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After the 123 Agreement between India and the United States, pursuing controls on India’s nuclear weapons programme, could there ever be such an agreement between Israel and the United States?

1. Introduction

Israel, not a signatory to the existing Nuclear Non-proliferation Treaty of 1970, is nevertheless believed to have the potential to produce nuclear weapons and a considerable stockpile thereof. As a close geopolitical ally of the United States, some might believe that this means that the US would deal with it in the same way as it did with India in 2008, by signing one of the bilateral agreements on the use of nuclear technology for civilian reactors, bringing the country inside the purview of existing agencies to control the spread of nuclear technology and, by extension, the capacity to produce nuclear weapons. I will analyse the legal content of and the strategic logic behind the recent Indian agreement, particularly in reference to the implications for the international legal norms of engagement with the non-proliferation process (section 2), and Israel’s current military and defensive situation, its arguable need to keep its nuclear weapons secret and its policies regarding existing non-proliferation regimes and norms (section 3). I hope to show how considerations in the region might not actually produce the same result with Israel and how the US might actually shrink from signing such an agreement with its Middle Eastern partner, although in the interests of its democracy and responsibilities to the regional and international communities of which it is a part, Israel actually should at least bring its nuclear weapons under some sort of international security regime (section 4).

2. The 123 Agreement with India and its implications for the NPT regime

India, like Israel, has always refused to sign the NPT of 1970. The Agreement fills in a gap in the existing non-proliferation regime, whereby India constitutes neither a nuclear

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1 Hereafter NPT.
2 One source has Israel’s status regarding its possession of nuclear weapons listed as ‘confirmed’: ‘States of Interest With NBC Weapons’, P B McCarron and C A Holt, ‘A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal’ (2001) 25 Fletcher Forum of World Affairs 203, table, 226. From other sources, it is clear that Israel does have nuclear weapons (notably A Cohen and M Miller, ‘Bringing Israel’s Bomb Out Of The Basement: Has Nuclear Ambiguity Outlived Its Shelf-Life?’ (2010), 89 Foreign Affairs 30); most of the literature available assumes their existence.
weapon state, as defined by the NPT\textsuperscript{4} a state ‘which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967’, nor a non-weapon state\textsuperscript{5} (since there have been two nuclear tests since then, once in 1974\textsuperscript{6} and once in 1998\textsuperscript{7}). Jack Garvey recognises this as a failure of the legal non-proliferation framework to be able to control non-signatories to the treaty: ‘[b]oth covertly and overtly,’ non-signatory states such as India and Israel ‘rejected the foundational distinction, and developed nuclear weapons capacity outside the arrangements established under the Treaty’\textsuperscript{8}; to join the NPT regime now, a state possessing weapons, as India and Israel both do would have to disarm\textsuperscript{9}. The jurisdiction of the NPT simply does not cover non-signatory states\textsuperscript{10} who continue to develop nuclear weapons, but the Nuclear Suppliers Group\textsuperscript{11} imposes export controls on those states who have not signed up to the NPT treaty and submitted to International Atomic Energy Agency\textsuperscript{12} safeguards\textsuperscript{13}.

The purpose of the Agreement is ‘to enable full civil nuclear cooperation between the Parties’\textsuperscript{14}; the agreement is also stated as hoping to prevent ‘the proliferation of nuclear weapons or other nuclear explosive devices’\textsuperscript{15}. Significantly, as a result of these negotiations, the NSG has made an exception for India and lifted its export controls on ‘nuclear fuel and technology’\textsuperscript{16}. There is thus a clear ability here for the US to trade nuclear fuel, and indeed safeguard a supply thereof, with a state ‘that has a full-fledged nuclear weapons program and stays outside the NPT’\textsuperscript{17}. Although the state will not receive support for weapons proliferation, keeping the 123 Agreement within the letter of Article I of the NPT, by

\textsuperscript{4} Article IX., NPT, \url{http://www.fas.org/nuke/control/NPT/text/npt2.htm}, accessed 22 November 2011.
\textsuperscript{5} Hereafter NNWS.
\textsuperscript{10} Garvey (n 8), 376.
\textsuperscript{11} Hereafter NSG.
\textsuperscript{12} Hereafter IAEA.
\textsuperscript{13} B Wastler, ‘Having Its Yellowcake And Eating It Too: How The NSG Waiver For India Threatens To Undermine The Nuclear Nonproliferation Regime’ (2010) 33 B.C.Int’l & Comp.L.Rev. 201, 201.
\textsuperscript{15} Preamble, \textit{ibid}.
\textsuperscript{16} Wastler (n 13), 201
\textsuperscript{17} Mueller (n 9), 190.
importing what it needs for its civilian reactors, India can enrich its own domestic uranium to weapons-grade, still allowing it to proliferate. India has a clear no-first-use policy as regards the use of nuclear weapons, despite concerns that its policy is at variance with what might arise in the event of crises similar to that of 1983-84 in the face of a threat from fellow non-signatory state Pakistan.

According to Wastler, this agreement puts pressure on the NPT through de-incentivising the NNWS within the treaty from adhering to treaty obligations – particularly those such as Iran and North Korea who have already found ways out or around their obligations as signatory NNWS, and completely devalues the NPT in the eyes of ‘outlier states’ such as Iran by an exceptionalism which, in his view, does not adequately prevent India from making or testing additional weapons. Heinzelman, on the other hand, argues that it opens the ‘nuclear black box’ of India’s current civilian program, which contrasts strongly with the conditions in Israel where the doctrine is one of strict aminut, or opacity. Therefore, India is in a strong position as regards US trust in its commitment to safe and peaceful usage of nuclear weapons and technology – despite clear worries regarding its relationships with its neighbours.

The reason why Israel may not be a candidate for a 123 Agreement and India must therefore come down to trust in the non-NPT signatories’ military doctrines and prior good behaviour, making a 123 Agreement a privilege. Analysis of Israeli doctrines and situation as regards regional stability and international law might show why a similar agreement and NSG waiver may not be forthcoming.

3. The position of nuclear weapons within Israeli nuclear doctrine.

As stated above (note 2) it is widely known, though admittedly ‘unacknowledged’, that Israel has the bomb. Israel’s relationship with the non-proliferation regime is more active

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18 Wastler, (n 13), 208.
20 ibid, 132
21 Wastler (n 13), 214
22 ibid, 215
24 Cohen and Miller (n 2), 31
than it seems by its status as a non-signatory to the NPT. It has engaged, for instance, with the Comprehensive Nuclear Test Ban Treaty, taken on board the guidelines established by the NSG, and is party to Security Council Resolution 1540, ‘which obligates all UN member states to combat the proliferation of weapons of mass destruction’ and is party to the Convention on the Physical Protection of Nuclear Material. Avner Cohen insists that ‘nuclear weapons are near taboo and should not be used, short of situations that threaten the country’s existence.’ However, since it still refuses to sign the NPT – which would mean disarmament, laying it open to significant strategic danger – there is still a need to consider whether or not it could – or should – be brought within the exceptionalist regime that the 123 Agreement with India represents.

Despite insistences that Israeli military postures are inherently defensive, there are equally clear indications that Israel has come very close on occasions to action forbidden by Article 51 of the UN Charter, prohibiting aggression. This article does not deter nations, including Israel, from pre-emptive strikes, and furthermore, Israel has no written military doctrine relating to when it will use such methods; its ‘security conception and policy were always empirical and de facto’, built up by Israeli Defence Force commanders over time. It also has a widely-known history of difficult relations with its neighbours and military engagements using conventional forces, and, directly relevant to the question of proliferation, pre-emptive strikes on Iraqi and Syrian nuclear programs. For practical security reasons, Israel fears regime changes in surrounding states, including that recently occurring in Egypt and threatened in Syria, particularly if Islamist forces hold the balance of power, because of the Iranian revolution where ‘a virtual ally’ was transformed into an ‘implacable foe’. Thus in this challenging climate, Israel’s defence policy could justify developing nuclear weapons to give it the strategic edge over its NPT-signatory neighbours. Furthermore, according to some, Israel would have to have a first-strike capability; its ‘small size means that even a few nuclear detonations on its soil would be devastating’. It may be a reflection of Israel’s position in the region and the militarisation of society rather than a demonstration that it

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26 Cohen and Miller (n 2), 39
28 For example, L R Beres, ‘Where the Shadow Really Falls: Why Israel must have nuclear weapons’ (1997) 4 Brown Journal of World Affairs 127, 128
30 D Tal, ‘Israel’s Concept of Pre-Emptive War’ (2006-07) 77 Syracuse L.Rev. 601, 602
32 Edelman, Krepinevich, Montgomery, (n 3) 68
would use them, but the loose and rather informal nature of its declared military doctrines counteracts any ability to bring them within a secure non-proliferation regime.

Nuclear weapons acknowledged to be in such hands, even if part of a legitimate defensive strategy, would therefore necessarily cause severe pressure on the NPT adherence of Israel’s neighbours, and most commentators agree this gives some justification to Iran’s own projects as an official NPT signatory but believed to be involved in covert proliferation. This has been called a ‘slippery slope of ‘nuclear realism’33. Israel represents a ‘militarized and security-obsessed’ society, according to international relations theorist Barry Buzan34, who discusses Israel in passing while dealing with a summary of the international logic of security strategies pursued by states, whether by relying on others to protect them or on their own ability to defend themselves35, rather than making any ideological appeal. There is a strong thread of realism (where states act out of pure self-interest and, it is often implied rather aggressively, in accordance with their relative power vis-à-vis other states) and rational institutionalism (where states voluntarily place restrictions on themselves in order to maximise their own utility) running through his work, which appeals as an academic theory to those wishing to try to escape from the heavily politicised criticisms of Israeli policy that appear either from democrats such as Cohen and Miller36 or Arab commentators such as Abdel Monem Said Aly37. (Israel is defended by some38 equally political publicists.)

To Buzan, Israel allows these security concerns to dominate it ‘psychologically’. Moreover, these concerns have generated ‘a highly charged power-security dilemma’ and in turn may generate an arms race39. Indeed, in practice, Asher Arian notes that ‘an overwhelming proportion of the population sees [defence] as the central issue facing Israel…[it] penetrates the value system of the country’.40 Israeli ballistic missiles are proliferating, but it was also under real and immediate threat from states such as Iraq, which turned its fire on Tel Aviv during the first Gulf War. Israel has been developing nuclear weapons while raiding reactors in surrounding states which could have been the beginnings of NPT violations and defended under Article 51 of the UN Charter as imminent threats to its

33 Miller and Scheinman, (n 7), 24
35 ibid, chapter 9 generally.
36 Cohen and Miller (n 23).
38 Beres (n 28), entire article.
39 Buzan (n 34), 333.
security. Since secret nuclear weapons held by Israel may have bred secret nuclear weapons held by Iraq and Syria, the region is already labouring under a covert arms race. In allowing Israel’s bomb the tacit consent of India’s, the US would risk far more overt threat to the NPT from surrounding countries.

4. Why the US might not sign a 123 Agreement with Israel

In many of the commentaries regarding the Indian 123 Agreement, Israel is clearly ruled out as a future partner for the US, which appears to have more of a strategic interest in keeping the non-proliferation regime on track than be interested in backing Israel up so far as to establish an agreement with it in this manner. There are existing agreements between the US and Israel regarding Israeli possession of nuclear weapons; one was signed in 1969. Wastler states unequivocally that “[g]ranting a similar waiver to Israel would surely infuriate Israel’s enemies in the region who have abided by their nonproliferation obligations.” The apparently ‘selective enforcement’ of US non-proliferation strategy – discriminating between ‘good states’ and ‘bad states’ – notwithstanding, “[t]he weakening of the nonproliferation regime is not in the interest of the United States’ as a ‘menace to global stability.” Avner Cohen concurs when he states that ‘if Israel [openly] developed nuclear weapons its nuclear monopoly would be brief and soon would be replaced by a mutually nuclearized Middle East.” In general, the evidence indicates that the US has more interest in the non-proliferation regime, and thus does not endorse the nuclear capabilities of the few non-signatory states, or those like Iran and North Korea trying to pull out of the NPT, than writers such as Wastler think they do when the US creates exceptions to the NPT rules through 123 Agreements. If it comes down to trust in the regime that informs a decision to sign such an agreement, the US evidently does not trust Israel enough, nor does it trust the surrounding states.

India has proved itself willing to co-operate in some ways with the safeguards established under international treaty law, the NSG and the IAEA; Israel is in a difficult security position and has enemies which do not simply have border or territorial disputes with

41 Miller and Scheinman (n 23), also Cohen and Miller (n 2), 31.
42 Wastler, (n 13), 210.
44 ibid, 115
45 Cohen (n 27), 107.
it, but want to annihilate it completely\textsuperscript{46}. But according to Buzan’s theoretical assessment of the situation, that does not particularly help the security situation from degenerating into an arms race and threatening destabilisation. In fact, ‘popular dissatisfaction’ could undermine the political ‘foundations’ of this sort of strategy anyway\textsuperscript{47}. The question arguably becomes one of ‘should’, rather than ‘would’ with the discussion of Israeli politics in what is supposedly a democratic society. Cohen and Miller in particular\textsuperscript{48} believe that Israel should put its nuclear weapons under at least domestic scrutiny, particularly because it claims to be a democracy. Here, Buzan’s theories of popular dissatisfaction when a state so completely tries to insulate itself in a security cocoon, raised above, meets with political commentary from Cohen and Miller: amimut undermines Israeli democracy by conflicting with democratic norms\textsuperscript{49}.

5. Conclusion

The 123 Agreement with India is likely to be the only exception to the NPT norms officially endorsed by the United States, for the time being at least. India has been brought under the inspection regime normally limited to signatories to the NPT. Although in the interests of democracy and a genuinely public debate, perhaps Israel should make its nuclear capability and doctrine public, and thus sign up to international agreements at the heart of the non-proliferation process, whether bilateral such as the 123 Agreement system or multilateral such as the NPT, there are clear reasons not to. Chief among them for the United States is trying to maintain the status quo where Egypt and Syria, though currently more preoccupied with their own internal power struggles, do not feel they have to pull out of the NPT and try to keep up with Israeli proliferation. Israeli military doctrine has proved – in an understandably hostile geopolitical situation – to be volatile and not rigorously codified enough in order to be trusted with openly acknowledged nuclear weapons; moreover, their definition of Article 51 is broader than most other states’. It is evident that despite close ties between the US and Israel, the latter is just not to be trusted with such dangerous weapons, and such an agreement, effectively legitimating the possession of the use of nuclear weapons, would have dangerous and, in the US’ views, unwanted consequences for regional stability and the NPT regime.

\textsuperscript{46} See for instance Beres (n 28), 129
\textsuperscript{47} Buzan, (n 35), 333-34
\textsuperscript{48} Cohen and Miller (n 2), general arguments against the continuation of amimut
\textsuperscript{49} \textit{ibid}, 39
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