

Perspectives

The NPT Review Process: Identifying New Ideas to Strengthen the Regime

Jayantha DHANAPALA

The origins of the decision document *Strengthening the Review Process for the Treaty*, adopted at the 1995 Review and Extension Conference of the Treaty for the Non-Proliferation of Nuclear Weapons (NPTREC), are now well known. The innovative concept was first proposed by the Foreign Minister of South Africa in his statement during the general debate of the conference. Thereafter it was fleshed out in the President's consultations with significant contributions from the German delegation and others before it was accepted as part of the tripod that ensured the adoption of the decision to extend the NPT indefinitely without a vote. That tripod consisted of the two decision documents *Principles and Objectives for Nuclear Non-Proliferation and Disarmament* and *Strengthening the Review Process for the Treaty* and the *Resolution on the Middle East*.¹ Absent the tripod there could have been no decision on the extension of the NPT without a vote. There was also no agreed rule of procedure on voting on the extension decision. If a vote had been necessary, an acrimonious procedural wrangle or a "hung" conference could well have been the outcome with seriously adverse consequences for the durability and credibility of the NPT regime and the international security order it underpins.

These irrefutable facts need to be recalled as we reach the midway point between the conferences of 1995 and 2000—particularly since claims continue to be made that what was achieved in 1995 was an "unconditional" indefinite extension. Moreover, the importance of 1995 as a watershed demanding a fundamentally different approach to the review process does not appear to have been grasped and, instead, a "business as usual" attitude is being self-righteously adopted by some countries.²

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The First Session of the Preparatory Committee and its Implications

The only opportunity, so far, of assessing the efficacy of the enhanced review process was the first session of the Preparatory Committee (PrepCom) of the 2000 NPT Review Conference that was held from 7–18 April 1997. The record attendance of 149 States parties present, the apparently smooth agreement on the distribution of posts among the various groups despite the Eastern Europeans signalling their claim for the presidency of the 2005 Review Conference, the eventual absence of both Yugoslavia and the Democratic People's Republic of Korea—thereby postponing the complex task of evaluating their credentials for the next session, and the speedy resolution of other procedural issues set the stage for a successful launch of the post-1995 review process. In fact, the attendance was sporadic and relatively low-level, with many small delegations having to deploy their staff at other United Nations meetings taking place in New York at the same time. Only about a quarter of the delegations attending the meeting took part in the general debate.

The Non-Aligned and Others Group presented a working paper with its traditional positions on nuclear disarmament and other issues stated clearly but did not follow up with an organized pursuit of these. On International Atomic Energy Agency (IAEA) safeguards, the paper called upon those States that have not already signed agreements to do so because of the importance of safeguards as a guarantee of compliance with Article III. It also called for full-scope safeguards on the transfer of nuclear material or equipment to non-nuclear-weapon States (NNWS).

For the first time the five nuclear-weapon States (NWS) made a joint statement—the main significance of which lay in the fact that China was a party to it, agreeing to be in the company of the other four in the first post-extension meeting of the NPT. China did, however, submit its own proposals for inclusion in the report separately.

Another development was the higher profile of non-governmental organizations at the meeting, although improvements on their participation to bring it on par with international human rights and environment gatherings are still desirable. The substantive discussion on the three clusters of subjects, following the three-committee pattern of review conferences, was to have been encapsulated in a Chairman's Paper with the points of general agreement and the proposals made for further action in subsequent

PrepCom meetings and, eventually, the review conference. However, no consensus was reached in the discussion of the recommendations of the meeting. As a compromise,

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appropriate language was found after the Chairman's Paper was adopted as a working paper to be taken into account for future work.³

This last-minute controversy has been interpreted by some as the idiosyncratic behaviour of a particular delegation interfering with the harmonious flow of the meeting. In fact, the incident could prove to be more than an accident and may well be the tip of the iceberg that the review process may encounter unless correct-

ive action is taken well in advance. It was an illustration of the deep differences that divide the NPT regime and, if repeated at a review conference, could result in failure to adopt a Final Declaration by consensus. Most delegations were exploring the expanded scope of the review process and setting the stage for its future use. They were not ready to begin serious work on the substantive issues immediately until all of the procedural matters were clarified. We can therefore expect a more focused and engaged approach from all delegations at the April 1998 session of the PrepCom with some priorities being established among the many proposals that have been listed and more attention being given to some clusters than others. Delegates will, at that stage, be better prepared to work the review process to the full.

Between now and then the global discussion on international security and disarmament is certain to influence approaches to the meeting and the entire review process. The stalemate in the Geneva-based Conference on Disarmament (CD), the debate and outcome at the First Committee of the 1997 session of the United Nations General Assembly, the negotiations on the supply of nuclear technology to certain NPT countries by NWS, the future of American-Russian disarmament negotiations and in particular the fate of important treaties like the START II in the Russian Duma and the Comprehensive Test-Ban Treaty (CTBT) in the United States Congress and other disarmament-related developments will inevitably have their impact.

The NPT review process functions in the overall global security context and while NPT-specific subjects will have their own dynamics, it would be unrealistic to

expect States parties not to have accompanied baggage from other encounters. Thus, the need for careful disarmament diplomacy on all sides is important as States safeguard their security interests and yet endeavour to identify common security interests. In the period after 1995, the progress made in universalizing the NPT has been significant. With the decision of Brazil to join the NPT, we are only four States short of full universality. There is therefore some irony in the role of non-signatories in influencing the disarmament debate with serious repercussions for the NPT regime. For example, the wide media exposure of the controversial intelligence reports of one non-signatory State is being used as "hard evidence" to justify the suspension of nuclear supplies to a NPT party in total disregard of the IAEA's reports. Differences in reacting to instances of non-compliance is also a contentious issue not conducive to the strengthening of the NPT. If the review process is to be the means of ensuring a more rigorous accountability of how treaty parties fulfil their obligations, then subjective judgements and unilateral actions must be replaced by collective action by all treaty parties, preferably arrived at through consensus.

Suggestions to Strengthen the NPT Regime

In a situation where treaty parties appear to be losing sight of their primary obligations to each other in the strengthening of the treaty, two steps seem necessary in order to prevent a total breakdown of mutual confidence and to ensure a rededication to the fundamental goals of the treaty. The first is the vital need to form a voluntary group of "bridge builders" drawn from all regional and political groups to establish links among the treaty parties and to act as a "fire brigade" to defuse controversies and seek negotiated solutions to problems as they arise. Several delegations qualify eminently for this role and have already helped in this task informally at previous NPT conferences. At times, this role is tied to the personality of individual diplomats but most often a country is uniquely placed to play the role of a go-between or bridge builder. These countries must assert a leadership role in the NPT and forge a coalition to identify emerging problems and endeavour to find acceptable solutions to them. Their function is not to replace the chairpersons of the PrepCom sessions or the presidents of the review conferences and whatever mechanisms these office-bearers of the formal NPT gatherings may create as trouble-shooting aids. They will act informally and through quiet diplomacy to assist the smooth functioning of the meetings—especially in the important periods in between meetings when little is done to address the issues.

It would be invidious to attempt to identify delegations that could be possible members of this group or comprise its nucleus drawing on others to join them as and when the need arises. The office-bearers of the future

sessions of the PrepCom and the 2000 Review Conference have not all been identified and the group could begin to act as a search committee for the right candidates. We have learned through experience that having the right persons from the groups eligible to nominate them is crucially important in the conduct of conferences and meetings. This cannot be left to fortuitous circumstance. The value of such a group supplementing the efforts of the office-bearers of NPT gatherings is that they would bring into play the political influence of their countries and employ their diplomatic networks to undertake the efforts that are needed to ensure the smooth functioning of the review process.

The need for such an informal group arises precisely because the NPT, unlike some other treaty regimes, does not have a permanent secretariat or clearing-house to function as a grievance mechanism or simply to use its good offices to create the desperately needed glue to hold the NPT together. Of course, it is not necessary that every treaty regime should be serviced by a secretariat and indeed States are beginning to be concerned about the costs of maintaining such bureaucracies—however useful they may be. The IAEA existed before the NPT was signed and was eminently suited to perform the functions involved in Articles III and IV of the treaty. But other articles fall outside the ambit of the IAEA and it is time that States parties consider the possibility of electing a governing council for the NPT to act as an ombudsman to receive complaints about non-compliance and difficulties which States parties may be experiencing in the treaty regime. The Nuclear Suppliers Group and the Zangger Committee function outside the strict parameters of the NPT and do not derive their mandates from the entire NPT membership. These bodies are not permanent establishments like secretariats. The NPT needs a body comparable to the Executive Councils in the Organisation for the Prohibition of Chemical Weapons and the future CTBT Organization which could then make recommendations to the general membership and, if necessary, to the Security Council.

Therefore, a second step that is necessary is the creation of a body fully representative of the entire NPT membership which could be elected at the next review conference. This is well within the competence of a review conference and does need an amendment to the treaty. It could help to strengthen the regime by hearing complaints and reporting to the sessions of the PrepCom and the review conferences.⁴ Allegations of non-compliance are freely bandied about and many NPT parties are tried in the media with little opportunity of confronting their accusers. These allegations are also not shared with other NPT parties despite their far-reaching implications for the NPT regime. The recent incident in the context of the CTBT about an alleged test illustrates the susceptibility to manipulation of news stories in the absence of verification

procedures.⁵ Grievances are also building up on the implementation of Article IV while export policies of some NWS are being subjected to strong criticism. There is a need for structured treatment of this issue within the NPT. Failure to do so will result in the treaty becoming increasingly lop-sided. An even-handed approach to problems within the treaty can be fashioned through new mechanisms which will increase the confidence of all of the treaty parties and bring into the open any non-compliance before action is taken by non-NPT bodies. There is a grave danger that persistent suspicions without verifiable proof to substantiate them and to justify the withholding of NPT benefits may drive some States out of the NPT regime instead of keeping them within it and under the constraints of international law.

The Review Process as an Agenda-Setting Exercise

The review process has also a useful function as an agenda-setting exercise as far as nuclear non-proliferation and nuclear disarmament is concerned. The *Principles and Objectives* decision document read in conjunction with the treaty itself provided guidelines for action between review conferences. These guidelines need to be updated from time to time in relation to ongoing developments. The record since 1995 will show both positive and negative developments. Since the review process is henceforth to be both retrospective and prescriptive, greater attention to framing the agenda for the next period should be paid by member States of the regime. This is especially necessary because it is the increasing perception of some States that the future disarmament agenda is being arbitrarily confined to the non-proliferation of weapons of mass destruction. Maximum use should be made of the enabling provisions in paragraph 7 of the decision document on *Strengthening the Review Process* short of amending the treaty. Thus the creation of new mechanisms and the drafting of a new *Principles and Objectives* document at the 2000 Review Conference is entirely possible, although there is no doubt that delegations without the political will to do so will employ legal casuistry to block this.

The area in which some progress appears possible is in security assurances to non-nuclear-weapon States by the five NWS. It was already agreed in the 1995 Review and Extension Conference that "further steps should be considered" and that these "could take the form of an internationally legally binding instrument". This remains a common factor among the NNWS especially in the Non-Aligned Group, although there are differences of opinion that have emerged on where this should be negotiated and in what form. A key factor governing a nation's decision to acquire a nuclear weapon is its security and a treaty to guarantee States that they would not be attacked by

nuclear weapons and would be assisted were they to be attacked would contribute immeasurably to strengthening the resolve of States to remain within the treaty. This assurance was urged by the Non-Aligned Group when the NPT was being negotiated and India and Pakistan might have been in the NPT had this proposal prevailed.

In the contemporary global security context, the NPT must demonstrably serve the national interests of all States parties and not only of some of them. The argument that over 100 States already enjoy these security assurances as a result of being within nuclear-weapon-free zones only enhances the case for a treaty guaranteeing assurances to all of the NNWS in the NPT. Such a treaty could even have the reservations that are present in Security Council resolution 984.⁶ If we are ever to achieve universality, this is also one way of doing so. The lack of a positive response from four of the five NWS betrays a serious insensitivity to a key factor in holding the treaty together. The currently ambiguous policy of some NWS on the right to retaliate with nuclear weapons in the event of a chemical or biological weapons attack on them or their allies is seen as an obstacle to granting security assurances in treaty format on a global basis. In international law, belligerent reprisals in self-defence must be capable of stopping an attack, should be in proportion to the injury suffered and must be consistent with the law applicable to armed conflict which includes the principles and rules of humanitarian law. George Bunn has recently argued that existing commitments of the United States to NNWS in the NPT are legally binding but that because the United States is not of that view, a negative security assurance treaty should be negotiated.⁷

The working paper of the Non-Aligned Group at the first session of the PrepCom also referred to the need for nuclear material transferred from military uses to peaceful activities to be placed under IAEA safeguards. A Norwegian paper called for voluntary measures by all "nuclear-capable States" to increase transparency on holdings of weapons-grade fissile material, plutonium and highly enriched uranium as a confidence-building measure. The Chairman's working paper took note of the United States/Russian Federation/IAEA trilateral initiative on fissile material, welcoming the decision to place under safeguards material no longer needed for defence purposes. This is another confidence-building measure on which the United States, the Russian Federation and the IAEA can report progress to future meetings in the review process. Details of the amount of material and the methods used to render the material unusable for defence purposes would be helpful, especially since the fissile material cut-off is still to be achieved and concerns abound over the large amounts of existing stocks. As a precedent for the future when more nuclear disarmament takes place, the United States and the Russian Federation would be well advised to pursue methods of disabling the

plutonium irretrievably. Storing it or recycling it in civilian plants will remain a threat to global security.

Four countries have signed on to the recently adopted Model Protocol of the IAEA to implement Part 2 of the measures of its 93+2 Programme. A decision in the next review conference to encourage more signatures would help to create confidence that the NPT provisions are being complied with. At the same time, more information on how the IAEA proposes to implement this protocol would be expected by the treaty parties. Meanwhile, fears of nuclear terrorism and rumours of unaccounted suitcase bombs are not merely the stuff of Hollywood films. They have some credence because of disturbing reports of the safety of nuclear weapons in NWS and may well be the legitimate subject of discussion during the review process in terms of compliance with Articles I and II.

Nuclear Disarmament

The most contentious area will remain the question of nuclear disarmament, especially with the NWS, in two of the three decisions in the 1995 NPTREC, committing themselves to the goal of eliminating nuclear weapons. This was not specifically reiterated in the joint statement of the five at the first session of the PrepCom to the disappointment of many, but they will nonetheless be held to this during the review process. The nuclear doctrines and postures of the NWS have not changed since the Cold War ended, although there is some hope that the United Kingdom policy review may yield positive results. In the Russian Federation, in a strange reversal of roles since the Cold War ended, a perception of a NATO superiority in conventional arms (and possibly NATO enlargement over which Russia continues to have concerns despite the signature of the Founding Act of May 1997) is leading to a greater reliance on nuclear weapons in addition to its newly adopted first-use policy. Reports also have appeared about the design and manufacture of new nuclear weapons in the United States. The advisory opinion of the International Court of Justice of 8 July 1996 significantly expands the interpretation of Article VI by stating "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."⁸ The demands for nuclear disarmament have increased with the usefulness of these weapons and their legitimacy is more frequently questioned in the post-Cold War situation.

A number of influential reports such as those from the Stimson Center, the Canberra Commission and the United States National Academy of Sciences (NAS) have recommended either total elimination or drastic reductions to a few hundred warheads, thereby creating conditions where a prohibition of nuclear weapons would be possible. The NAS report specifically states: "How soon the United

States and Russia could move to a level of a few hundred warheads, and the other three declared nuclear powers to equal or lower levels (perhaps zero), would depend more on political than technical factors."⁹ The Helsinki Accords of March 1997 between Presidents Clinton and Yeltsin (envisaging a level of 2,000 to 2,500 deployed strategic nuclear warheads) are but an interim step towards deeper cuts. Although the argument about Duma ratification of START II is valid, it need not hold up progress. Other steps may be taken in terms of nuclear disarmament, such as the removal of warheads from their delivery vehicles, the de-alerting of nuclear forces through a transparent reduction of the launch readiness of nuclear weapons, and other practical steps set out in some of the reports referred to earlier (especially that of the Canberra Commission). Precisely because of the danger of a nuclear war being started by error or accident, especially in conditions of weak management, action is urgently needed to change old practices regarding the deployment of nuclear weapons. Agreements on detargeting are inadequate because these are quickly reversible. The statement of the Canberra Commission summarizes the symbiotic link between nuclear proliferation and nuclear disarmament in these words: "Nuclear weapons are held by a handful of States which insist that these weapons provide unique security benefits, and yet reserve uniquely to themselves the right to own them. This situation is highly discriminatory and thus unstable; it cannot be sustained. The possession of nuclear weapons by any State is a constant stimulus to other States to acquire them."¹⁰

The Global Debate on Disarmament and the Review Process

The current stalemate in the CD has led to fresh attention to the problem of "linkage"—the tactic of holding progress in one area ransom for progress in another. This is not a new development in negotiations and has been adopted at various times by various countries, linkage between progress in human rights and trade concessions being one example. Such negotiating positions are also not inflexible and have been known to soften and change with the demonstration of a will to have a meaningful dialogue. In the field of disarmament, that dialogue appears to be in desperate need of revival. A Fourth Special Session of the General Assembly devoted to disarmament has already been agreed upon by consensus, although a date has not been decided on. The United Nations Secretary-General's reform proposals have recommended that the principal features of special United Nations conferences which have focused attention on important issues providing a basis for agreement on measures to deal with them might be usefully incorporated in the working methods of the General Assembly. He has suggested therefore that a high-level, one-week thematic segment be discussed every year

and has proposed "the financing of development" as the theme for 1998. The end of the Cold War has certainly reduced the threat of global war but global security needs to be enhanced and disarmament goals redefined to suit new challenges and opportunities. It is possible that Member States could agree on disarmament as the theme for 1999. This would enable the international community to have a broad set of agreed disarmament goals, which will smooth the approach to the 2000 Review Conference.

The current controversies within the NPT regime, apart from being part of the legacy of the original political compromises made at the time of the treaty's conclusion, are also symptomatic of a lack of consensus on a number of disarmament and security issues since the First Special Session on Disarmament in 1978. Despite the enormous pressure of public opinion in the non-nuclear and essentially humanitarian issue of landmines, no universality was possible over the Ottawa Convention. It is possible that public opinion is outstripping national governments in setting the agenda of disarmament as with other areas. In this development the established machinery for the negotiation of treaties may be bypassed especially if they are perceived to be paralyzed by political and procedural gridlock. After Ottawa, Russia and Japan are said to be rethinking their positions on signing the treaty presumably in response to their national public opinion. There is therefore a danger that even democratically elected governments misread their people's interpretation of where their national security interests lie as we make the adjustment from Cold War doctrines and mindsets to the changes that have taken place. Revelations of past violations of the human rights of their own citizens, through the conduct of nuclear-weapon tests for example, have evoked strong anger and civil society's tolerance for the pursuit of outdated policies in the national interest will be much lower than during the Cold War.

Another phenomenon to be addressed is the fact that weak and "failed" States where the rule of law is fragile are vulnerable points in the implementation global non-proliferation regimes and disarmament treaties established by the international community. The World Bank's 1997 *World Development Report* focuses on the role of the State in economic and social development and makes

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proposals to enhance the effectiveness of the State.¹¹ A similar internationally coordinated effort is needed to underpin the global treaties on disarmament and security including the NPT. This will have to be borne in mind by all States as they assess their positions when they approach the review process.

The leverage the NNWS may have lost by agreeing to an indefinite extension does not have to be regained through confrontation or the extreme step of exercising their rights under Article X: 1. It can be pragmatically achieved by working constructively with the NWS within the review process to achieve incremental progress so that all States will ensure their national security interests while preserving collective security. Initiatives must also come from the NWS to stimulate the review process in the same way that the decision to negotiate a CTBT paved the way for the success of the 1995 NPTREC. The review process must be given a fair chance to prove itself and realize its potential. ■

Notes

1. The 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document (NPT/CONF.1995/32 Part I).
2. See, for example, Jayantha Dhanapala, A Strengthened Review Process for the NPT, *Fordham International Law Journal*, Book V, pp. 501–510 and Fulfilling the Promise of the NPT: The CTBT and Beyond, *Arms Control Today*, May–June 1996, pp. 3–6.
3. Rebecca Johnson, Reviewing the NPT: The 1997 PrepCom, *Disarmament Diplomacy*, April 1997, p. 9.
4. See the Sri Lankan delegation's statement at the 1995 NPTREC, NPT/CONF.1995/SR.5 and NPT/CONF.1995/PV.19. Also available at <http://www.un.org/Depts/dpa/cda/nptconf>, documents 21b2 and 217a.
5. See R. Jeffery Smith, U.S. Formally Drops Claim of Possible Nuclear Blast, *Washington Post*, 4 Nov. 1997, p. A 02.
6. Security Council resolution 984 (1995) is on security assurances against the use of nuclear weapons to NNWS that are parties to the NPT.
7. George Bunn, The Legal Status of U.S. Negative Security Assurances to Non-Nuclear-Weapon States, *The Nonproliferation Review*, Spring-Summer 1997, pp. 1–17.
8. International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons', advisory opinion, Press Communiqué 96/23 (8 July 1996), <http://www.icj-cij.org/Presscom/ipr9623>.
9. National Academy of Sciences, *The Future of U.S. Nuclear Weapons Policy*, Washington, DC: National Academy Press, 1997.
10. See statement by the Canberra Commission on the Elimination of Nuclear Weapons, <http://www.dfat.gov.au/dfat/cc/cchome.html>.
11. World Bank, *World Development Report 1997: The State in a Changing World*, Washington, DC: Oxford University Press, 1997.

Process and Mechanisms for Making the Enhanced Review Process Work

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From a purely pragmatic perspective, whether the enhanced review process agreed upon at the 1995 Nuclear Non-Proliferation Treaty Review and Extension Conference (NPTREC) will "work" is going to depend upon three factors: the expectations of those who created it; whether these expectations continue to be held by the officials who will represent NPT States parties in 1998–2000; and whether agreed procedures can be devised to implement the enhancements to the process contained in the 1995 *Strengthening the Review Process* decision document. This article will seek to examine each of these issues in turn.

Initial Conceptions of the Strengthened Review Process

Radically different conceptions emerged from the 1995 NPTREC of the motivations for and objectives of the new process. One was that it should offer enhanced possibilities of putting pressure upon the five declared nuclear-weapon States (NWS) to engage in productive nuclear disarmament negotiations. Another was a desire to make the NPT review process more constructive and "efficient". Similarly, the role of the *Principles and Objectives* decision document (agreed in 1995 in parallel with that on *Strengthening the Review Process*) was viewed variously as providing a set of agreed targets to be sought in the future and a collection of yardsticks for measuring past implementation of the NPT.

The decision document on *Strengthening the Review Process* contained the following substantive amendments to the arrangements that previously existed:

- Review conferences would, from 1995 onwards, be mandatory rather than optional every five years.
- Starting in 1997, they would be preceded by annual meetings of their Preparatory Committee (PrepCom) in the three years prior to a conference. PrepComs would normally last ten working days. A fourth

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