

Testimony

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Previewing the Nuclear Nonproliferation Treaty Conference

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When the NPT State parties convene at the 2005 Review Conference, they will have to confront the most difficult challenges the NPT has ever faced. They seem to have run out of options for dealing with these challenges, or in some cases appear to be complacent to tackle them head on. Admittedly the period since the 2000 Review Conference has seen undesirable nuclear proliferation developments, but it is also fair to say that the overwhelming majority of non-nuclear weapon states (NNWS) have demonstrated their commitment to, and compliance with, their treaty obligations. While the growing burden increasingly lies on the NNWS to demonstrate their compliance, this is not reciprocated by the nuclear weapon states (NWS). Many NNWS, including close allies of the United States, remain unsatisfied with the emphasis that is currently placed by the United States on the nonproliferation elements of the NPT, believing that nuclear disarmament should be given increased priority. Germany, for instance stated clearly during the preparatory phase for the Review Conference that a *de facto* restriction on the right to the peaceful application of nuclear energy should be accompanied by far reaching nuclear disarmament measures by the NWS.

The continued vitality and efficacy of the NPT as an instrument to maintain international peace and security, is dependent on the implementation of the treaty and treaty based political agreements as a whole. However, the trend set by some NWS, including the United States to roll back, or in some cases simply ignore many of these political commitments and undertakings, could have serious repercussions for the future viability of the treaty. Some NNWS could come to the conclusion that if the NWS are allowed to cherry-pick which commitments – legally or politically - they consider applicable or not, then why should they be refused the same privilege? Take for instance the 1995 and 2000 pledges to negotiate and work for the early entry into force of the Comprehensive Nuclear Test Ban Treaty (CTBT) and to negotiate an internationally verifiable treaty banning fissile material for weapons purposes. The United States has since walked away from these agreements. If the principle of *quid pro quo* is to be applied, NNWS could rightfully stop upholding commitments in a way that the United States would find distasteful.

An approach at the 2005 Review Conference that focuses on the achievable, maintains the balance between the core NPT bargains, and does not attempt to reinterpret, negate or withdraw from existing obligations, commitments, and undertakings, will allow the conference to meet the core challenges flowing from the treaty's inherent deficiencies. In this lies the challenge for all the State parties, but in particular for the United States.

Inability to Enforce Compliance

From a U.S. perspective the single most important objective would be to strengthen the treaty's ability to enforce compliance with its nonproliferation obligations. This objective, fueled in part by the frustration over increasing evidence that Iran is not forthcoming about its nuclear intentions have led to U.S. criticism of the existing mechanisms to verify and enforce compliance. Since the statutory bodies designated to address treaty violations - the IAEA Board of Governors and the UN Security Council - are not independent institutional actors and often politically divided, they have failed to

take effective action. For example, the Security Council has so far been unable to even consider the North Korean case despite condemning IAEA evidence, and divisions within the IAEA Board continue on how to deal with Iran's failure to fully implement its safeguards agreements.

Although several proposals have been made to strengthen the treaty's enforcement mechanism, it is not clear how any special body tasked to enforce compliance would be any more vigorous in adopting enforcement mechanisms than the existing institutions. Rather than focusing on altering enforcement mechanisms, the Review Conference and subsequent discussions might more usefully concentrate on when they would be needed. That is, these efforts could focus on drafting appropriate criteria to unambiguously prove that another state-party has a nuclear weapons program. In addition, the State parties should direct their energy at strengthening the IAEA's ability – both legal and technical – to verify compliance.

Dealing with non-compliant States

The only State parties found to be in non-compliance by the IAEA and the Security Council are Iraq and North Korea. It is striking that the United States was prepared to go to war in part over its belief that Iraq was in non-compliance with Security Council resolutions related to the development of nuclear weapons and other weapons of mass destruction. It is equally striking that despite the unprecedented challenge represented by North Korea's announced withdrawal from the treaty and its determined pursuit of nuclear weapons no action has been taken by either the NPT parties or the Security Council. This apparent inaction appears tantamount to tacit acceptance of yet another nuclear-armed State outside the treaty. Failure by the State parties to collectively respond at this Review Conference to one of the most significant events in the treaty's history could make a mockery of the treaty.

In addition to North Korea, concerns have increased that states such as Iraq, Iran, and Libya, have in the past been, or continue to be, involved in clandestine nuclear weapons development. Iran in particular, may be closely watching how the States respond at this Review Conference to the North Korean nuclear challenge, especially if it believes that the only way to avoid becoming a target of potential U.S. military intervention would be to develop a nuclear weapons capability of its own. The treaty would be severely weakened – if not mortally wounded - should Iran choose to follow this path.

The U.S. quest to strengthen the treaty's compliance mechanism seems to be focused mainly on Iran. However, the pursuit of a strategy at this Review Conference to single out Iran as a non-compliant state could have serious repercussions. Since the IAEA Board remain seized with the matter, and has so far been unable to conclusively find Iran in non-compliance, Iran and many other states, including U.S. allies are likely to argue that the Review Conference should not prematurely express itself in this regard. Moreover, a strong focus on non-compliance could stimulate allegations by NNWS that the United States itself is in non-compliance with some of its treaty obligations, in particular its Article VI commitments. Instead the United States should work with the European Union

and other members of the IAEA Board to find a permanent diplomatic solution to the Iranian challenge.

Preventing further withdrawals

Concerns over the treaty's weakness to enforce compliance further highlighted by North Korea's announced withdrawal expose yet another deficiency in its design: how to prevent a state from secretly acquiring a nuclear weapons capability and then use the treaty's withdrawal clause to exonerate it self from any consequences.

First of all, State parties should agree that no state should be rewarded for threatening to withdraw in order to extract some economic or security benefit, and that no state should be allowed to renege on its treaty obligations if its withdrawal is used to avoid consequences or noncompliance by the NPT. Secondly, State parties might agree that withdrawal from the treaty cannot free a NNWS state from the obligation not to use fissile material and production facilities (including those of indigenous origin) acquired prior to its withdrawal for weapons purposes. While difficult to enforce, such an agreement would signal that the State parties will challenge attempts to exploit Article X. Some other measures might be taken outside the context of the NPT. For example, the Security Council should stiffen its resolve to act promptly when a state indicates its intention to withdraw. In the end, the withdrawing state must realize it will be worse off than it was before making the decision to pull out of the NPT.

Article IV: An inalienable right or a potential loophole?

Concerns over Iran's nuclear intentions highlight the potential risks of allowing NPT member states to legitimately develop an entire nuclear fuel cycle under Article IV without having a sufficient mechanism to objectively gauge their nuclear intentions. Although recent proposals by President Bush and IAEA Director-General Mohamed ElBaradei—although vastly different in nature—to limit access to, or internationally control over, civilian nuclear fuel production may make sense under current circumstances, these proposals are based on the premise that NNWS in full compliance with their treaty's obligations should agree to further restrict a sovereign right. For this reason, both proposals have been criticized – if not rejected - by many States, including key U.S. allies such as Japan. Moreover, since any proposal to restrict access to or development of national fuel cycles would introduce a “new deal” with added restrictions on non-nuclear-weapon states, any agreement to this end would have to be met with reciprocal obligations by the NWS.

A possible way for the Review Conference to address the apparent weakness of Article IV would be for them to first and foremost agree that while the right to use the atom for peaceful purposes is an inalienable one, ownership of the capability—which could be used to develop nuclear weapons—places a special responsibility on states concerned. Secondly, the States should reaffirm their interpretation of Article IV and its relationship with Articles I, II, and III, thereby interpreting the inalienable right to peaceful use of nuclear energy to belong only to those parties in full compliance with the treaty's nonproliferation obligations. This approach, together with an agreement to apply

comprehensive safeguards agreements and the Model Protocol additional to those agreements, could significantly strengthen the IAEA's ability to verify compliance.

A more radical approach—likely to face strong opposition from many NNWS—would be for the Review Conference to agree that State parties under investigation of violating their safeguards agreements, or that have been found by the IAEA Board to have failed to comply with their obligations, should lose the right to develop their own enrichment and reprocessing capabilities. Agreement on how to enforce this approach, especially in the case of countries that could pursue indigenous development of these capabilities, may be very difficult.

Outdated safeguards

Another high priority should be to secure an agreement that the strengthened safeguards system would constitute the treaty's mandatory safeguards standard. Although a tough nut to crack, it is achievable provided a reasonable strategy by the United States in cooperation with other States across traditional political groupings. If for instance linked to a compromise that would allow negotiations on a fissile material cut-off treaty to commence, such a strategy has the potential to build consensus at the conference.

Still even with its full implementation, the Additional Protocol only provides the agency with more extensive abilities to verify capabilities, not intentions; thus a state can still legally develop a "break-out" capability even if it is under IAEA supervision. What would be required is for the agency to have an enhanced technical capacity linked to reliable access to intelligence sources and technologies. This would require an increased political and financial commitment from all its member states.

Weakness of Article VI

Many NNWS believe that the NWS are no longer fully committed to their obligations under Article VI of the treaty to make good faith efforts toward disarmament. They are especially bothered that some nuclear-weapon states appear to have walked away from the "unequivocal undertaking" given at the 2000 NPT Review Conference to eliminate their nuclear arsenals as part of "13 practical steps" toward nuclear disarmament. This highlights what many view as one of the fundamental weaknesses in the treaty: the absence of a timeframe for disarmament. While the United States is promoting ways to enhance the nonproliferation objectives of the treaty, many NNWS rightfully argue that if these objectives are to be backed by stricter verification and enforcement measures, so should the treaty's disarmament objectives.

It should be pointed out that the 2000 agreement on practical disarmament steps was not taken in isolation—it should be considered against the backdrop of the package of decisions adopted in 1995, which included the indefinite extension of the treaty. The 1995 package allowed all State parties to support the indefinite extension while also providing several practical steps for achieving progress toward nuclear disarmament and nonproliferation. The 2000 Review Conference reaffirmed this program of action, and agreed on a set of specific practical "systematic and progressive" steps to implement Article VI.

Bearing in mind the reality of the current security situation, it would be important for the United States to seek compromises with key NNWS – as it did in 2000 in partnership with the New Agenda Coalition – rather than to reject the majority of states’ quest to achieve real progress towards nuclear disarmament. An achievable approach would be for all State parties to focus their attention on reaching agreements that could be implemented in the foreseeable future and in the period before 2010, without negating those that were agreed upon in 1995 and 2000. An indicative list of measures could include:

- (1) The United States could issue a declaration stating that its current testing moratorium is irreversible. Given the U.S. rejection of the CTBT, such a declaration could address concerns regarding U.S. research on new types of nuclear weapons. In addition, the United States could show flexibility by recognizing that the overwhelming majority of State parties support the earliest entry into force of the CTBT. It could furthermore support a call on all States to provide full financial and technical support for the Comprehensive Test Ban Treaty Organization Preparatory Commission and its Provisional Technical Secretariat.
- (2) In sharp contrast to one of its longest standing policy objectives, i.e. the need for an effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices stands the new U.S position that such a treaty cannot be verifiable. Given that the 1995 Shannon negotiating mandate clearly protects all states’ positions since the verification and scope of such a treaty would be subject of the negotiations in the CD, it would be in U.S. interest to enter the negotiations as soon as possible. A “concession” by the United States to start negotiations on this basis could for instance be linked to progress on the Additional Protocol as the required level of treaty adherence.
- (3) Of related importance, in particular given concerns over nuclear terrorism and clandestine nuclear networks, would be the completion and implementation of arrangements by all NWS to place fissile material no longer required for military purposes under international verification. Given the United States’ own initiatives in this regard, it could work with other NWS to do the same.
- (4) Another disarmament measure that could earn the United States some credit without significant negative implications would be to agree to further steps by the NWS to reduce their non-strategic nuclear arsenals, and not to develop new types of nuclear weapons in accordance with their commitment to diminish the role of nuclear weapons in their security policies.

The Unresolved Issue of Negative Security Assurances

One of the original shortcomings of the treaty was that it did not provide legally binding assurances against the use or threat of use of nuclear weapons against non-nuclear-weapon states—so called negative security assurances—in exchange for the commitment by these states not to acquire nuclear weapons themselves. The NWS have, however, made or updated unilateral, non-legally binding pledges establishing criteria for the granting of negative security assurances to NNWS. These combined pledges provided the NWS with bargaining leverage at the 1995 conference. The 2000 Review Conference

Final Document included a clear and unambiguous statement that legally binding security assurances would strengthen the NPT regime.

The need for these assurances have become particularly acute to the NNWS given concerns over the potential development in the United States and Russia of new types of nuclear weapons such as the Robust Nuclear Earth Penetrator (RNEP) or “bunker buster.” Given the principled reasons behind the need for such assurances, this issue, if not addressed properly, has the potential to generate serious problems at the 2005 Review Conference.

Several options exist on how to address the quest by the NNWS for legally binding negative security assurances, including negotiating a legally binding protocol to the treaty. Although inconceivable that the United States will at this Review Conference agree to negotiate such an instrument, it could initiate a joint NWS statement in this regard. A reaffirmation by the Conference that legally binding security assurances would strengthen the NPT regime and that the issue should continue to be considered in the context of the strengthen review process, may appease most NNWS. Regardless of how such assurances are to be formulated it would, however, be important to recognize that assurances offered within the context of the NPT, as opposed to another forum, would provide a significant benefit to NPT parties. They would serve as an incentive to those who remained outside the treaty, or those who may consider leaving the regime. As such, security assurances should be granted only to states that have forgone the nuclear weapons option and not to those who are still keeping their options open, such as North Korea and Iran. This would strengthen the regime and confirm the continued validity of the NPT and its indefinite extension, while addressing concerns over possible scenarios in which some NWS may consider using nuclear weapons.

Promoting universal adherence

The near universality of the NPT has succeeded in creating a nonproliferation norm that has made the world safer by significantly raising the political cost of making nuclear weapons. But its inability to become fully universal is a major failure with potential serious consequences, especially since the non-parties are all armed with nuclear weapons. While the goal of persuading these states to eliminate their nuclear arsenals should not be abandoned, it is likely to be achieved only when the five declared NWS get rid of theirs.

Instead of symbolic efforts to convince the three outlier states to join the NPT as NNWS, it would be more important to press these states to politically commit themselves to the nonproliferation obligations similar to those adhered to by the NPT NWS: preventing proliferation exports, securing nuclear weapons and materials, reducing the role of nuclear weapons in their national security policies, and eschewing nuclear testing.

Dealing with New Players: Non-State Actors and Terrorists

Since the treaty was designed to deal with state entities only, it appears ineffective to prevent subnational terrorist groups from acquiring nuclear weapons. Moreover, treaty members have witnessed an increased proliferation of nuclear weapons technologies,

including the discovery of a network of clandestine nuclear smuggling activities from a non-party with nuclear weapons—Pakistan—despite increasing efforts by supplier states to control these technologies. No mechanism exists—other than that of individual states and institutions such as the Security Council—to deal with this emerging challenge.

The adoption of Security Council Resolution 1540 was clearly meant to address this weakness. Although its Chapter VII nature implies that all NPT States should be in support of its objectives, many States remain concerned that the Security Council has now taken on a legislative role in adopting broad - as opposed to case specific - measures applicable to all states. States are also concerned about the practical implications of implementing these measures. Still, State parties critical of the resolution are likely to face difficulties at the Review Conference to oppose references to the resolution as an important tool to deal with non-state actors. States, in particular the members of the Non-Aligned Movement are, however, likely to argue that the resolution clearly stipulates that none of the obligations set forth in it “shall be interpreted so as to conflict with or alter the rights and obligations” of NPT state parties, which by implication also include the inalienable right to nuclear energy for peaceful purposes. They may also use the occasion to press for the assistance that the resolution be offered to states “lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions.” A U.S. strategy to promote the implementation of resolution 1540 in the context of the NPT should therefore be linked to rendering legislative and practical assistance to States that require such assistance.

Conclusion

The challenges to the treaty are not new – most of them are embedded in the treaty’s bargains and deficiencies. But for the treaty to remain viable as the “cornerstone” of the nonproliferation and disarmament regime, the State parties will have to muster the political will—both individually and collectively—to implement all their obligations under the treaty. The Review Conference can play an important role in this process by turning the spotlight on today’s nonproliferation and disarmament challenges and identifying collective and national responses to deal with them. What is, however, of crucial importance is that they do so in earnest and not seek to fix the cracks in the NPT’s armor through carefully scripted, and often watered down consensus language, for the sake of a “successful outcome” or final document. Failure to focus on, and resolve these tough issues—even though doing so may require difficult decisions and hard compromises—runs the risk of making the NPT irrelevant and leading to the eventual downfall of the regime.

A successful Review Conference should ensure that the various governments of State parties and their bureaucracies begin to get really serious about implementing all their obligations. However, a divisive debate at the Review Conference, where some states continually attempt to reinforce the treaty’s core bargains, while others attempt to reinterpret or negate them, will undermine the treaty regime.

In this context it should be underlined that individual elements of the NPT's bargains cannot be approached singularly, neither can one or another of these elements be ignored or minimized. Any desire, be it by the United States and other NWS or by the NNWS to address only one aspect of the NPT bargains—be it nuclear disarmament, nuclear non-proliferation, safeguards, the peaceful uses of nuclear energy or universality—should be guarded against. The proponents of such proposals would need to realize that they may not only be satisfying an immediate national objective(s), but that they may in the process be laying the foundation for undermining the entire package of bargains that make up the NPT treaty regime. Such approaches may set additional challenges that the 2005 Review Conference will not be able to meet.
