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A Strengthened Review Process for the NPT

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Jayantha Dhanapala

Abstract

The NPT represents an uneasy compromise between the desire of nuclear weapon States to halt proliferation of nuclear weapons in other States in order to safeguard their own security, and the determination of the overwhelming majority of non-nuclear weapon States to reduce and finally to eliminate nuclear weapons in the world because of their intolerable destructiveness to all humanity. The newly fashioned review process provides a unique opportunity through which to resolve this ambiguity in the post-cold war era, where new doctrines must replace old ones as we enter the twenty-first century.

A STRENGTHENED REVIEW PROCESS FOR THE NPT

*Jayantha Dhanapala**

INTRODUCTION

My closing statement as President of the 1995 Review and Extension Conference¹ ("1995 Conference" or "Conference") of the Treaty on the Non-Proliferation of Nuclear Weapons² ("NPT" or "Treaty") contained the following words on the future review process:

It is less important to debate about what is legally binding and what is politically binding. What is more important is that through delicate and painstaking negotiations the States Parties were able to craft a balanced and forward-looking agreement which they are committed to implement[ing] in a systematic and progressive manner. They will also periodically review and evaluate the implementation of the package of principles and objectives together with the provisions of the Treaty. This review and evaluation process will be on-going, regular, and action-oriented. The institutional infrastructure required to operationalise this process has also been put in place. All these elements of the agreed [to] package represent a framework to further the objectives of the Treaty regime, the endurance of which is essential for the future security order of the world. The strengthened Review process that we have established will now ensure a sharper focus on Review Conferences of the future and their Preparatory Committees. These fora of rigorous accountability will play a more crucial role in the operation of the Treaty than ever before. We, as State Parties to the Treaty, have to ensure that we make maximum use of this mechanism of accountability

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1. See Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 1995, 34 I.L.M. 961 (1995) (setting forth results of 1995 Conference) [hereinafter 1995 Conference]. The 1995 Conference reviewed the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

2. NPT, *supra* note 1, 21 U.S.T. 483, 729, U.N.T.S. 161.

in the fulfillment of the undertakings of the Treaty.³

I. THE NPT & AMBIGUITY

In the immediate aftermath of the 1995 Conference, I concluded that only history will prove whether we had collectively given the nuclear weapon States a virtual *carte-blanc*he, or whether we had strengthened the NPT and made a significant and irreversible step towards nuclear disarmament. It seems illogical that a Conference decision achieved without a vote, intending to permanently entrench an international legal norm against nuclear proliferation, could produce such contradictory outcomes. The root cause lies in the ambiguity of the NPT itself. The NPT represents an uneasy compromise between the desire of nuclear weapon States to halt proliferation of nuclear weapons in other States in order to safeguard their own security, and the determination of the overwhelming majority of non-nuclear weapon States to reduce and finally to eliminate nuclear weapons in the world because of their intolerable destructiveness to all humanity. The newly fashioned review process provides a unique opportunity through which to resolve this ambiguity in the post-cold war era, where new doctrines must replace old ones as we enter the twenty-first century.

II. THE ALTERNATIVES

The three carefully interwoven Decisions⁴ and the Resolution on the Middle East,⁵ all adopted without a vote at the conclusion of the 1995 Conference, have had a far-reaching impact beyond the indefinite extension of the NPT. Generally, the 1995 Conference represented the great potential for successful, result-oriented, multilateral diplomacy which, over the years, has been viewed with cynical disfavour and which led to the crisis in the

3. U.N. Doc. NPT/Conf.1995/32/pt. III (1995).

4. See 1995 Conference, *supra* note 1, Annex, at 967-73 (setting forth 1995 Conference Decisions). Decision 1 governs the strengthening of the review process for the NPT. *Id.*, Annex, Decision 1, at 968 [hereinafter NPT Review Process Decision]. Decision 2 governs principles and objectives for nuclear non-proliferation and disarmament. *Id.*, Annex, Decision 2, at 969-72 [hereinafter Principles and Objectives Decision]. Decision 3 governs the extension of the NPT on the non-proliferation of nuclear weapons. *Id.*, Annex, Decision 3, at 972-73 [hereinafter NPT Extension Decision].

5. See *id.*, Annex, Resolution on the Middle East, at 973-74 (setting forth 1995 Conference Resolution).

United Nations today. At a more specific level, the 1995 Conference ushered in a new era of stringent accountability by the NPT States in meeting their NPT obligations and the benchmarks set out in the Declaration of Principles and Objectives For Nuclear Non-Proliferation and Disarmament.⁶ The era of stringent accountability begins in April 1997, with the first Preparatory Committee meeting ("Preparatory Committee Meeting") for the Sixth NPT Review Conference scheduled for the year 2000. The first Preparatory Committee Meeting and those that follow it will be unprecedented and uncharted, and ultimately will amount to what the NPT parties make of it. Committee members could repeat the sterile debates between the nuclear haves and have-nots, and maybe cover-up the lack of progress in nuclear disarmament with skillful drafting, ultimately perpetuating the ambiguities of the past. Future meetings, on the other hand, could be a pathbreaking exercise in agenda-setting, strengthening the NPT in all its aspects on the irreversible road to eliminating nuclear weapons in an honest implementation of Article VI⁷ of the NPT and the politically binding decisions of the 1995 Conference.

There is an increasing need to align the outcome of the April 1997 Preparatory Committee Meeting, and indeed the entire NPT Review process of the future, with the explicit intent of the 1995 Conference's expectations. The 1995 Conference has been characterized as an indefinite and unconditional extension of the NPT. Indefinite - yes. Unconditional - most definitely not. If attempts are made to place self-serving constructions on the final decisions of the 1995 Conference, I fear the Review process is going to be an acrimonious one imperilling the permanence of the NPT. To date, it was the ambiguity of the NPT provisions and their implementation, including lacuna in the safeguards system, that led to inconclusive debates of past Review Conferences, two of which failed to produce a consensus final document.⁸ The 1995 Conference may not have eliminated

6. See Principles and Objectives Decision, *supra* note 4, at 969-72 (setting forth Principles and Objectives Decision).

7. NPT, *supra* note 1, art. VI, at 490 (setting forth obligation to negotiate in good faith and to achieve nuclear disarmament in all its aspects); Principles and Objectives Decision, *supra* note 4, at 969-72 (noting 1995 Conference Decision).

8. Both the 1980 and 1990 Conferences failed to produce a consensus final document.

those ambiguities entirely, but it did reduce the ambiguities in an attempt to reach the ultimate goal of the elimination of nuclear weapons.

III. THE REVIEW PROCESS POST 1995

The NPT's twinned responsibilities to halt proliferation and to achieve nuclear disarmament are not the NPT's only objectives. The Review process, as was decided in 1995, had to be based on Article VIII(3) of the NPT examining all provisions of the Treaty.⁹ Reflecting on the Review process's operations from 1970-95, however, reveals that the NPT Parties made two main contributions.

The NPT Parties expanded the scope of Preparatory Committee Meetings beginning in 1997. They converted the Preparatory Committee Meetings into virtual Review Conferences designed to examine substantive issues in depth. In this exercise the Principles and Objectives Decision¹⁰ had special recognition conferred on it when Preparatory Committee Meetings considered the implementation of the Treaty.

The Review exercise was to be both retrospective and prescriptive. The contribution of the German representative in the Presidential Consultations within the 1995 Conference led to the formulation of paragraph 7 of the Decision on Strengthening the Review Process of the Treaty which stated:

The Conference further agreed that Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the State [P]arties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future. Review Conferences should also address specifically what might be done to strengthen the implementation of the Treaty and to achieve its universality.¹¹

These provisions imply that there is decision-making in the

9. See 1995 Conference, *supra* note 1, at 968 (setting forth agreement to strengthen review process instituted by Article VIII(3) of NPT); NPT, *supra* note 1, art VIII(3), at 492 (setting forth plan for periodic review conferences to assure realization of NPT's purposes and provisions).

10. See Principles and Objectives Decision, *supra* note 4, at 969-72 (governing principles and objectives for nuclear non-proliferation and disarmament).

11. NPT Review Process Decision, *supra* note 4, ¶ 7, at 968.

Review process. The procedure for this is already set out in the Rules of Procedure for Review Conferences and Preparatory Committee meetings. The strengthened Review process must decide whether these procedures should be adopted. The format for embodying these decisions in the Review process could be a Report, Declaration, Resolution, or Decision. This depends on decisions reached in the Review process. There is an urgent need, therefore, to maximize the use of opportunities for multilateral consultations.

IV. *THE NPT RECORD POST 1995*

A. *The Comprehensive Test Ban Treaty*

Further clarity in the objectives of the parties to the NPT has been provided by a number of developments since the 1995 Conference. The Principles and Objectives Decision¹² of the 1995 Conference set out three measures for nuclear disarmament. The first was the completion of negotiation "on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996."¹³ Happily that has not only been achieved, but the Comprehensive Test Ban Treaty¹⁴ ("CTBT") has actually been signed by 141 countries to date. It is true that many countries expressed reservations about many features of the CTBT. It is also true that we may have to wait indefinitely for the entry into force of the CTBT. But there is no dispute over the fact that this aspect of the 1995 Conference has been fulfilled. The other two measures, namely a possible fissionable material cut-off, and further efforts to reduce nuclear weapons, have not been achieved. Developments outside the NPT process have added weight to the 1995 Conference Decisions, however, which the Review process commencing in 1997 cannot ignore.

B. *The ICJ Advisory Opinion*

The International Court of Justice's ("ICJ") historic Advi-

12. Principles and Objectives Decision, *supra* note 4, at 969-72.

13. *Id.* ¶ 4(a), at 970.

14. Comprehensive Test Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439.

sory Opinion of July 8, 1996¹⁵ (the "ICJ Advisory Opinion"), offered the first formal acknowledgment of the applicability of the Martens clause to nuclear weapons.¹⁶ The ICJ Advisory Opinion stated that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."¹⁷ To those who dismiss the ICJ Advisory Opinion on the grounds that it was adopted by "a narrow margin," it must be recalled that the Court accepted the jurisdiction issue by thirteen to one¹⁸ and on the general illegality of nuclear weapons three of the dissenting judges were clearly of the view that there should be no exception to the principle of general illegality.¹⁹ Thus, ten judges were of the view that the threat or use of nuclear weapons is illegal. Furthermore, and with particular relevance to Article VI of the NPT, the ICJ went on to state "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."²⁰

Pledges to adhere to international law are common-place. It is now necessary for these pledges to be fulfilled. While the ICJ "states . . . existing law and does not legislate,"²¹ collectively the ICJ's Advisory Opinions go to form the body of customary international law that should prevail in international relations, especially in the post Cold War era. The interpretation of Article VI of the NPT has been enlarged by the requirement that good faith negotiations on nuclear disarmament must not only be conducted, but must also be brought to a successful conclusion. The parties to the NPT will therefore have added reason to

15. Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827-28, ¶¶ 78-87 (July 8, 1996) [hereinafter ICJ Advisory Opinion].

16. The Martens Clause is the preamble to the 1899 and 1907 Hague Conventions. See Convention Respecting the Laws and Customs of War on Land, July 29, 1899, pmbl., 23 Stat. 1803, at 1804-05, 187 Consol. T.S. 429, at 430-31, 1 A.J.I.L. Supp. 129, at 130-32; See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmbl. 36 Stat. 2277, at 2279-80, 205 Consol. T.S. 277, at 278-79, 2 A.J.I.L. Supp. 90, at 90-92.

17. ICJ Advisory Opinion, *supra* note 15, ¶ 105(2)(E), at 831.

18. *Id.* ¶ 105(1), at 831.

19. See *id.* ¶ 105(2)(E), at 831 (noting vote of seven to seven, decided by President's casting vote); *id.* at 878 (Judge Mohamed Shahabudden dissenting); *id.* at 923 (Judge Christopher Gregory Weeramantry dissenting); *id.* at 934 (Judge Abdul G. Koroma dissenting).

20. *Id.* ¶ 105(2)(F), at 831.

21. *Id.* ¶ 18, at 819.

insist on the implementation of the two unfulfilled measures in the Principles and Objectives Decision on nuclear disarmament of the 1995 Conference.²²

C. *The Canberra Commission on the Elimination of Nuclear Weapons*

The Canberra Commission,²³ of which I was privileged to be a member, added an influential voice in the attempt to end the possession of nuclear weapons. Although lacking the same degree of international legal impact, the Canberra Commission concluded that "[t]his situation is highly discriminatory and thus unstable; it cannot be sustained. The possession of nuclear weapons by any state is a constant stimulus to other states to acquire them."²⁴ The conclusion reiterates a well-known theme in the NPT context, namely that nuclear non-proliferation and nuclear disarmament cannot be pursued separately. They are two faces of the same coin. The Canberra Commission Report,²⁵ formally presented to the U.N. General Assembly on September 30, 1996 by the Foreign Minister of Australia, identified a series of steps and practical measures to bring about the verifiable elimination of nuclear weapons. These could be adopted as an agenda for action in the NPT Review process perhaps with an added time frame adopted through consensus decisions.

D. *Programme for Action for the Elimination of Nuclear Weapons*

Twenty-eight States presented the Programme for Action for the Elimination of Nuclear Weapons at the Geneva-based Conference on Disarmament (the "Programme") on August 7, 1996. The Programme will significantly influence the NPT Review process because many of the co-sponsors are NPT parties. The Programme sets time frames, and in 1996, introduced a

22. Principles and Objectives Decision, *supra* note 4, at 969-72 (governing nuclear non-proliferation and disarmament).

23. The Canberra Commission on the Elimination of Nuclear Weapons was established as an independent commission in November 1995 by the then Australian Government. REPORT OF THE CANBERRA COMMISSION ON THE ELIMINATION OF NUCLEAR WEAPONS 3 (1996) (on file with the *Fordham International Law Journal*). The Canberra Commission's goal is to propose practical steps towards a nuclear weapon free world including the related problem of maintaining stability and security during the transitional period and after this goal is achieved. *Id.*

24. *Id.* at 7.

25. *Id.*

phased program of action to achieve the total elimination of nuclear weapons by the year 2020.

Seven new countries have joined the NPT regime since the 1995 Conference, but there remain "states that operate unsafeguarded nuclear facilities" that have not done so yet. Nor are there prospects of these States joining anytime soon. Cuba, for example, has not yet ratified the Treaty of Tlatelolco.²⁶ Until these States join, concerns will continue to persist.

Before the outstanding States join the NPT, there will be a debate on Articles 1 and 2 along with the vexed question of export controls. The absence of START II²⁷ ratification and a lack of meaningful progress on further nuclear arms reduction, however, together with ominous signs of the designing and deployment of Ballistic Missile Defence²⁸ systems are troubling factors. No nuclear weapon-state has any published plans for nuclear disarmament. Some have advanced new political reasons for retaining nuclear weapons citing fresh dangers to their security. Only on nuclear weapon-free zones can the post-1995 record be said to be a positive one. The conclusion of the Pelindaba²⁹ and Bangkok Treaties³⁰ are certain to be welcomed, as will the signature of the Rarotonga Protocols³¹ by the United Kingdom, United States, and France. This will encourage progress in the more difficult regions of the Middle East and South Asia, while the Baltic States and other parts of Europe may also begin negotiations. Security assurances continue to be debated and nuclear weapon states, with the exception of China, remain unwilling to proceed beyond Security Council Resolution 984.³² It appears difficult to justify the rejection of a legally binding

26. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281, 6 I.L.M. 521.

27. Reduction and Limitation of Strategic Offensive Arms, Jan. 3, 1993, U.S.-Russian Federation, Hein's No. KAV 3526, S. TREATY DOC. NO. 103-1, 103d Cong., 1st Sess. 32 (1993).

28. See Treaty on the Limitation of Anti-Ballistic Missile Systems May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 (1972) [hereinafter ABM Treaty]. The ABM Treaty defines an ABM System as a system to counter strategic ballistic missiles, and includes ABM interceptor missiles, ABM launchers, and ABM radars. *Id.*, art. II(1), at 3439.

29. Organization of African Unity: African Nuclear Weapon-Free Zone Treaty, 35 I.L.M. 698 (1996).

30. Southeast Asia Nuclear Weapon-Free Zone Treaty, Dec. 15, 1995, 35 I.L.M. 635 (1996).

31. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1442.

32. See S.C. Res. 984, U.N. SCOR, 50th Sess., at 2, S/RES/984 (1995) (discussing

instrument embodying assurances to non-nuclear weapon states against the use or threat of use of nuclear weapons, particularly after the ICJ Advisory Opinion. The Programme for Promoting Nuclear Non-proliferation's Issue Review No. 7³³ has a number of possible options which the 1997 Preparatory Committee Meeting may consider.

Safeguards and peaceful uses of nuclear energy are two aspects where developments in the International Atomic Energy Agency³⁴ ("IAEA") will be important. The need for agreement in the IAEA on enhanced safeguards will be the subject of debate and further development in Vienna before April 1997. Safeguards on fissile material from destroyed nuclear weapons is another key issue. Developing countries will continue to seek more assistance for technical cooperation in the peaceful uses of nuclear energy as required under Article IV of the NPT.³⁵

CONCLUSION

The bridge between 1995, 1997, and beyond, has to be constructed carefully if the positive gains of 1995 are to be preserved. Ambiguities, compromises, and clever drafting cannot conceal the failure to achieve the fundamental objectives of the NPT or to fulfill its political commitments. The indefinite extension of the NPT in 1995 is much less final than it seems and should not be taken for granted. Prior to, and during the 1995 Conference, proposals were made to establish a mechanism within the NPT to hear and decide allegations of non-compliance. This was an alternative to empowering the U.N. Security Council to do so directly under the all-embracing general rubric of maintaining international peace and security. The strengthened Review Process, with annual meetings of NPT parties beginning in 1997, fulfills this purpose and makes it difficult to justify direct approaches to the U.N. Security Council which by-

States' promise to abstain from using nuclear weapons against non-nuclear weapons states that are parties to NPT).

33. George Bunn & Roland Timerbaev, *Security Assurances to the Non-Nuclear Weapon States: Possible Options for Change*, PROGRAMME FOR PROMOTING NUCLEAR NON-PROLIFERATION, Issue Review No. 7, Sept. 1996.

34. See NPT, *supra* note 1, art. III, at 487-89, 729 U.N.T.S. at 172 (establishing IAEA to monitor peaceful uses of nuclear energy).

35. NPT, *supra* note 1, art. IV, at 489 (discussing development of nuclear energy for peaceful purposes).

pass NPT parties without peer recommendations. A caveat, however, is that parties to the NPT must be able to act purposefully and unitedly if other bodies are not to adjudicate on matters pertaining to the NPT.

The 1995 Conference had many ingredients for its success as a multilateral endeavor, including a widespread desire to avoid voting, conference mechanisms that promoted compromise and consensus, and a number of delegations and individuals who played a bridge-building role between groups. There is no reason why the same ingredients should not be present at the 1997 Preparatory Committee Meeting.

The year of the 1997 Preparatory Committee Meeting will have several propitious factors. Many of the industrialized democracies will have obtained fresh mandates for their governments. Those democracies could therefore adopt forward looking policies rather than defend the status quo out of a fear of the polls. The 1995 Conference acted to provide a political boost to the U.N.-affiliated Conference on Disarmament ("CD") on the CTBT. The Review process cannot replace the CD, which is the "leading multilateral disarmament negotiating body,"³⁶ because it is neither a universal body nor a negotiating one. The Review process can, however, be supportive of the CD, and shape its own agenda for the immediate future by achieving a consensus on specific issues such as strengthening safeguards, achieving a fissile material cut-off, and other steps in the nuclear disarmament agenda. The 1995 Conference ended positively despite the discordant notes caused by the failure to have a consensus Review Declaration, and the statements of the few who reluctantly acquiesced in the Decisions adopted without a vote.³⁷

The signing of the CTBT in 1996 signified positive momentum despite the reservations of several states. We need to preserve this forward movement among NPT parties. We cannot let these efforts run aground on differences that were not reconciled by the ambiguous compromise embodied in the NPT.

The Canberra Commission³⁸ called upon the five nuclear weapon states to make an unequivocal commitment to eliminate

36. David A. Koplow, *Bonehead Non-Proliferation*, 17 FLETCHER FORUM 145, 152 (1993).

37. See *supra* note 4 and accompanying text (discussing 1995 Conference Decisions).

38. See *supra* note 23 (discussing role of Canberra Commission).

nuclear weapons, and to start work on practical steps and negotiations for the achievement of this goal. The 1997 Preparatory Committee Meeting is an ideal opportunity for this commitment to be made by clarifying the ambiguities in the NPT bargain that have caused the tensions and pressures within the NPT regime. It is also an opportunity to make the NPT obligations and political commitments credible in a multilateral setting as we begin a new phase in the history of the NPT.