

A Treaty in Troubled Waters: Reflections on the Failed NPT Review Conference

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An international regime is as strong as the coherence among its members and the convergence of their expectations and behaviour around the rules and norms they have agreed upon. This fact is not obvious to everybody, but it is nevertheless true. All legal systems rely on the voluntary compliance with the rules of the vast majority of community members. In an environment of general anarchy or anomy no force in the world would be able to coerce vast crowds (of men or states) into compliance. The fact that the majority abide by the rules makes it possible to isolate the few who do not and to deal with them one by one.¹

Regime coherence in a community of sovereign states cannot be based on fear. As strong as hegemony may be in the era of a single superpower, imposing its will on a crowd of 190 is beyond the possibility of even this uniquely powerful state.² As a consequence, any regime, and the non-proliferation regime in particular, can only endure if it is seen as both useful

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¹ A. Chayes, A. Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995); T. M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990).

² J. S. Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002).

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and legitimate in the eyes of the many: useful, in that it serves the interests, notably the security interests, of all the members; legitimate, in that it provides a fair balance of rights and duties for all, and that the implementation of undertakings is equally distributed among members and various classes of members, as applicable.

The failure of the Review Conference of the Nuclear Non-Proliferation Treaty (NPT) in New York in May 2005 has disclosed that these conditions can no longer be taken for granted as far as this treaty is concerned. It has revealed a badly divided community of states parties, acerbically quarreling with each other, to the predictable satisfaction of those for whom unity of NPT membership might provide a serious obstacle on their chosen path of nuclear policy, and might contain the spectre of future sanctions against actions not in conformity with NPT rules if they chose to go that path. Of course, North Korea and Iran come to mind in this regard and these two can be counted among the very few big winners of the failed conference.

In the following, the drama – or boredom – of the Review Conference and the way it failed will be briefly described. A look will then be taken at the two criteria of treaty stability – utility and legitimacy – and both discussed in relation to various groups of states. In conclusion, some steps will be proposed for the European Union to take to limit the damage, if possible.

A disastrous conference

The mood at the beginning of an NPT Review had never been as bad as this time, not even for the two failed conferences in 1980 and 1990.³ Not even an agenda could be agreed upon, and this impossible state of affairs continued well into the third week. Once resolved, this first procedural squabble was promptly followed by another concerning the work programme and then a third concerning the distribution of time between Main Committees and Subsidiary Bodies (sub-committees). But what for outsiders must have looked like a march of total diplomatic folly was, in fact, caused by serious disagreements on substance.⁴

At the core of the matter was the staunch refusal by the United States (and, to a less visible degree, France) to accept the results of the 2000 NPT

³ R. Johnson, "The 2005 NPT Review Conference in Crisis: Risks and Opportunities", *Disarmament Diplomacy*, no. 79, April/May 2005, pp. 2-5

⁴ For details, see H. Müller *Vertrag im Zerfall? Die gescheiterte Überprüfungskonferenz des Nichtverbreitungsvertrages und ihre Folgen*, Peace Research Institute of Frankfurt (PRIF) Report 4 (Frankfurt/M: PRIF, 2005).

Review Conference as the basis for proceedings. 2000 had been a hard-won compromise, resulting in the most substantive final declaration ever adopted by a NPT Review. And at the centre of this compromise were the "Thirteen Steps" on nuclear disarmament, a combination of general principles for the disarmament process, such as transparency and irreversibility, and specific steps, such as bringing the Comprehensive Test Ban Treaty (CTBT) into force, commencing negotiations on a verifiable treaty to cut off the production of fissile materials for explosive purposes (FMCT), and including non-strategic nuclear weapons in the orderly disarmament process.

What was the significance of the Thirteen Steps? The major misgivings of non-nuclear weapon states parties to the NPT had always been that their undertakings were precise and controlled (through the verification activities of the International Atomic Energy Agency - IAEA), while those of the nuclear weapon states were vague with no strings attached. In 1995, when the NPT was extended indefinitely, nuclear weapon states had, for the first time, conceded a more precise interpretation of Article VI, which sets out their disarmament obligation: they had accepted the conclusion of a CTBT and negotiations on a FMCT, and "progressive and systematic steps" towards nuclear disarmament. In 2000, these "steps" had been further refined and detailed. It was this more stringent and focussed type of obligation that was to make the NPT a more equal and balanced treaty which the nuclear weapon states – the US and France in the lead – refused in 2005. And it was this refusal that triggered the otherwise incomprehensible procedural manoeuvring that characterised the conference.⁵

All these manoeuvres revolved around whether the 2000 results would be the standard for the judging progress and compliance (as notably the 116 NPT members and 16 observers of the Non-Aligned Movement - NAM - requested) or would be excluded from the agenda altogether (as the United States preferred). And this theme proved recurrent in the three phases of procedural dispute, as described above. Everybody came well prepared however: the conflict had already become clear during the three sessions of the Preparatory Commission. So the antagonists were well geared to pursue their struggles by "negotiations by other means", to paraphrase Clausewitz, namely the skillful use of procedural instruments.

In the end, the Conference barely managed to agree on a purely formal report (who had met when and done what) because even there the same frontlines and the same manoeuvring popped up again, with the Americans

⁵ J. Dhanapala and R. Rydell, *Multilateral Diplomacy and the NPT. An Insider's Account* (New York: United Nations, 2005).

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and French trying to keep all allusions to the year 2000 out of the report, and the non-aligned trying to bring it in as much as possible. At the last minute, the forces of reason – the small, but dedicated group of truly committed NPT members – succeeded in overcoming this show of insanity, as they had before by breaking the procedural deadlock over agenda and programme of action. But all this came too late to enable the delegations to engage in serious negotiations on substance. Not even four full days were left for this purpose. And the controversies during those days made it clear that much, much more time would have been needed to overcome the vast gaps between the views of the various groups.

The Utility of the NPT

Why would non-nuclear weapon states wish to join the NPT in the first place?⁶ This is no trivial question. After all, it has been the rule in history that states that could afford to do so would always acquire the most powerful weapon of their time, for deterrence, defence and conquest. It is a stunning deviation from this custom that more than 180 states, at least a third of which could easily afford starting nuclear weapons programmes such as Pakistan, North Korea or Libya, would solemnly pledge not to do so, and that the overwhelming majority of them would indeed abide by this undertaking rather than cheat. There are two interest-based answers to this question. The first one is a “collective good” consideration, the second, one of equality.

Collective good. While some, such as Kenneth Waltz, believe that the more states possess nuclear weapons the more stable deterrence dyads will emerge,⁷ most people think that the stability of the international system is potentially undermined by the increasing spread of nuclear weapons: the risk of multi-front nuclear arms races would considerably enhance the risk of nuclear war by accident, miscalculation or misperception. Furthermore, more nuclear weapon states would provide more points of access for terrorists to nuclear weapons and/or fissile materials. International stability is a common good; so every individual non-nuclear weapon state could speculate that its own nuclear arsenal would add only a tiny margin of increased instability and thus could be tolerated if only the others would

⁶ Z. S. Davis, “The Realist Nuclear Regime”, *Security Studies*, vol. 2, no. 3/4, 1993.

⁷ K. N. Waltz, *Nuclear Proliferation: More May Be Better* (London: International Institute For Strategic Studies, 1981).

abstain from nuclear weapons. The NPT is meant to overcome this typical collective good problem by guaranteeing that everybody (with the few exceptions of today's non-members) stays non-nuclear, thus avoiding the risk of destruction of the common good by many uncoordinated individual steps. In this context, contributing to international stability by renouncing nuclear weapons is a rational act - since all the others act in the same way - as long as there is sufficient confidence that the NPT continues to be effective.

Equality. The second interest-based argument in favour of staying non-nuclear is the foundation of the "grand bargain" in the NPT: when the Treaty was negotiated, non-nuclear weapon states were confronted with the existence of five nuclear weapon states. For middle powers, this raised the unpleasant issue of status and discrimination. Equal sovereignty, a principle worshipped by most nation-states, is seriously compromised if five members of the international community can blow the rest to pieces, and the rest cannot retaliate. It is all the worse if this inequality is sealed into an international treaty. This is why non-nuclear weapon states insisted on Art. VI which obliges the nuclear "haves" to disarm. The "haves", in turn, could plausibly argue that nuclear disarmament could only be an option if no new nuclear weapon states emerged, that is, if the objective of non-proliferation were achieved. There was thus an incentive on the part of the non-nuclear weapon states to stay non-nuclear, since only this renunciation could persuade the five nuclear weapon states to lay down their arms, leading to a restoration of equal status with regard to nuclear weapons in the distant future.⁸

What is left of these interests today?

Non-proliferation

The Treaty has certainly fulfilled its purpose of keeping most states in the world non-nuclear – and this is an amazing achievement. Nevertheless, three have stayed out of the regime and have developed nuclear weapons. Of these three, Israel is of particular concern because its nuclear weapons influence the Arab appreciation of the NPT. This is true of Egypt, in particular, which joined the Treaty in 1981 in the firm expectation that the United States would "deliver" Israel sooner or later. Not only has that not happened, but the US - most notably under the Bush administration - has

⁸ M. Shaker, *The Nuclear Non-Proliferation Treaty: Origins and Implementation 1959-1979* (London: Oceana, 1980).

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shown an almost provocative lack of concern about Israel's nuclear weapons. In fact, Israel's capability no longer shows up in official statements or analyses of the non-proliferation problem. The US also showed an ostensible aversion to dealing with the Middle East Resolution of the 1995 Extension Conference in the 2005 Review Conference context. But since that resolution was the condition on which the Arab states had consented not to call a vote on the extension issue, the US attitude merely added insult to injury.

Even more aggravating for the Arabs – and again Egypt in particular – is the course of the Iranian affair. Almost all Arab states (with the possible exception of Syria, a virtual ally of Iran) are extremely nervous about the possibility of an Iranian bomb. For Egypt, it is an issue of both security and status. If all these aspects are considered together, Egypt's behaviour during the Review Conference becomes more comprehensible: Egypt was the most destructive force and the most defiant to US wishes – even more than Iran. In fact, the Iranian delegation repeatedly found it possible to hide behind Egypt's back and even take mediating positions because of the Cairo delegation's explicit radicalism. Nevertheless, Egypt did no more than demand the implementation or the re-affirmation of the past commitments of the nuclear weapon states – and the US in particular – and balked when the other side refused. This could betray a deeper disappointment on the part of the Egyptian political leadership with what their accession to the NPT has brought in terms of political gains – namely practically nothing – and signal the beginning of a much more opportunistic attitude, that is, manipulating the Treaty for domestic or international gains (for example, to present itself as the non-aligned leader). At worst, it could indicate an Egyptian interest in weakening the Treaty and following the Iranian example to build a military nuclear option in the future.

Discrimination

The second interest of non-nuclear weapon states remains equally unfulfilled. The Five have documented their determination to stick to their nuclear weapons – probably forever. During the 2005 Conference, all states not possessing nuclear arms were confronted with the near certainty of an indefinite future in which the discrimination between the "haves" and the "have nots" will persist. This was not the deal when the NPT was negotiated and signed.

The nuclear weapon states tried their best to conceal this sad fact by presenting brochures documenting what they considered their implementation of Art. VI. They were not very convincing, not least because most of the steps

documented predated 2000 and did not fall into the 2000-2005 period which was, after all, the one to be reviewed by this conference. The United States and France are constructing large test facilities to simulate hydrogen bomb explosions. US laboratories have new warhead designs on their drawing boards. Russia is tenaciously sticking to its tactical nuclear weapons and refuses to put them on the disarmament agenda. China, while paying lip service to the lofty goal of complete disarmament, is steadily building up its arsenal to counter the perceived threat embodied by a future American national missile defense system. Meanwhile, the Bush administration has scrapped the Anti-Ballistic Missile (ABM) Treaty (dubbed in the 2000 Final Declaration as the "pillar of international stability"), declared its refusal to ever put forward the CTBT for ratification (which was one of the political conditions for the indefinite extension of the NPT in 1995), and refused to negotiate a cut-off if verification of that treaty would be part of the agenda (another 1995 condition).

For those states in the middle of the power rank, sitting between the great powers and the small states, that is, countries like Brazil, Indonesia, Egypt or Turkey, the question is whether this discrimination is acceptable. They watch the US court India and breach its pledge to the Nuclear Supplier Group not to have dealings in civil nuclear power with non-NPT states; they watch it court Pakistan as an important ally in the so-called war against terror with total amnesia as far as its nuclear weapons are concerned. It may take time, but no one should be surprised when an agonising re-appraisal of the fundamental decision to stay non-nuclear enters the agenda of one middle power after another.

The normative dimension

Apart from pure interest, the normative dimension should not be underrated. Treaties embody values cherished by their parties. Alongside the notion of interests – which treaties must necessarily serve to be acceptable – there is the notion of moral rightness which gives legal instruments their lasting meaning.⁹ In the case of the NPT, this normative or moral dimension has two aspects. First, the aversion to the inhuman character of nuclear weapons, and second – and this is a feature of all treaty-making in the

⁹ C. Albin, *Justice and Fairness in International Negotiation* (Cambridge: Cambridge University Press, 2001); A. Hasenclever, P. Mayer, V. Rittberger, *Justice, Equality, and the Robustness of International Regimes. A Research Design* Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung Nr. 25 (Tübingen: Universität Tübingen, 1996)

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international arena – a quest for fairness and justice as far as the distribution of rights, duties, and implementation is concerned.

Abhorrence of nuclear weapons

The aversion to nuclear weapons rests on the fact that they embody all attributes of a tool in strict contradiction to humanitarian law: their impact is indiscriminatory, killing both civilians and combatants; their effects are cruel for those who survive the initial blast; their consequences last long beyond the end of the war.

This aversion motivated some of the earlier supporters of the NPT, such as, *inter alia*, Ireland and Sweden. It has become a matter of faith for most of the non-aligned group and gained ground even among non-nuclear NATO allies. In 2000, it put the New Agenda Coalition (NAC¹⁰) squarely against the nuclear weapon states in the final hours of negotiations on the Final Declaration. The NAC wanted a clear confession of the impossibility of squaring nuclear weapons with existing norms. The NWS wanted nothing of it. In 2005, it became clear that the NWS are set on keeping their nuclear weapons and regard them as legitimate elements of their military postures. The US government's considerations to employ nuclear weapons to destroy deep bunkers hosting the leaders of "rogue states" or biological or chemical weapons or weapons facilities,¹¹ or in retaliation for biological or chemical weapons used in regional contingencies, combined with its claim to a right to intervene preventively against states it deems dangerous are a clear demonstration of a positive assessment of nuclear weapons as legitimate instruments of warfare.¹² Similar views can be imputed to Russia's military doctrine emphasising the value of tactical nuclear weapons in various contingencies, including purely conventional ones, and to the stubborn refusal by NATO to renounce the option of a first-use of nuclear weapons. It is thus clear that on normative grounds the Treaty community is deeply divided.

Equality in compliance

This applies equally to the fairness/justice dimension. Non-nuclear weapon states like Iran are taken to task because they have cheated on their safeguard agreement with the IAEA, while no comparable condemnation is

¹⁰ Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, Sweden.

¹¹ R. T. Cooper, "Making Nuclear Bombs 'Usable'", *Los Angeles Times*, 3 February 2003.

¹² H. Müller, A. Schaper, *US Nuclear Policy after the Cold War*, PRIF Report 69 (Frankfurt/M: PRIF, 2004).

brought to bear for the non-compliance of the NWS with their Article VI obligations. In fact, Mexico tabled a sophisticated argument in a working paper calling for a balanced review of compliance that would put Articles I (transfer of nuclear weapons) and VI (disarmament) on an equal footing. This ran counter to the US argument that this was a non-proliferation treaty, with a main purpose and some sideshows, one of which was nuclear disarmament. This re-interpretation of the three pillars of the NPT – non-proliferation, disarmament and cooperation in the peaceful uses of nuclear energy – is seriously unraveling whatever consensus could be achieved among the parties. Historical fact is that the US and the Soviet Union tabled a draft treaty in the late sixties that was purely non-proliferation. It was simply not sellable. Only after the NNWS succeeded in amending the draft with Art. VI and Art. IV (peaceful uses), that is, as a balanced bargain with three equal parts, did the NPT become viable for broad consensus.

The discrimination aspect

This discrimination in implementation is exacerbated by recent efforts to roll back NNWS' rights deriving from Art. IV. One has to recall that the revamping of the IAEA's verification system in the 1990s – the conclusion of the "Additional Protocol" – was already a great concession by the NNWS aimed at fostering the common good of an efficient treaty regime, as the wording in Art. III of the NPT calls only for safeguards on the civilian fuel cycle, not on nuclear-related facilities that do not contain fissile material. Such inspection attested to the NNWS' willingness to endure additional burdens to make the Treaty work. Now they are confronted with the US request of February 2004 that all non-nuclear weapon states that do not yet dispose of reprocessing or enrichment technology should be denied access and instead be offered fuel guarantees by present technology holders – a clear breach of Art. IV, which explicitly maintains an unrestricted right to develop the peaceful uses of nuclear energy. In other words, an already discriminatory regime is to be made even more discriminatory, at a time when the US is refusing a verification system for a cut-off treaty which would at least create a level-playing field between nuclear and non-nuclear weapon states as far as civilian nuclear energy uses are concerned.

Consequences of normative dissatisfaction

The frustration with the normative dimension will not, in itself, lead countries to reconsider their non-nuclear status, as the violation of national interests could do. But it does undermine support for the NPT and eliminate

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all willingness to consider measures to strengthen the non-proliferation value of the NPT, at least as far as the non-aligned group is concerned. As the nuclear weapon states were refusing all efforts to create more tangible disarmament obligations, the non-aligned states killed all proposals that would add useful non-proliferation tools to the regime. Among the measures that fell by the wayside during the conference were

- the adoption of the Additional Protocol as the standard for verification and as a condition for new nuclear-related supply;
- a pledge to further explore opportunities for the multilateralisation of the fuel cycle so as to prevent the spread of national-controlled enrichment and reprocessing facilities;
- the endorsement of UNSC Resolution 1540 and the Proliferation Security Initiative¹³ and the amended Convention for the Physical Protection of Fissile Material as steps to combat nuclear terrorism;
- sophisticated proposals to deal with the problem of withdrawal by parties from the Treaty under Art. X (the idea was to prevent the abuse of membership in the NPT to acquire all the necessary ingredients of a weapons programme with the firm intent to withdraw as soon as the necessary preparations are completed) and cases of non-compliance; and
- the institutional strengthening of the NPT by establishing a frugal structure for the interim between review conferences.

This rich menu attests to the enormous potential of the conference to contribute to the strengthening of the non-proliferation regime. It is obvious that these measures – proposed mainly from the ranks of the most committed northern non-nuclear weapon states such as Australia, Canada, Germany, Sweden, the EU and the G-10 group of industrialised countries that have been working to enhance regime effectiveness since 1980 – are in the interest of all faithful Treaty parties, including the overwhelming majority of the non-aligned. That this group nevertheless objected to their adoption, or at least did not prevent its more radical members from objecting, reveals the degree of frustration many member states feel towards the Treaty, or more precisely, its unequal implementation.

In addition to motivating resistance to reasonable proposals for strengthening non-proliferation, the normative frustration of the non-aligned majority helped to create a veil of solidarity behind which the few not so well-willed parties could hide. The Iranian delegation left the

¹³ For a description of SCR 1540 and PSI, see footnotes 1 and 4, respectively, of the article by Serge Sur in this issue, pp. 8 and 14.

Conference with visible satisfaction. It can also be imagined that Pyongyang took pleasure in watching the Treaty community in disarray.

European options

The US has obviously lost its keen interest in the NPT. The present government regards the Treaty as useful insofar as it constrains the freedom of action of others and justifies unilateral initiatives including counter-proliferation, but not useful enough to justify major concessions in terms of national (nuclear) military policy. For the US, non- and counter-proliferation policies focus more on unilateral, bilateral and coalition-of-the-willing initiatives than on this legally binding, multilateral international instrument.

This leaves a void in leadership that has not yet been filled. The European Union entered the conference with a Common Position¹⁴ that ranged between vague and substantial. It included some proposals that had the potential to strengthen the regime, such as the one on dealing with withdrawals. The Union also played a reasonably useful role in breaking the procedural deadlock, but only after France could be persuaded to adopt a compromising position on procedure, and Britain to stop rallying consensus around the US policy not to permit progress on the basis of the 2000 Final Declaration in its capacity as chair of the Western and Others Group.

On substantial issues, the Union was not at its best, despite its promising Common Position. France quickly took positions similar to those of the US in Main Committee I (on nuclear disarmament); Sweden and Ireland continued to work in the weakened NAC. The Netherlands, somehow hyperactive, acted in three different groupings (besides the EU, the G-10 and a "NATO-7" group, very much of Dutch making). Rather than steadily promoting the reasonable positions encapsulated in the Common Position, member states went astray along national lines. Since the Conference could not agree on anything anyway, this dismal performance was not too painfully exposed. But it does not augur well for the potential of an EU leadership role.

Should the EU be willing to seriously get its act together, the following is a set of actions that it could take in the run-up to the next Review Conference in 2010:

- develop a concept on how to draw India and Pakistan closer to the regime without compromising its principled distinction between five nuclear weapon states and non-nuclear weapon states;

¹⁴ EU, Council Common Position relating to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Brussels, 2005 <<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32005E0329:EN:HTML>>

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- elaborate a verification concept for a Fissile Material Cut-off Treaty that could help persuade reasonable US Republicans that this is feasible without compromising national security. The EU with its experience in safeguarding dual-use facilities in the UK and France and with the great British effort to develop fundamental ideas for verifying a nuclear weapon free world is in an ideal position to do so;
- fund a series of coordinated second-track meetings on a Middle East nuclear weapon free zone, focussing on verification, security guarantees, compliance and enforcement policies and conditions for entering into force;
- set up an assistance programme for implementing UNSC Res. 1540, notably on export controls and physical security for resource-poor developing countries;
- start a nuclear fuel assurance initiative, based on the experience of the multinational consortia EURODIF, URENCO and the EURATOM Fuel Supply Agency;
- engage in continuous dialogue with key non-aligned and developing countries such as Algeria, Brazil, Cuba, Egypt, Indonesia, Malaysia, Mexico, Nigeria, South Africa in addition to continuing discussions and negotiations with Iran;
- support, and, if necessary, fund a technical unit for assessing weapons of mass destruction threats at the United Nations (best in the Department for Disarmament Affairs) as a necessary element of compliance and enforcement policy.

Conclusion

The NPT is in very bad shape, due to the bizarre interaction of two extreme sides, the US, which wants non-proliferation without disarmament, and some radical non-aligned member states who are either completely frustrated about the lack of compliance of the NWS with their Art. VI commitments or, worse, have nuclear weapon ambitions themselves and are thus interested in weakening the non-proliferation regime. Since stopping and reversing the spread of nuclear weapons is a key EU security interest, it should make this *the* field of priority within CFSP. This will require some political concessions by the European nuclear weapon states, but nothing that would really compromise their national security interests. As long as the US proves incapable of providing the necessary leadership for repairing the regime, the Union is the only one left to fill the void, at least temporarily. The list of required activities is long, but in the non-proliferation field the EU has the experience and capability for action: it should make good use of it.