

## The Nuclear Non-Proliferation Treaty

---

JOHN BURROUGHS

---

### RECOMMENDATIONS OF THE WMD COMMISSION

**Recommendation 1:** All parties to the Non-Proliferation Treaty need to revert to the fundamental and balanced non-proliferation and disarmament commitments that were made under the treaty and confirmed in 1995 when the treaty was extended indefinitely.

**Recommendation 2:** All parties to the Non-Proliferation Treaty should implement the decision on principles and objectives for non-proliferation and disarmament, the decision on strengthening the Non-Proliferation Treaty review process, and the resolution on the Middle East as a zone free of nuclear and all other weapons of mass destruction, all adopted in 1995. They should also promote the implementation of ‘the thirteen practical steps’ for nuclear disarmament that were adopted in 2000.

**Recommendation 3:** To enhance the effectiveness of the nuclear non-proliferation regime, all Non-Proliferation Treaty non-nuclear-weapon states parties should accept comprehensive safeguards as strengthened by the International Atomic Energy Agency Additional Protocol.

**Recommendation 4:** The states parties to the Non-Proliferation Treaty should establish a standing secretariat to handle administrative matters for the parties to the treaty. This secretariat should organize the treaty’s Review Conferences and their Preparatory Committee sessions. It should also organize other treaty-related meetings upon the request of a majority of the states parties.

The Nuclear Non-Proliferation Treaty (NPT) is the only security treaty that permits two classes of members: states acknowledged to possess nuclear weapons and states barred from acquiring them. One hundred and eighty-eight states are members. Only four countries are outside the regime, all with nuclear weapons: India, Pakistan, Israel, and North Korea, the only state to announce its withdrawal.

The NPT strikes a bargain between non-nuclear weapon states, which

are prohibited from acquiring nuclear arms and are guaranteed access to peaceful nuclear technology, and nuclear weapons states, which are obligated to negotiate disarmament. The International Atomic Energy Agency (IAEA) monitors operation of nuclear reactors and other facilities by non-nuclear weapon states with the aim of detecting and thereby preventing diversion of fissile materials (plutonium and highly enriched uranium) for use in weapons. In Article VI, states parties, including nuclear-armed Britain, China, France, Russia, and the United States, agree 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.”

So far as preventing the spread of nuclear weapons, the NPT’s record has been reasonably good. States wishing to retain a nuclear weapons option that initially stayed outside the treaty have eventually joined, among them South Africa, which relinquished its small arsenal, Brazil, and Argentina. Serious efforts to acquire nuclear weapons in violation of the treaty are known to have occurred only in a handful of cases, Iraq, Libya, and North Korea. In addition, Iran failed to report significant nuclear activities to the IAEA over nearly two decades ending in 2003, and is pursuing a uranium enrichment capability that would enable it to fuel nuclear reactors or, should it decide to do so, make nuclear weapons (*see section 3.2*). The vast majority of states have complied with the obligation of non-acquisition, but implementation of the disarmament obligation has been dismal, as explained below and in section 2.1. It is estimated that there were over 38,000 nuclear weapons in the world in 1968 when negotiation of the treaty was completed; today, nearly four decades later, there are two-thirds of that total, about 26,000.<sup>1</sup>

The WMD Commission takes a cautiously optimistic approach in assessing the state of the treaty, observing that “two basic ideas at the heart of the NPT continue to have strong international support—that more fingers on more nuclear triggers would result in a more dangerous world, and that non-proliferation by the have-nots and disarmament by the haves will together lead to a safer world.”<sup>2</sup> Among the problems identified by the Commission, however, are “the failure to make progress towards disarmament” and “breaches of the treaty or of IAEA safeguards obligations by a small number of parties,” namely, the countries mentioned above: Iraq, Libya, North Korea, and Iran.<sup>3</sup> The Commission cautions against drawing dire conclusions from the second problem, noting “that that the world is not replete with would-be proliferators nor, as yet, with nuclear-capable terrorists.”<sup>4</sup> The Commission adds, “As long as relations between the great powers are characterized by cooperation and regional tensions are not heightened, there is probably little reason to fear a collapse of the NPT.”<sup>5</sup> While alarmism may not be warranted, it is also true (as the Commission is well aware) that if North Korea and Iran become permanent nuclear weapon-possessing states, their respective regions may very well experience additional proliferation. Further, the failure of the nuclear weapon states to meet their disarmament obligation saps the

will of other states to accept or strengthen non-proliferation constraints, such as enhanced IAEA inspection powers under the Additional Protocol to safeguards agreements and restrictions upon withdrawal.

### *The NPT Disarmament Obligation in the Post-Cold War Era*

The nuclear weapons states have long viewed the NPT as an asymmetrical bargain, imposing specific, enforceable obligations in the present on non-nuclear weapon states, while requiring of nuclear weapon states only a general and vague commitment to good faith negotiation of nuclear disarmament, as set forth in Article VI, to be brought to fruition in the distant future if ever. The 1995 and 2000 NPT Review Conferences, and a 1996 International Court of Justice opinion, decisively rejected that view. It is now established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to eliminate their arsenals.

*1995 Principles and Objectives.* In 1995, the year that the NPT was due to expire, the United States and other nuclear weapon states pressed for the treaty to be extended indefinitely. That objective was achieved as part of a larger package that included a set of commitments known as the “Principles and Objectives for Nuclear Non-Proliferation and Disarmament.”<sup>6</sup> The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They include negotiation of a Comprehensive Test Ban Treaty (CTBT) by 1996, commencement of negotiations on a treaty banning production of fissile materials for use in weapons, and the “determined pursuit by the nuclear weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons.” Another essential element of the package was a resolution calling on all NPT parties, in particular the nuclear weapon states, to work to establish a zone free of nuclear and other weapons of mass destruction and their delivery systems in the Middle East.<sup>7</sup>

*1996 International Court of Justice Opinion.* In 1996, the International Court of Justice, the judicial branch of the United Nations, offered a further interpretation of the Article VI obligation. In an advisory opinion on the legality of the threat or use of nuclear weapons requested by the UN General Assembly,<sup>8</sup> the Court held that the threat or use of nuclear weapons is “generally” contrary to principles of customary international law requiring necessity and proportionality in responding to armed attacks and forbidding the infliction of indiscriminate harm, unnecessary suffering, harm to neutral states, and disproportionate damage to the environment.<sup>9</sup> While a divided Court was unable to reach a definitive conclusion regarding threat or use in an extreme circumstance of self-defense in which the very survival of a state is at risk, the overall thrust of the opinion is toward categorical illegality, that is, illegality of threat or use in all circumstances. Thus the Court stated that “a use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the applicable law in armed

conflict which comprise in particular the principles and rules of humanitarian law.”<sup>10</sup> A National Academy of Sciences study, carried out by persons well versed in the realities of nuclear weapons and doctrines of use, found it “extremely unlikely” that any threat or use would meet criteria of lawfulness set forth by the Court.<sup>11</sup>

Going beyond the terms of the General Assembly request, the Court also unanimously held that “[t]here 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.”<sup>12</sup> Quoting this holding from what it called a “landmark” opinion, the WMD Commission commented that:

Such an obligation requires that states actively pursue measures to reduce the numbers of nuclear weapons and the importance of their role in military force structures. Yet, even though nuclear-weapon states ask other states to plan for their security without nuclear weapons, they do not themselves seem to be planning for this eventuality.<sup>13</sup>

In large part, the Court’s statement of the disarmament obligation was an interpretation of Article VI of the NPT. It has been directly endorsed by nearly all states. In the most recent General Assembly vote on the resolution following up on the opinion,<sup>14</sup> 168 states voted for the paragraph containing the Court’s statement of the obligation, including non-NPT states India and Pakistan. Only three states voted against it, the United States, Russia, and Israel; the five abstainers included France and Britain.

It is important that the Court delinked the obligation to achieve nuclear disarmament from the objective of demilitarization referred to in Article VI (“general and complete disarmament”). Nuclear weapon states can no longer plausibly rely on the rationale that elimination of nuclear weapons must await comprehensive global disarmament. It is often assumed that the Article VI reference to “a treaty on general and complete disarmament” envisages an agreement on demilitarization, including major conventional weapons (tanks, aircraft, etc.). It is true that the objective of general and complete disarmament (GCD) does have this meaning. But that does not mean that *a* treaty on GCD would embrace all major weapons. Indeed, the preamble of the NPT points towards the treaty referenced in Article VI as a treaty on *nuclear* disarmament. It refers to “the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.” That is, the preamble seems to refer to a treaty on elimination of nuclear forces as an instance of a type of treaty, the type being treaties on general and complete disarmament, or GCD. Similarly, the Biological Weapons Convention and the Chemical Weapons Convention are both treaties on GCD. As the preamble to the CWC says, they represent “effective progress towards general and

complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction.” The Practical Steps for disarmament, discussed below, support this view of Article VI. The unequivocal undertaking to eliminate nuclear arsenals is separated from the reaffirmation of the “ultimate objective” of “general and complete disarmament under effective international control.”

*Practical Steps for Disarmament.* The 2000 NPT Review Conference further specified what the Article VI disarmament obligation requires. Its Final Document sets forth 13 “practical steps for the systematic and progressive efforts to achieve nuclear disarmament”<sup>15</sup> (*see box, section 2.1*). Reinforcing the holding of the International Court of Justice, a key element is “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals.” Other steps include:

- entry into force of the CTBT and a moratorium on nuclear explosive testing in the meantime;
- negotiating a treaty banning production of fissile materials for weapons;
- establishing a subsidiary body on nuclear disarmament in the CD;
- bringing the START II U.S.-Russian strategic reductions agreement into force and concluding a START III agreement while preserving and strengthening the ABM Treaty;
- applying the principle of irreversibility to nuclear weapons reductions and elimination;
- increased transparency with regard to nuclear weapons;
- further developing of verification capabilities;
- measures to further reduce the operational status of nuclear weapons;
- a diminishing role for nuclear weapons in security policies to minimize the risk of their use and to facilitate their elimination.

Like the Principles and Objectives that accompanied the indefinite extension of the NPT, these commitments are often understood to be “political” rather than “legal” in nature. However, given that the agenda was adopted without objection at the Review Conference, it represents participating NPT states’ view of what Article VI requires. At the General Assembly in the fall of 2000, the U.S. representative said that the Final Document “is our guiding light for nuclear nonproliferation and disarmament efforts.”<sup>16</sup> Indeed, under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 2000 agenda together with the 1995 Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT, authoritatively applying and interpreting Article VI.<sup>17</sup>

Most of the world’s governments—including allies of the nuclear weapon states—continue to insist on implementation of the commitments made at the 1995 and 2000 NPT Review Conferences. In 2006, the UN General Assembly

once again adopted several resolutions to that effect. Perhaps most important was the “Renewed Determination” resolution sponsored by Japan and nine other countries from both the North and South.<sup>18</sup> It passed overwhelmingly, with 167 countries voting for it and four against: the United States, India, Pakistan, and North Korea; seven abstained. Its adoption means that nearly all governments in the world are now on record as favoring application of the principles of transparency, irreversibility, and verification “in the process of working towards the elimination of nuclear weapons.” This is a ringing endorsement of the principles embedded in the Practical Steps for disarmament agreed in 2000. The resolution wisely singles out two other commitments from the Practical Steps, “the necessity of a diminishing role for nuclear weapons in security policies,” and reduction of “the operational status of nuclear weapons systems.” It also calls for entry into force of the CTBT and negotiations on a Fissile Materials Cut-off Treaty (FMCT). The 2006 resolution put forward by the New Agenda Coalition,<sup>19</sup> the pioneering cross-boundary group,<sup>20</sup> was adopted by a vote of 157 for, seven against, and 13 abstentions. It directly affirms the continuing force of the Practical Steps.

### *Lack of Compliance with the Disarmament Obligation*

As elaborated in section 2.1, the United States, and to a lesser extent the other nuclear weapon states, are failing to comply with the NPT disarmament obligation. This is not only due to the lack of progress on most of the Practical Steps identified in 2000, but above all the failure to make disarmament the driving force in national planning and policy with respect to nuclear weapons. The Bush administration expressly rejected certain of the Practical Steps, including ratification of the CTBT, implementation of the START process, and preservation of the ABM Treaty;<sup>21</sup> failed to apply the principles of verification, irreversibility, and transparency to the reductions agreed in the 2002 Strategic Offensive Reductions Treaty; and expanded, rather than diminished, the role of nuclear weapons in the U.S. military posture.

In large part due to the refusal of the Bush administration to permit reaffirmation of or even reference to the 1995 and 2000 disarmament commitments, the 2005 NPT Review Conference failed to reach agreement on a program of action.<sup>22</sup> The lack of progress on compliance with the disarmament obligation thus precluded movement on addressing multiple challenges on the non-proliferation side of the ledger. Chief among these is prevention of transfer of nuclear weapons-related equipment and expertise by non-state networks like that led by A.Q. Khan, one of the creators of Pakistan’s nuclear bomb; achieving the dismantlement of North Korea’s nuclear weapons program and bringing that country back into the NPT; and regulating the acquisition and operation of technologies for production of enriched uranium and separated plutonium to prevent their use in weapons programs. (See sections 1.3, 3.1, and 3.2.)

### *Revitalizing the NPT*

The most important means of revitalizing the NPT is good-faith implementation of the disarmament obligation. At some point, this will require an agreement or agreements that complete that obligation, integrate states outside the NPT, and institutionalize the elimination of nuclear weapons globally (*see section 3.3*). Progress towards that goal will in turn stimulate much greater acceptance of measures identified by the WMD Commission as necessary to strengthen the non-proliferation regime, among them enhanced IAEA inspection powers through the Additional Protocol and solutions to the problem of the spread of uranium enrichment capabilities. Crises in the Middle East and Northeast Asia must also be successfully resolved, to prevent unraveling of the regime in those regions (*see section 3.2*). In the case of the Middle East, this will likely require steps towards implementation of the 1995 Middle East resolution calling for the creation of a zone free of weapons of mass destruction.

To promote implementation of both non-proliferation and disarmament obligations, a stronger NPT institutional capability is needed. As the WMD Commission observes, “the NPT is the weakest of the treaties on WMD in terms of provisions about implementation.... The NPT has no provisions for consultations or special meetings of the parties to consider cases of possible non-compliance or withdrawal, nor to assist in the implementation of the treaty between the five-yearly Review Conferences.”<sup>23</sup> Currently, administrative support for the NPT is provided by the UN Office for Disarmament Affairs, which is under-resourced and has no authority to do anything between review proceedings. Impartial, expert compliance assessment is limited in scope with respect to non-proliferation, since the IAEA is charged by its Statute and safeguards agreements only with monitoring nuclear materials to ensure their non-diversion to weapons. Compliance enforcement with respect to non-proliferation is left largely to the Security Council, which has problems of legitimacy and accountability (*see section 1.3*). There are no treaty provisions for compliance assessment or enforcement with respect to disarmament, and no agency is given any responsibility in this regard. Not surprisingly, the Security Council, whose permanent members are nuclear weapon states, has shown no interest in assessing or enforcing compliance with disarmament commitments.

There have been multiple proposals to strengthen NPT institutional capability, such as adding a secretariat, an executive council, and empowered annual meetings of states parties. The proposals have come from states like Ireland and Canada,<sup>24</sup> and have been advanced by Jayantha Dhanapala, chair of the 1995 Review and Extension Conference, former UN Under-Secretary-General for Disarmament Affairs, and a member of the WMD Commission.<sup>25</sup> At a minimum, as the WMD Commission recommends, states parties need to establish a secretariat and a mechanism for holding meetings of state parties to address issues of withdrawal and of compliance with both disarmament

and non-proliferation requirements. A further important innovation would be an executive council capable of addressing issues on short notice.

*Recommendations for U.S. Policy*

- The United States should make compliance with the Nuclear Non-Proliferation Treaty obligation of pursuing and concluding negotiations in good faith on nuclear disarmament the central aim of policy on nuclear weapons, recognizing that implementation of a good-faith obligation cannot be indefinitely postponed.
- The United States should work for the achievement of a zone free of weapons of mass destruction in the Middle East as agreed at the 1995 and 2000 Nuclear Non-Proliferation Treaty Review Conferences.
- The United States should promote mandatory adherence to the Additional Protocol as a condition for supply of cooperation, assistance, materials, and equipment related to the peaceful use of nuclear energy.
- To improve Nuclear Non-Proliferation Treaty governance, the United States should support creation of a secretariat and an executive council. The executive council should be empowered to address, on short notice, issues of withdrawal and compliance with non-proliferation and disarmament obligations. Annual meetings of states parties should be similarly empowered.