

## INTRODUCTION

### NEW LEFT REVIEW DEBATE ON THE NPT

*Across a largely pacified international landscape, nuclear proliferation remains one of the few issues capable of igniting military conflagration. It was yellowcake uranium that headlined Colin Powell's presentation to the UN of the casus belli against Iraq in February 2003. Clinton signalled a war alert over North Korea's research reactor in 1994, while Bush followed suit in lower key in 2002. Embryonic nuclear facilities in Iraq and Syria have been bombed by the IDF. Iran's uranium-enrichment programme incurs threats and sanctions from Congress and the Security Council, and more sabre-rattling from Israel. American officials have begun to speak of a zero-enrichment option for selected states.*

*The normative legal framework at stake in these conflicts is the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. A product of détente-era American–Soviet diplomacy, famously privileging the rights of the established nuclear powers over all newcomers, the NPT has been given a new lease of life since the end of the Cold War; its abrogation of national sovereignties chiming well with current superpower needs. Yet with scant exception, states facing UN-sanctioned coercion for breaching their obligations under the Treaty—Iran, for instance—still cling to it, rather than exercise their right to withdraw; while the Bush Administration has regularly been accused of flouting its provisions. For mainstream and much liberal-left opinion, the NPT betokens a moral pledge to a future world without weapons, as much as a shield against the calamity of nuclear war. Yet the Treaty itself has received little attention since its unconditional extension in 1995. With this number, *New Left Review* begins a discussion on the political meaning of the NPT, the evolution of its institutional apparatus, the International Atomic Energy Agency, and broader questions of nuclear non-proliferation. In his opening contribution Norman Dombey, Emeritus Professor of Theoretical Physics at Sussex, surveys the aims, limitations and achievements of the Treaty, while Peter Gowan, author of *The Global Gamble*, argues that attempts by the Bush Administration to bypass the NPT have ended in failure. The editors hope to return to this theme in future issues.*

NORMAN DOMBEY

# THE NUCLEAR NON-PROLIFERATION TREATY

## *Aims, Limitations and Achievements*

**I**N MARCH 1967 while the Nuclear Non-Proliferation Treaty was in its final stages of negotiation, a conference was held at the University of Notre Dame in Indiana at which strategists, diplomats and academics from the US and Canada presented their views of what the Treaty was about. The Soviet and Polish embassies in Washington also sent representatives, while various European members of NATO sent written statements outlining their position. The draft then under discussion was essentially that signed the following year, but there are differences. The proceedings of the Conference thus provide a useful guide to the NPT's aims, its limitations and the difficult issues at stake when it was signed.<sup>1</sup> The final draft was agreed by the Eighteen Nation Committee on Disarmament (ENDC) and the UN General Assembly in June 1968, ten months after the USSR and US had presented identical versions to the ENDC. It was opened for signature on July 1, 1968 and came into force on March 5, 1970. No amendment has been made to it, so the NPT signed in 1968 is the same one in force today and invoked every time the 'Western community' (i.e. the current US administration) worries that 'rogue' state X or Y may have a nuclear-weapon programme.

The French Embassy in Washington—De Gaulle was President at the time—sent a note to the Notre Dame Conference explaining the Elysée's position on the NPT: 'France is against proliferation. But she considers that the draft treaty, as it currently stands, settles nothing. It does not

represent any progress towards disarmament. It sanctions the supremacy of some countries over the rest of the non-nuclear nations.’ The letter goes on to quote Couve de Murville, the French Foreign Minister:

Non-dissemination [the initial and more specific word for preventing the spread of nuclear weapons] is, assuredly, a problem. There is no advantage, there would even be great danger, in having more and more countries manufacture nuclear weapons. But one thing is much more important—those who possess nuclear weapons should not manufacture more but destroy the ones they have. Yet what is being proposed seems to us to arrive at the opposite result: preventing those who do not have and who, for the most part, cannot have nuclear weapons, from manufacturing them. But this in no way prevents those [possessing] such weapons from continuing to manufacture them and from maintaining their stockpiles. Consequently, this is not disarmament, and we think that we should not, by taking paths of this kind, lead the world [to] believe there is disarmament where, in fact, there is only a strengthening of the monopolies of the great powers.

As was so often the case, De Gaulle’s view was far-sighted. France, however, did eventually ratify the Treaty, as did China, which had originally agreed with France. The purpose of this article is to explain what the NPT forbids and what it does not; the obligations assumed by its parties; its successes and failures; and whether it can be maintained. I start from the premise, shared by France, the US and Britain, that a world in which most countries possessed nuclear weapons would be less secure than one in which only a few do. Not everyone agrees: Kenneth Waltz argued that the increased responsibilities the weapons bring would reduce the likelihood of wars between nuclear powers.<sup>2</sup> The majority view, with which I agree, is that whilst this may be the case, a war involving nuclear weapons would be so horrific that the eventual elimination of these weapons by all states should be the goal; the NPT together with other measures such as the Comprehensive Test Ban Treaty—signed in 1996 but still not in force—are necessary steps towards that end. This discussion of the NPT does not aim to be complete. Mason Willrich and especially Mohamed Shaker have given full accounts of the negotiations leading to the Treaty and its interpretation.<sup>3</sup> I try to deal with those subjects still relevant to the

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<sup>1</sup> Stephen Kertesz, ed., *Nuclear Non-Proliferation in a World of Nuclear Powers*, Notre Dame, IN 1967.

<sup>2</sup> Kenneth Waltz, ‘The Spread of Nuclear Weapons: More May Be Better’, *Adelphi Papers*, no. 171 (1981).

<sup>3</sup> Mason Willrich, *Non-Proliferation Treaty: Framework for Nuclear Arms Control*, Charlottesville, VA 1969; Mohamed Ibrahim Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation*, 3 Vols, Oceana, NY 1980.

present international situation, but leave aside some, such as the Cold War security guarantees, which have little meaning now.

The final report of the Notre Dame Conference summarized the NPT's expected aims:

A treaty should be drawn up which (1) binds the military nuclear powers not to transfer nuclear weapons to other states, (2) commits the other states not to build or acquire nuclear weapons, (3) assures all signatory nations of the opportunity to develop and share in the benefit of nuclear energy for peaceful purposes, and (4) contains an agreement on an international inspection system. It should be drafted in such a way as to attract the early adherence of the nuclear powers and to facilitate other steps towards arms control and disarmament.

These aims were in accordance with the 'Irish Resolution' 1576, passed unanimously by the UN General Assembly in December 1961, entitled 'Prevention of the Wider Dissemination of Nuclear Weapons'. This envisaged an international agreement under which weapon states pledged not to transfer control of their nuclear arms or information necessary for their manufacture to non-weapon states, while states without nuclear weapons agreed not to acquire them.

Non-aligned states were not represented at Notre Dame. Nevertheless the Conference report gives an accurate summary of the Treaty's aims since the US and USSR were the co-chairs of the ENDC, set up by Resolution 1722 of the UN General Assembly with a remit to negotiate 'general and complete disarmament under effective international control', including negotiations on the non-dissemination treaty. Thus the Soviet-US version with some amendments became the eventual Treaty. Considered as a deal made between the nuclear-weapon states (or at least the US, USSR and UK, since France and China took no part in the negotiations) and the non-weapon states, the NPT was a framework in which non-weapon states could develop nuclear-power programmes under an international inspection system in return for relinquishing their right to develop nuclear weapons.

Andrzej Konopacki, the Polish representative, realized that many non-weapon states would not consider this an equitable deal. 'How would the balance of mutual responsibilities and obligations [between weapon states and non-weapon states] be reached—or to put it more bluntly:

what would the non-nuclear countries receive in return for their renunciation of acquiring nuclear weapons?’ he asked rhetorically—replying to his own question that the security of all states would be improved if nuclear proliferation was avoided. But he added:

The treaty we are seeking should not provide for unilateral obligations. It should not enjoin nuclear abstinence to one group of states, while leaving complete freedom of action to the other. It should place restrictions, though different in character, on all. We cannot but recognize that the purpose of a non-proliferation treaty is limited. It is not so much intended to improve the present situation as to prevent it from getting worse.<sup>4</sup>

Hence the logic of the French criticism that ‘this is not disarmament’. In the draft, as in the final Treaty, non-weapon states would renounce their right to manufacture or acquire nuclear weapons and accept international inspection of any civil nuclear facilities, while weapon states would simply give up their right to transfer weapons to other states or help non-weapon states acquire them. Thus the obligations between the two are not balanced. Furthermore, the proposed international inspection system only bound non-weapon states: weapon states could continue to use their nuclear facilities—power reactors, uranium enrichment plants, reprocessing plants—without external interference.

U Maung Maung of Burma was among the representatives of non-aligned states on the ENDC to take up this theme in discussions of the US–USSR joint draft. He argued that since the nuclear-weapon powers themselves had repeatedly acknowledged that the NPT was not an end in itself but merely a step towards total nuclear disarmament, it should be incumbent on them to move towards the progressive liquidation of their nuclear-weapon status. Nevertheless he understood that ‘security needs’ would impose limitations on the will of the signatory nuclear-weapon powers to undertake disarmament obligations. He proposed therefore that

an article should be formulated, in clear-cut and precise terms, under which the nuclear-weapon powers would assume a definite obligation to take tangible steps towards nuclear disarmament. Those steps should be explicitly defined. One would envisage them to include the concluding of a comprehensive test-ban treaty . . . an agreement on the cut-off of all

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<sup>4</sup> Kertesz, *Nuclear Non-Proliferation*, p. 29.

production of fissile materials for weapon purposes and on their diversion to peaceful use; a halt to production of nuclear weapons themselves; a verified freeze of the production of nuclear delivery vehicles; and progressive reduction and final destruction of all stockpiles of nuclear weapons and carriers.<sup>5</sup>

Swedish representative Alva Myrdal also emphasized the demand formulated by the non-aligned members of the ENDC throughout the discussion that a treaty must contain an ‘acceptable balance of mutual responsibilities and obligations of the nuclear and the non-nuclear powers’.<sup>6</sup>

It was not to be. No major revisions were made to balance obligations more equitably. Various non-binding commitments were made by the weapon states to meet these demands but they, or at least the Soviet Union and the United States, insisted that consideration of concrete measures of disarmament would prevent agreement on the Treaty, and had to be pursued after its ratification; weapon states could not be bound to a specific measure of disarmament before negotiating the details. Indeed, in the Senate hearings on the NPT, chairman of the US Joint Chiefs of Staff General Wheeler was asked whether ‘all that the military, all that the nuclear powers are asked to do is not to pass the control of the weapons to other countries?’ Wheeler responded ‘That is correct, sir’.<sup>7</sup> The only revision that could be claimed to strengthen the disarmament obligations of the weapon states was that they were moved from the Preamble to a new Article VI. Thus all parties to the NPT agreed to negotiate in good faith further measures in three areas: nuclear arms control, nuclear disarmament and general disarmament.

West Germany, although not represented on the ENDC, was dissatisfied on the grounds that an inspection regime applying only to non-weapon states would give an unfair commercial advantage to the weapon states in the provision of nuclear power. In response the US and UK, followed later by the USSR, offered their civil nuclear facilities to the inspection body,

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<sup>5</sup> *Final verbatim record of the Conference of the Eighteen Nation Committee on Disarmament*, Ann Arbor, MI 2005, pp. 6–7, Meeting 337, 10 October 1967; available online through the University of Michigan Digital Library. Henceforth ENDC.

<sup>6</sup> ENDC, 4 August 1966, Meeting 279, p. 5.

<sup>7</sup> Hearings on the NPT, Committee on Foreign Relations, US Senate, 11 July 1978, p. 61.

the International Atomic Energy Agency. Of course, the IAEA, with its limited budget, did not consider such voluntary measures a priority.

Nevertheless, the NPT has been surprisingly successful since it came into force in 1970. Many forecasts predicted a substantial increase in the number of weapon states, since more countries were using nuclear power. Kennedy estimated that over 20 states would have nuclear weapons by the 1970s. A London *Times* leader of 1983 predicted that 40 countries would be capable of building weapons by 1990.<sup>8</sup> Currently 56 states have civil nuclear reactors but only Israel, India, Pakistan and the five permanent members of the Security Council possess nuclear weapons. North Korea has tested a weapon but is now expected to relinquish it in return for aid and security, which was always its intention; South Africa possessed weapons in the apartheid era but allowed them to be dismantled afterwards; Iran terminated its weapon programme in 2003.<sup>9</sup> These states join Argentina, Australia, Brazil, South Korea, Sweden and Switzerland, who once had plans for weapon programmes, but concluded they were detrimental to their security. Ukraine and Kazakhstan, both of which had advanced nuclear programmes, agreed to join the NPT as non-weapon states after the break-up of the Soviet Union.

Israel and India—like South Africa—already had advanced weapon programmes in the early 1970s. Hence the number of states possessing nuclear arms has increased by just one in over thirty years. During this period, several nuclear-weapon reduction treaties have been signed. Perhaps the most important step was the agreement on a Comprehensive Test Ban Treaty in 1996: it is now almost impossible for any state to test a weapon without detection. Unfortunately the CTBT is not yet in force.

In what follows I analyse the various Articles of the NPT. First, the central obligations of Articles I and II on non-dissemination; second, the civil nuclear energy obligations of Articles III and IV. The third section is on disarmament, in particular Article VI, which although peripheral to the Treaty's core objectives, is now the part most likely to be quoted (usually incorrectly) by journalists, peace activists and even eminent lawyers. The fourth focuses on the remaining articles, dealing with peaceful nuclear explosions, the duration and extension of the Treaty and other

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<sup>8</sup> Third Nixon–Kennedy Presidential Debate, 13 October 1960; *The Times*, 17 January 1983.

<sup>9</sup> National Intelligence Estimate Report, 'Iran: Nuclear Intentions and Capabilities', November 2007.

legal necessities. The conclusion addresses the present and reviews current problems.

## I. NON-DISSEMINATION: ARTICLE I

It is instructive to compare the text of Article I submitted to the ENDC by the US in March 1966 with the final version of the Treaty (see overleaf). The earlier draft read:

Each of the nuclear-weapon States party to this treaty undertakes:

1. Not to transfer nuclear weapons into the national control of any non-nuclear-weapon State, or into the control of any association of non-nuclear-weapon States.
2. Not to provide to any non-nuclear-weapon State or association of such States—
  - (a) assistance in the manufacture of nuclear weapons, in the preparation for such manufacture, or in the testing of nuclear weapons, or
  - (b) encouragement or inducement to manufacture or otherwise acquire its own nuclear weapons.
3. Not to take any other action which would cause an increase in the total number of States and associations of States having control of nuclear weapons.
4. Not to take any of the actions prohibited in the preceding paragraphs of this Article directly, or indirectly through third states or associations of States, or through units of armed forces or military personnel of any State, even if such units or personnel are under the command of a military alliance.<sup>10</sup>

The basic premise on which the NPT—like all the arms-control treaties of that generation—was interpreted was that ‘the Treaty deals with what is prohibited, not with what is permitted’.<sup>11</sup> The prime example of this principle is in the Outer Space Treaty of 1967 which banned nuclear and other weapons of mass destruction in space, thereby legitimizing reconnaissance satellites (not explicitly prohibited by the treaty), and thus achieving a strategic goal of the US after the Soviet Union shot down a U-2 reconnaissance plane over the Urals in 1960.

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<sup>10</sup> Kertesz, *Nuclear Non-Proliferation*, p. 96.

<sup>11</sup> As noted in a paper on the NPT prepared by the US Administration for its allies: see Appendix, p. 67.

## *Extracts from the Treaty on the Non-Proliferation of Nuclear Weapons*

### ARTICLE I

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

### ARTICLE II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

### ARTICLE III

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere [ . . . ]

3. The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities,

including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this Article and the principle of safeguarding set forth in the Preamble of the Treaty.

#### ARTICLE IV

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

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

#### ARTICLE VI

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.

#### ARTICLE X

1. Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

2. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.

*The full text of the Nuclear Non-Proliferation Treaty is available on the IAEA website.*

The March 1966 US draft of the NPT does not allow transfer or control of nuclear weapons to non-weapon states, nor to an association of non-weapon states. That wording is deliberate: a multinational NATO force then under discussion was aiming to deploy nuclear-armed Polaris missiles. NATO was not an association of non-weapon states, since France, the US and Britain were members; such deployments therefore would not contravene the treaty.

The Soviet Union was never going to agree to this formulation: it saw the NPT as a means to prevent the FRG from acquiring nuclear capability, and West Germany was the main backer of the multinational force. The version of Article I agreed by the US and USSR in August 1967 is that appearing in the final Treaty, prohibiting transfer of nuclear weapons directly or indirectly 'to any recipient whatsoever'. By this time plans for the multinational NATO force had been scrapped. Yet the USSR made no objection to the US interpretation that allowed West German, Turkish, Belgian, Dutch, Italian and British air forces to be equipped with US nuclear weapons: ownership and control of those weapons was not transferred and NATO's supreme commander in Europe was always a US General who took instructions from the Pentagon.

The second clause of Article I prohibits weapon states from assisting, encouraging or inducing any non-weapon State 'to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices'. This was the most important clause for Britain, which in 1961 had persuaded the US to sell it Polaris missiles. Missiles are delivery systems, not weapons, but the UK needed the design of the warhead. Since the US-UK agreement on cooperation on nuclear energy for military purposes in 1958, the US had supplied Britain with weapon designs which the UK built 'under licence' at Aldermaston. Again this clause is worded to allow this arrangement to continue.<sup>12</sup>

A deeper question is whether the transfer of nuclear-weapon designs is permitted by the first clause of Article I, which prohibits transfer 'directly or indirectly' of the weapons. In 1958 there was a discussion in the US

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<sup>12</sup> The Brown government's recent decision to renew Trident raises the question of whether the submarine itself is a nuclear weapon. Although the term is not defined in the NPT, both the US Atomic Energy Act and the 1967 Treaty of Tlatelolco exclude nuclear-powered delivery systems, such as the Trident, from their definitions of a nuclear weapon; so does the 'US Replies to Questions' from its NATO allies (see p. 67 below), unchallenged by other states.

Joint Committee on Atomic Energy regarding the proposed exchange between the US and UK of weapon designs, non-nuclear components of nuclear weapons, fissile material and tritium. Representative Holifield stated to Commission Chairman Strauss: 'When you say we are not furnishing weapons you are technically correct of course. But the end effect of the whole bill is to furnish the materials, the design and the information with which to construct the weapon. So the end result is a weapon.'<sup>13</sup> When I wrote in 1984 that this looked like an indirect transfer of a US weapon to the UK, banned by Article I, the Foreign Office responded that the negotiating history of the Treaty showed that the meaning of indirect is 'via third parties', as in the March 1966 draft tabled by the US. That view may be arguable; but the riposte must be that if the drafters of the Treaty had intended 'indirectly' to mean via third parties they would have said so. The US position was explained by Gerard Smith, Director of the Arms Control and Disarmament Agency: 'the words "directly or indirectly" were used, as in many US laws, to prevent evasions of the prohibitions of the Treaty by indirect means, such as a transfer of a nuclear weapon through an intermediary which was not party to the Treaty'.<sup>14</sup> Transfer of the weapon design, components and materials, when supply of the weapon itself was prohibited, thus seems to me an 'indirect' provision of the weapon, seeking to evade a prohibition of the Treaty.<sup>15</sup>

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<sup>13</sup> Norman Dombey, 'The Nuclear Non-Proliferation Treaty', *Arms Control*, vol. 5, no. 13, 1984.

<sup>14</sup> 'Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons', Hearing before the US Senate Armed Services Committee, 91-2, 27 and 28 February 1969, p. 122.

<sup>15</sup> In *The Independent Nuclear State*, John Simpson gives the Foreign Office version of how the US passed on design information to the UK: 'The British design concept was then shown to the American laboratories, who commented on it and suggested ways of modifying it to create a production warhead similar to the equivalent American one. This procedure avoided the direct transfer of information on thermonuclear weapon designs.' The US account, as minuted at a US-UK meeting at Albuquerque in September 1958, is much simpler: 'We provided the British with blueprints, material specifications, and relevant theoretical and experimental information related to our XW-47 warhead, Mark 28, 44, 45 and 48 warheads', as permitted under US law and the US-UK agreement. When Kennedy arranged to sell Polaris missiles to Britain in 1961, it was much cheaper for the British to get the blueprints and specifications of the US warhead already designed for the Polaris system (probably the W-58 by then) than to develop a new one themselves. See Simpson, *The Independent Nuclear State*, London 1983, and for the Albuquerque meeting, Robert Norris, Andrew Burrows and Richard Fieldhouse, *Nuclear Weapons Databook*, vol. v: 'British, French and Chinese Nuclear Weapons', Boulder, CO and Oxford 1994, p. 48.

The 1958 Mutual Defence Agreement was drawn up long before the NPT, of course. But the situation has not changed. The Trident missile is supplied to the UK under an extension to the Polaris agreement. The MDA has been extended many times and is still in force. The US W-76 warhead carried by the older Trident missiles of the US fleet is also used on the British Trident missiles, albeit now manufactured at Aldermaston and Burghfield. At the very least then, the US–UK sharing of weapon designs raises serious questions about the compliance of both states to the Treaty. But the NPT, unlike later arms-control treaties, contains no mechanism for resolving disputes or interpretations of the text. If Iran, or another non-weapon state, is thought to have violated the safeguard provisions of Article III, the IAEA can report this to the UN Security Council. If the US, UK or another weapon state is thought to have violated Article I, IV or VI, the IAEA has no role.

## II. INSPECTIONS AND SAFEGUARDS: ARTICLES III AND IV

The field of international safeguards is now enormously complex, and of no great interest except to specialists. But it is basic to the NPT and the non-proliferation regime, as it is called, which the Treaty established. The IAEA inspection system is often in the news, with claims that Iraq, Iran, Libya, Syria or whoever has been in breach of its NPT safeguards obligations; rarely does one read allegations about breaches of NPT obligations by the US, UK or China.

Article III, dealing with inspection of nuclear facilities in the non-weapon states by the IAEA, took time to negotiate; it was left blank in the 1967 joint US–USSR draft. Eventually it was agreed that each non-weapon state would conclude a safeguards agreement with the IAEA that would allow the Agency to verify that there had been no ‘diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices’. Unlike earlier IAEA agreements, concluded after the Agency was established in 1957, those under the NPT apply to all peaceful nuclear activities in non-weapon states, not just designated facilities. A local bureaucracy is set up whereby the state reports all facilities containing nuclear material, and arrangements are made for determining the quantity of fissionable material going through them; each facility keeps ‘nuclear material’ accounts, as well as financial ones. This is not necessarily to the commercial disadvantage of non-weapon states: EU

members have their own Euratom safeguards and nuclear-accounting systems, as do the US and Russia.

The purpose of all the different IAEA safeguarding systems is the ‘timely detection of diversion of significant quantities of nuclear material from peaceful nuclear activities’ to other unknown activities and the ‘deterrence of such diversions by the risk of early detection’.<sup>16</sup> Any state subject to a safeguards agreement is obliged to give design details of any facility in which nuclear material is to be used, at a set time before the material arrives, to allow appropriate monitoring equipment to be set up. For example, Iran’s safeguards agreement specifies a 180-day notification period. In addition to acting as nuclear accountant, the IAEA installs surveillance equipment to monitor movements of nuclear material. It also applies containment measures, putting locks and seals on nuclear containers or storage areas, to prevent access without the IAEA’s knowledge. Nevertheless, the safeguards system for NPT-signatory non-weapon states allows any civil nuclear activity, provided it is subject to safeguards. Significantly, there is no prohibition on uranium enrichment or plutonium reprocessing, as long as they are under IAEA safeguards. As a legal adviser to the British Foreign Office has pointed out: ‘safeguards are designed to detect diversion of materials for military or unknown purposes. Nothing in the NPT or safeguards agreements legally prevents a state party to them from acquiring nuclear-weapon capability, for example by enriching uranium to high grades, reprocessing spent fuel and so on’.<sup>17</sup> Furthermore, a non-weapon state can withdraw nuclear material from safeguards for military purposes, provided it is used for submarine reactors rather than weapons.

Since the NPT came into force in 1970 I know of only one diversion of safeguarded material for weapon purposes: Iraq’s ‘crash programme’ of 1990–91.<sup>18</sup> There have been various examples of a violation of the safeguards regime, most recently by Iran. Yet it seems to me that the very

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<sup>16</sup> IAEA Information Circular 153, p. 28. INFCIRC 153, incorporating the NPT rules, was predated by INFCIRC 66; INFCIRC 193 replaces INFCIRC 153 for EU non-weapon states subject to Euratom safeguards; INFCIRC 263 deals with the voluntary safeguarding of UK facilities, etc. All Circulars are available from the IAEA website.

<sup>17</sup> D. M. Edwards, ‘International Legal Aspects of Safeguards and the Non-Proliferation of Nuclear Weapons’, *International and Comparative Law Quarterly*, vol. 33, no. 1, 1984.

<sup>18</sup> For details see 1998 briefing on ‘Iraqi Nuclear Weapons’ by the Nuclear Information Project, available on the Federation of American Scientists website.

bureaucracy associated with reporting flows of fissionable material does add confidence that no state subject to these safeguards is manufacturing a weapon. For example: whatever its long-term intentions, while Iran remains subject to the NPT safeguards system, although it is not impossible for it to be manufacturing a weapon, it is improbable. Its future intentions will in any event depend on its perceived security situation. A recently declassified CIA report from 1974 specified several states with the competence to develop weapons.<sup>19</sup> No non-weapon state party to the NPT has done so—apart from North Korea, which withdrew from the Treaty before testing its weapon. The CIA report considered that Israel had nuclear weapons and India was well advanced; only Pakistan has since developed them, and it is not a party to the NPT.

Article IV addresses the development of nuclear energy for peaceful purposes. It gives weapon states some obligations, as opposed to Article I where there are only prohibitions. It declares that parties to the Treaty ‘undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.’ Hence Iran’s complaint for many years that the US has discriminated against it, and violated its obligations under Article IV. The US would no doubt respond that Iran has long had a weapon programme, in violation of Article II, and therefore the US was entitled to discriminate against it.

### III. NUCLEAR DISARMAMENT: ARTICLES VI AND VIII

The final version of Article VI, committing states ‘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’, did not appear in early drafts. The US–USSR text relegated nuclear disarmament and arms control to the non-binding Preamble, which included ‘Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race’, and:

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the

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<sup>19</sup> Special National Intelligence Estimate, ‘Prospects for Further Proliferation of Nuclear Weapons’, 23 August 1974, available from George Washington University, National Security Archive.

elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general disarmament under strict and effective international control.

Most of that remains in the Preamble. The remit of the ENDC, after all, was to pursue nuclear and general disarmament—the Soviet aim—while the US insisted this take place ‘under strict and effective control’. Much of this is rhetoric rather than substance; but during the negotiations various non-aligned members of the ENDC, with Romania, attempted to harden the disarmament elements by adding a new article to the body of the Treaty. Thus Article VI first appeared on 18 January 1968, though Romania and Brazil continued to insist weapon states take greater responsibility for arms control than envisaged in that draft. But neither the US nor USSR were willing to move any further than the commitment to ‘negotiate in good faith’. Gerard Smith gave the US view that the weapon states could not and would not be bound to ‘achieve any disarmament agreement, since it is impossible to predict the exact nature and results of such negotiations’. So, notwithstanding the frequent assertions that the weapon states are not fulfilling their disarmament obligations, there are in fact no specific disarmament requirements on weapon states in the NPT.

How, then, was such a lop-sided treaty concluded, whereby the weapon states have effectively no obligations, while the non-weapon states agree to far-reaching constraints on their activities? The former responded that the 1963 Nuclear Test-Ban Treaty was also of general benefit but impinged only on weapon states, since non-weapon states had no arms to test. The NPT was to be considered an early step in a process of nuclear-arms control to be negotiated after the Treaty came into force. As a mechanism for this, Article VIII stipulated that a review conference be held every five years, ‘with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized’. Among these purposes were ‘the discontinuance of all test explosions of nuclear weapons . . . the liquidation of all existing stockpiles, and the elimination from national arsenals of nuclear weapons’. So the weapon states—or at least those present; France and China signed much later—told the non-weapon states to wait and see. The NPT was but a necessary step towards arms control. President Johnson duly announced the start of strategic-arms limitation talks with the Soviet Union when he recommended the

NPT to the US Senate; negotiations leading in turn to the Anti-Ballistic Missile Treaty and the SALT I and II Treaties.

The text of the NPT has not been amended since it entered into force in 1970; Article VIII assured that. Amendments could only take place after a special conference of all parties, and subsequent majority approval from all 35 members of the IAEA Board of Governors. At present these include Algeria, Brazil, India, Iraq, Mexico, Nigeria, Pakistan, Saudi Arabia, South Africa, and the five weapon states. Thus no amendment is ever likely to be agreed, which was the drafters' intention.

How does the UK decision to renew Trident fit with the NPT? As we have seen, replacing the Vanguard submarines does not technically involve nuclear weapons. Furthermore, in 1980 the Thatcher government announced that it was not only building a new generation of Vanguard submarines, but buying (or more accurately leasing) the Trident missile from the US. This necessitated manufacturing a new warhead. Yet no NPT party protested that this violated Article VI even though, unlike the recent Trident decision, that of 1980 involved replacing an existing nuclear weapon with a new one with enhanced capabilities. But as noted, there are no specific disarmament obligations in the NPT, nuclear or otherwise. Furthermore, as Michael Quinlan has emphasized, Article VI is just as much about negotiating a treaty on general and complete disarmament as it is on nuclear disarmament.<sup>20</sup> So if the UK were to be in violation of Article VI for modernizing its nuclear deterrent, this would also apply each time it modernizes its tanks or its rifles.

Finally, a quick look at the remaining Articles. In Article V, provision is made for non-weapon states to reap the 'potential benefits' when weapon states carry out nuclear explosions for peaceful purposes, such as excavating canals. Non-weapon states would pay a fee that 'will be as low as possible and exclude any charge for research and development'. Early enthusiasm for this idea evaporated after India tested a nuclear device in 1974 and called it a peaceful explosion. Article VII allows states to form regional groups to 'assure the total absence of nuclear weapons in their respective territories'—the Treaty of Tlatelolco is an example for South and Central America. Article IX states that the Treaty will enter

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<sup>20</sup> Michael Quinlan, 'The future of United Kingdom nuclear weapons: shaping the debate', *International Affairs*, vol. 82, no. 4, 2006.

into force after 40 states ratify it, in addition to the depositary states of the US, USSR and UK. It also defines a nuclear-weapon state as one which has tested a weapon before 1 January 1967, which excludes India and Pakistan. So the only nuclear-weapon states under the Treaty are now the five permanent members of the UN Security Council.

Article X allows states to withdraw from the Treaty if 'extraordinary events have jeopardized' their 'supreme interests'. Three months' notice must be given, together with a statement detailing the events. It also specifies that, twenty-five years after the Treaty had entered into force, a conference would be convened to decide whether the Treaty should be extended indefinitely, or for a further fixed period.

#### IV. 1995 EXTENSION CONFERENCE AND AFTER

When the NPT reached the twenty-five-year mark, in 1995, the Extension Conference was held in conjunction with the regular five-year review of the Treaty. Nuclear disarmament seemed on track. The collapse of the Soviet Union had much reduced the prospect of global nuclear war, whether by design or accident. The Comprehensive Test Ban Treaty was almost ready for signature. The US and post-Soviet Russia had agreed in the START talks to dispose of substantial numbers of weapons and their delivery vehicles. France had signed and ratified the NPT in 1992, announcing simultaneously that it would need to carry out further tests in the Pacific to ensure that its *force de dissuasion atomique* was reliable. China followed suit, with another test before joining up; but both claimed these were their last. When it announced its decision to join, France stated that this did not mark a change in policy, since it had declared when the NPT was opened for signature in 1968 that, although it would not sign, it would act in all respects as if it had done so.

The main question at the Review Conference was whether to extend the Treaty indefinitely, without conditions, or make extension conditional on progress with nuclear disarmament. In retrospect, it is not clear what reasons there could have been for an indefinite extension without conditions, but that is what was decided. Ten non-weapon states argued for a stronger review process and a twenty-five-year extension; but the weapon states won the day, albeit with China hedging its bets. The ten

had argued that extension without conditions implied international recognition for 'the perpetuation of the existence of the nuclear-weapon states'. The weapon states did agree to sign a CTBT no later than 1996; to cease producing fissionable material for weapon purposes and 'reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons'. This was the first time weapon states had accepted the goal of eliminating nuclear weapons, which went beyond their Article VI obligation to negotiate in good faith; but there was no time-scale and no targets were set. Nor was this commitment a treaty obligation: it was not considered by the US Senate and therefore successor US administrations are not bound by it. The Arab states had threatened to rebel if Israel did not subscribe to a nuclear-free Middle East, but were bought off with another non-binding resolution calling on all states in the region to join the Treaty and put all nuclear facilities under IAEA safeguards.

The Review Conference in 2000 marked the end of an era. The Clinton Administration would be gone by the beginning of 2001, and the outgoing President's priorities were now an Israel–Palestine settlement and concluding an agreement with North Korea, after six years of negotiations: the 1994 Agreed Framework between the two countries had proposed that North Korea would close its plutonium-producing reactor at Yongbyon in return for assistance with energy supplies from the US, Japan and South Korea. But Clinton's trip was delayed when the Middle East talks got into difficulties and in the event both sets of negotiations failed, leaving no time to pursue CTBT ratification. Then everything changed with George W. Bush and September 11. The new Administration believed neither in treaties nor in nuclear disarmament.

The 2000 Review Conference did agree on some 'practical steps' towards implementing Article VI. Step One urged the signature and ratification of the CTBT. Step Thirteen proposed further verification capabilities to assure 'compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world'. These were pious hopes rather than legal undertakings, as illustrated by Step Seven, which called for the conclusion of the strategic arms negotiations between Russia and the US while preserving the Anti-Ballistic Missile Treaty as 'a cornerstone of strategic stability'. Bush's response was to scrap the ABM treaty soon after taking office.

*Iraq, Iran, Syria*

Developments in Iran and Iraq were more pertinent to the application of the Treaty. From 1988 to 2003, stories about Iraq being close to possessing a nuclear weapon filled the news. From 2003 until late in 2007 identical claims appeared about Iran. North Korea, which now seems to have made peace with the Bush Administration on the same terms agreed with Clinton over a decade ago, really did test a nuclear weapon; but no one is particularly worried. The DPRK is invulnerable to US attack in any case: Seoul lies within artillery range of the forces north of the border.

Both Iraq and Iran were early NPT signatories. Britain hoped to sell several civil nuclear-power reactors to the Shah in the early 1970s; France supplied a large research reactor and ancillary equipment to Iraq. Joining the NPT was thus mandatory and both Iraq and Iran expected it would result in nuclear-weapon capability. Britain argued that plutonium from its light-water reactors was not suitable for use in weapons and that IAEA safeguards would in any case be in place; France argued similarly about the isotope-producing Osirak reactor it had sold to Iraq, which was particularly unsuited for plutonium production since it used highly enriched uranium as fuel (only 10 per cent of this was uranium-238, which is transformed into plutonium-239 inside a reactor). Nevertheless Israel bombed Osirak in 1981.

Iraq switched to a clandestine programme of uranium enrichment to produce a weapon. Progress was slow but when Iraq–Kuwait relations deteriorated in 1990, Iraq launched a ‘crash programme’ in an attempt to have one nuclear weapon in stock in case of any counter-attack. The plan was to use the highly enriched uranium supplied by France and the former Soviet Union to fuel Iraq’s operating reactors in order to make a bomb. This material was, of course, safeguarded by the IAEA and under Agency seal. It seems the Soviet fuel was only 80 per cent U-235 and needed to be further enriched before use. The 1990 crash programme is the context for the US statement before the 2003 invasion that Iraq had ‘only been a few months away’ from the bomb. In terms of Iraq’s own uranium-enrichment programme, the country was a few years away from weapon status when it invaded Kuwait.<sup>21</sup> It should be

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<sup>21</sup> John Chipman, ‘Iraq’s Weapons of Mass Destruction: A Net Assessment’, IISS Strategic Dossier, 9 September 2002.

recalled that Saddam Hussein had been fighting Iran as a proxy for the US and UK from 1980–88 and so was considered a friendly power at the time of the invasion. Immediately after the first Gulf War the IAEA removed all Iraq's enriched uranium, together with the calutrons and centrifuges used to produce it.

Iran suffered an estimated one million casualties during the war with Iraq, when Saddam used chemical weapons with great effect against both civilian and military targets. The Iranian nuclear-weapon programme began in the 1980s, probably as a response to Iraq's use of these weapons; Pakistan was willing to exchange old uranium-enrichment centrifuges and designs for Iran's oil. The war ended in 1988 but the enrichment continued, as did the weapon programme, albeit with diminished urgency. Operating the old centrifuges was hard, but building new ones was even more difficult. Iran could have withdrawn from the NPT, citing Iraq's use of chemical weapons against it as the 'extraordinary events' threatening its supreme interests. It did not do so. If it had, the US would presumably have had another reason to attack. According to the Iran–IAEA safeguards agreements, the Agency should have been informed 180 days before uranium was introduced into enrichment facilities, while a nuclear-weapon programme was a breach of Article II. In August 2002 at a press conference in Washington, the National Council of Resistance of Iran group claimed the existence of a secret nuclear facility at Natanz and produced satellite pictures of it.

The US invasions of Afghanistan and Iraq changed Iran's strategic situation completely. The Taliban regime had been anathema to the Shia clerics ruling Iran, while Saddam had decimated its young male population for eight years. Iran was a strong backer of both invasions. The overthrow of the two regimes allowed Iran to rethink its foreign policy and nuclear stance. It decided to cooperate with the IAEA, allow access to the enrichment facility at Natanz and reveal details of its past actions. It sought good relations with its Arab neighbours in the Gulf and with the EU. Three EU foreign ministers, Jack Straw, Dominique de Villepin and Joschka Fischer, flew to Tehran later in 2003 to agree a suspension of Iran's enrichment programme, promising in return supplies of enriched uranium, economic assistance and negotiations on security. Iran was also persuaded to sign the Additional Protocol, which allowed more intrusive inspections by the IAEA, as a voluntary measure to show goodwill.

Unfortunately no meaningful security guarantees could be offered to Iran without the US, and negotiations petered out. Furthermore Khatami, who was seen as favouring good relations with Western countries, was replaced in 2005 by Mahmoud Ahmadinejad. At the beginning of 2006 Iran withdrew its voluntary adherence to the Additional Protocol and resumed enrichment at Natanz. Nevertheless, it still adheres to the NPT and its original safeguards agreement, under which an IAEA inspector is based at Natanz, along with 24-hour surveillance equipment. But the pre-2002 introduction of nuclear material into the centrifuges without 180 days' notice was a violation of Iran's safeguards agreement, as were other failures to account for movement of nuclear material within Iran. The IAEA therefore reported Iran to the UN Security Council in March 2006. A test of wills ensued, Iran claiming its enrichment programme was purely civil, the US and EU saying they were not satisfied that was the case. The Security Council passed resolutions suspending Iran's right to enrich uranium, which Iran ignores on the grounds that it is entitled to enrich under the NPT. True, but the Security Council also has the right to suspend Iran under Article 41 of Chapter VII of the UN Charter, which allows the UNSC to decide on measures, 'not involving the use of armed force', to back up its decisions where it perceives a threat to peace. At the time of writing, the situation remains unresolved. But where a matter of law is at stake—as in this case, since Iran claims the right to enrich uranium under the NPT—Article 36 of the UN Charter states that the dispute 'should as a general rule be referred to the International Court of Justice'.

In December 2007 the US issued a National Intelligence Estimate stating that Iran had ceased its weapon programme in 2003. Thus it seems Iran wishes to exercise the flexibility allowed by the NPT to acquire a weapon option, rather than a weapon itself. The situation will not change as long as the IAEA inspectors remain in Iran.

Three months earlier, on 6 September 2007, Israeli aircraft attacked a building at Al Kibar, in the Dayr az Zawr region of eastern Syria. In April 2008, US intelligence officials showed a video and satellite photos of a site in eastern Syria that had been levelled, together with satellite images from 2005 and 2006 that depicted a large building under construction. A picture of the interior and computer-generated diagrams of the outside showed a reactor very similar to the North Korean one at Yongbyon. The briefing stated that the reactor had not been fuelled at the time of

the raid.<sup>22</sup> The Syrian authorities had bulldozed the site after the attack. Syria possesses a small Chinese research reactor, and had been interested in buying a larger one for many years. In 1998 the Syrians signed an agreement with Russia for the construction of a nuclear-research centre, including a 25MW light-water research reactor. American pressure ensured nothing came of this, but the *Financial Times* reported in 2003 that Moscow's Ministry of Atomic Energy had told them that Syria still wanted the project, and Russia 'in principle' could supply it. Again the US prevented an agreement. It is thus certainly credible that Syria was trying to build a reactor. According to the April 2008 briefing, construction had begun in 2001 and North Korean personnel had been visiting the site since then.

The Yongbyon device is modelled on the British Magnox reactors. Calder Hall was the first, opened by the Queen in 1956 and operated throughout its long life—it closed down in 2003—to produce plutonium for military use. It is a particularly easy reactor to build and fuel: neither enrichment facilities nor specialized steel pressure vessels are required; North Korea was able to build the Yongbyon reactor without outside help. So, the story makes sense. But was it a breach of the safeguards agreement? Syria has an obligation to report the planning and construction of any nuclear facility to the IAEA 'in a timely manner', which might be taken to mean no later than 180 days before the introduction of fissile material, as is the case with Iran. But it is impossible to determine when the fuel for the reactor would have been installed. Indeed there is evidence that North Korea could not supply fuel for the reactor because all its available fuel was safeguarded at Yongbyon by both IAEA and US government personnel.<sup>23</sup> The IAEA was unhappy about the incident, not only because it received no notification from Syria about the construction of the reactor, but because neither Israel nor the United States had informed the Agency about their intelligence findings prior to the raid.

### *Israel, India, Pakistan*

Israel, India and Pakistan have consistently refused to join the NPT as non-weapon state parties. This is no surprise: all have manufactured nuclear weapons which are central to their defence strategy. Israel and

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<sup>22</sup> 'Background Briefing with Senior US Officials on Syria's Covert Nuclear Reactor and North Korea's Involvement', 24 April 2008; available from the Director of National Intelligence website.

<sup>23</sup> Dombey, 'At Al Kibar', *London Review of Books*, 19 June 2008.

India had weapon programmes well before the NPT came into force. Israel thought Arab armies could overwhelm it unless it had nuclear weapons—an identical argument to that of NATO in Western Europe during the Cold War. Its weapon programme dates from 1957, when France agreed to supply a nuclear reactor and fuel-reprocessing facility that could produce plutonium. Built at Dimona, it went critical in 1962; Israel has thus been accumulating weapons for 40 years and probably has a comparable number to the UK.<sup>24</sup>

Following China's test in 1964, India also decided to start weapons development in addition to its civil nuclear programme. Canada had provided a reactor at Trombay in 1954, together with facilities for handling spent fuel, which India used to extract plutonium. A nuclear explosive device was tested in 1974, which India announced was for peaceful purposes. Thus India and Israel have very similar programmes: both depended initially on a heavy-water reactor and spent-fuel facilities provided by another state, without IAEA safeguards. The strategic rivalry between India and China, and the border skirmish in 1962, meant India was bound to react to the Chinese test by developing a weapon of its own.

Once India had demonstrated its nuclear capability, it was not surprising that Pakistan followed suit. Its route, however, was different from Israel's and India's. Instead of extracting plutonium from a reactor's spent fuel, Pakistan constructed a uranium-enrichment plant. In the early 1970s Holland, West Germany and the UK had combined their expertise on building centrifuges for enrichment in a company called URENCO, with sites at Almelo, Gronau and Capenhurst. When A. Q. Khan, a Pakistani metallurgist working at Almelo, returned home in 1975, he carried with him a full set of documents and blueprints. A year later he was appointed by President Bhutto to run the Pakistani enrichment programme. In 1998 both India and Pakistan carried out nuclear tests.

Yet three 'rogue states'—India, Pakistan and Israel—is surprisingly few, given the large number of countries with nuclear-power programmes. Only Iraq has diverted IAEA-safeguarded nuclear material for weapon use. Israel's and India's acquisition of an unsafeguarded reactor is unlikely to recur; the US and some EU states rail at Iran for building a new reactor

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<sup>24</sup> See for example *SIPRI Yearbook 2007: Armaments, Disarmament and International Security*, Stockholm 2007.

at Arak but that device is safeguarded. While Iran adheres to the NPT, it is unlikely that its spent fuel or other irradiated material will be used for weapon purposes, and the IAEA inspectorate also provides reassurance that Iran's enrichment facilities are not used for similar ends.

At the Review Conference in 2000, the weapon states renewed their 'unequivocal undertaking' to achieve 'the total elimination of their nuclear arsenals', under Article VI. Various steps for unilateral and multilateral reductions in their strategic and tactical nuclear forces were adopted. In 2002, under the Strategic Offensive Reductions Treaty between the US and Russia, substantial long-term nuclear-arms reductions were agreed. Since then, however, the NPT has come under severe strain. The *Wall Street Journal* noted during the 2005 Review Conference that:

North Korea is in open defiance of the Treaty, Iran is testing its limits, and a Pakistan-based black market has shown how easy it is to end-run the system. Suspicion of the Bush Administration also is high, fuelled by its interest in developing new nuclear weapons and its rejection of, among others, the Comprehensive Test Ban and Anti-Ballistic Missile treaties.<sup>25</sup>

These developments have brought into question the usefulness of the non-proliferation regime based on the NPT. The US has withdrawn from the ABM Treaty and the Comprehensive Test Ban Treaty, signed in 1996, is still not in force. The 2005 Review Conference failed to agree on measures to increase the effectiveness of the non-proliferation regime. Negotiations on a Fissile Material Cut-off Treaty to end the production of highly enriched uranium and plutonium have stalled. Nuclear weapons continue to play important roles in the defence postures of each possessor; there is no sign of them seriously considering a reduction in their arsenals, let alone negotiations leading to their elimination. Israel, Pakistan and India remain outside the NPT and the US–India agreement on nuclear cooperation, if ratified, threatens to sideline the Treaty.

Furthermore, the Bush Administration has refused to consider itself bound by its predecessor's commitment in 2000 to work towards the elimination of the US nuclear arsenal. It has continued to request funds from Congress for the development of new weapons. Robert Joseph, then Under-Secretary of State for Arms Control and International Security—the principal State officer for counter-proliferation matters—has said that

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<sup>25</sup> Carla Anne Robbins, 'US Faces 2 Fronts at Nuclear Treaty Talks', *Wall Street Journal*, 29 April 2005.

his 'starting point and first conclusion' in formulating national-security strategy is the fact that 'nuclear, biological and chemical weapons are a permanent feature of the international environment', while his second conclusion was that nuclear, biological and chemical weapons 'have substantial utility'.<sup>26</sup> Since 2006, however, Democratic control of Congress has blunted some of this pro-nuclear-weapon rhetoric.

## V. ASSESSMENT

The *NPT* is a discriminatory treaty which gives privileges to the five weapon states, allowing them to continue to develop their nuclear arsenals while prohibiting others from doing the same. Clearly that is neither a stable nor an equitable arrangement. But the *NPT* was never intended to exist by itself; it was conceived as an early step towards nuclear-arms control and disarmament. It was (and is) a non-dissemination treaty, aiming to limit the number of states which possess nuclear weapons. Through its Preamble and Article VI, it envisaged other measures, in particular a comprehensive test-ban treaty and an agreement to cut off supplies of fissionable material for weapon use. The *NPT* also established regular reviews, which could serve as opportunities for negotiations on nuclear disarmament, arms control and general disarmament.

There has always been a tension between the non-weapon states and the weapon states where nuclear disarmament is concerned. While the Treaty was carefully worded to avoid committing any weapon state to particular measures of nuclear disarmament, or disturbing the nuclear-weapon arrangements of the parties as of 1968, it was clear from the beginning of the *ENDC* negotiations that this was untenable. It could hold only if the weapon states made visible progress on nuclear disarmament and arms control. For the *NPT* to retain the backing of the majority of states, there have to be political obligations on the weapon states to achieve something concrete, beyond the legal obligation of Article VI that they negotiate in good faith. This was clearly set out by *UN* General Assembly Resolution 2028 of November 1965, which stated that a future non-proliferation treaty 'should embody an acceptable balance of mutual obligations and responsibilities between the nuclear and non-nuclear powers'. Otherwise, as Judge Shahabuddeen pointed out at

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<sup>26</sup> Testimony of Robert Joseph, Senate Armed Services Committee, 23 March 1999.

the International Court of Justice in 1996, when the Court issued an Advisory Opinion on the legality of the use of nuclear weapons in war, 'the real thrust [of the NPT] was not so much to prevent the spread of a dangerous weapon, as to ensure that enjoyment of its use was limited to a minority of states'. He added: 'the difference in perceived objectives is material to the correctness of the interpretation to be placed on the Treaty'.<sup>27</sup>

To reiterate: the NPT did not stand alone; it was the start of a process. The Johnson Administration accepted this. Although the US resisted all attempts to include concrete nuclear-arms control and disarmament measures in the text of the NPT, Johnson announced that negotiations with the USSR on strategic-arms limitation and an anti-ballistic missile treaty would begin when he sent the Treaty to the Senate. Lord Chalfont, the British Minister for Disarmament in Harold Wilson's Labour government, had stressed the previous year that:

the principle must be accepted and clearly understood that, if a non-proliferation treaty is not followed by serious attempts amongst the nuclear Powers to dismantle some of their own vast nuclear armoury, then the Treaty will not last, however precise its language may be. There is in my mind no doubt that if the non-nuclear Powers are to be asked to sign a binding non-proliferation treaty it must contain the necessary provisions and machinery to ensure that the nuclear Powers too take their proper share of the balance of obligations.<sup>28</sup>

The judges at the International Court of Justice also realized the NPT was part of a process that had made some progress, but which still had much to do. In the same 1996 Advisory Opinion, Judge Vereshchetin stated that:

the construction of the solid edifice for the total prohibition on the use of nuclear weapons is not yet complete. This, however, is not because of the lack of building materials, but rather because of the unwillingness and objections of a sizeable number of the builders . . . At the same time, the Court has clearly shown that the edifice . . . is being constructed and a great deal has already been achieved.<sup>29</sup>

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<sup>27</sup> International Court of Justice, Advisory Opinion, 8 July 1996.

<sup>28</sup> ENDC, Meeting 299, 25 May 1967, pp. 7–8.

<sup>29</sup> International Court of Justice, Advisory Opinion, 8 July 1996.

The set of issues that U Maung Maung identified in 1967 are still outstanding, forty years on. The non-weapon states consider that the weapon-state parties to the NPT are not fulfilling their (political) obligations towards nuclear-arms control and disarmament—a comprehensive test-ban treaty; an agreement on the cut-off of all production of fissile materials for weapon purposes and on their diversion to peaceful use; a halt to production of nuclear weapons themselves; a verified freeze of the production of nuclear delivery vehicles; and progressive reduction and final destruction of all stockpiles of nuclear weapons and carriers. The Director-General of the IAEA, Mohamed ElBaradei, agrees; in 2004 he stated:

We must abandon the unworkable notion that it is morally reprehensible for some countries to pursue weapons of mass destruction yet morally acceptable for others to rely on them for security—and indeed to continue to refine their capacities and postulate plans for their use.<sup>30</sup>

This call to the weapon states to fulfil their (legal and political) obligations to negotiate reductions in their nuclear arsenal was reiterated by Kofi Annan just before he left office.

All of the NPT nuclear-weapon states are modernizing their nuclear arsenals or their delivery systems. They should not imagine that this will be accepted as compatible with the NPT. Everyone will see it for what it is: a euphemism for nuclear rearmament . . . By clinging to and modernizing their own arsenals, even when there is no obvious threat to their national security that nuclear weapons could deter, nuclear-weapon States encourage others—particularly those that do face real threats in their own region—to regard nuclear weapons as essential, both to their security and to their status. It would be much easier to confront proliferators, if the very existence of nuclear weapons were universally acknowledged as dangerous and ultimately illegitimate.<sup>31</sup>

While the NPT was effective during its first thirty years in reducing the spread of nuclear weapons—and Russian–US cooperation has led to the decommissioning of over half the world’s nuclear arms—little progress on the core issues of nuclear disarmament has been made. Neither the Comprehensive Test Ban Treaty nor a Fissionable Material Cut-off Treaty

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<sup>30</sup> *New York Times*, 12 February 2004.

<sup>31</sup> Speech of 28 November 2006, available from the UN Department of Public Information website.

is yet in force, nor are there treaties to take forward the strategic-arms agreements of previous years. With a new administration in Washington in 2009, it is possible US policy will revert to reducing the number and importance of nuclear arms. That makes sense from the US point of view as it is much stronger than any possible rival in conventional arms, whereas the Soviet Union demonstrated in the 1960s that it could equal US nuclear firepower; and both Russia and China could do so again in the next twenty years. If the US does return to a more traditional multi-lateral policy, the NPT will be a central plank in the framework governing nuclear trade and global security. If it does not, the NPT will join the ABM treaty, the League of Nations and other historical relics; but the world will be less secure. Those strategists and politicians who worry about nuclear proliferation should spend less time attacking small countries: the road to a world with significantly fewer nuclear weapons passes through Washington, Moscow, Paris, Beijing and London, not Damascus, Tehran and Pyongyang.

## US Replies to Questions from NATO Allies on the Draft Non-Proliferation Treaty

*What may and what may not be transferred under the draft treaty?*

The treaty deals only with what is prohibited, not with what is permitted. It prohibits transfer to any recipient whatsoever of 'nuclear weapons' or control over them, meaning bombs and warheads. It also prohibits the transfer of other nuclear explosive devices because a nuclear explosive device intended for peaceful purposes can be used as a weapon or can be easily adapted for such use. It does not deal with, and therefore does not prohibit, transfer of nuclear delivery vehicles or delivery systems, or control over them to any recipient, so long as such transfer does not involve bombs or warheads.

*Does the draft treaty prohibit consultations and planning on nuclear defense among NATO members?*

It does not deal with allied consultations and planning on nuclear defense so long as no transfer of nuclear weapons or control over them results.

*Does the draft treaty prohibit arrangements for the deployment of nuclear weapons owned and controlled by the United States within the territory of non-nuclear NATO members?*

It does not deal with arrangements for the deployment of nuclear weapons within allied territory as these do not involve any transfer of nuclear weapons or control over them unless and until a decision were made to go to war, at which time the treaty would no longer be controlling.

*Would the draft prohibit the unification of Europe if a nuclear weapon state was one of the constituent states?*

It does not deal with the problem of European unity, and would not bar succession by a new federated European state to the nuclear status of one of its former components. A new federated European state would have to control all of its external security functions including defense and all foreign policy matters relating to external security, but would not have to be so centralized as to assume all governmental functions. While not dealing with succession by such a federated state, the treaty would bar transfer of nuclear weapons (including ownership) or control over them to any recipient, including a multilateral entity.

Source: Department of State, *Foreign Relations of the United States 1964–1968*, Volume XI: 'Arms Control and Disarmament', Washington, DC 1997, Document 232, Tab A, 28 April 1967.