

THE NUCLEAR NONPROLIFERATION TREATY AND ITS 2005 REVIEW CONFERENCE: A LEGAL AND POLITICAL ANALYSIS

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Despite years of relative success in constraining the spread of nuclear weapons and efforts to obtain their universal elimination,² nuclear weapons continue to pose a tremendous threat to the survival of humanity. Their destructive capacity is beyond comprehension. “The atomic bomb used against Hiroshima in 1945 was [about] 12.5 kilotons, the equivalent . . . of 12,500 tons of TNT.”³ By the mid 1950s, both the United States and the Soviet Union had developed “nuclear weapons in the megaton range, equivalent to one million tons of TNT,” and some in excess of twenty megatons.⁴ One megaton would compare “to a freight train loaded with TNT, stretching from New York to Los Angeles.”⁵ There are approximately 27,000

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2. As an example, the very first resolution of the General Assembly of the United Nations (UN) called for the elimination of atomic bombs. Resolution I (1) “was adopted unanimously on January 24, 1946 at the First Session of the General Assembly of the United Nations.” Model Nuclear Weapons Convention, U.N. GAOR, 52nd Sess., Agenda Item 71, at 11, U.N. Doc. A/C.1/52/7 (Nov. 17, 1997).

3. AMBASSADOR THOMAS GRAHAM, JR., COMMON SENSE ON WEAPONS OF MASS DESTRUCTION 10 (2004).

4. *Id.*

5. *Id.*

of these horrific devices, thousands of which remain on hair trigger alert, which increases the risk of accidents, misunderstandings, or even deliberate use.⁶ The potential horror that could be caused by these weapons is enormous.⁷

Public appreciation of the destructive force of nuclear weapons is inadequate. General George Lee Butler, who as former Commander-in-Chief of U.S. Strategic Air Command (1991-1992) and U.S. Strategic Command (1992-1994) was responsible for all nuclear forces in the U.S. Air Force and Navy, stated forcefully: "Despite all the evidence, we have yet to fully grasp the monstrous effect of these weapons, that the consequences of their use defy reason, transcending time and space, poisoning the Earth and deforming its inhabitants."⁸ Nuclear weapons, he concluded, are "inherently dangerous, hugely expensive and militarily inefficient."⁹ Hence, the Nuclear Non-proliferation Treaty (NPT),¹⁰ the central legal instrument containing and constraining their spread, is essential to our security. According to Ambassador Robert T. Grey, a former U.S.

6. WEAPONS OF MASS DESTRUCTION COMMISSION, *WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, BIOLOGICAL AND CHEMICAL ARMS* 87 (2006), available at http://www.windcommission.org/files/Weapons_of_Terror.pdf. See also STANSFIELD TURNER, *CAGING THE NUCLEAR GENIE* 18-19 (1997).

7. Admiral Stansfield Turner, former Director of the United States Central Intelligence Agency, illustrated the effects of a nuclear explosion:

The fireball created by a nuclear explosion will be much hotter than the surface of the sun . . . and it will be hundreds or thousands of times brighter than the sun at noon. If the fireball is created by the detonation of a 1-MT [megaton] nuclear weapon, for example, within roughly eight- to nine-tenths of a second each section of its surface will be radiating about three times as much heat and light as a comparable area of the sun itself This flash of incredibly intense, nuclear driven sunlight could simultaneously set an uncountable number of fires over an area of close to 100 square miles.

TURNER, *supra* note 6, at app. A 127-28. According to Turner, there is the power of nearly "1 million Hiroshima-type bombs" in today's approximately 30,000 nuclear warheads. *Id.* at 9.

8. CHARLES J. MOXLEY, JR., *NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD* 535 (2000) (quoting Otto Kreisher, *Retired Generals Urge End to Nuclear Arsenal*, SAN DIEGO UNION-TRIB., Dec. 5, 1996, at A1).

9. *Id.*

10. See Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]; see also DOUGLAS ROCHE, *AN UNACCEPTABLE RISK*, at app. 99 (1995).

arms control negotiator, the NPT is “in many ways an agreement as important as the UN Charter itself.”¹¹

The NPT arose because intelligence estimates during the 1960s reported that, by the end of the 1970s, there would be “twenty-five to thirty states with nuclear weapons integrated into their national arsenals and ready for use.”¹² The treaty came into force in 1970, and has effectively constrained proliferation. Because of the success of the NPT, we have escaped a “nightmarish” alternate world in which dozens of nuclear-weapon States threaten civilization, where it is impossible to keep these devices “out of the hands of terrorists,” and where nearly every political crisis risks “going nuclear.”¹³ The NPT’s success is based on a careful “bargain” described by Ambassador Thomas Graham, Jr., who led the U.S. negotiating team at the 1995 Review and Extension Conference of the NPT:

In exchange for a commitment from the non-nuclear weapon states (today, some 182 nations) not to develop or otherwise acquire nuclear weapons and to submit to international safeguards intended to verify compliance with the commitment (Article 2), the NPT nuclear weapon states promised unfettered access to peaceful nuclear technologies (e.g. nuclear power reactors and nuclear medicine; Article 4), and pledged to engage in disarmament negotiations aimed at the ultimate elimination of their nuclear arsenals (Article 6).¹⁴

To understand current tensions related to the treaty, a brief review of its history is valuable. During the negotiation process that created the NPT, several prominent non-nuclear weapons states (NNWS), including Germany, Italy, and Sweden, refused to allow the treaty to be permanent. Instead, they

11. Robert T. Grey, *Preface to* GLOBAL SECURITY INSTITUTE, STATUS OF THE NUCLEAR NON-PROLIFERATION TREATY (2003), available at http://www.gsi.institute.org/gsi/pubs/06_03_npt_brief.pdf. The only countries not party to the treaty are Israel, India, Pakistan, and, since its withdrawal, North Korea. All other countries in the world are bound by its terms. See GLOBAL SECURITY INSTITUTE, STATUS OF THE NUCLEAR NON-PROLIFERATION TREATY I (2003).

12. GRAHAM, *supra* note 3, at 10.

13. *Id.*

14. *Id.* at 52.

ensured that it would be reviewed after twenty-five years and at that time would either be extended for a fixed period, indefinitely extended, or terminated.¹⁵

By the 1995 Review and Extension Conference, many NNWS were extremely dissatisfied with the progress on disarmament of the nuclear weapons states (NWS)—the United States, Russia, the United Kingdom, France, and China—and argued that they would not continue to accept the inequity of a dual global system of nuclear haves and have-nots. Instead, they demanded and obtained a new bargain containing a Statement of Principles and Objectives for Nuclear Non-proliferation and Disarmament which “politically, if not legally, condition[ed] the indefinite extension of the treaty.”¹⁶ The Statement pledged to accomplish the following:

1. Complete a “Comprehensive Test Ban Treaty (CTBT) by the end of 1996”
2. Reaffirm the commitment “to pursue . . . nuclear disarmament”
3. Commence “negotiations for a treaty to stop” production “of nuclear bomb material[s]”
4. “[S]harply reduce global nuclear arsenals”
5. Encourage “the creation of nuclear-weapon-free zones”
6. Vigorously work to make the treaty universal by bringing in Israel, Pakistan and India, who have nuclear weapons and remain outside the treaty
7. Enhance IAEA [International Atomic Energy Agency] safeguards and verification capacity
8. Reinforce negative security assurances already given to NNWS “against the use or threat of use of nuclear weapons against them”¹⁷

The bargain to extend the treaty centered on a strengthened review process with almost yearly preparatory conferences and a rigorous review every five years to ensure “[t]he determined pursuit by the nuclear-weapon states of systematic

15. NPT, *supra* note 10, at art. X.

16. GRAHAM, *supra* note 3, at 53.

17. *Id.* at 54.

and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons”¹⁸

Five years later, the 2000 Review Conference successfully reached a consensus on thirteen practical steps to advance the commitment to lower the salience of nuclear weapons in policies, reinforce nonproliferation measures, and move toward the elimination of nuclear weapons. All 187 States Parties agreed on the following issues:

1. Signing the CTBT: The importance and urgency of signatures and ratifications, without delay and conditions, and in accordance with constitutional processes to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT).
2. Stopping Testing: A moratorium on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of the CTBT.
3. Fissile Material Cut Off Treaty: The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral, and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices. The Conference on Disarmament is urged to agree on a program of work that includes the immediate commencement of negotiations on such a treaty with a view to their conclusion within five years.
4. Negotiations on Nuclear Disarmament: The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament. The Conference on Disarmament is urged to agree on a program of work that includes the immediate establishment of such a body.
5. Irreversibility: The principle of irreversibility to apply to nuclear disarmament and nuclear and

18. Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 17-May 12, 1995, *Final Document, Part I: Organization and Work of the Conference*, at 10, U.N. Doc. NPT/CONF.1995/32 (1995).

other related arms control and reduction measures.

6. Commitment to Progress on Elimination: An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States Parties are committed under Article VI.
7. Upholding Existing Treaties: The early entry into force and full implementation of (Strategic Arms Reduction Treaty/START) II and the conclusion of START III as soon as possible while preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons in accordance with its provisions.
8. Implementing Existing Treaties: The completion and implementation of the Trilateral Initiative between the United States, the Russian Federation, and the International Atomic Energy Agency.
9. Progress by NWS: Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability and is based on the principle of undiminished security for all:
 - Further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally.
 - Increased transparency by the nuclear-weapon States with regard to their nuclear weapons capabilities and the implementation of agreements pursuant to Article VI as a voluntary confidence-building measure to support further progress on nuclear disarmament.
 - The further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process.
 - Concrete agreed measures to further reduce the operational status of nuclear weapons systems.

- A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate their total elimination.
 - The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons.
10. Excess Fissile Materials Under IAEA Control: Arrangements by all nuclear-weapon States to place, as soon as practicable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification and arrangements for the disposition of such material for peaceful purposes, to ensure that such material remains permanently outside of military programs.
 11. General and Complete Disarmament: Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control. This commitment was disjoined from nuclear disarmament obligations.
 12. Regular reports, within the framework of the NPT strengthened review process, by all States parties on the implementation of Article VI and paragraph 4(c) of the 1995 Decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” and recalling the Advisory Opinion of the International Court of Justice of 8 July 1996.
 13. Verifying: The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.¹⁹

19. Reaching Critical Will, The Promises of the 2000 NPT Review Conference, <http://www.reachingcriticalwill.org/legal/npt/13point.html> (last visited Apr. 12, 2007). *See also* Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 24-May 19, 2000, *Final*

Despite the initial progress made by the NPT, the process has slowed down significantly over the last few years. The commitments that produced the consensus in 2000 lost the support of the United States. Warnings of a deadlock came as early as the Preparatory Conference of 2003, with the withdrawal of North Korea, the severe criticism of Iran's fuel program, and the push of the Bush Administration to advance its new "bunker buster" nuclear weapon. Finally, without active U.S. leadership, hopes for progress on nuclear nonproliferation and disarmament were dashed from the outset of the 2005 Review Conference, which was held at the United Nations (UN) in May 2005.²⁰ The States party to the treaty were unable to generate even a timely working agenda, and fifteen out of twenty days were squandered on procedural battles.

Procedural squabbles at the 2005 Review Conference masked real differences on substantive political questions. Due to the time wasted on procedural issues, there was inadequate time to work out the substantive details of the treaty even though there had been four preparatory conferences beginning in 2002. Thus, despite the efforts of the world's best diplomats, no substantive progress on disarmament or nonproliferation was made at the Conference in 2005. In view of these difficulties, the Mayor of Hiroshima gravely stated that "we stand today on the brink of hyper-proliferation and perhaps of repeating the third use of nuclear weapons."²¹

At the commencement of the 2005 Review, UN Secretary-General Kofi Annan warned against further stalemate, asking delegates "to imagine, just for a minute," the consequences of a nuclear attack on a great city.²² He predicted the basis for the ensuing impasse accurately when he made the following

Document, Part I: Review of the Operation of the Treaty, Taking into Account the Decisions and the Resolution Adopted by the 1995 Review and Extension Conference, at 3, U.N. Doc. NPT/CONF.2000/28 (2000); *2000 NPT Review Conference Final Document*, ARMS CONTROL TODAY, June 2000, at 28, available at http://www.armscontrol.org/act/2000_06/docjun.asp.

20. Jimmy Carter, *Erosion of the Nonproliferation Treaty*, INT'L HERALD TRIB., May 2, 2005, available at <http://www.iht.com/articles/2005/05/01/opinion/edjimmy.php>.

21. Hon. Douglas Roche, *Deadly Deadlock: A Political Analysis of the Seventh Review Conference of the Nuclear Non-Proliferation Treaty 4* (Middle Powers Initiative, Briefing Paper, June 2005), available at <http://www.gsinsitute.org/2005NPTpoliticalanalysis.pdf>.

22. *Id.* at 6.

distinction: "Some will paint proliferation as a grave threat. Others will argue that existing nuclear arsenals are a deadly danger."²³

The 2005 agenda stalled along several fault lines. The United States would not permit the commitments already made under the treaty review process to be the basis for a working agenda and focused instead on the proliferation threats posed by Iran and North Korea. Conversely, Egypt demanded clear expositions based on previous commitments, focusing on the need to work to make the treaty universal. Additionally, Iran baited the NWS on their failure to make progress on disarmament and specifically the United States for its development of low-yield nuclear weapons and pursuit of space weaponization. In the end, no consensus document was generated.²⁴

According to some legal scholars, good faith compliance with the treaty can be measured by the extent to which a State adheres to commitments made at the 1995 Review and Extension Conference and at each subsequent quinquennial review

23. *Id.* at 6. Secretary-General Annan stated the following with regard to the threat posed by nuclear weapons:

Tens, if not hundreds, of thousands of people would perish in an instant, and many more would die from exposure to radiation. The global impact would also be grave. The attention of world leaders would be riveted on this existential threat. Carefully nurtured collective security mechanisms could be discredited. Hard-won freedoms and human rights could be compromised. The sharing of nuclear technology for peaceful uses could halt. Resources for development would likely dwindle. And world financial markets, trade and transportation could be hit hard, with major economic consequences. This could drive millions of people in poor countries into deeper deprivation and suffering.

Kofi Annan, UN Secretary-General, Address to the Nuclear Non-Proliferation Treaty Review Conference 1 (May 2, 2005), *available at* <http://www.un.org/events/npt2005/statements/npt02sg.pdf>.

24. See Rebecca Johnson, *Politics and Protection: Why the 2005 NPT Failed*, DISARMAMENT DIPLOMACY (Acronym Inst. for Disarmament Dipl., London, UK), Fall 2005, *available at* <http://www.acronym.org.uk/dd/dd80/80npt.htm>. For a full exposition of the statements of the participating States, reports on the proceedings, and NGO presentations, the web site of Reaching Critical Will is outstanding and gained widespread praise from many diplomats. See Reaching Critical Will, The Nuclear Non-Proliferation Treaty, <http://www.reachingcriticalwill.org/legal/npt/nptindex1.html#docs> (last visited Mar. 03, 2007).

conference.²⁵ It is the unwillingness of the United States to respond to specific demands to review its previous commitments that seems to be primarily responsible for undermining the integrity of the NPT—for if commitments made yesterday need not be honored today, why should any commitments made to the body of the NPT ever be taken seriously? At least in part as a result of this U.S. failure, international law faced a grave threat at the 2005 Review Conference.

Universally respected nonproliferation goals were not seriously negotiated, not because of a poverty of valid proposals,²⁶ but because of a failure of political will. Consequently, important issues with regard to nuclear proliferation went

25. See Lawyers' Comm. on Nuclear Pol'y, *The Thirteen Practical Steps: Legal or Political?*, May 2005, available at <http://www.lcn.org/disarmament/npt/13stepspaper.pdf>. Serious arguments have been made that such compliance has not been forthcoming. See generally Lawyers' Comm. on Nuclear Pol'y, *Nongovernmental Organizations' Statements to the States Party to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons*, May 11, 2005, available at <http://www.lcn.org/disarmament/npt/ArtVIcompliance.pdf>.

26. For example, Mohamed ElBaradei, the Director-General of the IAEA, has proposed seven practical steps that could have been reviewed to good effect. These ideas are detailed on the IAEA website:

1. A five-year moratorium on building new facilities for uranium enrichment and plutonium separation. "There is no compelling reason for building more of these proliferation-sensitive facilities, the nuclear industry already has more than enough capacity to fuel its power plants and research facilities," Dr. ElBaradei said.
2. Speed up efforts to convert research reactors operating with highly enriched uranium (HEU) to use low enriched uranium, and accelerate technical research to make HEU unnecessary for all peaceful nuclear applications.
3. Establish the "Additional Protocol" as the norm for verifying compliance with the NPT. [This is a] move that would expand IAEA inspectors' access to physical structures and information about nuclear programs.
4. Call on the UN Security Council to act swiftly and decisively on the case of any country that withdraws from the NPT.
5. Call on all States to act on the Security Council's recent resolution 1540, to pursue and prosecute any illicit trading in nuclear materials and technology.
6. Call on all five Nuclear Weapon States party to the NPT to accelerate implementation of their "unequivocal commitment" to nuclear disarmament. "Negotiating a treaty to irreversibly ban the production of fissile material for nuclear weapon programmes would be a welcome starting point," Dr. ElBaradei said.

unaddressed. The Conference failed to yield any effective means of addressing new threats posed by States leaving the treaty or misusing the treaty's guarantee of the right to peaceful uses of nuclear energy by developing facilities to produce nuclear weapons materials. In addition, the Conference was unable to prevent the failure of the NWS to fulfill their pledges to develop threat reducing, legally verifiable, practical steps toward elimination of nuclear weapons.

The consequences of these failures are serious. In December of 2004, the UN High-Level Panel on Threats, Challenges and Change issued a report stating: "We are approaching a point at which the erosion of the non-proliferation regime could become irreversible, and result in a cascade of proliferation."²⁷

As an eyewitness to the debacle of the 2005 NPT Review Conference, I saw a level of cynicism that was nothing short of shocking given the importance of this legal instrument. All too many diplomats expressed concern that the United States was not taking seriously enough international cooperative security under the rule of law. In that regard, one cannot overlook statements such as those contained in the March 2005 National Defense Strategy of the United States. In particular, this document features a new definition of vulnerability very much at odds with traditional U.S. advocacy of law and diplomacy as a means of achieving security: "Our strength as a nation state will continue to be challenged by those who employ

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7. Acknowledge the volatility of longstanding tensions that give rise to proliferation—in regions like the Middle East and the Korean Peninsula—and take action to resolve existing security deficits and, where needed, provide security assurances.

Int'l Atomic Energy Agency [IAEA], Staff Report, Strengthening the NPT and World Security: 2005 Review Conference of Non-Proliferation of Nuclear Weapons Treaty, http://www.iaea.org/NewsCenter/News/2005/npt_2005.html (last visited July 20, 2007).

27. The Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report2.pdf>. The panel was headed by Anand Panyarachun, a former prime minister of Thailand, and included Brent Scowcroft, the United States national security adviser under the first President Bush; Yevgeny Primakov, a former prime minister of Russia; Qian Qichen, a former foreign minister of China; and Amre Moussa of Egypt, secretary general of the League of Arab States. *Id.*

a strategy of the weak using international fora, judicial processes, and terrorism.”²⁸

Without U.S. leadership in the international fora and judicial processes embodied in arms control agreements and other instruments of cooperative security, the heads of state of the world will remain unwilling and unable to address proliferation issues through diplomacy. On September 13, 2005, Secretary General Annan lamented this development: “The big item missing is non-proliferation and disarmament. This is a real disgrace. We have failed twice this year: we failed at the NPT [Non-Proliferation Treaty Conference], and we failed now.”²⁹

This institutional deadlock has arisen from a profound failure of political will to work cooperatively. It cannot be ignored. When diplomacy fails, use of force, war, violence, and much bloodshed is the result. Ambassador Paul Meyer of Canada summed up the situation in a particularly poignant manner:

We have let . . . short term, parochial interests override the collective long-term interest in sustaining this Treaty’s (NPT) authority and integrity. We have witnessed intransigence from more than one State on pressing issues of the day, coupled with the hubris that demands the priorities of the many be subordinated to the preferences of the few. . . . If there is a silver lining in the otherwise dark cloud of this Review Conference, it lies in the hope that our leaders and citizens will be so concerned by its failure that they mobilize behind prompt remedial action. . . . This is a treaty worth fighting for and we are not prepared to stand idly by while its crucial supports are undermined.³⁰

28. DEP’T OF DEFENSE, NATIONAL DEFENSE STRATEGY OF THE UNITED STATES 5 (2005), *available at* <http://www.cngr.gov/pdf/library/Copy%20of%204%20national%20defense%20strategy%202005.pdf>.

29. Press Conference, UN Secretary-General Kofi Annan (Sept. 13, 2005), <http://www.un.org/News/briefings/docs/2005/sgsm10089.doc.htm>. This press conference was in regard to the outcome document of the September 2005 World Summit at the UN. *Id.*

30. DOUGLAS ROCHE, BEYOND HIROSHIMA 75-76 (2004).