgment and policy sense, and it may not be possible to set down precise recipes ahead of time for which responses will be appropriate in any particular case.

B. Counter-WMD Intervention

In extreme cases, particularly given the nature of the potential threats that can be posed by the possession of weapons of mass destruction by a rogue state—particularly one with ties to international terrorism—the repertoire of potential responses to proliferation noncompliance may include military action. Of course, any decision to take this course of action would require careful

6. See Non-Proliferation Treaty, *supra* note 3, art. III (“Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfillments of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this article shall be applied to all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.”)

analysis of legal authorities and policy considerations, and would ultimately be made at the highest levels of our government.

We are often asked when such action would be consistent with the United Nations Charter and other principles of international law. It is impossible to state a general rule here because, in the end, each use of force must look for its legitimacy in the facts and circumstances that the state believes have made it necessary, and each such use of force should be judged, not against abstract concepts, but on the particular events that gave rise to it. In the case of Iraq, for instance, the U.S. had ample authority under pertinent Security Council resolutions to use force to compel compliance with WMD obligations in the face of material breaches of Iraqi obligations under relevant resolutions of the Security Council, including conditions that had been essential to the establishment of the ceasefire in 1991. This is not to say, however, that Security Council action is a *sine qua non* for the use of force in such cases, as the doctrine of self-defense may be available to justify use of force in cases where the Council has not acted. Each case must be judged on the particular facts. This is why so many attempts to define bright-line rules describing the circumstances in which the use of force is justified have come to naught.

C. Diplomacy and Counter-Proliferation

I would like to emphasize, however, that if we spend all our time debating hypothetical scenarios of military intervention we will likely miss some very important points about what can be done—and in fact is being done—to fight WMD proliferation and prevent things from ever having to come to such a pass. After all, it is now clear that skillful diplomacy can help create opportunities for compliance enforcement far short of military intervention. Let me offer you some examples:

- 1) This Administration's Proliferation Security Initiative (hereinafter "PSI") and Dangerous Materials Initiative (hereinafter "DMI"), for instance, are innovative approaches to some of these problems that rely upon coordinated applications of existing legal authorities to increase the costs and risks to proliferators and smugglers of dangerous material around the globe. We are working with like-minded friends and allies, using well-established rules regarding ascertaining the true nationality of vessels on the high seas or conducting medical, safety, and customs inspections in ports of call, and securing ship-boarding agreements with major flag states such as Panama and Liberia. The U.S. is, by such means, making it much harder for countries such as Libya to receive black market centrifuges, for countries such as North Korea to ship missiles, illegal drugs,

- or counterfeit currency around the world, and for other rogue states to acquire chemical weapon precursor materials or ballistic missile components.
- 2) The U.S. is also now working with the Nuclear Suppliers Group (hereinafter “NSG”) to halt the spread of enrichment and reprocessing technologies while we endeavor to ensure reliable alternative nuclear fuel supplies for countries that forswear such proliferation-risky capabilities. Incidentally, just this past week [October 17-18, 2005], in accordance with its recently revised guidelines, the NSG also held an extraordinary plenary meeting to consider the Iran issue in light of the IAEA Board of Governors’ resolution declaring Iran in noncompliance with its safeguards obligations (and noting that this requires a U.N. Security Council report).⁷ I’m pleased to note that at the NSG plenary, the European Union announced that it would make no transfers of NSG trigger list items to Iran and would exercise special vigilance with regard to non-listed items that could nonetheless be useful in enrichment and reprocessing.
 - 3) The U.S. also uses a range of bilateral economic and diplomatic pressures to fight WMD-related proliferation. These pressures include sanctions laws passed by the U.S. Congress, many of which are explicitly linked to specific international nonproliferation norms such as the NSG guidelines or the MTCR. Through such mechanisms, we have made it harder and more costly for would-be proliferators to do the wrong thing by making it clear that one cannot be both a WMD proliferator and a full trading partner of the world’s largest economy.
 - 4) Finally, the example of our successful efforts, first to negotiate, and then to assist in the implementation of and ultimately to verify Libya’s elimination of its WMD programs, is also a very important illustration of the innovative approaches being taken to handle proliferation challenges. While we worked closely in Libya with both the IAEA and the Organization for the Prohibition of Chemical Weapons (hereinafter “OPCW”), it is important to note that most of our work in country was done on a cooperative trilateral basis between the U.S., our British allies, and our Libyan partners. Once Libya had made its strategic commitment to renounce WMD, for example, it was possible to work with the Libyans to eliminate their nuclear weapons program—not merely to place seals on it and monitor it

7. INT’L ATOMIC ENERGY AGENCY, BOARD OF GOVERNORS, IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT IN THE ISLAMIC REPUBLIC OF IRAN (2005), *available at* <http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf> (last visited Mar. 1, 2006).

pursuant to IAEA safeguards. As far as we're concerned, dismantlement and removal beats mere monitoring any day.

Thanks to patient diplomatic efforts and a keen U.S. focus upon stopping WMD proliferation during 2004—coming on the heels of years of international pressure on Libya in connection with terrorism, human rights, and regional security problems—this Administration was able to achieve a tremendous success in WMD rollback on a voluntary and cooperative basis.

I hope these examples make clear that there exist a great many tools for policymakers whose job it is to cope with the threats posed by noncompliance with arms control, nonproliferation, and disarmament agreements and commitments. The military variety of compliance enforcement constitutes only one tool in the toolbox. A finding of noncompliance should always produce compliance enforcement response, but it does not, and should not, automatically produce any particular response. Which tools will best suit the circumstances at hand is something that we need to consider anew for each problem that arises, as we tackle the policy challenges of fashioning remedies that address the wrong, and that best serve U.S. national security interests and the interests of international peace and security.

III. CONCLUSION

I hope that my discussion of the compliance assessment process and the challenges of *After Detection . . . What?* will help you better understand the sometimes somewhat arcane world of compliance enforcement. So while I am sorry that I offer today no bright line rules and clear recipes, I am not sure that such things exist. Nonetheless, I hope I have been able to impress upon you both the seriousness and the complexity of these challenges, and I look forward to hearing some very interesting discussions today.

Thank you.