

TOWARDS A NUCLEAR-WEAPON-FREE WORLD: HOW CAN THE WORLD RESOLVE THE DISHARMONY BETWEEN THE UNSC AND UNGA?

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Global momentum towards a "Nuclear-Weapon-Free World" (NFWF) has been growing since the end of the Cold War. Nevertheless, in the international community, it is still difficult to discern a unified voice about how to approach a NFWF, utilising international law. This is possibly because of ongoing disagreement between nuclear weapon States (NWS) and non-nuclear weapon States (NNWS), particularly the non-aligned countries. The issue revolves around the understanding of the Nuclear Non-Proliferation Treaty (NPT), especially art 6 of that treaty which sets out the contracting parties' nuclear disarmament obligations. Reflecting the discord between the NWS and NNWS, this article sheds light on the gap between the United Nations Security Council (UNSC) and the United Nations General Assembly (UNGA)'s perceptions of, and actions taken towards, the realisation of a NFWF. The article calls for the minimisation of disharmony by reinvestigating the roles of the United Nations system and the NPT in establishing a NFWF, and through observing the UNGA's current position.

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I INTRODUCTION – DISHARMONY BETWEEN THE UNSC AND UNGA?

Global momentum towards nuclear disarmament has been growing since the end of the Cold War. This sentiment seems to have culminated in United States President Barack Obama's 2009 speech in Prague, in which he discussed the necessity of realising a "Nuclear-Weapon-Free World" (NFWF).¹ Nevertheless, in the international community, it is still difficult to formulate a unified voice about how to approach a NFWF utilising international law. This is possibly because of the ongoing disagreement between nuclear weapon States (NWS) and non-nuclear weapon States (NNWS), particularly the non-aligned countries, about their understanding of the *raison d'être* of art 6 of the Nuclear Non-Proliferation Treaty 1968 (NPT), which stipulates the nuclear disarmament obligations of contracting parties to the NPT.²

The emerging gap between perceptions of and action towards a NFWF between the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC) is clearly visible, and reflects the discord between the NWS and NNWS. In fact, the UNGA passed a number of follow-up resolutions to the International Court of Justice's (ICJ) 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons (1996 Advisory Opinion)*,³ demanding a faster realisation of the tenets of a nuclear weapons convention banning the use and possession of nuclear weapons, in accordance with the terms of art 6 of the NPT.⁴ In contrast, in *UNSC Resolution 1887*,

1 Barack Obama, President of the United States of America "Remarks of President Barack Obama" (Speech to the people of Prague, Hradčany Square, Prague, 5 April 2009).

2 Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 (opened for signature 1 July 1968, entered into force 5 March 1970) [NPT]. Article 6 stipulates as follows:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures 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.

3 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 [1996 *Advisory Opinion*].

4 See United Nations General Assembly [UNGA] resolutions: *Advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 51/45 M, A/Res/51/45 (1997); *Advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 52/38 O, A/Res/52/38 (1998); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 53/77 W, A/RES/53/77 (1999); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 54/54 Q, A/Res/54/54 (2000); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 55/33 X, A/Res/55/33 (2001); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 56/24 S, A/Res/56/24 (2002); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA

adopted in 2009, the UNSC stated that a NFWF should be accomplished "in accordance with the goals of the [NPT], in a way that promotes international stability, and based on the principle of undiminished security for all".⁵ That means that the UNSC prioritises non-proliferation of weapons of mass destruction (WMD) rather than an immediate and complete nuclear disarmament. Thus, the disharmony between the UNSC and UNGA must be urgently resolved.

In this article, four points are analysed to clarify the roles of the United Nations (UN) system and the NPT in establishing a NFWF. First, the history of the failure of multilateral disarmament negotiations between States in the League of Nations (LON), the arms control mechanism of the UN system, and the status of the NPT on the road to a NFWF, are briefly discussed. Second, the differences in understanding of the international law surrounding the use and disarmament of nuclear weapons by the NWS – which are also the permanent members of the UNSC – and their allies are investigated. Third, the international law surrounding nuclear weapons, as understood by the majority of the UN (mainly non-aligned States) is discussed, through reference to the *1996 Advisory Opinion*⁶ and the 2007 *Model Nuclear Weapons Convention (2007 MNWC or MNWC)* proposed by Costa Rica and Malaysia.⁷ Fourth, the crucial reason for disharmony – that the aforementioned UNSC view, which prioritises nuclear non-proliferation, is not shared with the UNGA, or at least with the non-aligned countries – is discussed. After that, the apparently diminishing trend of disharmony

Res 57/85, A/Res/57/85 (2003); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 58/46, A/Res/58/46 (2004); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 59/83, A/Res/59/83 (2004); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 60/76, A/Res/60/76 (2006); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 61/83, A/Res/61/83 (2006); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 62/39, A/Res/62/39 (2008); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 63/49, A/Res/63/49 (2009); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 64/55, A/Res/64/55 (2010); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 65/76, A/Res/65/76 (2011); *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 66/46, A/Res/66/46 (2012).

The de facto Nuclear Weapon States [NWS] (such as India), and the States causing proliferation concerns (such as Iran), are some of the States that proposed these resolutions. The Democratic People's Republic of Korea [DPRK] also became one of these States in 2012.

5 *Resolution 1887 (2009)* SC Res 1887, S/Res/1887 (2009) at 1.

6 *1996 Advisory Opinion*, above n 3.

7 See *Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations addressed to the Secretary-General* A/62/650 (2008) [2007 MNWC or MNWC].

between the UNSC and the UNGA will be discussed. In conclusion, the cause of, and a solution to, disharmony, will be examined.

II NUCLEAR DISARMAMENT: ROLES OF THE UN SYSTEM AND NPT

According to dominant logic, disarmament can only be achieved where States are bound by consenting to obey limitations on the use and possession of certain armaments. Is the UN system, in practice, following that understanding and logic? Are the member States of the UN allowed to freely decide their qualitative and quantitative priorities with regard to armaments, particularly where the right of self-defence is invoked? This Part briefly analyses the roles of the UN system and NPT in achieving nuclear disarmament. It focuses on the following points: first, why a general disarmament negotiation failed in the LON; second, how the Charter of the United Nations (UN Charter) was designed to regulate disarmament through collective security; and finally, what kind of status is given to the NPT on the road to a NFWF.

A Failure of Disarmament in the LON

Several reasons might be proffered for why the LON could not achieve general disarmament. If one of the main reasons for that failure is Germany's rearmament, investigating the history of disarmament negotiations at that time may be beneficial for understanding the deadlock situation of the nuclear disarmament process existing within the UN today.

After World War I, Germany was nearly disarmed under the Inter-Allied Commissions of Military Control. The Inter-Allied Commissions had "the duty of seeing to the complete execution of the delivery, destruction, demolition and rendering things useless to be carried out at the expense of the German Government",⁸ as per pt V of the Treaty of Versailles 1919 (TOV).⁹ The main reason for enacting this Part was "to render possible the initiation of a general limitation of the armaments of all nations" in the LON, so that Germany was required to undertake "strictly to observe the military, naval and air clauses" of the TOV.¹⁰ The near disarmament of Germany implies the fact that the

8 Treaty of Versailles 225 CTS 188 (signed 28 June 1919, entered into force 10 January 1920), art 204 [TOV]. See also pt V at Preamble.

9 According to Hans J Morgenthau (Kenneth W Thompson (ed)) *Politics Among Nations: The Struggle for Power and Peace* (Brief ed, McGraw-Hill, New York, 1993) at 438:

This disarmament [under the 1919 Versailles Treaty] was quantitative as well as qualitative and so thorough as to make it impossible for Germany to wage again a war similar in kind to the First World War.

10 TOV, above n 8, pt V at Preamble.

LON originally took a discriminatory approach toward achieving general disarmament.¹¹ Even though Germany was allowed to be a member of the LON with a permanent seat on the Council of the LON under the 1925 Locarno Treaties,¹² Germany was not invited to the Naval Limitations Conference 1932–1934, but only to the Preparatory Commission on Disarmament meeting in 1931.¹³ In the Preparatory Commission meeting, although the French tried to remain a signatory to the TOV by proposing their own disarmament plan, Germany consistently opposed the plan on the basis of equality of rights and obligations with other States.¹⁴ Although Germany accepted the draft of a general disarmament convention in the Preparatory Commission meeting (though with many

11 Because of the collective security response to the "covenant-breaking State" (including a military sanction led by the Council members) as stipulated in art 16, all members of the League of Nations [LON] would consider "the reduction of [their] national armaments to the lowest point consistent with [their] national safety and the enforcement by common action of international obligations", as per the Covenant of the LON 1 LNTS 403 (signed 28 June 1919, entered into force 10 January 1920), pt I at art 8.

12 Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy 54 LNTS 291 (signed 16 October 1925, entered into force 14 September 1926), art 10: this article only mentioned that Germany could be "a Member of the League". In addition to this, on 31 January 1927 the Inter-Allied Commission of Military Control came to an end. But see TOV, above n 8, pt V at art 164, which stipulates:

Germany agrees that after she has become a member of the League of Nations the armaments fixed in [Table No II annexed to section V, with the exception of an optional increase not exceeding one-twenty-fifth part for small arms and one-fiftieth part for guns] shall remain in force until they are modified by the Council of the League. Furthermore she hereby agrees strictly to observe the decisions of the Council of the League on this subject.

Serious doubts as to how Germany (with a permanent seat on the Council) could be controlled by the LON might have arisen at the time.

13 This denial to participate implies that pt V, art 164 of the TOV, above n 8, was strictly applied and implemented by the major member States even after Germany was recognised as a "permanent" member of the LON.

14 An official German delegate, Count JH Bernstorff, claimed that Germany "cannot recognise anything as a first [general] Disarmament Convention unless the solution which it provides is just and equitable, and pays regard to the security of all States": *LON Documents of the Preparatory Commission for the Disarmament Conference, Entrusted with the Preparation for the Conference for the Reduction and Limitation of Armaments* (League of Nations, Geneva, 1931) series x, pt 4 at 262. An official delegate of the British Empire, Lord Cecil of Chelwood, replied that "the proposal adumbrated by ... Bernstorff ... is, roughly speaking, to apply the disarmament provisions of the Treaty of Versailles to all the world" but "a step will be taken by the first Disarmament Conference [not] in the direction of ... [the] German proposal": *Documents of the Preparatory Commission for the Disarmament Conference* at 508. Germany's attitude was possible because Prime Minister Stresemann originally desired to change the LON from "an instrument of the victorious powers into a true League of all nations" which was based on the principle of universality": Georg Schwarzenberger *The League of Nations and World Order: A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations* (Constable, London, 1936) at 78–79.

reservations, including an intimation of failure of the World Disarmament Conference)¹⁵ the new government under the Hitler regime eventually withdrew from the Conference and the LON, insisting that rearming "defensive" weapons must be equally and immediately allowed for Germany.¹⁶ Thus, the effort taken towards achieving general disarmament under the LON was stalemated due to the procedure in place under the Covenant of the LON,¹⁷ and the LON finally collapsed because of this failure of disarmament.

Through this historical analysis, two points can be made regarding the reasons for failure: first, general disarmament was blocked by the consensus procedure and the members emphatically claiming sovereign equality and self-defence; second, there was a lack of an effective sanction mechanism relating to arms control.

B Arms Control Under the UN's Collective Security

To avoid the failures of the LON era, the UN has adopted a new disarmament approach by establishing an international enforcement mechanism reaching beyond the sovereignty of States. During the period of negotiating the UN system, the 1943 Declaration of Four Nations on General Security (Joint Four-Nation Declaration)¹⁸ introduced a doctrine through which international policemen "should forcibly disarm Germany and Japan ... and also assure that no other states should develop sufficient armaments to threaten world peace".¹⁹ Further, these policemen:²⁰

15 The main reason for their reservation was that the "German Government must reject the draft, which ... is full of the most serious and fundamental defects and omissions [of the proposals]" and "this so complex instrument lacks that which is essential – namely, a firm determination to disarm": LON *Documents of the Preparatory Commission for the Disarmament Conference*, *ibid*, at 409. Germany also stated that (LON *Documents of the Preparatory Commission for the Disarmament Conference*, *ibid*, at 597):

... as a starting point a state of disarmament resulting from the Conference such that no country would be powerful enough to be in a position to assert its strength against that of the League of Nations.

16 See Indiana University "Chronology 1933" (October 2002) League of Nations Photo Archive <www.indiana.edu>.

17 The disarmament procedure stipulated in the Covenant of the LON, above n 11, at art 8, is that first, the Council of the League was to "formulate plans for [the] reduction [of national armaments] for the consideration and action of the several Governments"; second, "these plans shall have been adopted by the several Governments", probably by consensus as per art 5; and third, "the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council".

18 Declaration of the Four Nations on General Security 38 AJIL 7 (signed 30 October 1943) [Joint Four-Nation Declaration].

19 Bernhard G Bechhoefer *Postwar Negotiations for Arms Control* (Brookings Institution, Washington, 1961) at 18. Bechhoefer's interpretation relied on the word "practicable" in the Joint Four-Nation Declaration, *ibid*, at [7], which stipulated that the signatories would work towards "a practicable general agreement with respect to the regulation of armaments in the post-war period". This declaration was based on the Atlantic

... should not disarm after the war, but should continue to be in a position to maintain international peace against any aggressor until the [UN] itself had the military strength to take over the task.

This approach indicates that a feasible and effective disarmament can be realised only by taking a strict arms control approach, backed by those powerful countries that are responsible for and have the capacity to maintain international peace and security. Admittedly, however, arms control under the UN system may *prima facie* discriminate between the UNSC permanent members and the other members.²¹

If the UN Charter is recognised, then the international legal order of peace and security is backed by the international security organisation (namely the UNSC), and it may not be difficult to accept an idea broached by Hans Kelsen regarding the relationship between disarmament and security. Kelsen emphasised that any disarmament could not be achieved without collective security.²² Recognising the UN Charter as "the new general international law",²³ Kelsen put forward a positive interpretation of the UN system, saying that "the Members of the United Nations may be subjected to much stricter obligations (sic) with respect to their disarmament than the Members of the League were".²⁴ Although "the obligation [of disarmament *per se*] is established by a treaty concluded by the Member

Charter 204 LNTS 382 (issued 14 August 1941), art 8, which noted that "all of the nations of the world ... must come to the abandonment of the use of force", and, "pending the establishment of a wider and permanent system of general security" to disarm aggressor nations, must "aid and encourage all other practicable measure which will lighten for peace-loving peoples the crushing burden of armaments".

- 20 Bechhoefer, *ibid.*, at 23.
- 21 The UN's collective security system backed by the powerful countries, namely the permanent members of the UNSC, is essentially a discriminatory relationship because it looks like the relationship between police and civilians. This point is developed further in this section.
- 22 Hans Kelsen *Collective Security Under International Law* (The Lawbook Exchange, New Jersey, 2001) at 197–198.
- 23 According to Hans Kelsen "Sanctions in International Law Under the Charter of the United Nations" (1946) 31 *Iowa L Rev* 499 at 502: "the most striking difference between the old and the new general international law" is that "[t]he procedure for the application of these sanctions is completely centralized, and thus the principle of self-help eliminated." Basically, Kelsen describes the historical evolution of the international law of peace as a centralisation of the forces. See also Hans Kelsen *Principles of International Law* (The Lawbook Exchange, New Jersey, 2003) at 3–89.
- 24 Hans Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange, New Jersey, 2000) at 105.

with the Organization",²⁵ since "the [UNSC] is completely free in its determination",²⁶ the fact that:²⁷

... a Member who refuses to accept the plan providing for a reduction of its armament may, in the opinion of the [UNSC], constitute a threat to the peace and consequently lead directly or indirectly ... to an enforcement action.

This means that, pursuant to art 39 of the UN Charter, "the [UNSC] has the power to enforce its plans for the establishment of a system for the regulation of armaments, which may provide for disarmament".²⁸ Under the UN Charter, the UNSC may be authorised to fulfil a sort of legislative and judicial function with regard to disarmament, as a matter of international peace and security, and members – and even non-members – of the UN in general have an obligation to obey any arms control measures agreed to by the UNSC. In other words, the decision of the members of the UN either to accept or refuse to accept the plan for disarmament proposed by the UNSC and also the "disarmament treaty" inspired by the plan is circumstantial. This is because the "wording of the Charter referring to [the] action does not imply the idea of an obligation"²⁹ and "any act of the [UNSC] or [UNGA]" cannot summon the member States but is considered only as a "'recommendation' and/or 'plan'".³⁰ Thus, any UNSC documents and treaties on the regulation of armaments may have a quasi-binding power over all members of the UN and even on the non-members, unless these documents are recognised as a significant international effort to maintain peace and security by the five permanent members of the UN.

In the sphere of arms control under collective security, understanding and applying international law in a contractual manner will generally not marry with reality. For instance, by adopting UNSC *Resolution 1718*,³¹ "[w]hile the DPRK may have been legally entitled to leave the NPT, it cannot lawfully escape the bounds of the Charter regarding international peace and security".³² According to Andreas Paulus and Jörn Müller, "[s]overeign equality may ... in itself not constitute a limit to the

25 Ibid.

26 Kelsen "Sanctions in International Law Under the Charter of the United Nations", above n 23, at 521.

27 Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, above n 24, at 106.

28 Ibid. According to Kelsen, the phrase "the establishment of a system for the regulation of armaments" refers to "international treaties concerning disarmament concluded among the Member States": Kelsen "Sanctions in International Law Under the Charter of the United Nations", above n 23, at 521, n 12.

29 Kelsen "Sanctions in International Law Under the Charter of the United Nations", above n 23, at 522.

30 Kelsen "Sanctions in International Law Under the Charter of the United Nations", above n 23, at 521.

31 *Resolution 1718 (2006)* SC Res 1718, S/Res/1718 (2006).

32 Andreas L Paulus and Jörn Müller "Security Council Resolution 1718 on North Korea's Nuclear Test" (2006) 10 ASIL Insights at Conclusion.

Council's powers", and "[t]hat is what the Charter system was designed for".³³ Further, the UNSC, in condemning India and Pakistan for conducting nuclear tests in 1998, has only focused on whether those States "challenge[d] ... international efforts aimed at strengthening the global regime of non-proliferation of nuclear weapons".³⁴ In addition to this, the UNSC clearly stated that these de facto countries "cannot have the status of a [NWS]", in "accordance with the [NPT]";³⁵ nevertheless they conducted nuclear tests to obtain such status. Thus, some scholars have come to realise that the UNSC possesses a sort of judicial and legislative power to maintain nuclear non-proliferation in the post-Cold War era, arguing that there has emerged "a new architecture for the non-proliferation of nuclear weapons"³⁶ or that the UNSC's resolutions have gained "a quasi *jus cogens* quality".³⁷ Although there exists an argument that there is a logical possibility of ultra vires action being taken by the UNSC, in practice none of the members have obviously criticised and challenged UNSC action.³⁸ Whether the UNSC takes action to penalise States or not is primarily dependent on the considerations of each of the five permanent members of the UNSC.

C Status of the NPT on the Road to a NFWF

The history of nuclear weapons began during World War II as an arms race between Nazi Germany and the Allies – such as the United States – and then was taken to the next stage by two atomic bomb attacks on Hiroshima and Nagasaki.³⁹ The next stage was a nuclear arms race between two superpowers, the United States and the Soviet Union, and also the proliferation of nuclear

33 Ibid.

34 *Resolution 1172 (1998)* SC Res 1172, S/Res/1172 (1998) at 1.

35 Ibid, at 3. See also *Resolution 1718 (2006)*, above n 31.

36 According to Jack I Garvey "A New Architecture for the Non-Proliferation of Nuclear Weapons" (2008) 12 *J Conflict Security Law* 339 at 355, such new architecture can be recognised because the United Nations Security Council [UNSC] has consistently stated that the proliferation of weapons of mass destruction is a "threat to peace, triggering ... Chapter VII" of the Charter of the United Nations [UN Charter].

37 Peter Hulsroj "Jus Cogens and Disarmament" (2006) 46 *Indian J Intl L* 1 at 9, has argued that "law-making by the Security Council has a quasi *jus cogens* quality", even if some of the Security Council's resolutions merely use the words "demand" or "call upon", without mentioning ch VII of the UN Charter.

38 Two "law-making" resolutions adopted by the UNSC under ch VII of the UN Charter (*Resolution 1373 (2001)* SC Res 1373, S/Res/1373 (2001) and *Resolution 1540 (2004)* SC Res 1540, S/Res/1540 (2004)), are considered to be ultra vires and ineffective: see Eric Rosand "The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?" (2004) 28 *Fordham Intl L J* 542 at 545. But in practice, these resolutions are implemented even by those members of the UN who criticised them, such as India.

39 Joseph M Siracusa *Nuclear Weapons: A Very Short Introduction* (Oxford University Press, Oxford, 2008) at 12–13.

umbrellas⁴⁰ and technologies linked to the military alliances backed by them; including NATO and the Warsaw Pact. This hostile relationship bred, internationally, some nuclear threshold States.⁴¹ Thus, a universal and complete nuclear disarmament was hard to achieve immediately. The international community lost its first chance to achieve a NFWF due to Cold War politics.

Nevertheless, three NWS, the United States, the United Kingdom and the Soviet Union, successfully led international negotiations to prevent other States (except France and China), from making nuclear weapons and explosive devices, while internationally disseminating nuclear technologies in the name of "atoms for peace". By adopting two international instruments, the Statute of the International Atomic Energy Agency 1957 (IAEA)⁴² and the Partial Nuclear Test Ban Treaty 1963 (PTBT),⁴³ it became obvious that a sort of technology denial regime led by the NWS (and their allies with advanced nuclear technology) was gradually being established in order to prevent the further emergence of States possessing nuclear weapons. The latter instrument obviously introduced a discriminatory approach since it did not ban the NWS from conducting underground nuclear explosive tests.⁴⁴ Despite taking a discriminatory approach, many countries accepted the PTBT and abandoned their attempts to make nuclear weapons, instead obtaining international cooperation for the peaceful use of atomic energy for their economic development, and obtaining positive and negative security assurances from the NWS.

It is fair to say that the NPT was adopted as "a step towards the achievement of general and complete [nuclear] disarmament".⁴⁵ Yet its main purpose was undoubtedly "to prevent the proliferation of nuclear weapons" because "the proliferation ... would endanger the security of all States and make more difficult the achievement of general and complete disarmament under effective

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- 40 The nuclear umbrella is a sort of security assurance by the States possessing nuclear weapons to help their allies by utilising security measures to deter aggression. Thus, the assurance could be provided tangibly by placing their nuclear weapons in the territories of allies in advance, or intangibly by a promise to provide them in a state of emergency.
- 41 "Threshold States" refers to the times at which the States are either secretly manufacturing nuclear weapons or are attempting to do so.
- 42 Statute of the International Atomic Energy Agency [IAEA] 276 UNTS 3 (signed 23 October 1956, entered into force 29 July 1957).
- 43 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water 480 UNTS 43 (opened for signature 5 August 1963, entered into force 10 October 1963).
- 44 Later, this approach was also implemented in the Comprehensive Nuclear Test Ban Treaty 35 ILM 1439 (opened for signature 24 September 1996, not yet in force) [CTBT], which did not ban non-explosive nuclear tests like subcritical nuclear and computer-simulating tests. This was technically able to be done only by the NWS at the time.
- 45 *Non-Proliferation of Nuclear Weapons* GA Res 2028 (XX), A/Res/2028 (XX) (1965) at 3 [*Resolution 2028 (XX)*].

international control".⁴⁶ Since the People's Republic of China (PRC) was recognised as the sole legitimate Government of the Chinese State by the UN, the definition of the NWS under art 9 of the NPT indicates that States possessing nuclear weapons must be limited to the permanent members of the UNSC.⁴⁷ Thus, the NPT is not per se a treaty for pursuing the absolute abolition of nuclear weapons, but may be categorised as a treaty for "partial disarmament"⁴⁸ under collective security.⁴⁹ This fact might allow the NPT to be considered as regulating armaments – or might be called "arms control" of nuclear weapons – in pursuing its goal of total disarmament under the UN system.

Moreover, Nuclear Weapons Free Zones (NWFZ) have been established as "regional arms control (or disarmament) measures"⁵⁰ which are a supplementary arrangement of the NPT "to assure the total absence of nuclear weapons in ... respective territories" constituted of NNWS,⁵¹ and which are also a regional security arrangement under ch VIII of the UN Charter. These NWFZ are backed by the NWS'

46 Ibid, at 2.

47 Article 9(3) of the NPT, above n 2, stipulates that a NWS is "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967". The People's Republic of China conducted a nuclear explosive test before this time.

48 If Kelsen's classification is correct, a partial nuclear disarmament means "an internationalisation of [nuclear weapons] or of the production, possession, and use of such weapons". His presupposition is that "[a]s long as [the] sanction [is] to be executed by the members of the [security] organization employing their own national armed forces, no real disarmament is possible" and "[i]f the abolition were extended [to the execution of international sanctions], [nuclear weapons] would be prohibited even in the execution of international sanctions": see Kelsen *Principles of International Law*, above n 23, at 203–204.

49 In fact, the NPT, above n 2, (commented by *Treaty on the Non-Proliferation of Nuclear Weapons* GA Res 2373 (XXII), A/Res/2373 (XXII) (1968) [*Resolution 2373*]) was opened for signature after the adoption of *Question relating to measures to safeguard non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons* SC Res 255 (1968), S/Res/255 (1968) [*Resolution 255*], which stipulates a positive security assurance for the use of nuclear weapons by the NWS, for the NNWS who are party to *Resolution 255*; and further, three depository States – the United States, the United Kingdom and Soviet Russia – had signed *Resolution 255* on 1 July of the same year. The draft of *Resolution 255* was originally proposed by the States on 7 March 1968 and was published as Annex II of the Conference of the Eighteen-Nation Committee on Disarmament Report to the UNGA and the Disarmament Commission. See United Nations "Procedural History: Treaty on the Non-Proliferation of Nuclear Weapons New York, 12 June 1968" (2008) Audiovisual Library of International Law <<http://untreaty.un.org>>. However, four non-permanent members, Algeria, Brazil, India and Pakistan, abstained from voting due to discrimination of the collective security between the parties and non-parties: see *United Nations Security Council Official Meeting Records S/PV.1433* (1968).

50 South Pacific Nuclear Free Zone Treaty 1445 UNTS 177 (opened for signature 6 August 1985, entered into force 11 December 1988), 178; and African Nuclear Weapon Free Zone Treaty 35 ILM 698 (opened for signature 11 April 1996, entered into force 15 July 2009).

51 NPT, above n 2, at art 7.

security assurance provided through the protocols of respective treaties.⁵² These regional and supplementary arrangements have significantly contributed toward some threshold States abandoning their nuclear military activities.

There is a remarkable interpretation of the NPT which argues that the so-called "three pillars" of the NPT (nuclear non-proliferation, nuclear disarmament and the peaceful use of nuclear energy between the NWS and NNWS)⁵³ must be equally interpreted and implemented; in other words, "none of the pillars should be presumed to be of higher prioritization",⁵⁴ since that is the "grand bargain"⁵⁵ or *raison d'être* of the scheme. Is it possible to accept the three pillar interpretation under the NPT and will this interpretation actually be followed by the member States? This interpretation is based on the fact that UNGA *Resolution 2028*⁵⁶ states that "[t]he [NPT] should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers".⁵⁷ In fact, the final documents of the NPT Review Conferences⁵⁸ which emphasise nuclear disarmament have been variously adopted by consensus, as a result of dealing with the three pillars in a certain balanced

52 The NWFW treaties have a protocol assuring the NWS' negative security assurance. But that negative security assurance remains a conditional undertaking. For instance, at the time of ratifying the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean 634 UNTS 326 (opened for signature 14 February 1967, entered into force 22 April 1968), the United States' declaration of 11 June 1971 (President Richard Nixon *Proclamation by President Nixon on Ratification of the Additional Protocol to the Treaty for the Prohibition of Nuclear Weapons in Latin America, June 11, 1971* (Department of State, Washington DC, 2007) at I) stated that the United States would:

... have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the Contracting Party's corresponding obligations under Article I of the treaty.

See also CTBT, above n 44, at Preamble.

53 Daniel H Joyner *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, Oxford, 2011) at 19.

54 *Ibid.*, at 32.

55 According to Joyner, above n 53, at 27, the "grand bargain" of the NPT is "[the] *quid pro quo* relationship of differential and reciprocal obligations between [the NWS] and [NNWS]".

56 *Resolution 2028 (XX)*, above n 45. See also *ibid.*

57 *Resolution 2028 (XX)*, above n 45, at 3.

58 For instance, *Decision 2: Principles And Objectives for Nuclear Non-Proliferation and Disarmament in 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document* NPT/CONF.1995/31 (Vol I) (1995) at 9–12; *2000 NPT Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document* NPT/CONF.2000/28 (Parts I and II) (2000) at 13–15.

manner.⁵⁹ Further, demands by the non-aligned movement (NAM) countries – for instance negotiating for a nuclear weapons convention – has been noted in the final documents of the NPT Review Conferences. Nevertheless, it seems that the three pillars interpretation mentioned above is not yet shared by the NWS and their allies, since they retain the stance that nuclear non-proliferation must be prioritised under the NPT.

Actual nuclear disarmament negotiations continuing at the Conference on Disarmament in Geneva (which is the multilateral disarmament forum) have been stuck due to a lack of trust among the members.⁶⁰ In the post-Cold War era, the main cause of lack of trust has remained disagreement between the NWS and NNWS. For instance, the final draft of the Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT)⁶¹ was rejected by the Disarmament Conference in 1996 as a result of India's veto. There was a strong perception that any discriminatory process in line with the NPT would not contribute to nuclear disarmament, as per the procedure of consensus voting.⁶² Any "step-by-step" process suggested by the Conference, such as the emphasis of the NWS and their allies on the priority of the Fissile Material Cut-Off Treaty's (FMCT)⁶³ negotiation, is far from obtaining the approval of the NAM countries, including de facto NWS. This is due to the priority given to the earlier realisation of a nuclear weapons convention supporting equal nuclear disarmament between the NWS and NNWS, including the non-parties to the NPT.⁶⁴

59 However, according to Norman A Wulf "Misinterpreting the NPT" (September 2011) Arms Control Association <www.armscontrol.org> "a careful balancing among [the three pillars] is a political imperative. It is not, however, a legal imperative". He further states that "the quid pro quo [contract] for [the NNWS] adherence" was not "created by the negotiating process [of the NPT]" and "the primary object and purpose ... is ... nonproliferation of nuclear weapons". Thus, the NPT just "obligate[s the NWS] to make good-faith efforts toward disarmament", otherwise "illegal nuclear-weapon states' policies reliance in part on the three pillars being equal and on the existence of a contract" would be justified.

60 *The Conference on Disarmament: Issues and Insights* (United Nations Institute for Disarmament Research, Geneva, 2012) at 1.

61 CTBT, above n 44.

62 Arundhati Ghose "Maintaining the moratorium – a de facto CTBT" (2006) 2 Disarmament Forum 23.

63 *Prohibition of the production of fissile material for nuclear weapons or other nuclear explosive devices* GA Res 48/75 L, A/Res/48/75 (1993).

64 Such a claim by the NAM countries was broadly seen in the debate on Australia's draft resolution in the First Committee in 2011. It was suggested that the procedure of consensus voting be changed in the Conference on Disarmament in Geneva and so on, in order to increase ease of negotiation. See *Other Texts on Nuclear-Weapon-Free Middle East, Nuclear Proliferation Risk, Regional Disarmament in Africa, Latin America and Caribbean, Asia and Pacific* GA/DIS/3444 (2011); and *Some Point to 'Misuse of Consensus Rule': Others Say 'Broken Machinery Won't Fix Itself', Ask General Assembly to Tell Conference on Disarmament 'Time Running Out'* GA/DIS/3445 (2011). According to Waheguru Pal Singh Sidhu "Dealing with extra-NPT actors and non-state actors" in Jane Boulden, Ramesh Thakur and Thomas G Weiss (eds) *The United Nations and Nuclear Orders* (United Nations University Press, Tokyo, 2009) 210 at 219–220:

The Conference on Disarmament in Geneva has caused confusion for the nuclear arms control effort. This is because the Conference works by consensus among its members, including non-parties to the NPT. For instance, the CTBT's entry-into-force clause included even non-parties to the NPT, amongst those 44 States whose ratification is required for the CTBT to enter into force. The purpose was to "[attract] the adherence of *all* States to this Treaty" and "contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament".⁶⁵ Ironically, the entry-into-force clause allows non-parties to the NPT, such as India and Pakistan, not only to evade signing and ratifying the CTBT, but also to legitimise their claim of pursuing equal nuclear disarmament with the two NWS that are not ratifying it – the United States and China. Even the Democratic People's Republic of Korea (DPRK), the State that declared its withdrawal from the NPT, has adopted the same stance. This fact indicates that the CTBT does not necessarily invoke a strict NPT approach, and a nuclear disarmament negotiation in the Conference might have serious difficulty in breaking through.

Thus, there is significant confusion among members of the UN as to how to use the NPT and its supplementary regimes (such as the CTBT and FMCT) on the road to a NFWF.

III DIFFERENCES IN UNDERSTANDING OF THE USE, POSSESSION AND DISARMAMENT OF NUCLEAR WEAPONS

The deadlock situation at the Conference on Disarmament in Geneva derives from differences in understanding of the NPT, specifically art 6, which stipulates the nuclear disarmament obligations of contracting parties and also the role of the UN system on the road towards a NFWF. In this Part, these differences in understanding are briefly discussed.

A The NWS and Their Allies: Retaining the NPT

The NWS' present understanding of the NPT may be influenced by the use and possession of their nuclear weapons, which is legally allowed under the NPT. Further influences include: UNSC *Resolutions* 255 and 984,⁶⁶ which stipulate "conditional"⁶⁷ positive and negative security

Led by India, a number of [the NAM] countries had been linking the commencement of [the] FMCT negotiations to concurrent negotiations on a timetable for nuclear disarmament, which the five [NWS] refused to take seriously.

65 CTBT, above n 44, at Preamble (emphasis added).

66 *Resolution* 255, above n 49; *Resolution* 984 (1995) SC Res 984, S/Res/984 (1995).

67 The five permanent members of the UNSC declared that both a positive and negative security assurance is only provided to "the party" to the NPT. But China's stance toward a positive security assurance is with little doubt due to the national statement that "China undertakes not to be the first to use nuclear weapons at *any time or under any circumstances*" (*Letter dated 25 April 1995 from the Permanent Representative of the People's Republic of China to the United Nations and Deputy Head of the Chinese Delegation Addressed to the Secretary-General of the 1995 Review and Extension Conference of the Parties to the Treaty on the*

assurances; the right of individual or collective self-defence preserved under the UN Charter; and even "applicable international law, including international humanitarian law".⁶⁸ On nuclear disarmament, NWS already accept the "unequivocal undertaking to accomplish, in accordance with the principle of irreversibility, the total elimination of their nuclear arsenals leading to nuclear disarmament ... under article VI of the [NPT]".⁶⁹ They may also voluntarily follow any action plans mentioned in the final documents of 1995, 2000 and 2010,⁷⁰ due to the political status of these documents. The four permanent members of the UNSC (except China) apparently accept neither the ICJ's *1996 Advisory Opinion* nor the *1996* and *2007 MNWCs*.⁷¹ This is because their stance on the universalisation of the NPT endorses significant, rather than complete, nuclear disarmament.

Specifically, in relation to art 6 of the NPT, the United States and the Soviet Union (now Russia) have gradually been reducing their nuclear weapons capacity, through the 1987 Intermediate-Range

Non-Proliferation of Nuclear Weapons NPT/CONF.1995/26 (1995) at [1]); or "the unequivocal commitment that [China] will *unconditionally* not use or threaten to use nuclear weapons against non-nuclear-weapon states or nuclear-weapon-free zones" (emphasis added) ("Statement by the Chinese Delegation on Nuclear Disarmament at the Thematic Debate at the First Committee of the 67th Session of UNGA" (19 October 2012) Permanent Mission of the People's Republic of China to the United Nations and other International Organizations in Vienna <<http://www.chinesemission-vienna>>). On the other hand, the United Kingdom more clearly stated that a negative security assurance would not be provided to the party, even "if any beneficiary is in material breach of its own non-proliferation obligations": *Letter dated 21 April 1995 from the Head of the Delegation of the United Kingdom of Great Britain and Northern Ireland Addressed to the Secretary-General of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* NPT/CONF.1995/24 (1995) at Appendix B. See also annexes of *Letter dated 6 April 1995 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General* S/1995/261 (1995); *Letter dated 6 April 1995 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General* S/1995/262 (1995); *Letter dated 6 April 1995 from the Chargé d'affaires a.i. of the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General* S/1995/263 (1995); *Letter dated 6 April 1995 from the Permanent Representative of France to the United Nations addressed to the Secretary-General* S/1995/264 (1995); *Letter dated 6 April 1995 from the Permanent Representative of China to the United Nations addressed to the Secretary-General* S/1995/265 (1995); and Ministry of Foreign Affairs of the People's Republic of China "Fact Sheet: Nuclear Disarmament" (27 April 2004) <www.fmprc.gov.cn>.

68 *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document* NPT/CONF.2010/50 (Vol I) (2010) at 19.

69 *Ibid.*, at 12.

70 See *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, above n 58; *2000 NPT Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, above n 58; and *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, above n 68.

71 *Model Nuclear Weapons Convention A/C.1/52/7* (1997) [*1996 MNWC*]; *2007 MNWC*, above n 7.

Nuclear Forces Treaty (INF),⁷² the Strategic Arms Reduction Treaty 1991 (START-I),⁷³ the Strategic Arms Reduction Treaty 1993 (START-II),⁷⁴ the Strategic Offensive Reduction Treaty 2002 (SORT),⁷⁵ and the Strategic Arms Reduction Treaty 2010 (New START).⁷⁶ Historically, each Preamble of the START treaties has expressed the following points: "nuclear war would have devastating consequences for all humanity, that it cannot be won and must never be fought" in START-I;⁷⁷ taking "further progress ... will help lay a solid foundation for a world order built on democratic values that would preclude the risk of outbreak of war" and simultaneously "[r]ecognizing their special responsibility as permanent members of the [UNSC] for maintaining international peace and security" in START-II;⁷⁸ and, "endeavoring to reduce further the role and importance of nuclear weapons" and "the achievement of the historic goal of freeing humanity from the nuclear threat" in New START.⁷⁹ Thus, the parties' political will towards achieving a NFWF is progressing.

Among the NWS, only China has taken a different approach towards a NFWF. This is obviously seen in China's constant voting in favour of the UNGA resolutions following on from the ICJ's *1996 Advisory Opinion* on art 6 of the NPT that was proposed primarily by the NAM countries. China wants other NWS to limit their use of and reduce their stock of nuclear weapons in an equal manner.⁸⁰

72 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, United States–Union of Soviet Socialist Republics 12101 TIAS (signed 8 December 1987, entered into force 1 June 1988).

73 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, United States–Union of Soviet Socialist Republics (signed 31 July 1991, entered into force 5 December 1994) [START-I].

74 Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, United States–Russian Federation (signed 3 January 1993, not in force) [START-II].

75 Treaty between the United States of America and the Russian Federation on Strategic Offensive Reductions, United States–Russian Federation (signed 24 May 2002, entered into force 1 June 2003).

76 Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, United States–Russian Federation (signed 8 April 2010, entered into force 5 February 2011) [New START].

77 START-I, above n 73, at Preamble.

78 START-II, above n 74, at Preamble.

79 New START, above n 76, at Preamble.

80 For instance, China "strongly calls for the early conclusion of an international convention on no-first-use of nuclear weapons" among the NWS (*Letter dated 25 April 1995 from the Permanent Representative of the People's Republic of China*, above n 67, at [3]), and states that "[t]he [United States] and Russia ... possessing the largest nuclear arsenals in the world, bear special and primary responsibilities for nuclear disarmament" (Ministry of Foreign Affairs of the People's Republic of China "Nuclear disarmament between the United States of America and Russian Federation" (2005) <www.fmprc.gov.cn>) and:

In a somewhat different capacity, China has been able to share its agenda of negotiating a nuclear weapons convention with these NWS.

The allies of the NWS are taking almost the same stance as the four NWS (except China). They constantly request the NWS to take concrete steps and to undertake the action plans for nuclear disarmament mentioned in the final documents of the NPT Review Conferences. Nevertheless, they do not support the ICJ's *1996 Advisory Opinion* due to it being negatively appraised as a political maneuver by the NAM countries, and likewise, the other four NWS.⁸¹

Thus, the NWS and their allies – except China – are strictly following the NPT, and thereby taking a "step-by-step" approach towards a NFWF.

B Non-Aligned Countries: Departing From the NPT

Almost all of the NAM countries share an understanding that the use and possession of nuclear weapons by any country is generally illegal under international laws, specifically humanitarian laws.⁸² Those countries have tried to delegitimise a "step-by-step" approach based on the NPT, and replace it with an approach aimed at a universal and complete nuclear disarmament. Basically, the NAM countries share a common understanding that the NPT is "a kind of nuclear colonialism"⁸³ and

... the international community should develop, at an appropriate time, a viable, long-term plan composed of phased actions, including the conclusion of a convention on the complete prohibition of nuclear weapons.

– "Statement by Counselor Zhang Junan of the Chinese Delegation on Nuclear Disarmament at the Thematic Debate at the First Committee of the 67th Session of UNGA" (18 October 2012) Permanent Mission of the People's Republic of China to the UN <www.china-un.org>. See also CTBT, above n 44, at Preamble.

- 81 Germany requested the International Court of Justice's [ICJ] advisory opinion on the legality of the use and threat of nuclear weapons sponsored by the NAM countries. The reason for this was that "[the draft resolution] could ... have wider adverse implications for non-proliferation goals which we all share". From the United States' point of view it was "an inappropriate use of the [ICJ] ... for what can only be seen as political purposes": *United Nations General Assembly Official Records: Forty-ninth session A/49/PV.90* (1994) at 26. However, the Draft Resolution was barely adopted, with 78 votes in favour (the NAM countries), 43 votes against (the four NWS), 26 absent (the NWS allies), and 26 votes of non-action (China).
- 82 At least before the *1996 Advisory Opinion*, above n 3, was issued, almost all of the NAM countries shared an understanding that the use of nuclear weapons was not legitimised even in exercising the right of self-defence. India is a good example. See for example *Letter dated 20 June 1995 from the Ambassador of India, together with Written Comments of the Government of India* HAG/POL/443/2/95 (1995).
- 83 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization) and Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations): Verbatim Record* CR/95/27 (1995) at 44. Malaysia also stated that accepting the NPT meant that they "would have to come to the frightening conclusion that international law is on the side of the powerful, as interpreted by the powerful" (at 47). As such, Malaysia's oral statement implies the shared common understanding of the NAM countries.

the genuine cause of nuclear proliferation⁸⁴ and they even do not accept a positive security assurance with the use of nuclear weapons granted by the UNSC under ch VII of the UN Charter.⁸⁵ With these understandings, the NAM countries unilaterally initiated a request to the ICJ for an advisory opinion on the legality of the use and threat of nuclear weapons in order to delegitimise the aforementioned "step-by-step" approach. This was achieved through the World Health Organization (WHO) Assembly Resolution passed in 1993 and the UNGA Resolution passed in 1994,⁸⁶ by a simple majority vote. The main reason the countries took such a premature action at that time was because the NPT would be indefinitely extended; or alternatively, the dominant approach, namely the "step-by-step" approach would be fully legitimised in 1995. This attempt led to a controversial precedent in the UN system, because a simple majority of the UNGA can now use the ICJ's authoritative advice in order to delegitimise and evade the UNSC's decisions and efforts towards achieving a NWFV.⁸⁷

The *1996 Advisory Opinion* apparently empowered the NAM's political endeavour, since it ruled that an obligation stipulated in art 6 of the NPT is a customary law,⁸⁸ such that all States are required

84 Ibid, at 44. Malaysia stated as follows:

As long as [NWS] fail to commit to a time frame for the elimination of nuclear weapons, and for as long as four of the five nuclear-weapon States refuse even to give up the first use option, there is every possibility of further proliferation and of an enhanced risk of a nuclear conflagration that can threaten the planet and all of humanity.

85 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, above n 83, at 45. According to Malaysia:

[A] submission of a [NWS] that each [NWS] can determine for itself when the use of nuclear weapons is appropriate ... under Chapter 7 of the Charter of the United Nations, the Security Council can authorize the use of nuclear weapons, and that nuclear weapons can be used on [NNWS] ... must be seriously alarmed over such a claim.

86 See *World Health Organization Resolution RES/46/40* (1993). It was also barely adopted with 73 votes in favour (the NAM countries), 40 votes against, with 10 absent. See also *UNGA Resolution RES/49/75K* (1994); *United Nations General Assembly Official Records: Forty-ninth session*, above n 81.

87 In the case of the legality of the use and threat of nuclear weapons, whether the ICJ caused further disharmony between the UNSC and UNGA is debatable. Where there is a certain consensus between the UNSC and UNGA, the ICJ may contribute to resolve an international dispute on international peace and security effectively.

88 See *1996 Advisory Opinion (Declaration of President Bedjaoui of Algeria)*, above n 3, at 273–274. The Costa Rica Government referred to this understanding in proposing the *2007 MNWC*, above n 7: see *Model Nuclear Weapons Convention: working paper submitted by Costa Rica* NPT/CONF.2010/PC.I/WP.17 (2007). However, all judges of the ICJ did not necessarily agree with President Bedjaoui's interpretation. For instance, ICJ Vice-President Schwebel (United States), expressed negativity toward the emergence of such customary law, stating that para 2F of the conclusion must be treated as "dictum" and "[i]f it applies to States not party to the NPT, it would be a dubious holding" (*1996 Advisory Opinion (Dissenting Opinion of Vice-President Schwebel)*, above n 3, at 329). Aside from that, Judge Fleischhauer (Germany) indicated that

"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" because "the long-promised complete nuclear disarmament appear[ed] to be the most appropriate [solution]".⁸⁹ Thus, the NAM States have repeatedly proposed the UNGA resolve as follows:⁹⁰

[To call] once again upon all States immediately to fulfill that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination [as a follow up of the advisory opinion].

Not only that, the NAM States were also empowered by Secretary-General Ban Ki-moon's 2008 Five-Point Proposal on Nuclear Disarmament, which proposed to take further efforts towards nuclear disarmament through an "agreement on a framework of separate, mutually reinforcing instruments ... [o]r ... a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations".⁹¹ The NAM States have emphasised that the final document of the 2010 NPT Review Conference underscores the Secretary-General's Five-Point Proposal for legitimising their political endeavour.⁹²

Ironically, the *1996 Advisory Opinion* also reinforced the aspirations of de facto NWS, such as India and the DPRK, to officially possess their nuclear weapons for self-defence. Although the NPT was indefinitely extended in 1995, the *1996 Advisory Opinion* merely ruled that there is no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such", and although "the threat or use of nuclear weapons would generally be contrary to ... the principles and rules of humanitarian laws", it could not:⁹³

nuclear disarmament requires a comprehensive approach, stating that "the answer to the conflict ... of the nuclear weapon ... can only lie in effective reduction and control of nuclear armaments and an improved system of collective security" (*1996 Advisory Opinion (Separate Opinion of Judge Fleischhauer)*, above n 3, at 310).

89 *1996 Advisory Opinion*, above n 3, at 267 and 263.

90 *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons* GA Res 66/46, above n 4, at 3.

91 Ban Ki-moon, Secretary-General of the United Nations "The United Nations and Security in a Nuclear-Weapon-Free World" (Address to the East-West Institute, New York, 24 October 2008), also stated that the *2007 MNWC*, above n 7, is "a good point of departure".

92 *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, above n 68, at 13 and 20. However, whether the final document actually referred to negotiating toward a nuclear weapons convention [NWC] as an "action" is doubted.

93 *1996 Advisory Opinion*, above n 3, at 266 (emphasis added).

... conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

It therefore seemed as though the *1996 Advisory Opinion* was indirectly legitimising nuclear deterrence for all countries. For instance, according to the understanding India has held since 1998,⁹⁴ the possession of nuclear weapons is legitimised because India is a non-party to the NPT, and also the use of nuclear weapons is equally legitimised within the ambit of the right to self-defence under the UN Charter. Interestingly, General Sundarji of India, who enjoyed strong influence in policy-making at the time, clearly stated in 1996 that "[t]he [ICJ] has recently ruled that the possession of nuclear weapons is not illegal", and:⁹⁵

... there is therefore nothing sinful about India wanting to safeguard its national security or nothing illegal, or immoral about India wanting to keep a credible nuclear capability for use against an aggressor who might make first use of nuclear weapons against it.

He further stated that "[i]f we need to test to establish the credibility of our nuclear deterrence capacity, let us do so".⁹⁶ India may retain a so-called "credible minimum deterrence" position until non-discriminatory general and complete nuclear disarmament within the NWS is achieved.⁹⁷ This fact implies that the *1996 Advisory Opinion* actually furthered nuclear proliferation rather than nuclear disarmament, because it fundamentally ignored the significance of the NPT and UNSC resolutions.

Against this backdrop, the *MNWC*, proposed by and accepted within the NAM countries, may be politically manoeuvred not only to divert from a "step-by-step" approach based on the NPT but also to legitimise the de facto NWS. The *MNWC* would equally and comprehensively ban the use and threat of nuclear weapons, any nuclear tests, the manufacture and possession of weapon graded fissile materials, the deployment and development of ballistic missiles and so on, and invoke a time-bound

94 India's official statement to the ICJ in 1995 mentioned that the use and threat of nuclear weapons is "illegal" and thus, for peace to be achieved, the weapons themselves should not be made: see *Letter dated 20 June 1995 from the Ambassador of India, together with Written Comments of the Government of India*, above n 82, at 5.

95 General K Sundarji "Imperatives of Indian Minimum Nuclear Deterrence" (1996) 12 *AGNI* 17 at 17.

96 *Ibid*, at 22.

97 Former Minister of External Affairs of India, Pranab Mukherjee stated as follows in "Foreword: India's Strategic Perspective" in Atish Sinha and Madhup Mohta (eds) *Indian Foreign Policy: Challenges and Opportunities* (Academic Foundation, New Delhi, 2007) 21 at 23:

India's nuclear deterrence is a measure of self-defence in a hostile and nuclearised environment. Its nuclear doctrine emphasises no first use, non-use against non-nuclear weapon states, a voluntary moratorium on testing and credible minimum deterrence. India has been, and remains, a staunch advocate of nuclear disarmament.

and phased nuclear disarmament, under a strong international verification system. Thus, the *MNWC* approach can be termed an "Incremental-Comprehensive Approach" towards a NFWF.⁹⁸ The *MNWC* problematically tries to introduce a new State category called "Nuclear Capable States" (NCS), meaning "a State which has developed or has the capacity to develop nuclear weapons and which is not party to the [NPT]".⁹⁹ As per the Special Provision of the *MNWC*, the NCS may be allowed to take "temporary retention of small and diminishing quantities of nuclear weapons",¹⁰⁰ if the Executive Council decided such an action was acceptable by a two-thirds majority vote. Further, the NCS "shall follow the requirements, guidelines and phases ... [but] ... shall not be expected to implement the provisions of this Convention in advance of other States Parties", probably the NWS.¹⁰¹ This structure implies that the *MNWC* may depart from mainstream views on nuclear non-proliferation by legitimising the de facto NWS.¹⁰² In addition, the *MNWC* may not allow a positive security assurance even by the UNSC because it should "emphasize compliance over

98 International Association of Lawyers Against Nuclear Arms, International Network of Engineers and Scientists Against Proliferation, International Physicians for the Prevention of Nuclear War *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention (NWC)* (Cambridge, Massachusetts, 2007) at 27–29.

99 See 2007 *MNWC*, above n 7, at art 2(A)(2). In addition, the nuclear threshold States, "which [desire] to become party to the Convention and are known to possess or have credibly declared that they possess nuclear weapons", was originally proposed in the 1996 *MNWC*, above n 71. Thus, there is a doubt that the change was made to match the present situation of de facto NWS, such as exists in India, Pakistan and probably the DPRK.

100 2007 *MNWC*, above n 7, at arts 4(E)(12) and 8(C)(29). In addition, as is the structure of the Executive Council, all council members are equally entitled to one vote. Thus, first, NWS do not have veto rights, and second, their and their allies' support of the NPT may not be well represented due to the two-thirds majority voting system, and:

... due regard being paid to equitable geographic distribution, to representation by nuclear-capable states and to the interests of all states to be free from the threat of nuclear devastation [in electing the member].

See 2007 *MNWC*, above n 7, at art 8(C)(23).

101 2007 *MNWC*, above n 7, at art 4(E)(13).

102 This provision may imply that de facto NWS that are not yet party to the NPT may not unilaterally disarm their nuclear weapons capacity prior to nuclear disarmament by the NWS. Indeed, an Indian high official, D Bala Venkatesh Verma, has stated that India can support the *MNWC* unless it does not have a relationship with the NPT. This information is based on a personal interview with D Bala Venkatesh Verma, Joint Secretary in the Ministry of External Affairs (16 March 2012). See also the Lawyers' Committee on Nuclear Policy *Nuclear Weapons Convention: Commentary on the MNWC* (April 1997) at Introduction, which clearly explained that "[a]n overriding principle guiding the drafting has been the search for a regime ... sufficiently permissive to allow states to join without jeopardizing their legitimate security interests". It also further stated at pt II(A) that "a special provision ... aims to accommodate the concerns of threshold States seeking to participate in the NWC regime, without referring to them as threshold States," and "not including [the States to the regime] might perpetuate the "two-tier" system of the [NPT]".

[coercive] enforcement [as a sanction of the collective security]"¹⁰³ and not allow any violation of humanitarian laws.¹⁰⁴

Thus, the NAM's understanding of nuclear disarmament is very radical and obviously departs from the NPT. It would be highly problematic in the international community if States thought that some NAM countries' retention of nuclear weapons was not an obstacle in the path towards a NFWF. The proposed *MNWC*, if adopted as the official convention, might legitimise nuclear proliferation and make a nuclear disarmament negotiation more complex and difficult.¹⁰⁵

IV CURRENT SITUATION: DISHARMONY BETWEEN THE UNSC AND UNGA?

If the primacy of the UNSC under the UN Charter is accepted,¹⁰⁶ it is a logical consequence that any UNGA resolution not in harmony with the UNSC may not be well reflected. Putting this matter aside, this Part briefly captures the current position of nuclear disarmament under the UN system, focusing on the UNSC and UNGA resolutions.

A UNSC: Enforcing Nuclear Non-Proliferation as a Step Towards a NFWF

Since the NPT was adopted, the UNSC has maintained a nuclear non-proliferation regime and supported the IAEA safeguard system for international peace and security. In adopting *Resolution 418*

103 International Association of Lawyers Against Nuclear Arms, above n 98, at 109.

104 Ibid. But, at the San Francisco Conference on the Charter of the UN, held in 1945, the United States opposed a proposal trying "to restrict the freedom of the [UNSC] ... by reference to principles of international law or justice," "on the grounds that ... the [UNSC] should not be hampered by detailed direction of its activities", and eventually such claim was accepted at the Conference: Secretary of State of the United States of America *Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State* (26 June 1945) at 105 and 111–112. This indicates doubt as to whether the UNSC's enforcement activity must inevitably be bound by humanitarian laws and so on.

105 According to the Government of Costa Rica, the proposed *MNWC* is "a guide" to the multilateral negotiations leading to a NWC, and thus "an actual negotiated [convention] ... might be similar to some aspects of the [*MNWC*] and differ in other aspects": *2007 MNWC*, above n 7. But, due to the fact that the text of the *2007 MNWC* itself explains (at 4) that "[t]he drafters do ... believe that this Model demonstrates the feasibility and practicality of nuclear disarmament", only minor changes that are not fundamentally contrary to the interests of the NAM countries might be allowed.

106 According to James D Fry "Early Security Council Efforts at Nuclear Non-Proliferation Law and Policy: Cooperation Forgotten" (2012) 21 *Transnatl L & Contemp Probs* 337 (forthcoming):

There is no mention in the U.N. Charter of how the [UNSC] and [UNGA] are to coordinate their activities in the realm of disarmament and arms control in general or nuclear non-proliferation in particular ... [but] the U.N. Charter is designed to give [the UNSC] the lead on [these matters].

under ch VII of the UN Charter,¹⁰⁷ the UNSC expressed a grave concern that "South Africa is at the threshold of producing nuclear weapons"¹⁰⁸ and decided that "all States shall refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons".¹⁰⁹ Aside from that, in the case of "the premeditated Israeli air attack on Iraqi nuclear installations" which was subject to the IAEA full scope safeguards, the UNSC condemned Israel, saying that "the said attack constitutes a serious threat to the entire IAEA safeguards regime which is the foundation of the [NPT]" since "the Agency has testified that these safeguards have been satisfactorily applied to date".¹¹⁰ Further, in *Resolution 825*, "emphasizing the integral role of IAEA safeguards in the implementation of the [NPT]", the UNSC called upon "the DPRK to ... comply with its safeguards agreement" due to the IAEA Board of Governor's finding of the DPRK's "non-compliance" with the agreement.¹¹¹

In the post-Cold War era, the UNSC has aggressively enforced nuclear non-proliferation standards with a view towards achieving a NWFV supported by the members of the UN – even members that are non-parties to the NPT or non-signatories to the CTBT. The UNSC has strengthened the non-proliferation regime under the NPT standards after deciding in 1992 that the proliferation of WMD is a "threat to international peace and security".¹¹² This dramatic momentum was created when Iraq's violation of the NPT was discovered after the 1991 Gulf War and the UN Special Commission was established to unilaterally disarm Iraq's WMD capacity under UNSC *Resolution 687*.¹¹³ Momentum was further strengthened by two NWS' accessions to the NPT; those of France and China in 1992. The 1995 Review Conference decision to indefinitely extend the NPT,¹¹⁴ and also to adopt the CTBT in the UNGA in 1996, were further catalysts. In such an international situation, the UNSC became very much responsible for proliferation matters. For instance, India's, Pakistan's and the DPRK's nuclear tests for self-defence were penalised, and Iran was also penalised by the UNSC

107 *Resolution 418 (1977)* SC Res 418, S/Res/418 (1977).

108 *Ibid*, at Preamble.

109 *Resolution 418 (1977)*, above n 107, at [4]. Interestingly, this resolution even called upon "[the] States non-members of the [UN]" to "act strictly" the same as all member States (at [5]) (emphasis added). Later, South Africa acceded to the NPT on 10 July 1991.

110 *Resolution 487 (1981)* SC Res 487 (1981), S/Res/487 (1981) at Preamble and [3]. Further, in the same Resolution, at [5], the UNSC called upon Israel who "has not adhered to the [NPT]", "urgently to place its nuclear facilities under [the] IAEA safeguards".

111 *Resolution 825* SC Res 825, S/Res/825 (1993) at [2].

112 *Note by the President of the Security Council S/23500* (1992) at 4.

113 *Resolution 687 (1991)* SC Res 687, S/Res/687 (1991).

114 *Decision 3: Extension of the Treaty on the Non-Proliferation of Nuclear Weapons* NPT/CONF.1995/32 (1995) Part I at Annex.

due to its violations of the NPT and the IAEA Safeguards Agreement.¹¹⁵ In addition, the UNSC adopted (under ch VII of the UN Charter), the so-called "law-making" resolution that directed all members of the UN to enact national laws to prevent the proliferation of WMD by non-State actors under the 1540 Committee's Observation.¹¹⁶

The UNSC adoption of *Resolution 1887*, led by President Obama, is a historical evolution in the movement toward nuclear disarmament. It is unique in that it calls upon:¹¹⁷

... all States that are not Parties to the NPT to accede to the Treaty as [NNWS] so as to achieve its universality at an early date, and pending their accession to the Treaty, to adhere to its terms.

It also asks those States "to refrain from conducting a nuclear test explosion and to sign and ratify the [CTBT], thereby bringing the treaty into force at an early date".¹¹⁸ This means that the UNSC requests all members of the UN to de facto, or quasi de jure if the permanent members deem it so, adhere to the treaty regardless of it not being acceded to or even not entering into force. Additionally, *Resolution 1887* apparently follows a "step-by-step" approach, stating in the Preamble that a NFWF should be achieved in accordance with the NPT. Further, due to the fact that "the statements by each of the five [NWS], noted by [UNSC] resolution 984"¹¹⁹ are also recalled, the resolution might be based on an understanding that the collective security system, backed by a positive security assurance of using nuclear weapons, is necessary until the NPT is universally adhered to as an inevitable step towards a NFWF for the UNSC. The attitude of the UNSC in enforcing nuclear non-proliferation gives a hint as to the reason why the *1996 Advisory Opinion* and the *2007 MNWC* are completely ignored in *Resolution 1887*. If this is the case, are the UNSC and UNGA in grave disharmony?

115 By adopting *Resolution 1696 (2006)* SC Res 1696, S/Res/1696 (2006) in the UNSC, Iran began to be penalised, due to the fact that the IAEA Board of Governors *Resolution Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran* GOV/2006/14 (2006) stated, at [g], that Iran had "many failures and breaches of its obligations to comply with its NPT Safeguards Agreement and the absence of confidence that Iran's nuclear programme is exclusively for peaceful purposes". Before that, *Resolution 1540 (2004)*, above n 38, clearly stated in its Preamble that "goals of peaceful utilization should not be used as a cover for proliferation". Currently, the latest IAEA Report of the Director-General *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran* GOV/2012/37 (2012) – mentioning that Iran's continuous expansion of its uranium enrichment activities and several possible military dimensions – appears to be fully supported by the permanent members of the UNSC.

116 *Resolution 1540 (2004)*, above n 38.

117 *Resolution 1887 (2009)*, above n 5, at [4].

118 *Resolution 1887 (2009)*, above n 5, at [7].

119 *Resolution 1887 (2009)*, above n 5, at [9].

B UNGA: Two Main Streams Towards a NFWF

According to the UN Charter, the UNGA is vested with an authority to make recommendations (though not binding on the members of the UN),¹²⁰ on "the principles governing disarmament and the regulation of armaments ... to the Members or to the [UNSC] or to both".¹²¹ Indeed, UNGA *Resolution 2373*, which adopted the NPT:¹²²

... requests the Conference of the Eighteen-Nation Committee on Disarmament and the [NWS] urgently to pursue negotiations on ... a treaty on general and complete disarmament under strict and effective international control.

What kind of trend is visible within the UNGA at present must be investigated, without regard to the issue of whether and which resolutions concerning nuclear disarmament can be recognised as evidence of the emergence of a customary law or not.

Two main streams, the contra-NPT approach and the pro-NPT approach, are recognisable up to the present day. The former approach is seen in the follow-up resolutions to the 1996 ICJ Advisory Opinion,¹²³ proposed by 52 countries (mainly the NAM countries). The latter approach is seen in the *Resolution on United action towards the total elimination of nuclear weapons*,¹²⁴ led by Japan and proposed by 99 countries, including the United States and their allies. Indeed, during the 2011 UNGA session, the former resolution obtained 130 votes in favour (mainly the NAM countries and China) and 26 votes against the motion (the four NWS and others), while 23 abstained (Japan and others).¹²⁵

120 But, the ICJ stated in *1996 Advisory Opinion*, above n 3, at 254–255, that:

[UNGA] resolutions, even if they are not binding, may sometimes have normative value ... in certain circumstances [in which] evidence important for establishing the existence of a rule or the emergence of an *opinio juris* [is recognised].

Although the ICJ examined a possibility of *lex lata* on the illegality of use of nuclear weapons through these resolutions, they eventually failed to find it since "the adoption each year by the [UNGA], by a large majority, of resolutions recalling the content of resolution 1653 (XVI)" and "to take ... by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament" was not sufficient for it (*1996 Advisory Opinion*, above n 3, at 255). This logic somewhat implies that the UNGA resolutions concerning nuclear disarmament, including the *Follow-up Resolution[s] to the 1996 ICJ Advisory Opinion*, have little impact in the UN system.

121 UN Charter, above n 36, at arts 11 and 1.

122 *Resolution 2373*, above n 49, at Preamble. In addition, the Conference of the Eighteen-Nation Committee on Disarmament is now the Conference on Disarmament in Geneva, having expanded to 65 members.

123 See above n 4.

124 *Resolution on United action towards the total elimination of nuclear weapons* GA Res 66/45, A/Res/66/45 (2012).

125 *United Nations General Assembly Official Records: 71st Plenary Meeting* A/66/PV.71 (2011) at 27–28.

On the other hand, the latter resolution obtained 169 votes in favour and one against, while 11 abstained.¹²⁶ The latter resolution emphasised the necessity of retaining a "step-by-step" approach by "fully implementing the action plan agreed at the 2010 NPT Review Conference"¹²⁷ and taking the actions as stipulated in UNSC *Resolution 1887*.¹²⁸ But it did not explicitly mention the *1996 Advisory Opinion* and the *2007 MNWC*, both of which decisively contradict the former resolution. This implies that the trend of nuclear disarmament in the UNGA at present is contributing to greater harmony with the UNSC. However, it is fair to say that the disharmony may not be fully diminished unless the latter resolution can obtain a vote of favour, in real terms, from some influential NAM countries who severely doubt a "step-by-step" approach and also have the potential to block the Conference on Disarmament in Geneva.¹²⁹

V **CONCLUSION: REASSESSMENT OF THE CAUSES OF DEADLOCK, AND SOLUTIONS**

In this article, the roles of the UN system and NPT in the nuclear disarmament process were briefly examined. The history of the LON clearly shows us that failures of disarmament were caused by the consensus procedure; by the member States claiming sovereign equality and self-defence in order to evade a discriminatory disarmament; and by the lack of an effective sanction mechanism for arms control. On the other hand, the UN system as a collective force for security has a strong mechanism for arms control backed by the five permanent members of the UNSC. These facts hint that any UNGA resolution and ICJ advisory opinion that is in disharmony with the UNSC may not be well represented in the UN system, and it might not bring about a good outcome for disarmament per se. Indeed, and ironically, the *1996 Advisory Opinion*, which supported equal disarmament and equally allowing the use and threat of nuclear weapons under the right of self-defence, furthered the nuclear proliferation of some emerging and developing countries, thus evading the non-proliferation obligations of the NNWS. The *2007 MNWC*, reflecting the *1996 Advisory Opinion*, may legitimise

126 The voting pattern was as follows: 169 votes in favour (four NWS and their allies); 1 vote against (DPRK); and 11 absent (Brazil, China, Cuba, Ecuador, India, Iran, Israel, Mauritius, Myanmar, Pakistan, Syria). See *ibid.* at 24–27.

127 Ministry of Foreign Affairs of Japan "2011 the United Nation General Assembly Resolution: 'United action towards the total elimination of nuclear weapons'" (December 2011) <www.mofa.go.jp>.

128 It seems as though the resolution has a clear consistency with *Resolution 1887 (2009)*, above n 5. See also *ibid.*

129 India, in explaining their reasons of voting for *General and complete disarmament: united action towards the total elimination of nuclear weapons A/C.1/66/L.41 (2011)*, stated that the country remains dedicated to "the goal of global, verifiable and non-discriminatory nuclear disarmament in a time-bound framework". See India's official statement "United action towards the total elimination of nuclear weapons" (26 October 2011) <www.reachingcriticalwill.org>.

the actions of these States. This means that we must remain strongly supportive of nuclear arms control backed by the UNSC's decision to work towards a NFWF.

Although the sharp conflict in understanding of international law relating to nuclear disarmament between the NWS and their allies and the NAM countries might not cease soon, it is being minimised, even in the UNGA. Evidently, emphasising "a step-by-step" approach based on the NPT and UNSC *Resolution 1887*, avoiding mention of the *1996 Advisory Opinion* and the *2007 MNWC*, is overwhelmingly gaining acceptance. We can expect to see a kind of "good synergy" between the UNSC and UNGA towards achieving a NFWF.

Finally, this analysis may contribute to the reshaping of a reasonable balance of nuclear disarmament approaches in the UN system, premised on two conditions: first, immediately establishing a well-balanced decision-making procedure for the Conference on Disarmament in Geneva, so as to revive a disarmament procedure led by the UNSC (as Hans Kelsen proposed); and second, never accepting the possession of nuclear weapons by any NNWS under the NPT. In testing the second chance to achieve a NFWF, strict enforcement of the maintenance of nuclear non-proliferation – that is, pursuing complete universalisation of the NPT as a regulation of "nuclear" armaments of the UN system – would establish a strong basis for furthering nuclear disarmament negotiations and measures among the NWS. The UNSC permanent members that are the NWS already promised that a NFWF would be pursued in accordance with the NPT and under positive and negative security assurances to the NPT parties. Thus, we now need a strong will to never depend on nuclear weapons, which might be achieved by expanding and strengthening the NWFZ and inspection systems of the IAEA and CTBT, and accepting further centralisation of force within the UN's collective security system.¹³⁰

130 The Preamble of the Constitution of Japan (3 November 1946) stipulates that the Japanese people "preserve [their own] security and existence, trusting in the justice and faith of the peace-loving peoples of the world", and respecting "the right to live in peace, free from fear and want" which "all peoples of the world have". Article 9 of the Constitution clearly stipulates that "the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes", and thus "land, sea, and air forces, as well as other war potential, will never be maintained".

