

Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

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The Treaty on the Non-Proliferation of Nuclear Weapons as the cornerstone of the nuclear disarmament and non-proliferation regime and its relationship to other relevant treaties

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1. The authors share with other States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons the conviction that the Non-Proliferation Treaty is the cornerstone of the nuclear disarmament and non-proliferation regime. Based on its well-known three pillars of disarmament, non-proliferation and peaceful uses, the Treaty established the framework that has led to and guided a complex set of international instruments to implement and strengthen the international nuclear disarmament and non-proliferation regime.

Peaceful uses

2. A good case in point is the area of peaceful uses foreseen in article IV of the Non-Proliferation Treaty. Its slim text lays down the principles without delving into implementation:

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.

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.

3. Consequently, a large number of legal instruments were adopted over the last 50 years to give effect to the principles outlined in article IV. In the area of nuclear



security, there has been a constant process of implementation and efforts to strengthen the regime. For instance, the Convention on the Physical Protection of Nuclear Material, which entered into force on 8 February 1987, deals with physical protection measures to be applied to nuclear material in international transport, as well as measures related to criminal offences regarding nuclear material. The 2005 amendment, in force since 8 May 2016, expands the scope of the Convention to nuclear material in domestic use, storage in transport, and to nuclear facilities. The International Convention for the Suppression of Acts of Nuclear Terrorism, in force since 7 July 2007, contains agreements with regard to offences relating to unlawful and intentional possession and use of radioactive material or a radioactive device and the use or damage of nuclear facilities.¹

4. Equally in the area of nuclear safety, following the Chernobyl nuclear plant accident, the international community tried to mitigate the dramatic consequences of such disasters by further strengthening the international regime. The most pertinent examples here are the Convention on Early Notification of a Nuclear Accident, which entered into force on 27 October 1986 and established a notification system for nuclear accidents, as well as the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, which entered into force on 26 February 1987. More recently, the Convention on Nuclear Safety, which entered into force on 24 October 1996 and contains fundamental safety principles related to the operation of land-based civil nuclear power plants, as well as the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, which entered into force on 18 June 2001 and establishes fundamental safety principles, have further improved the regime.²

5. This brief overview represents merely an excerpt of legally binding instruments adopted in order to implement and strengthen the peaceful uses pillar of the Non-Proliferation Treaty. By its very nature the Treaty does not contain legal provisions on all issues that are necessary for its full implementation. Therefore, further legal instruments are also required for the full implementation of the other two pillars.

Non-proliferation

6. The non-proliferation pillar of the Non-Proliferation Treaty is the most defined in the Treaty text:

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.

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.

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

¹ See the IAEA overview at <https://www.iaea.org/topics/conventions>.

² Ibid.

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.

2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.

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.

4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.

7. Nevertheless, this pillar has equally required a plethora of legal instruments, as well as practical implementation via an international organization, the International Atomic Energy Agency (IAEA), to give effect to its articles. The instrument explicitly foreseen by the Non-Proliferation Treaty and created immediately after the Treaty's adoption is the comprehensive safeguards agreement concluded between non-nuclear-weapon States parties to the Treaty and IAEA according to article III.1 of the Treaty. IAEA currently has concluded 175 comprehensive safeguards agreements. These allow the Agency to apply safeguards on all nuclear material in the territory, jurisdiction or control of the State for the exclusive purpose of verifying that such material is not diverted to nuclear weapons or other nuclear explosive devices.³

8. These comprehensive safeguards agreements need to be complemented by an additional protocol in order to enable access to information about and access to all parts of a State's nuclear fuel cycle. As of April 2019, 134 countries have such additional protocols in force.

9. Multilateral instruments have also been developed to implement the non-proliferation pillar, with varying degrees of success. One such instrument

³ See INFCIRC/153.

considered to contribute to articles I, II and VI is the Comprehensive Nuclear-Test-Ban Treaty adopted in 1996. While the Comprehensive Nuclear-Test-Ban Treaty makes no reference to the Non-Proliferation Treaty in its text, the Non-Proliferation Treaty review process includes clear references and commitments to the Comprehensive Nuclear-Test-Ban Treaty, such as in actions 10-14 of the 2010 Action Plan. Unfortunately, in the more than 20 years since its adoption, the treaty has not yet entered into force and – despite interim measures such as the creation of the Comprehensive Nuclear-Test-Ban Treaty Organization, has not been able to fully contribute to the Non-Proliferation Treaty’s implementation.

10. Another relevant instrument would be a future treaty on fissile materials (fissile material cut-off treaty). By prohibiting the production of fissile materials for nuclear weapons, the treaty would have the potential to contribute to the aims of both articles I and II, but also of article VI of the Non-Proliferation Treaty. Despite continuous attempts at making progress in the framework of the Conference on Disarmament, even the start of negotiations on such a treaty has been blocked for decades, again holding back implementation of the Non-Proliferation Treaty disarmament pillar.

11. This section again only provides a cursory overview of the plethora of legal instruments adopted to implement and strengthen the non-proliferation pillar of the Non-Proliferation Treaty, illustrating the need for such instruments in order to properly give effect to the Treaty.

Disarmament

12. Article VI of the Non-Proliferation Treaty is similarly brief, as the peaceful uses pillar and explicitly stipulates that effective measures are needed for its implementation:

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.

13. While the above-mentioned fissile material cut-off treaty and the Comprehensive Nuclear-Test-Ban Treaty have the potential to positively impact the implementation of article VI, to date this pillar has been primarily implemented via bilateral agreements. As such, concrete progress has been achieved through the conclusion and implementation of arms control agreements between the Russian Federation and the United States, the two largest possessors.

14. While the Intermediate-Range Nuclear Forces Treaty, signed in 1987, does not contain references to the Non-Proliferation Treaty, numerous arms limitation treaties have included explicit references to the Non-Proliferation Treaty and its article VI. The New Strategic Arms Reduction Treaty (New START), signed in 2010, contains the following preambular paragraph:

Committed to the fulfillment of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, and to the achievement of the historic goal of freeing humanity from the nuclear threat,

thus explicitly confirming that nuclear arms control and disarmament agreements serve the implementation of article VI.

15. Other examples include references to the Non-Proliferation Treaty and article VI in the Strategic Offensive Reductions (SORT) Treaty (signed 2002),⁴ the

⁴ “Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968,”

Strategic Arms Reduction Treaty (START I), signed in 1991⁵ and the Strategic Arms Limitation Talks Agreement (SALT I), signed in 1972.⁶

16. These explicit references to the fulfilment of article VI-“obligations” in the 1972 SALT I, 1991 START, 2002 SORT and the 2010 New START treaties clearly show that the United States and the Union of Soviet Socialist Republics/Russian Federation recognize that such treaties are considered to be in fulfilment of the Non-Proliferation Treaty, thus complementing the Comprehensive Nuclear-Test-Ban Treaty, the Treaty on the Prohibition of Nuclear Weapons, a future fissile material cut-off treaty and subsequent treaties on further nuclear weapons disarmament.

17. The authors, like many other States, are on record as having acknowledged and applauded the progress achieved by the implementation of these bilateral agreements. Unfortunately, it appears that this part of implementation of article VI is slowing down and there are even signs of a dangerous reversal.

18. After the end of the Anti-Ballistic Missile (and Conventional Armed Forces in Europe) Treaties, as well as the United States withdrawal from the Joint Comprehensive Plan of Action, the Intermediate-Range Nuclear Forces Treaty might cease to be in force by August 2019. The treaty has made a tangible contribution to the implementation of article VI and has a positive impact on security, in particular in Europe. The declaration of the suspension of compliance with the obligations under the Intermediate-Range Nuclear Forces Treaty by the United States and Russian Federation as well as the declaration of withdrawal under article XV under the Intermediate-Range Nuclear Forces Treaty runs counter to the implementation of the Non-Proliferation Treaty’s article VI obligations. If no solution between the Russian Federation and the United States is found within the remaining period for withdrawal, a major achievement in the nuclear disarmament and non-proliferation architecture will fall away, opening up to a possible new arms race. This stands in clear contrast to the implementation of article VI obligations.

19. Similarly, New START is set to expire in 2021. Despite the very positive achievement of New START limitations by February 5, 2018, there are currently no signs of discussions on extending the treaty as foreseen in article XIV nor of negotiations of a successor instrument. Failing to extend the treaty and in the future to replace it by a successor instrument bringing further reductions would amount to regressing on Non-Proliferation Treaty disarmament obligations. Dialogue on an extension and possible further reductions in a future new agreement between the United States and the Russian Federation would be in line with article VI obligations.

20. It is generally accepted that the full implementation of article VI requires a legally binding norm to prohibit nuclear weapons, since otherwise a world free of nuclear weapons cannot be achieved nor maintained. This legally binding norm indispensable for the full implementation of article VI came about by the adoption by 122 countries of the Treaty on the Prohibition of Nuclear Weapons on 7 July 2017. The Treaty explicitly builds on the Non-Proliferation Treaty, as acknowledged in its preamble.

Reaffirming also that the full and effective implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the

⁵ “Mindful of their undertakings with regard to strategic offensive arms in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968; Article XI of the Treaty on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972; and the Washington Summit Joint Statement of June 1, 1990”

⁶ “Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,”

nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security,

21. The drafters of the Treaty were motivated by the very same concerns about the devastating humanitarian consequences of nuclear weapons,⁷ as further explored in three humanitarian conferences in Oslo, Nayarit and Vienna. A prohibition of use alone would be insufficient for nuclear weapons in the light of the risks inherent in them, as well as the systems connected to them. The prohibition itself, of course, only represents a step, which will need to be followed by further steps to achieve the ultimate goal of a world free of nuclear weapons.

22. The Treaty contains clear pathways towards a world free of nuclear weapons in its article 4, representing an effective measure as foreseen in article VI of the Non-Proliferation Treaty. Furthermore, the prohibitions in article 1 strengthen the global non-proliferation and disarmament regime.

23. Besides contributing to article VI implementation, the Treaty in fact also contributes to the non-proliferation pillar of the Non-Proliferation Treaty. States parties signing up to the clear norm against nuclear weapons sign a binding legal commitment that goes beyond the Non-Proliferation Treaty, as it includes, inter alia, prohibitions on stationing, as well as the use and threat of use of nuclear weapons. The safeguards provisions contained in article 3 of the Treaty on the Prohibition of Nuclear Weapons equally exceed the Non-Proliferation Treaty requirements in that they require all States Parties without distinction to apply a comprehensive safeguards agreement as a minimum and – equally as a minimum – maintain their level of safeguards at the time of entry into force of the Treaty on the Prohibition of Nuclear Weapons. The Treaty on the Prohibition of Nuclear Weapons thus not only effectively contributes to the implementation of article VI, but of the Non-Proliferation Treaty as a whole.

The importance of compliance

24. The Non-Proliferation Treaty represents a grand bargain between its three pillars of disarmament, non-proliferation and peaceful uses. The implementation of the obligations under all three pillars is essential for adherence to the Non-Proliferation Treaty. While the scorecard looks good with regard to non-proliferation and peaceful uses, the implementation of disarmament obligations under article VI is severely lagging behind and, 50 years after its entry into force, far from full implementation. Attempts at accelerating progress, inter alia, the 13 steps agreed at the 2000 Review Conference and the Action Plan agreed at the 2010 Review Conference have equally not been fully implemented.

25. The central importance of compliance with obligations under disarmament and non-proliferation treaties has been highlighted in the context of other disarmament and non-proliferation treaties over recent months. Treaties have collapsed or are under serious threat to do so owing to issues of non-compliance, severely undermining confidence in multilateral disarmament and non-proliferation agreements. Unilateral withdrawals from treaties where all conditions are being fulfilled undermine the fundamental principle of *pacta sunt servanda*.

⁷ Compare the preamble to the Non-Proliferation Treaty “Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,” and the preamble to the Treaty on the Prohibition of Nuclear Weapons “*Deeply concerned* about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances,”

26. Two recent cases are compliance issues with chemical weapons and regarding the Intermediate-Range Nuclear Forces Treaty. It is of the utmost importance for upholding the contained norms that compliance issues are resolved among States parties, otherwise the existence of the treaty is in jeopardy.

27. Equally concerning are recent attempts at narrowly interpreting central provisions, concretely article VI, which puts in question the commitment of States parties to the grand bargain contained in the Treaty. Indeed, countries may well be tempted to follow that example and interpret the other pillars equally narrowly. Furthermore, arguments that new conditions need to be fulfilled before Treaty provisions can be implemented, coupled with modernization and upgrading programmes, carry the danger that non-nuclear armed countries may be tempted to follow a similar logic, leading to proliferation.

28. Consequently, any form of non-compliance or reduced compliance weakens treaties. Current dangerous trends of non-compliance and reduced compliance not only erode trust in individual treaties but in the disarmament and non-proliferation regime as a whole, including the Non-Proliferation Treaty as its cornerstone.

Conclusion

29. The Non-Proliferation Treaty as the cornerstone of the nuclear disarmament and non-proliferation regime is the well-established foundation that needs to be implemented and strengthened by further instruments built upon it. While this has been actively pursued in the peaceful uses and non-proliferation pillars, the disarmament pillar has lagged behind and is in danger of backtracking. The adoption of the Treaty on the Prohibition of Nuclear Weapons follows the logic of the two other pillars of the Non-Proliferation Treaty, by providing an effective measure, as foreseen in article VI of the Non-Proliferation Treaty, towards nuclear disarmament. Its entry into force and application is essential for the implementation of the Non-Proliferation Treaty and for the effectiveness of the international nuclear non-proliferation and disarmament regime as a whole.

30. The adoption of the Treaty on the Prohibition of Nuclear Weapons demonstrates the clear attachment of the States supporting it to the Non-Proliferation Treaty, as well as to full compliance with the treaties' provisions. The Treaty on the Prohibition of Nuclear Weapons is an indispensable step to fully implement article VI, which will need to be followed by further effective measures to achieve the ultimate joint goal of a world free of nuclear weapons. The Treaty on the Prohibition of Nuclear Weapons not only contributes to the effective implementation of article VI of the Non-Proliferation Treaty but in fact strengthens the Non-Proliferation Treaty as a whole. Criticism of the Treaty on the Prohibition of Nuclear Weapons hits thus compliance with article VI of the Non-Proliferation Treaty, thereby affecting the Non-Proliferation Treaty and the disarmament and non-proliferation regime as a whole.

31. The nuclear disarmament and non-proliferation architecture is highly interwoven und interdependent. Developments in one part of the architecture will have major impact on the Non-Proliferation Treaty as its cornerstone. It is therefore essential that utmost efforts are exerted not to allow the demise of existing elements of the disarmament and non-proliferation architecture.

32. Full compliance with the Non-Proliferation Treaty's obligations, including article VI, and commitments taken during the review process are essential. Such compliance must not be subjected to limiting interpretations or new conditions, as this would severely weaken the Treaty.

Recommendations

33. In the light of this, it is suggested that the following recommendations regarding the subject matter of the present working paper for the 2020 Review Conference be made:

(a) To call on all States and in particular the nuclear-weapon States to fulfill their obligations under the Non-Proliferation Treaty and previous review conferences, including their unfulfilled obligations and commitments under the disarmament pillar;

(b) To acknowledge the relationship of the Non-Proliferation Treaty to other relevant treaties;

(c) To refrain from reinterpreting existing agreed commitments and setting new conditions for their implementation;

(d) To acknowledge the inherent danger in the erosion of the treaty-based disarmament and non-proliferation architecture with treaties such as the Anti-Ballistic Missile Treaty, the Treaty on Conventional Armed Forces in Europe, the Joint Comprehensive Plan of Action and Intermediate-Range Nuclear Forces Treaty having been terminated or being severely threatened;

(e) To call on the Russian Federation and the United States to exert efforts with a view to resolving compliance issues and preserving the Intermediate-Range Nuclear Forces Treaty;

(f) To extend the New START Treaty and to negotiate a successor treaty to the New START Treaty bringing further reductions, in order to prevent backsliding of compliance with article VI;

(g) To acknowledge the positive role the Treaty on the Prohibition of Nuclear Weapons plays in strengthening the Non-Proliferation Treaty by providing an effective measure to implement article VI of the Non-Proliferation Treaty, as well as strengthening non-proliferation.
