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THE ROLE AND RATIONALE OF THE NUCLEAR NON-PROLIFERATION TREATY IN THE TWENTY-FIRST CENTURY

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ABSTRACT

Much has been written about perceived weaknesses of the NPT and the challenges it has been facing over the last decades. Analysing the most important provisions of the NPT, this article demonstrates how the treaty has managed to maintain its central role in the non-proliferation regime since its conclusion, and how it retains enough flexibility within its review mechanism and its managerial approach to supervision to keep this position for the decades to come. The theoretical framework of the article is formed by theory of arms control law, relevant features of which are: a large influence of politics and national interests of states on the rule of law; its flexible yet treaty-based nature; and the distinctive role of supervision in order to ensure compliance with primary rules. The article analyses key NPT provisions. Based on Article VIII, the NPT Review Conferences have both an important political and legal function. They are the NPT's mechanism for review, implementation and supervision; in legal terms, they enable the evolution of the NPT based on subsequent agreement and practice. The NPT articles on non-proliferation and disarmament illustrate how the NPT has evolved to close off loopholes (Articles I and II) and retains its flexibility whilst providing a global platform for negotiations on nuclear disarmament (Article VI). Article III evolved and must be understood to oblige NPT states to sign an Additional Protocol (AP) with the IAEA. Article IV sets the parameters for the peaceful uses of nuclear energy, but leaves room for negotiation and conflict. The supervision of the NPT, illustrated by the case of Iran, is a complicated process involving international organisations such as the IAEA and the UNSC; while these may play important roles, however, the enforcement of the NPT is ultimately left to the NPT states themselves.

KEYWORDS

- International arms control law
- Non-proliferation Treaty
- Review Conferences
- International Organizations

1. Introduction

The concept of nuclear non-proliferation is as old – arguably, even older – as that of nuclear weapons itself.¹ Non-proliferation efforts have always taken place both within and beyond the framework of international law; it was not before in 1959 that the idea of some form of a multilateral non-proliferation agreement surfaced during discussions at the UN General Assembly (UNGA). Negotiations throughout the following decade led by the US and the USSR at, first, the Eighteen Nation Committee on Disarmament (ENDC) and then the UNGA, resulted in the adoption of the Nuclear Non-Proliferation Treaty (NPT) in 1968.² Although the approach of the NPT is discriminatory in the sense that it divides its member states into nuclear-weapon states (NWS), which are legally allowed to possess a nuclear deterrent (China, France, the UK, the US and the USSR – now the Russian Federation), and non-nuclear weapon states (NNWS), which are prohibited from acquiring such capacities, at the time both NWS and the majority of NNWS agreed that halting the spread of nuclear armaments was in everyone's best interest. The NNWS did feel that the treaty benefited the interests of the NWS more than their own, which is why they pressed for provisions on nuclear disarmament and peaceful nuclear cooperation to be included.³

The NPT has attracted its share of support as well as criticism.⁴ Yet it has remained the only global treaty on nuclear non-proliferation over four decades, slowly increasing its membership until, today, only four states remain outside the treaty.⁵

1 In this article, I understand the term 'non-proliferation' to cover all efforts, short of the use of force, that aim to *prevent* states from acquiring or developing nuclear weapons, or nuclear-related equipment, materials or technology with the aim of developing a nuclear weapon. Such efforts may be of a legal, political or economic character; they may be uni-, bi- or multilateral. Counter-proliferation are initiatives involving the threat or use of force aimed at halting the spread or development of nuclear weapons; usually, they are more of a roll-back than a preventive nature: one may think, in this context, of the bombings of reactors in Iraq or Syria, the Second Gulf War, or the boarding of ships under the Proliferation Security Initiative. The US and UK had developed foreign policies to stop Nazi Germany from acquiring nuclear weapons before the US managed to construct its first nuclear weapon itself. See, for example, JT Richelson, *Spying on the Bomb: American Nuclear Intelligence from Nazi Germany to Iran and North Korea*, Norton & Company, New York, 2007.

2 For a good overview of the process of NPT negotiations, see the UN Yearbooks 1959-1968, available at <http://unyearbook.un.org/> [accessed 2/08/12].

3 M Shaker, *The nuclear non-proliferation treaty: origin and implementation 1959-1979 (Volume 1)*, Oceana Publications, London, 1980. See also statements by Canada (ENDC/PV.241 p.11); India (ENDC/PV.298); Mexico (ENDC/PV.304 p.6); Brazil (ENDC/PV.327 pp.5-6); and Sweden (ENDC/PV.363, p.6).

4 See, for example, R Broinowski, *Flaws in the Nuclear Non-Proliferation Treaty*, Australian Institute of International Affairs, 2010; D Albright & A Stricker, *After the 2010 NPT Review Conference: Advancing the Non-Proliferation Pillar*, Institute for Science and International Security, Report of 15/07/10, available at www.isis-online.org [accessed 12/06/12]; A Kelly, *NPT: Back on Track*, Arms Control Association, July/August 2010, available at http://www.armscontrol.org/act/2010_07-08/kelly [accessed 16/06/12]; S. Lodgaard (ed), *Nuclear Disarmament and Non-proliferation*, New York: Routledge, 2011; O Njolstad (ed), *Nuclear Proliferation and International Order: Challenges to the Non-Proliferation Treaty*, Routledge, New York, 2011; DH Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, OUP, New York, 2009; JI Garvey, "A New Architecture for the Non-Proliferation of Nuclear Weapons", *JCSL*, no. 3, 2007, pg. 339; HD Sokolski, *Reviewing the Nuclear Nonproliferation Treaty (NPT)*, Strategic Studies Institute, Washington, 2010; R Acheson, *Thinking Beyond the NPT Review Process*, Reaching Critical Will, 2010; D Cliff et al, *2010 and Beyond: NPT Briefing*, Acronym Institute for Disarmament Policy, Washington, 2010.

5 Democratic People's Republic of Korea, India, Israel, Pakistan. All four have developed nuclear weapons outside the NPT and will in this article be referred to as "non-NPT NWS".

Since the early 1990s, however, a number of incidents have indicated that the non-proliferation regime, with the NPT at its foundation, is facing major challenges.⁶ The nuclear weapons programme in Iraq that was discovered in 1991 confronted the world with the shortcomings of the existing non-proliferation verification methods; it is on these methods, however, that the International Atomic Energy Agency (IAEA) still must rely today in order to verify that nuclear activities are strictly for peaceful uses in a large number of states.⁷ The proliferation network of A.Q. Khan, operating through the 1990s into the early 2000s, exploited the fact that the trade in nuclear and dual-use items has become so expansive that it is extremely difficult to control, opening up avenues for nuclear proliferation for countries such as Pakistan or Libya.⁸ Iran has been posing difficulties for the NPT, IAEA and UN Security Council (UNSC) since 2002, illustrating not only how problematic it is to enforce compliance with non-proliferation rules, but also how the dual-use nature of nuclear energy poses a problem of policy and diplomacy, for it is hardly possible to judge whether a state intends to use its nuclear facilities for peaceful or for military purposes (see chapter 7). The dual-use problem was highlighted, moreover, by the Democratic People's Republic of Korea (DPRK) withdrawing from the NPT in 2003 to develop a nuclear deterrent: as the NPT stimulates peaceful nuclear trade, many realised, it was possible for any state to develop its nuclear capacities as an NPT member state, only to subsequently exercise its right to withdraw from the treaty and divert its resources to the construction of a weapon.⁹

Developments such as these prompt the question whether or not the NPT is still capable of fulfilling its main goal of preventing nuclear non-proliferation. The NPT has been supplemented by other non-proliferation treaties and initiatives, although it remains the cornerstone of the non-proliferation regime. New global dynamics, such as the end of the Cold War, the demise of the USSR, the faltering ability of the Cold War superpowers to enforce their norms on regional powers, or the rise of Asia, with China at the forefront, could be detrimental to the functioning

6 The term 'non-proliferation regime' will remain undefined here, but it includes all multilateral, regional and bilateral non-proliferation treaties, the IAEA and its safeguards system, as well as nuclear trade agreements and political initiatives.

7 See, for example, 'Iraqi Nuclear Weapons', *Federation of American Scientists*, retrieved 13 December 2010, <http://www.fas.org/nuke/guide/iraq/nuke/program.htm>; D Albright, 'Iraq's Programs to Make Highly Enriched Uranium and Plutonium for Nuclear Weapons Prior to the Gulf War', Institute for Science and International Security, 2002, retrieved 13 December 2010, http://www.wisisonline.org/publications/iraq/iraqs_fm_history.html#note1; C Duelfer, 'Arms Reduction: The Role of International Organizations, the UNSCOM Experience', *JCSL*, no.1, 2000, pp. 105-122; L Rockwood, 'The IAEA's Strengthened Safeguards System', *JCSL*, no.1, 2002, pp. 123-136.

8 See C Braun & CF Chyba, 'Proliferation Rings: New Challenges to the Nuclear Nonproliferation Regime', *International Security* (2004), vol.29, no.2, p. 16; P Crail, *Evading Export Controls: Mitutoyo Corporation As a Case Study in Determined Proliferation*, October 2006, retrieved 20 January 2011, http://www.wmdinsights.com/I9/I9_EA1_EvadingExport.htm; 'Rogues' Gallery: The legal status of suspected A.Q. Khan network members worldwide', *Bulletin of the Atomic Scientists*, vol. 26, no. 6, 2006, pp. 29-34; C Clary, 'A.Q. Khan, Proliferation Networks, and the Nuclear Slippery Slope', in JA Russel (ed), *Proliferation of Weapons of Mass Destruction in the Middle East*, Palgrave MacMillan, New York, 2006; D Albright & C Hinderstein, 'Unraveling the A.Q. Khan and Future Proliferation Networks', *Washington Quarterly*, vol. 28, no. 2, 2005, p. 112.

9 See for example Lodgaard, *Op. Cit.*, pp. 154-155; M Asada, 'Arms Control Law in Crisis? A Study of the North Korean Nuclear Issue', *Journal of Conflict and Security Law*, vol. 9, no. 3, 2004, pp. 331-355; S Hecker, 'What I Found in North Korea', *Foreign Affairs*, 9/12/10, retrieved 10 December 2011 <http://www.foreignaffairs.com/articles/67023/siegfried-s-hecker/what-i-found-in-north-korea>.

of the NPT.¹⁰ In 2005, the Review Conference ended in disagreement and chaos, prompting fears that the NPT regime might collapse in case 2010 Conference would be unsuccessful.

This article explores the current role and position of the NPT within the nuclear non-proliferation regime. It answers the question whether the NPT is still the right instrument to prevent nuclear proliferation or whether its form and underlying ideas are Cold-War relics, unable to deal with today's nuclear threats. In a broader sense, these comments could provide an interesting starting point for an analysis of the functionality and purpose of classic arms control law in the global political dynamics of today. First, section 2 outlines the theoretical legal framework of such an analysis in order to highlight some basic relevant features of arms control law. Section 3 takes a closer look at the political and legal relevance of NPT Review Conferences, which take place every five years to review the operation of the treaty.¹¹ It thus forms the basis for the interpretation of key articles of the NPT, which follows in sections 4, 5 and 6. These discuss the provisions in the treaty on the prohibition of nuclear proliferation for both NWS and NNWS, the obligation to pursue negotiations on disarmament, the obligation to conclude safeguards agreements with the IAEA, and the right to peaceful uses of nuclear energy. Section 7, which is loosely based on the case of the contentious nuclear programme in Iran, illustrates the role of the IAEA and the UNSC vis-à-vis the NPT. The results of these assessments are reiterated and contextualised in section 8 of this article.

2. Theoretical legal framework

In legal terms, the NPT is an arms control treaty. Arms control, in the definition of the US Arms Control and Disarmament Agency (ACDA), consists of “efforts to reduce the likelihood of war and to limit the effects if it occurs”.¹² The NPT attempts to achieve this goal primarily by confining the spread of a certain class of weapons to the group of states that already possessed them at the time of its conclusion.¹³ It is important to realise that in 1968 the ultimate goal of the NPT was the prevention of global nuclear war: non-proliferation of nuclear weapons, however, was, by the majority of states, favoured over nuclear disarmament as the most urgent and feasible step towards that goal.¹⁴ Articles I and II of the NPT,

10 See, for example, TV Paul, RJ Harknett & JJ. Wirtz (eds), *The Absolute Weapon Revisited. Nuclear Arms and the Emerging International Order*, MIT Press, Cambridge, 2001; J Simpson, *The nuclear non-proliferation regime: back to the future?*, United Nations Institute for Disarmament Research, 2004, retrieved 17 July 2011, <http://www.unidir.org/pdf/articles/pdf-art2015.pdf>; M El-Baradei, *The Age of Deception*, Metropolitan Books, New York, 2011.

11 Art. VIII(3) NPT.

12 ‘Arms Control and National Security’, ACDA, Washington DC, 1968, pg. 3. See also, for example, AH Chayes & A Chayes, ‘From Law Enforcement to Dispute Settlement: A New Approach to Arms Control Verification’, *International Security*, no. 4, 1990, pp. 147-164.

13 See Articles I and II NPT.

14 See, for example, the preamble of the NPT; Shaker, Op.Cit.; UNGA First Committee meetings A/C.1/PV.1556-1582; ECB Schnoettle, *Postures for non-proliferation: arms limitation and security policies to minimize nuclear proliferation*, SIPRI, London, 1979. See on the relation between arms control and disarmament also S Feldman, ‘The Place of Arms Control and Disarmament in the System of International Law’, in: J Dahlitz & D Dicke (eds), *The International Law of Arms Control and Disarmament – Vol I Arms Control and Disarmament Law*, UN, 1991, p. 38.

containing its key non-proliferation provisions, are therefore worded more strongly than Article VI, which contains the NPT's disarmament paragraph.

Arms control efforts were originally realised after an armed conflict by the victorious state onto its vanquished opponent. They were, as such, not so much a result of any international legal system, but rather a reflection of existing political and military power relations between states. Arms control moved into the realm of international law when states began to conclude agreements that regulated the number and types of arms in their possession, agreements that were based on the ideas of reciprocity and prevention.¹⁵ Today, arms control law is recognised as a field of public international law that is closely connected to areas of law such as international humanitarian law and the law of collective security.¹⁶ The NPT must be analysed in the theoretical context of arms control law in the broader sense. Three distinctive and interrelated features of arms control law deserve closer attention: its relation with national security; its treaty-based nature; and the role of supervision of arms control agreements.

Relation with national security. Although the UN Charter outlaws the use of force by states, two exceptions to this rule apply: states are authorised to use military force in self-defence and to implement a UNSC resolution that is adopted under Chapter VII of the Charter.¹⁷ To these ends, states may possess armaments. States, in general, regard the right to arm themselves as a *sine qua non* for their ability to protect their territory and national sovereignty; for many states, their ability to project military power is also an important pillar of foreign policy. The right to build up national defences is understood to be unlimited: in absence of a binding international obligation stating the contrary, no restrictions apply to the right of states to possess any number or types of arms.¹⁸ To voluntarily relinquish this right by entering into such obligations, for example by signing an arms control treaty, is therefore a decision that might have far-fetching military and international political consequences for states.

This explains why arms control treaties often require lengthy and difficult negotiations¹⁹; it also explains why their ratification by national legislators may take even longer.²⁰ National security and national interests are overriding concerns in the field of arms control law. Others are principles of non-interference, sovereign equality of states, good faith, or cooperation.²¹ International politics and diplomacy

15 An early example is the Hague Convention of 1899, which attempted to prohibit the launching of projectiles and explosives from balloons, the use of asphyxiating or deleterious gases, or the use of hollow-point bullets.

16 N White, 'The Future of Arms Control Law: An Overview of the Workshop', *JCSL*, no. 3, 2004, pg. 299; EPJ Myjer, 'The Law of Arms Control, Military Security and the Issues: An Introduction', in: EPJ Myjer (ed), *Issues of Arms Control Law and the Chemical Weapons Convention*, Kluwer Law International, Netherlands, 2001, pp. 1-10.

17 *Ibid.*, p. 8.

18 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment, ICJ Reports 1986, § 269; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, § 21.

19 Negotiations on the NPT started in 1959 and lasted nine years; on the BWC, they started in 1966, lasting six years; on the Chemical Weapons Convention (CWC), they started also in 1966, only to be concluded twenty-six years later.

20 The Comprehensive Test-Ban Treaty (CTBT), concluded in 1996, still has not been ratified by several key states, preventing its entry into force until up to this day.

21 Arms control law is, according to Feldman, based on "the principles of equality and undiminished security". Feldman, *op. cit.*

play a large role in the field of arms control law; they often continue to do so even after a treaty has been concluded.²²

Treaty-making: legal flexibility and certainty. The law of arms control is “mainly treaty law as distinct from custom and general principles”.²³ Its subject-matter warrants predictability, stability, and reciprocity, which is the reason that states have traditionally favoured treaty-making in this field of law.²⁴ Arms control treaties are normally a confirmation of the political status quo, arranged between dominant states to codify a *de facto* political or military situation that is in their best interest.²⁵ Once a treaty has been concluded, the adherent states benefit from the predictability and stability that is created by the legal certainty of written norms. This need for legal certainty has also led to a strong tendency by states that are party to multilateral treaties to preserve that treaty-regime and, if possible, attempt to achieve universal membership.²⁶

On the other hand, states will attempt to preserve some political and legal flexibility within the regime of arms control agreements. This apparent paradox is explained by the fact that states feel that they must not be constrained by too rigid treaty rules to take measures, if necessary, to protect their vital interests such as national security. Policy and international politics are more dynamic than the development of international law.²⁷ Treaties thus need to preserve flexibility to deal with economical, political, military or technological developments – which may happen gradually or suddenly.²⁸ For these reasons, states retain the required level of autonomy under arms control regimes through the use of open, multi-interpretable, central norms therein, or the incorporation of special withdrawal clauses.²⁹

Supervision of arms control agreements. The desire to preserve arms control agreements with a maximum number of member states for the sake of stability and

p. 41; see also G Den Dekker, *The Law of Arms Control: International Supervision and Enforcement*, Martinus Nijhoff, The Hague, 2001.

22 The International Law Association (ILA) concluded at its London Conference that “the end of the negotiations [of an arms control treaty] is, in fact, only the beginning of the arms control process”. ILA, Committee on Arms Control and Disarmament Law, Fifth Report, London, 2000, p. 3.

23 Ibid.

24 J Dahlitz, ‘The Role of Customary Law in Arms Limitation’, in Dahlitz & Dicke, *op. cit.*; G Den Dekker & T Coppen, ‘Termination and Suspension of, and Withdrawal from, WMD Arms Control Agreements in Light of the General Law of Treaties’, JCSL, no. 1, 2012, pp. 1-23.

25 Or, as Knut Ipsen phrases it: arms control treaties are the “terminating point of political evolution”. K Ipsen, ‘Explicit Methods of Arms Control Treaty Evolution’, Dahlitz & Dicke, *op. cit.*, p. 76.

26 The desire of the NPT member states to achieve universal adherence to the treaty is reflected in its Review Conference Final Documents. See NPT RC 1975 Final Document, NPT/CONF/35/I Annex I, pg.10; NPT RC 1985 Final Document, NPT/CONF.III/64/I Annex I, pg.17; NPT RC 1995 Final Document Decision 2, NPT/CONF.1995/32 (Part I), Annex, §2; NPT RC 2000 Final Document, NPT/CONF.2000/28 (Part I), §5-6 on pg.19; NPT RC 2010 Final Document, Review section, NPT/CONF.2010/50 (Vol.I), pp.17-18.

27 See Ipsen, *loc. cit.*; see also, for example, A von Baeckmann, ‘The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) (1968)’, in: Sur (ed.), *op. cit.*, Chapter 6.

28 Dahlitz, *op. cit.*; Den Dekker & Coppen, *op. cit.*

29 See, for example Article X NPT; Article XVI CWC; Article IX CTBT; Article 31 of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (LANWFZ Treaty); Article XIV of the New START Treaty; Article of the Article 1 of the African Nuclear Weapon Free Zone Treaty (ANWFZ Treaty); Article XV of the Anti-Ballistic Missile Treaty.

predictability requires a mechanism that ensures compliance with such treaties.³⁰ States will, after all, be reluctant to adhere to arms control norms if they cannot be guaranteed with a reasonable amount of certainty that their neighbours or rivals are not gaining a military advantage over them by covertly defecting from those same norms. The process of ensuring compliance with arms control agreements is termed verification, or supervision. The latter phrase will be used here, following Guido Den Dekker's 2001 terminology (see below).³¹ Supervisory mechanisms promote adherence to treaties by deterring non-compliance mainly through guaranteeing, with differing levels of certainty, that non-compliant behaviour will be detected; at the same time, such a guarantee will also form a positive incentive for treaty-abiding states to remain within a regime. Moreover, by increasing the stability and predictability of state behaviour, supervisory mechanisms in and on themselves contribute to enhancing security as well.³²

Discussions surrounding arms control supervision have long emphasised complete verifiability: the idea that any unilateral abrogation of an arms control treaty should be detected and punished.³³ The focus, however, has shifted away from such a coercive or law-enforcement approach to a more 'managerial approach'; at the same time, the practice of arms control supervision through international organisations, instead of unilateral or bilateral constructions, has become of greater importance.³⁴ An approach towards supervision that requires states to demonstrate their compliance with a treaty has become the norm. Cooperative supervision has turned into a confidence-building measure in itself, allowing opportunity for political and ideological exchange in the process. Non-compliance might better be addressed as a managerial problem to be solved than as violation to be punished.³⁵

Thus, the managerial approach of arms control supervision necessitates an important role of diplomacy and political discussion. By allocating such concerns it relinquishes the purely technical view on supervision. In this way, instead of equating verification with monitoring as many Cold-War era US-USSR bilateral arrangements did, the supervision of for example the NPT may consist of several elements or stages. This article loosely follows the phases of supervision identified by Den Dekker.³⁶ The first of these is monitoring or incident-independent

30 Den Dekker & Coppen, *op. cit.*; see also Feldman, *op. cit.*

31 Den Dekker, *op. cit.*

32 See S. Sur, 'General Considerations on Verification', in S. Sur (ed.), *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices*, UNIDIR, 1991; G. Den Dekker, *op. cit.*

33 Cf. S. Pawlak, 'The Legal Aspects of Verification', in Dahlitz & Dicke, *op. cit.*; P. Dunay, 'Verification of Conventional Arms Control', in *Verification Yearbook*, 2000, pp. 101-114; I. Oelrich, 'The Changing Rules of Arms Control Verification', *International Security*, no. 4, 1990, pp. 176-184; L. A. Dunn, 'Arms Control Verification: Living with Uncertainty', *International Security*, no. 4, 1990, pp. 165-175; K. L. Adelman, 'Why Verification is More Difficult (and Less Important)', *International Security*, no. 4, 1990, pp. 141-146.

34 See E. P. Myjer, 'The Organization for the Prohibition of Chemical Weapons: Moving Closer Towards an International Arms Control Organization? A Quantum Leap in the Institutional Law of Arms Control', in Myjer (ed.) *op. cit.*, pp. 61-139; M. El-Baradei, 'The Role of the International Atomic Energy Agency Safeguards in the Evolution of the Non-proliferation Regime', in Dahlitz & Dicke, *op. cit.*, pp. 11-113; Den Dekker, 2001, *op. cit.*; Sur, *op. cit.*; Dunn, *op. cit.*; Oelrich, *op. cit.*; Chayes & Chayes, *op. cit.*

35 Myjer, *op. cit.*, pg. 129.

36 Den Dekker, *op. cit.* See also S. Pawlak, *op. cit.*; Sur, *op. cit.*; Baeckmann, *op. cit.*; Myjer, *op. cit.*; Oelrich, *op. cit.*; I. L. A. 2000

fact-finding. The next phase is verification, which is fact-finding with the purpose of testing a state's compliance with an arms control norm. This phase includes the review and assessment of facts, thus incorporating a strong political element by necessitating formal or informal consultations, negotiations or diplomacy. The last phase is correction: enforcing compliance with norms that have been violated. Options to this end may include unilateral options, diplomatic procedures, or dispute settlement procedures. Throughout these phases an interpretative element is present: the process of supervision contributes to the progressive development of the law by specifying and clarifying norms.³⁷

3. Article VIII(3): Political and legal relevance of the NPT Review Conferences

Article VIII(3) of the NPT established that a Review Conference was to take place in 1975, five years after the entry into force of the treaty.³⁸ The article has been the basis of the practice of conducting five-yearly Conferences since. This section examines both the political and legal meaning of these conferences.

The system of Review Conferences is related to all three arms control features highlighted above. In political terms, it allows for the influence of negotiation and diplomacy post-conclusion, giving NPT states a chance to continuously monitor whether their sovereign rights or national security might be endangered by the implementation of the NPT. In legal terms, combined with the open norms used throughout the provisions of the NPT, it ensures both legal certainty and legal flexibility. Given that policy is more dynamic than law, Review Conferences might be a way for the NPT member states to ensure the continued relevance of the treaty because it enables them to establish an authoritative interpretation of its articles – one that may alter over time. Thus, these Conferences should be considered as a method of treaty evolution within the field of arms control.³⁹ Finally, the review cycle incorporates an important element of supervision – a diplomatic procedure for review, assessment, and dispute settlement.⁴⁰

To help define the role of the NPT Review Conferences further, a closer look at the negotiation records of the NPT is necessary. An early version of Article VIII(3) first appeared in a 1965 US draft version of the NPT.⁴¹ The ensuing discussions at the ENDC indicate that the function of what was to become Article VIII(3) was to supervise the fulfilment of the obligations of the treaty by its mem-

Conference report, *op. cit.*; Pawlak, *op. cit.*

37 Den Dekker, *op. cit.*; Myjer, *op. cit.*

38 Article VIII (3) NPT reads: *Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised. At intervals of five years thereafter, a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect to the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty.*

39 Ipsen, *op. cit.*, p. 78.

40 *Ibid.*, p. 82.

41 See Verbatim Records of the Eighteen Nation Committee on Disarmament, retrieved 1 August 2012, <http://quod.lib.umich.edu/e/encd/>, ENDC/152 of 17/08/65. See also Shaker, *op. cit.*, pp. 861-870.

bers. Initially, the review procedure of the NPT was linked in particular to the disarmament pledge by the NWS in order to address concerns of the NNWS that the disarmament paragraph in Article VI of the NPT was too weak.⁴² Later, treaty review was understood to cover the NPT as a whole, including all its operative articles and complete preamble. In other words: Review Conferences were meant to take stock of progress on non-proliferation, disarmament, and the easing of international tensions; in this way, they also serve as a safeguard for the treaty's effectiveness.⁴³ The Final Documents of the Review Conferences, as well as state practice, have hitherto shown an overwhelming support for the periodic Review Conference as the mechanism for reviewing the NPT and its implementation.⁴⁴ At the 1995 Review and Extension Conference, the NPT member states agreed to 'strengthen the review process for the operation of the Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized'; to this end, the five-year-cycle of Review Conferences, as well as the system of convening Preparatory Committees in each of the three years before a Review Conference, was formalised in the Final Declaration.⁴⁵ The NPT Review Conferences were intended not only to review the Treaty, but also to strengthen it, implement it and ensure compliance with it by its member states.

In this context, it is also important to stress the original function of Article X of the NPT, which contains the withdrawal clause and originally set the life-span of the treaty to twenty-five years.⁴⁶ Although it is often seen as a legal loophole for states that wish to acquire the necessary nuclear technology under the NPT and subsequently withdraw to be free of constraints to manufacture a nuclear weapon⁴⁷, Article X(1) was originally intended as a provision that enabled states, mainly NNWS, to enforce compliance with the NPT by giving them the option to

42 The US negotiator stated that the review procedure was included in part because of the concern of NNWS that the NPT treaty should be accompanied by measures of disarmament; see ENDC/PV.224, p.20. See also, for example, statements by Canada (ENDC/PV.226 p.8); Burma (ENDC/PV.250 p.29); and the UK (ENDC/PV.326 p.17). See also Schnoettle, *op. cit.*

43 See, for example, statements made at the ENDC by the US (ENDC/PV.325 p.9); Sweden (ENDC/PV.335 p.10); Italy (ENDC/PV.338 p.11); the UK (ENDC/PV.350 p.4); and Romania (ENDC/PV.376 p.10).

44 In 1975, 1980 and 1985, the Final Document included a provision on the convening of the next Review Conference; the NPT states were invited to request the UN Secretary-General to include an item on the establishment of a Preparatory Committee for the following Conference in the agenda of the UNGA. See the Final Documents of the 1975-1985 Review Conferences: UN documents NPT/CONF.35/I, NPT/CONF/II/22/I, and NPT/CONF.III/64/I; see also UNGA resolutions 31/75, 33/57, 38/74, and 43/82.

45 See UN document NPT/CONF.1995/32 (Part I), p. 8.

46 Article X NPT reads: *1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests. 2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.*

47 See, for example, V Orlov and IV Trushkin, *NPT 2010: Strengthening the Regime*, PIR Center, Moscow, 2010; C Harvey et al, *Major Proposals to Strengthen the Nuclear Nonproliferation Treaty. A Resource Guide for the 2010 Review Conference*, Arms Control Association, Washington, 2010; J Goldblat, *Should the Right to Withdraw from the NPT be Withdrawn?*, International Commission on Nuclear Non-proliferation and disarmament, 2009, retrieved 4 November 2010, <http://www.icndd.org>; G Bunn & R Timerbaev, 'The Right to Withdraw from the Nuclear Non-proliferation Treaty (NPT): the views of two NPT negotiators', *Yaderny Control (Nuclear Control) Digest*, no.1-2, 2005, pp. 20-29.

withdraw if they felt that other states were not living up to their obligations.⁴⁸ At present, leaving the NPT as a way to exercise diplomatic pressure on other NPT states does not seem to be a realistic option for NNWS. This, one may argue, has shifted the balance of power within the NPT supervisory system in favour of the NWS.⁴⁹

The *legal* relevance of the NPT Review Conferences must be viewed in the context of the rules on treaty interpretation as codified in Articles 31⁵⁰ and 32⁵¹ the Vienna Convention on the Law of Treaties (VCLT). Many interpretations of the NPT rely heavily on its negotiating history. That is not necessarily mistaken, but both Article 32 VCLT and the ILC commentary clearly state that recourse to the preparatory work of a treaty to assess the intentions of its contracting parties is only a *supplementary* means of treaty interpretation.⁵² Article 31(3) VCLT must be understood to assign complementary roles to subsequent agreements and practice in the interpretation of a treaty, subjecting form to intention: in other words, the test whether or not there is a subsequent agreement depends less on the form of such agreement than on whether or not a manifest intention exists that the understanding between treaty parties would constitute an agreed basis for that treaty's interpretation.⁵³ Subsequent practice must establish 'the agreement of the parties' regarding the treaty's interpretation: the value of a practice varies, according to the ILC commentary to Article 31 VCLT, yet it can indicate the common understanding of the State-parties as to the meaning of the treaty's terms. The WTO Appellate Body has qualified subsequent practice as having to be "concordant, common and consistent", establishing a "discernable pattern implying the agreement of the parties regarding its interpretation".⁵⁴ Indications as to the role of subsequent practice and agreements in the interpretation of a treaty might also be found in that treaty itself.⁵⁵ In light of the significant role for

48 See Den Dekker & Coppen, *op. cit.* See also statements at the ENDC by Mexico, Sweden, Canada, and the US: ENDC/PV.304 §13, ENDC/PV.335 §24, ENDC/PV.329 p. 11, ENDC/PV.341, p. 6, ENDC/PV.350, p. 6, ENDC/PV.358, p. 11.

49 The indefinite extension of the NPT in 1995, although increasing stability and predictability, in this way also meant a loss of influence for NNWS.

50 Article 31 VCLT reads: 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* 2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.* 3. *There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.* 4. *A special meaning shall be given to a term if it is established that the parties so intended.*

51 Article 32 VCLT reads: *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*

52 ILC, Draft Articles on the Law of Treaties with commentaries (1966) (hereinafter: ILC Draft Articles), §19.

53 See ICJ: *Corfu Channel Case*, Judgment of April 9th, 1949, ICJ Reports 1949, p. 25; *Territorial Dispute (Libyan Arab Jamuhiriya v. Chad)*, Judgment, ICJ Reports 1994, §66; *Kasikali/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, §52. See also R.K. Gardiner, *Treaty Interpretation*, Oxford: OUP, 2008, p. 217.

54 *Japan - Taxes on Alcoholic Beverages*, WTO Appellate Body, Report, AB-1996-2 of 4 October 1996, p. 13.

55 Especially relevant in connection to the application of the NPT is the case of *Rights of US nationals in Morocco*. In this case the ICJ, to interpret the 1906 General Act of Algerias, looked at the minutes of a meeting of a Committee on Customs Valuations, which was established pursuant to Article 96 of the Act: *Case concerning rights of nationals of the United States of*

the Review Conferences not only to review and strengthen the NPT but also to implement it as well as ensure compliance with its terms, it must be understood that the conclusions and recommendations thereof were indeed intended to be authoritative, although they were never meant to have any direct legal effect.⁵⁶

Review Conferences therefore play an important role in the interpretation of the NPT in the context of establishing subsequent agreement and practice. Although the Treaty cannot be reinterpreted by referring to a Final Document alone, recurring agreement at Review Conferences could indicate subsequent agreement in the sense of Article 31 VCLT. Such agreement, if supplemented by common, concordant and consistent practice of the NPT member states, is a crucial element in establishing the correct meaning of the terms of the NPT. The negotiating history of the treaty is, in such case, only of secondary relevance.

4. Non-proliferation and disarmament under the NPT: Articles I, II and VI

Articles I and II NPT. Articles I and II of the NPT contain the basic non-proliferation obligations of the treaty for NWS and NNWS.⁵⁷ After the NPT entered into force the provisions became the target of some criticism.⁵⁸ For one, in line with the desire of states to maintain a level of legal flexibility within the framework of a treaty, key concepts such as “nuclear weapon” and “to manufacture” in Articles I and II had been left undefined. Regarding the definition of a nuclear weapon, this situation resolved itself fairly rapidly, as many NNWS and all NWS either became signatories, or signed a protocol, to one or more treaties that *did* include such a definition.⁵⁹ Moreover, in practice, this omission in the NPT has not led to problems.

The same cannot be said, however, about the disagreement on what constitutes the *manufacture* of a nuclear weapon – in fact, it lies at the core of the current dispute in Iran over its right to use nuclear energy for peaceful purposes (section 7). There is no definition that asserts definitively at what point a previously civil nuclear

America in Morocco, Judgment, ICJ Reports 1952, p. 211.

⁵⁶ Jonas and Ahlstrom seem to believe Review Conferences can constitute subsequent agreement or subsequent practice according to Article 31: see DS Jonas, ‘The New U.S. Approach to the Fissile Material Cutoff Treaty: Will Deletion of a Verification Regime Provide the Way Out of the Wilderness?’, *Florida Journal of International Law*, vol.18, no.2, 2000, pp. 597-678; C Ahlstrom, ‘Legal aspects of the Indian–US Civil Nuclear Cooperation Initiative’, *SIPRI Yearbook*, 2006, pp. 678-679. Carnahan claims that the significance of Review Conferences ‘seems to be suggested’ by Article 31 VCLT, see BM Carnahan, ‘Treaty Review Conferences’, *AJIL*, vol.81, 1987, p. 226; Asada seems a bit more hesitant: Asada (2011), *op. cit.*

⁵⁷ Article I NPT: *Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.* Article II NPT: *Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; 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.*

⁵⁸ See, for example, Shaker, *op. cit.*; M Willrich, *Non-proliferation treaty: framework for nuclear arms control*, Michie Co. Publishing, Washington, 1969; E Young, *A Farewell to Arms Control?*, Penguin Books, Hammondsworth, 1972.

⁵⁹ See, for example, Article 5 LANWFZ; Article 1 of the South Pacific Nuclear Weapon Free Zone Treaty (SPNWFZ Treaty); Article 1 of the South Asian Nuclear Weapon Free Zone Treaty (SANWFZ Treaty); Article 1 ANWFZ.

programme should be regarded as the manufacturing of a weapon. This means, simply put, that one way to interpret the treaty is to regard all nuclear activities as peaceful until a nuclear explosive device is actually assembled. To prevent such interpretations, the USSR proposed to prohibit “preparations to manufacture” a nuclear weapon, but the proposal was rejected. The Swedish representatives at the negotiations wondered what was exactly going to be prohibited by the treaty, describing the process of nuclear weapon manufacture as a ladder with many rungs and wondering at which point it would be ‘reasonable and feasible’ to introduce international blocking.⁶⁰

Another perceived shortcoming of Articles I and II was that these provisions did not cover all possible scenarios of nuclear proliferation. States, especially the United Arab Republic, pointed out that proliferation via non-state actors was a problem that was not addressed by the NPT.⁶¹ Moreover, the wording of Articles I and II does not prohibit giving assistance to a nuclear weapons effort by a NWS to another NWS, or to a non-NPT state; or by an NNWS to any other state.⁶² A review of the NPT Review Conferences, however, indicates that Articles I and II NPT have been consequently interpreted by its member states in a way that closes off these loopholes. The 2010 Review Conference clearly states the obligation of *all* NPT members to ensure that their exports do not directly or indirectly assist nuclear weapons programmes, and that they are in conformity with the NPT’s objectives and purposes as stipulated in Articles I, II and III of the treaty, not distinguishing in this context between NPT and non-NPT recipient states.⁶³ Moreover, an overwhelming majority of nuclear exporting states abide by the guidelines of the Nuclear Suppliers Group (NSG): an export control regime that makes no distinction between recipient NWS, NNWS or non-NPT states.⁶⁴ Thus, in this case, subsequent agreement and practice have increased the effectiveness of the NPT over the years through the evolution of two key provisions.

Article VI NPT. NPT Review Conference documents routinely reflect a major debate on the question whether the NWS are making sufficient headway with the reduction and/or abolition of their nuclear arsenals. In fact, a perceived lack of progress in the sphere of nuclear disarmament has been the main factor leading to the failure of three Review Conferences.⁶⁵ The debate normally focuses on Article VI NPT, which obliges the NWS to pursue negotiations in good faith on effective measures leading to nuclear disarmament.⁶⁶ As the topic of this article is nuclear

60 See the 1966 USSR draft of the NPT, document ENDC/164; statements by Sweden, ENDC/PV.243 pp. 11-12; ENDC/PV.342, pp. 10-12.

61 See UAR statements at ENDC/PV.245 p. 10; ENDC/PV.294 p. 7; ENDC/PV.340 p. 6.

62 See for example ENDC/PV.340, p. 5-7; ENDC/PV.367 p. 6; Willrich, op. cit; Young, op. cit; Shaker, op. cit, p. 266.

63 NPT/CONF.2010/50 (vol. I), Actions 35-37, p. 26. Similar obligations were articulated by the Review Conferences of 1975, 1985, 1995, and 2000. See NPT/CONF/35/I, Annex I pp. 3-4; NPT/CONF.III/64/I, Annex I §4, p. 3; NPT/CONF.1995/32 (part I), Decision 2, §12, p. 11; NPT/CONF.2000/28 (Part I), Review of Article III, §34-35, p. 6.

64 See INF/CIRC/254/Rev.10/Part 1.

65 See, for example, *History of the NPT 1975-1995*, retrieved 1 March 2012 <http://www.reachingcriticalwill.org>; R Johnson, *Politics and Protection: Why the 2005 NPT Review Conference Failed*, Acronym Institute, 2005, retrieved 30 January 2012, <http://www.acronym.org.uk/dd/dd80/80npt.htm>.

66 The actual text of Article VI reads: *Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures*

non-proliferation, it suffices to mention here that Article VI NPT is a prime example of the NPT contracting parties wishing to combine maximum flexibility in terms of disarmament and strategic policy with a desire to achieve the highest number of (non-nuclear) signatories as possible. The provision, meanwhile, is the only legally binding norm in the area of nuclear disarmament that has been ratified by the five NPT NWS.⁶⁷

5. The obligation to implement safeguards: Article III(1) NPT

Article III(1) obliges NPT states to subject their peaceful nuclear activities to IAEA safeguards.⁶⁸ In 1970, the IAEA created the Comprehensive Safeguards Agreement (CSA), which contained a model on which subsequent individual safeguards agreements between states and the IAEA were to be based. Under a CSA, a state party accepts safeguards on all source or special fissionable material in all its peaceful nuclear activities, for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other explosive devices.⁶⁹ Shortcomings of the CSA came to light over the years, however, with the case of Iraq developing a nuclear weapons programme whilst under IAEA safeguards as the most spectacular example.⁷⁰ Some of these shortcomings were of a legal nature: the CSAs were too limited in scope, not covering the front end of the nuclear fuel cycle; routine access to declared facilities was limited; and too many safeguard exemptions existed. Other deficiencies were practical: the IAEA did not verify the absence of undeclared activities; the safeguards budget was constrained whilst the burden increased; and the development of nuclear technology outdated the IAEA safeguard methods.

To remedy this flaw the IAEA finalised the Model Additional Protocol (AP) in May 1997.⁷¹ When a state signs an AP, it serves as an addition to the existing

relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. It is generally assumed however, also by the NWS, that the primary focus of the article is on nuclear disarmament.

67 India, Israel and Pakistan have not signed the NPT and thus remain unbound even by the obligation to pursue negotiations on nuclear disarmament. Several UN GA resolutions calling for nuclear disarmament exist, but are not legally binding. See, for example, UNGA resolution A/RES/65/72 of 8/12/2010.

68 Article III(1) reads: *Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded 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 fulfilment 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 on 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.*

69 IAEA document INFCIRC/153 (Corr) of June 1972, retrieved 27 January 2012, <http://www.iaea.org/Publications/Documents/Infircs/Others/infirc153.pdf>.

70 Rockwood, op. cit.; MD Rosenthal et al, 'Review of the Negotiation of the Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards', Volumes I- II, Brookhaven National Laboratory, 2010.

71 IAEA INFCIRC/540, retrieved 27 January 2012, <http://www.iaea.org/Publications/Documents/Infircs/1997/infirc540c.pdf>. See also L Rockwood, Op.Cit, M.D. Rosenthal et al, 'Review of the Negotiation of the Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of

CSA: together they form the integrated safeguards system. By signing the AP a state confers powers onto the IAEA beyond those in the CSA. The purpose of the AP is the same as that of the CSA, which is to enable the IAEA to timely detect the diversion of significant quantities of nuclear material.⁷² The AP, however, strengthens the effectiveness and improves the efficiency of the IAEA.⁷³ It reflects the view of the IAEA that effective safeguards depend on the verification of not only the correctness but also the completeness of a state's declaration, which requires an awareness of the Agency of all nuclear and nuclear-related activities of that state; it also depends on the extent to which inspectors have access to relevant locations.⁷⁴

The choice to create a protocol to the CSA instead of reinterpreting or updating it was the result of the conclusion by the IAEA that it could not simply unilaterally change the safeguards regime. The fact that the AP is a separate document in itself does not affect its relationship to the NPT. Are states obliged, according to Article III(1) NPT, to ratify and implement and AP? This question has been subject to debate both in literature and at NPT Review Conferences.⁷⁵ No subsequent agreement on the topic, however, exists: up until the Review Conference of 1985 there was unanimous consent that the ratification of a CSA was the right implementation of Article III(1), but at the Conference of 1995 (when the AP was being negotiated) that consensus had disappeared.⁷⁶

If one looks at the NPT negotiations to determine the object and purpose of Article III(1) it becomes clear that there is a discrepancy between the *purpose* and the *scope* of the article. The purpose of the article was formulated very broadly by the US and the USSR, and accepted by the other negotiating parties, as ensuring the non-diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.⁷⁷ The *scope* of the article, however, was restricted to the flow of nuclear material within the state. This was the basis of the system underlying the CSA-based verification system of the IAEA, which turned out to be too limited to achieve the purpose of Article III(1).

Safeguards' Volume III, *Brookhaven National Laboratory*, 2010.

72 INFCIRC/153, §2. The paragraph applies to the AP through AP Article 1.

73 See the preamble of INFCIRC/540.

74 See INFCIRC/540 Articles 4, 5, 9; see also MD Rosenthal et al, 'Review of the Negotiation of the Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards', Volume II, *Brookhaven National Laboratory*, 2010.

75 See for example M Asada, 'The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol', *JCSL*, no. 1, 2005, pp. 3-34; statement by the US, UN doc NPT/CONF.2010/WP.17 of 28/03/10, §13; Working Paper by Australia, Austria, Canada, Denmark, Finland, Hungary, Ireland, the Netherlands, New Zealand, Norway and Sweden, UN doc NPT/CONF.2010/WP.17 of 28/03/10; Working Paper by the Non-Aligned Movement (NAM), NPT/CONF.2005/WP.19 of 2/05/05, §10.

76 See 1985 Review Conference Final Document, NPT/CONF.III/64/I, Annex I, 25/09/85. While this document reflects consensus of the participants that the CSA is the implementation of Article III(1), no such consensus can be inferred from later Review Conferences.

77 See statements by the USSR, ENDC/PV.357, pp. 8-9 or ENDC/PV.370 §60; and the US, ENDC/PV.357, pp. 15-16 or ENDC/PV.370 p. 28. See also, for example, statements by the UK, ENDC/PV.358 §14; Poland, ENDC/PV.359 §8. Cuba, at the UNGA, criticised the draft for going beyond the purposes for which the safeguards system was set up and allowing for interference, ultimately voting against the Treaty: see A/C.1/PV.1566 of 13/05/68, §123.

Although they could not predict the weaknesses of the CSA that would eventually surface, states did seem to realise back in 1968 that at some point in the future the scope of Article III(1) NPT might have to be extended in order to fully ensure the effective functioning of the obligation therein. Records of the NPT negotiations at both the ENDC and the UNGA support this claim. The US representative stressed that no treaty amendment would be required to revise the IAEA safeguard documents, a statement for which he received support from various other delegations.⁷⁸ Thus the concept of IAEA safeguards evolving to keep pace with technological or political developments was embedded in Article III(1) at the time of the conclusion of the NPT.

Support for this concept, moreover, has been expressed at every single Review Conference since the entry into force of the NPT. This includes Review Conferences that did not manage to produce a consensus Final Document, as well as Conferences that were held after the AP had come into existence. NPT state parties have, by consensus, agreed at every opportunity that the safeguards system should be developed so that its efficiency and effectiveness may be improved. In 1990, the NPT states expressed their desire for IAEA safeguards reform in a report that called on the Conference to ‘affirm its determination to strengthen further the barriers against the proliferation of nuclear weapons’, inviting the IAEA to consider studying new safeguard approaches including, for example, randomised inspections, and calling for the universal application of IAEA safeguards to *all* peaceful nuclear activities in all states.⁷⁹ These recommendations were linked to the actual process of the creation of the AP by the 1995 Conference, which further commended the IAEA for its work⁸⁰; in 2000, at the first Review Conference after the AP was adopted, all NPT states fully endorsed the Protocol, which it considered to be an integral part of the IAEA safeguards system.⁸¹

In short, not only have the NPT member states continuously called for the improvement of IAEA safeguards, but they have also given the IAEA a mandate to achieve such improvements in 1990 and 1995. It has been agreed by the same member states that the CSA alone cannot fulfil the purpose of Article III(1), which includes verifying the absence of undeclared nuclear activities in a state. The only reason that the AP is a separate document and thus requires a new ratification by states is that the IAEA rightly judged that it did not have the authority to unilaterally update the CSA, and thereby reinterpret Article III(1). A solid interpretation of the NPT, based on the rules of Articles 31 and 32 VCLT, must therefore result in the conclusion that NPT states are in fact obliged to ratify and implement an AP.

78 ENDC/PV.357 §50 ENDC/PV.329, §4; ENDC/PV.358 §70. See also, for example, verbatim records of the discussions of the NPT at the First Committee of the 1968 UNGA: A/C.1/PV.1561-1572.

79 Report of Main Committee II, adopted by consensus, NPT/CONF.IV/MC.II/1.

80 NPT/CONF.1995/MC.II/1.

81 NPT/CONF.2000/28 (Part I).

6. Article IV NPT: peaceful uses of nuclear energy

Article IV(1) of the NPT is often understood as creating a right for NPT state parties to use nuclear energy for peaceful purposes in exchange for their abstention from the development of nuclear weapons.⁸² This is erroneous, since this right is a sovereign right that any state possesses. Rather, it should be argued that Article IV(1) demarcates the line between peaceful uses of nuclear energy and nuclear proliferation. It limits the former by stating it can only be exercised in accordance with Articles I, II, and III.⁸³ Article IV(1), however, also codifies the rule that the right to nuclear energy for peaceful purposes can only be limited by rules emanating from the NPT itself. Thus, it limits and safeguards the right to peaceful nuclear energy at the same time.⁸⁴

The exact scope of Article IV(1) is unclear. In other words, there is no agreement on what particular activities are permitted and protected under the NPT. No subsequent agreement has been reached at NPT Review Conferences; in this case, the rules of treaty interpretation dictate a closer look at the NPT negotiation records. These indicate clearly that apart from peaceful nuclear explosives, which would be regulated by Articles II and V, no type of nuclear equipment, technology or activity should be considered as beyond the scope of Article IV(1).⁸⁵ This discussion was closely linked to that of the definition of the term “to manufacture” in Article II (see above), since peaceful use of nuclear energy ends where the manufacturing of a nuclear explosive commences. Several states issued, during the negotiating phase of the Treaty, statements which corroborate this conclusion: any non-explosive activity, including those which are now considered “sensitive” such as uranium enrichment or the extraction of plutonium from spent fuel, is allowed under the NPT.⁸⁶

The issue is slightly more complicated, however, than the above suggests. Even if one assumes that NPT states have the *right* to conduct any nuclear-related activities they desire short of constructing an explosive, this does not automatically

82 Article IV(1) NPT: *Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.*

83 The text of Article IV(1) only mentions Article I and II, but subsequent agreement and practice warrant the interpretation that this includes the application of safeguards according to Article III NPT. See, for example, the 2010 Review Conference Final Document, NPT/CONF.2010/50 (vol.1), §31.

84 See, for example, Actions 47 and 64 of the 2010 Final Document, calling upon NPT states to ‘respect each country’s choices and decisions in the field of peaceful uses of nuclear energy without jeopardizing its policies or international cooperation agreements and arrangements for peaceful uses of nuclear energy and its fuel cycle policies’ and to refrain from attacks on peaceful nuclear installations: NPT/CONF.2010/50 (Vol.1), pp. 27-29.

85 It was decided that NNWS would not, under the NPT, be allowed to develop nuclear explosives for peaceful uses. Although this was regarded as a limitation of the right to use nuclear energy for peaceful purposes, the NPT states as a majority agreed that non-proliferations in this case took preference, leading to the formulation of Article II NPT as prohibiting nuclear weapons or other nuclear explosive devices. This proves that a) ultimately, the NPT limits the right to peaceful uses of nuclear energy in the light of non-proliferation considerations and b) these limits can only flow directly from the NPT itself. See statements at the ENDC: ENDC/PV.289, p.17, ENDC/PV.357 §24; Statement by the US Department of State of 20/02/67, available in ACDA, *Documents on Disarmament 1967*, Washington DC: State Department, 1967; statements at the 1968 UNGA, PV.1561-1567.

86 See, for example, statement by Chancellor Brandt to the German Bundestag, 1/02/67, in: *Documents on Disarmament*, op. cit, p. 51; Aide-mémoire by Switzerland to the ENDC, document ENDC/204, 1966; Statement by Foster to the US Senate Foreign Relations Committee, 10/07/68, available in ACDA, *Documents on Disarmament 1968*, State Department, Washington DC, 1968. See also Shaker, op. cit, p. 251.

mean that states that possess advanced nuclear capabilities such as sophisticated uranium enrichment technology are under an obligation to share this knowledge or equipment with states aspiring to build up such sensitive capacities.⁸⁷ In legal terms: if Article IV(1) contains a negative obligation to refrain from interfering with a nation's domestic nuclear programme for peaceful purposes, is there any *positive* obligation to actively aid such a programme?

If one exists, it can only be found in Article IV(2) of the NPT.⁸⁸ Article IV(2) contains a positive legal obligation for states to facilitate the exchange of nuclear items, as well as to contribute to the development of the peaceful nuclear sectors in NNWS. The article was inserted into the NPT mainly under pressure of the negotiating NNWS.⁸⁹ The provision that would turn out to be Article IV(2) was, during the negotiations of the NPT, extended in scope, it was also understood that this duty to assist states in terms of non-restricted nuclear activities was not unlimited – which was reflected in the phrases “*the fullest possible*” and “*in a position to do so*”. Yet the actual shape or extent the assistance of Article IV(2) should take was not discussed in detail⁹⁰; rather, the article served as a basis for further discussions and additional instruments for international nuclear cooperation and development. The primary platforms to conduct such discussions are the NPT Review Conferences. Over the years, the IAEA has at these occasions been identified as the primary institution for disseminating nuclear assistance and cooperation.⁹¹ Other proposals that have been voiced, in this context, include special nuclear funds, nuclear-related financial mechanisms benefiting developing states, supply assurances, bilateral arrangements, multilateral approaches to the nuclear fuel cycle, and implementation through, or with help of, the UN Development Program, the World Bank, the Food and Agricultural Organization or the World Health Organization.⁹²

The discussions at NPT Review Conferences on Article IV(2), however, have been more of a political than of a legal nature. There is no evidence of a hard

87 Arguments put forward by Canada and the US at the 2005 Review Conference: NPT/CONF.2005/MC.III/SR.1 §40-41; NPT/CONF.2005/MC.III/SR.1 §33.

88 Article IV(2) NPT: *All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also co-operate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.*

89 Discussions at the ENDC: see ENDC/PV.295, §13; ENDC/PV.367, §57; ENDC/PV.371, §8-11. See also the debate at the 1968 UNGA, PV.1563-1575.

90 This holds true especially when comparing the debate to that on Article V NPT. The discussion on the conditions for assistance with PNEs was conducted in much greater detail at both the ENDC and UNGA: see for example statements by the USSR, ENDC/PV.325 §42; Nigeria, ENDC/PV.327 §56; Canada, ENDC/PV.329 p.10; the US, ENDC/PV.357 §62; see also statements at the UNGA First Committee by Sweden, Pakistan, Yugoslavia, Ceylon, Spain and Guatemala in A/C.1/PV.1564. As remarked in section...above, the US representative at the ENDC argued that the matter could be left to the NPT review conferences: see ENDC/PV.378 §4.

91 See 1975 NPT Review Conference Final Document, NPT/CONF/35/I, Annex I; 1985 NPT Review Conference Final Document, NPT/CONF.III/64/I of 25/09/85, Annex I, §14-15; 1995 NPT Review Conference Final Document, NPT/CONF.1995/MC.III/1 of 5/05/95 §2; 2010 NPT Review Conference Final Document, NPT/CONF.2010/50 (Vol.I), Action 48-55 at pp. 27-28.

92 See, for example, resolutions H and J of the Conference of Non-Nuclear Weapon States, A/CONF.35/10 pp. 14-17

positive obligation to provide other states with nuclear materials, equipment or technology that implements the right of states to have access to a complete nuclear fuel cycle in Article IV(1). Thus, the NPT, under close inspection, leaves large gaps for its member states' policies to fill. The scope of the right to peaceful nuclear energy is broad, but the obligation to contribute to peaceful nuclear programmes in other states is limited.⁹³ Moreover, any transfers of nuclear materials, equipment or technology must require the recipient state to have a CSA in place according to Article III(2)⁹⁴, yet this is also merely a minimum requirement – states are free to enact conditions for nuclear transfers that are more strict. On the other hand, these conditions may not be of such a nature that they would violate Article IV(1) or (2).

It is these legal lacunas in the NPT that supplier states have attempted to address by creating common guidelines for nuclear transfers in the context of the NSG. The NSG guidelines are not legally binding; rather, they are a political initiative to fill the gaps in international non-proliferation norms. Although the NSG is often criticised for violating Articles III(2) and IV NPT, this allegation must be regarded as having no basis in international law. As long as the NSG guidelines provide for the basic possibility of nuclear exchange, the participating states have a sovereign right to constrain nuclear trade beyond the restrictions in the NPT as they see fit – unilaterally or in association with likeminded states.⁹⁵

7. Iran, the IAEA and the NPT

The above may help shed some light on the current conflict over the nuclear programme in Iran and the legal position of the IAEA in that affair, vis-à-vis both Iran and the NPT. The current situation is that the Islamic Republic has been found to be in non-compliance with the safeguard obligations it is under after having concluded a CSA with the IAEA. Iran is, furthermore, the subject of a number of resolutions adopted by the IAEA Board of Governors and the UNSC that demand it, inter alia, to suspend its uranium enrichment activities, as well as to ratify and implement the IAEA AP.⁹⁶ This section will take a closer look at these resolutions in the light of the legal framework set out in the preceding paragraphs.

⁹³ The scope of the positive obligation to engage in the exchange of nuclear materials, equipment and technology is does not go beyond those items that are a *sine qua non* for the use of nuclear energy for peaceful purposes. The limits of thios obligation are unclear, but what is clear is that it does not extend to domestic uranium enrichment capacities or plutonium reprocessing technology.

⁹⁴ Article III(2) NPT reads: *Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.* As opposed to Article III(1), this provision does not refer to an AP. Its scope is broader, however, in the sense that it also covers nuclear exports to non-NPT states.

⁹⁵ As discussed above, such guidelines cannot amount to a *de facto* denial of the right of Article IV(1). The question is when this would be the case. A conceivable example of such a denial would be an agreement between supplier states to stop providing uranium to states that wish to acquire a domestic enrichment capacity.

⁹⁶ UNSC Resolutions S/RES/1696(2006) of 31/07/06; S/RES/1737(2006) of 27/12/06; S/RES/1747(2007) of 24/03/07; S/RES/1929(2010) of 9/06/10; and S/RES/1984(2011) of 9/06/11. IAEA Board of Governors resolutions GOV/2006/14 of 4/02/06; GOV/2009/82 of 27/11/09; and GOV/2011/69 of 18/11/11.

The starting point for a legal analysis of Iran's position should be the NPT. As both the issues of safeguards and peaceful nuclear activities are concerned here, the relevant provisions of the NPT will be found in Articles III(1) and IV. As was illustrated above, the demand for Iran to implement an AP is in accordance with Article III(1) NPT; Article IV, however, provides no legal basis for the demand to suspend uranium enrichment activities.

Bearing in mind that arms control is by nature treaty-based, the latter may appear problematic for the legality of the UNSC and IAEA resolutions. This is, however, only partly the case. The UNSC resolution is based on Chapter VII of the UN Charter.⁹⁷ The Charter, in turn, is the cornerstone of the global system of collective security, and is thus a fundamental collective security law treaty, which forms the legal context of the field of international arms control law (see section 2). The UNSC is the ultimate enforcer of arms control rules, either because the relevant treaty provides that this is the case, or because a situation of non-compliance with arms control rules may give rise to a threat of international peace and security – in which the UNSC can act directly based on the UN Charter.⁹⁸

The legal context is quite different in the case of the IAEA resolutions, since the IAEA does not occupy a similar position in the system of collective security. It is important to stress that the IAEA is an organisation that exists independently of the NPT; in fact, being created in 1957, the IAEA outdates it. NPT states are merely obliged by Article III of the NPT to conclude a safeguards agreement with the IAEA. In addition, as has been explained, the IAEA has become more or less the unofficial agency for the implementation of Article IV(2). The NPT does *not*, however, designate the IAEA as its supervisory organisation or mechanism: the IAEA merely supervises the agreements it has concluded with states as a result of their obligation to comply with Article III of the NPT.⁹⁹ This means that legally, the IAEA cannot oblige Iran to suspend its uranium enrichment activities, or to implement an AP, solely on the NPT: it lacks the legal authority to do so. In other words, although the IAEA has found Iran to be in non-compliance with its safeguards agreement, its powers to act are limited by that agreement and its own statute. The IAEA, moreover, cannot find Iran to be in non-compliance with the NPT, since that would require an interpretation of Articles I and II of the treaty and is therefore the exclusive domain of the NPT member states. Such decisions are therefore beyond the powers of the IAEA – not even to mention that it would constitute a situation in which non-NPT IAEA members such as India, Israel and

⁹⁷ Chapter VII of the Charter contains binding measures the UNSC may take if it finds that a threat to the peace exists. See B Simma, *The Charter of the United Nations, A Commentary* (2nd Ed.) Vol I, OUP, Oxford, 2002.

⁹⁸ *Ibid.*

⁹⁹ In this sense the IAEA differs from, for example, the Organisation for the Prohibition of Chemical Weapons, which is set up as its supervisory organisation. Article VIII(a) of the Chemical Weapons Convention: “*The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.*” See also, for example, the relationship between the LANWFZ Treaty and the OPANAL in Article 7 LANWFZ.

Pakistan, are in a position to interpret the NPT. Rather, finding a state to be in non-compliance with the NPT would require a political process taking place within the framework of the NPT review procedure, that would compare the result of IAEA verification and assessment to the norms set by the provisions of the NPT.

8. Conclusions

This article started off by outlining certain challenges to the nuclear non-proliferation regime and posing the central question whether or not the NPT is still the adequate instrument to lie at the core of that regime.

Section 2 introduced three distinctive features of arms control in general and arms control treaties in particular. This included the overriding concern for national security that dominates arms control issues, and the fact that this leads to a large and perpetual role for politics and diplomacy in the execution or implementation of arms control treaties – including, of course, the NPT. Second, treaties in this field of law have to combine legal certainty and legal flexibility. Third, their supervision involves a managerial approach to ensure compliance, instead of treating every infringement of their terms as a legal violation that must be punished. Section 3 took a closer look at the NPT Review Conference system as a mechanism for review and safeguarding the effectiveness of the treaty, originally in combination with Article X and its provisions on duration and withdrawal. In a legal context, the Conferences have contributed greatly to the establishment of subsequent agreements and practice in the implementation of the NPT which, according to the rules of treaty interpretation, makes a more dynamic interpretation of its provisions possible.

This was effectively illustrated in the three sections of the article that followed. These clarified that through constant review and debate, most NPT provisions have evolved in one way or another. Articles I and II expanded in terms of scope to cover, in time, all possibilities and avenues of nuclear proliferation. Articles IV(2) and VI have sparked debates on nuclear energy and disarmament, giving the NNWS – and, increasingly, global civil society – a platform on which to engage the NWS as a political bloc. Article III(1) incorporates a constant encouragement of further development of IAEA safeguards and has itself evolved to oblige NPT states to conclude an AP. Article VI(1), on the other hand, has been the only article of which the scope at present is the same as in 1968. There have been proposals to limit the scope of the right to peaceful nuclear energy, but these have been resisted vehemently by the majority of NNWS.

In terms of supervision, the NPT combines a managerial approach with close ties to international organisations such as the UN and the IAEA. Neither of these, however, supervises the norms of the NPT itself; this is left to its member states only by way of the NPT Review Conferences. The IAEA supervises the safeguards agreements that Article III NPT obliges states to conclude. It thus *verifies* the non-

proliferation obligations in the NPT, but the IAEA Board of Governors can only conclude a state is in non-compliance with its safeguards agreement; the assessment whether or not this constitutes non-compliance with the NPT must be left to the NPT member states only. The UNSC has been attributed well-defined but limited functions within the NPT/IAEA framework: it is notified of a withdrawal of the NPT¹⁰⁰, for example, and plays a role in enforcing compliance with IAEA safeguards agreements.¹⁰¹ Beyond that, the UNSC can act independent of the NPT if it finds that a certain situation threatens international peace and security: a logical consequence of the fact that the NPT is firmly embedded within the collective security system of the UN.

Through its system of Review Conferences the NPT has managed to keep its relevance for four decades, despite predictions of the opposite. The NPT is a crystal-clear example of a classical arms control agreement: it has provided the predictability and stability necessary for states to refrain from developing a nuclear weapon, whilst its key provisions are flexible enough to evolve with political and technological developments. This may not be a fast process, but an analysis of Articles I-IV learns that the NPT review system provides its member states with sufficient opportunity to achieve real progress in keeping its non-proliferation norms relevant. Articles I and II NPT are, even in 2012, the only binding non-proliferation rules with a global scope. Article III(1) is a dynamic norm that encourages the developments of new types of safeguards, while Articles IV(2) and VI NPT are central to today's global debate on peaceful nuclear cooperation and nuclear disarmament, respectively.

Another great success of the NPT has been that it managed to enable a continuing, high-level debate on nuclear non-proliferation. It has provided states with legal certainty by gradually incorporating virtually every state on the planet – and keeping them, apart from one exception, within the regime. The NPT, as any other arms control agreement, was drafted carefully so that it does not infringe upon its member states' political sovereignty and maximises their political room for manoeuvring. The withdrawal clause is a good example of this, as is the fact that it is nearly impossible to amend the Treaty without the consent of every member state. Another good illustration is Article IV(1) NPT of which, as was explained above, the interpretation did not change since 1968, because there was never any consensus to do so. Thus, the ultimate power of interpretation lies with the member states and the member states only.

Admittedly, the NPT and its Review Conferences cannot by themselves solve the challenges faced by the non-proliferation regime that were outlined in section 1. It does, however, form the legal and political framework within which solutions to these problems must ultimately be found. Whether one rethinks the

¹⁰⁰ Article X(1) provides that a notice of withdrawal from the NPT is to be sent to the UNSC as well as to the individual NPT member states.

¹⁰¹ See IAEA Statute, Article XII on Agency Safeguards, §C: *The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations.*

role of the safeguards regime of the UNSC, or considers options such as export control regimes or multilateral approaches to the nuclear fuel cycle, the NPT and its history of Review Conferences provide the underlying norms upon which the non-proliferation continues to be built. The above analysis has clearly shown that the NPT allocates legal and political room in its provisions for such initiatives to exist, and even that its provisions can evolve to keep up with changing demands of global politics. The fact that the NPT itself provides a continuous political and diplomatic forum to consider the development of these non-proliferation norms can only add to the conclusion that it is well-gearred to remain instrumental to the non-proliferation regime in the decades to come. Perhaps its review system should be updated; perhaps its remaining loopholes should be addressed; perhaps its position and purpose could be recalibrated to that of a framework convention. It is highly likely that new ideas and initiatives are needed to prevent the emergence of new nuclear weapon states in the decades to come. But that does not mean that the NPT, as the fundament of the non-proliferation regime, is as crucial to global stability now as it has been since 1970.

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