

JUST ANOTHER COLD WAR RELIC? THE FADING SIGNIFICANCE OF THE NON-PROLIFERATION TREATY

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Abstract

Given that there is scarcely a more grave threat to humanity than the outbreak of nuclear war, the nonproliferation regime is necessarily of critical importance. However, the cornerstone of this regime, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), cannot bear the weight that has been thrust upon it. An anachronism from a bygone era, the NPT is not capable of responding to the challenges of today. Many believe that the NPT should be fixed, but this essay contends that the NPT's flaws are too elemental for the treaty to be salvageable. First, the text of the NPT fails to strike a tenable compromise between the Nuclear Weapon States (NWS) and the Non-Nuclear Weapon States (NNWS), as the former seem unlikely to ever live up to the ordained goal of full disarmament while some members of the latter continue to exploit NPT loopholes, such as the ability to legally acquire virtual nuclear weapons capacity. Second, the vigor of the NPT is at the mercy of *realpolitik*, as the members of the United Nations Security Council in particular often subvert the goals of the NPT in order to advance other goals. As such, the international community, including those of a legal mind, should recognize the NPT as a lost cause and begin the process of rebuilding the nonproliferation regime with new foundations in place.

Introduction

Although the Cold War has been over for nearly two decades, in many ways the world is still designed for the needs of this bygone era. From the continuing construction of naval warships that seem to have little use outside of great power warfare to alliances such as NATO whose founding purposes have long since been obscured, the world is still waiting for necessary paradigm shifts that will reorient the political priorities, spending habits, and politico-legal regimes toward contemporary, rather than obsolete, threats. One staple of the global world order in dire need of such redress, or, more likely, outright replacement, is the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, or simply NPT), born in the era of grandiose superpower rivalry and still reflecting the preoccupations and anxieties of those ever-receding Cold War times. The NPT has ultimately failed to create a sustainable regime by which all of the world's players feel obliged to follow the rules regarding their nuclear ambitions. Ironically, the NPT contains the seeds to its own destruction: there are the "haves" and the "have-nots" of the Treaty, drawing a contentious line between the leading nations of World War II (and a few newcomers) and all others; there is the provision in Article IV allowing countries to attain virtual

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nuclear weapons capacity; there is the amorphous provision in Article VI that allows presently armed nuclear nations to disarm according to their own dictates. As time has worn on and technology has naturally become more accessible and cheaper to all nations, the NPT has increasingly become impotent. States occupying the fringes of the world stage are no longer the afterthought scenarios in nuclear war scenarios; quite the contrary, they occupy the center stage of the current drama.

The first part of this essay will examine the problems contained within the four corners of the NPT. In the second part, we will look beyond the words of the treaty and consider the collapse of the current nonproliferation regime. The third part will then briefly examine the most potent tool currently available to counter-proliferators, the Proliferation Security Initiative.

Part I: Seeds of Its Own Destruction

The text of the NPT starts off promisingly enough. Recognizing in the preamble the empirical fact that more nuclear weapons and more nuclear weapons states makes the likelihood of nuclear war greater, the NPT sets forth on a quest to reduce the number of nuclear weapons to zero. The as-yet insurmountable obstacle, though, appears quickly thereafter. Articles I and II seem innocuous in their bans on giving and receiving aid in the furtherance of developing nuclear weapons, respectively; however, the mere presence of a demarcation between nuclear weapons states (NWS) and non-nuclear weapons states (NNWS) has become the Achilles' heel of the Treaty. While international law is no stranger to having a hierarchy present within its institutions despite such power gradient being in tension with the equality presupposed by international law (see the United Nations and the permanent members of its Security Council), the contrived balance between the NWS and the NNWS simply refuses to find equilibrium.

The NPT is usually described as some type of "grand bargain" between the NWS and the NNWS.¹ The particular provisions that embody the important trade are Articles IV and VI.² Through Article IV, the NNWS promise to pursue only "peaceful" uses of nuclear energy and furthermore to ensure that the sharing of such technology will not violate Articles I and II. Meanwhile, the NWS are bound via Article VI to fully disarm themselves. Thus, the NNWS are not to attain nuclear weapons, and the NWS are to give up those weapons which they already have. This neat solution seems too good to be true, and it truly is. As it turns out, neither NWS nor NNWS are content with the other

¹ William Walker, "The NPT and Its Six Attributes," NATO and the Future of the Nuclear Non-Proliferation Treaty (2007): 19.

² Michael Ruhle, "The Non-Proliferation Treaty in Crisis," NATO and the Future of the Nuclear Non-Proliferation Treaty (2007): 31-32.

side's compliance.³ Both sides can read into the NPT what they wish, and neither side is able to convince or compel the other side to adopt their interpretation.

Article IV, in the abstract, is commendable. No one wants the prohibitions on nuclear proliferation to be so draconian as to disallow developing nations from making nuclear technology part of their energy formula. Given the concerns about global warming and the finite amount of fossil fuels, peaceful nuclear energy may be more important than ever. Yet the naïve assumption that there is “peaceful” nuclear energy here and “martial” nuclear energy there has contributed greatly to the impotence of the NPT.⁴ Dual-use technology has made such a distinction rather worthless, and thus precludes the simple solution that Article IV tantalizingly offers. Nuclear technology, then, is largely an all-or-nothing proposition: once the Pandora's box of nuclear energy is opened in a country, there is an aura of inevitability about the development of nuclear weapons; that is, if the nation wants to convert its civilian energy program to military purposes, then there is little in the technological sense to prevent them from doing so. There may indeed be nations that have had large and sophisticated civilian programs and still have refrained from producing nuclear weapons, such as Japan, but there is little question that it is only a matter of political will, and not technological capabilities, that keep such a nation from taking the next step.⁵ Thus, a nation that may be technically within the confines of the NPT may well be acting contrary to its spirit, using the NPT as a perverse cover for its ultimate ambitions. If the international community truly wants to put a definitive end to nuclear proliferation, the only surefire route would be to embargo the use of all nuclear technology, which is clearly countenanced by no one on any side of the debate, from the United States (see their support for India's nuclear program) to Russia (see their support for Iran's nuclear program).⁶

Article VI, like Article IV, states a proposition that, on a general level, is unobjectionable. The problem, though, is that the proposition lacks detail. Although Article VI envisions “strict and effective international control” over the process of disarmament of the NWS, other language within the Article cuts quite the other way in its laxity. Rather than imposing a deadline for the complete disarmament, the Article mentions no timeline whatsoever. This deadline looks even weaker when compared to the flaccid “early date” set for the termination of the Cold War arms races, which at least

³ Christopher Ford, "The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes," New York University Journal of International Law and Politics 39 (2007): 962. John R. Harvey, "U.S. Nuclear Weapons Programmes: Implications for Non-Proliferation," NATO and the Future of the Nuclear Non-Proliferation Treaty (2007): 70.

⁴ Ford 949.

⁵ Jacques E. C. Hymans, The Psychology of Nuclear Proliferation: Identity, Emotions, and Foreign Policy (New York: Cambridge University Press, 2006): 7.

⁶ Katja Mirwaldt and Vladimir I. Ivanov, "Russia: Struggling for Dignity," GLOBAL SECURITY GOVERNANCE: COMPETING PERCEPTIONS OF SECURITY IN THE 21ST CENTURY, eds. Emil Kirchner and James Sperling (New York: Routledge, 2007): 252. Rühle 31.

was an attempt to quantify the relevant timeline. Rather than mandating negotiations between the NWS regarding disarmament in any relevant aspect such as time, place, or process, the Article instead leaves the negotiations only to the “good faith” of the parties involved. Yet there is no defined arbiter of “good faith,” leaving the evaluation of the progress of NWS in disarming to endless debate.

Finally, Article X holds yet another chink in the NPT’s armor. The NPT allows a nation to opt out of the treaty as long as the state, in its own discretion, determines that “extraordinary events” have endangered the “supreme interests” of the country. The threshold for withdrawal may seem high given the “extraordinary” language, but as with the ambiguity surrounding what exactly is a “peaceful” nuclear program given dual-use technology or what precisely “good faith” means regarding disarmament, the actual outlines of Article X are too vague as to be useful. If Article IV is the favorite playground of Iran in its pursuit of “the bomb,” then Article X is the favored tool of North Korea, as it withdrew—without penalty—from the NPT without an apparently grave enough circumstance to justify its departure.⁷

Part II: What’s in a Name: The (Non-)Proliferation Treaty

Despite the inherent faults of the NPT, even vociferous critics of the NPT believe that this critical treaty has had and more importantly can continue to have a positive impact in stemming the tide of proliferation.⁸ It is unclear, however, that the NPT has had either a significant impact in curtailing the nuclear ambitions from years past or is relevant in the current era. The aforementioned inability of the NPT to provide any clear guidance on the legality of dual-use technologies regarding NNWS, the required rate of disarmament among NWS, or the prerequisites for sovereign withdrawal from the NPT, have allowed countries to essentially do what they would have done in the absence of the NPT. What is worse, if one is determined to find a causal effect attributable to the NPT, it may be that the NPT has at most functioned as a tool for proliferating nations, providing legal cover for their strategies.

It may seem unduly harsh to claim that the NPT has had, if anything, a negative net effect upon proliferation given that the dire predictions about proliferation from the Cold War era never came to pass. Such a pessimistic evaluation of the NPT may even strike one as only part of a more general attack upon the efficacy of international law.⁹ However, a legal tool is only effective as the remedies that it provides. Compliance is the

⁷ Christian Sonsi Homsy, “Self-Contained Regimes” – No Cop-Out for North Korea!,” Suffolk Transnational Law Review 24 (2000): 89.

⁸ Jack I. Garvey, “A New Architecture for the Non-Proliferation of Nuclear Weapons,” Journal of Conflict & Security Law 12 (2007): 356.

⁹ Jack L. Goldsmith and Eric A. Posner, “International Agreements: A Rational Approach,” Virginia Journal of International Law 44 (2003): 143.

first and last goal of any treaty. The NPT, therefore, should be judged solely by whether it actually decreases the likelihood of nuclear war.

There are two key components to an effective treaty regime, i.e., compliance: verification and, in the event of violation, sanction. Neither of these two critical pieces is actually working within the NPT framework. The verification process, pursued by the International Atomic Energy Agency (IAEA), is haunted by political and technological demons. Meanwhile, the sanctioning process is in an equally disreputable state of repair, subject to the enduring rivalries and whimsical vagaries of the rivals who sit upon the Security Council. Solutions have been proposed to both problems, but there is little hope that either the IAEA or the forces behind effective sanctions will soon be fixed.

The aforementioned difficulty, or even impossibility, in discerning “peaceful” nuclear energy uses from other applications, gives an indication of the uphill battle that the IAEA faces in its verification goals, but is actually only a piece of the complex puzzle that currently confronts IAEA Director El-Baradei. The Model Additional Protocol, adopted by the IAEA to enhance its verification procedures by allowing it to detect undeclared activity (whereas before the IAEA had to largely take a state at its word), has been a step in the right direction, but nonetheless may still leave a large gap between what the IAEA can reveal and what is truly going on within a given state.¹⁰ Moreover, the Model Protocol has not been adopted by many critical nations, as it remains a voluntary practice.¹¹ Finally, the IAEA’s intelligence capabilities have frequently been called into question.¹² The counterintelligence methods at the IAEA have never been up to the task of keeping information within the agency, thus leading national intelligence agencies to withhold information from the agency. Meanwhile, the intelligence gathering aptitude of the agency has been revealed as lacking, as seen by how the recent events involving Syria and Israel caught the IAEA by surprise. As the IAEA’s success depends not only upon its technical proficiency as embodied in the Model Protocol and similar mechanisms, but also upon its ability to gather and receive intelligence, the IAEA is clearly failing on multiple critical fronts.

Even if the IAEA was aware of every illegal nuclear activity that occurred throughout the world, this knowledge means little if nothing is done in response. The potent response to illicit nuclear activity, short of preemptive military strikes, has traditionally been sanctions. Although sanctions themselves have been refined over the

¹⁰ Joseph F. Pilat and Davis S Yost, "Introduction: NATO and the Future of the NPT," NATO AND THE FUTURE OF THE NUCLEAR NON-PROLIFERATION TREATY (2007): 12.

¹¹ Andrew O’Neil, Nuclear Proliferation in Northeast Asia: The Quest for Security (New York: Palgrave Macmillan (2007): 46.

¹² Yossi Melman and Meir Javedanfar, The Nuclear Sphinx of Tehran: Mahmoud Ahmadinejad and the State of Iran (New York: Carroll & Graf Publishers, 2007): 119.

years, and may have had potent, if only ephemeral, effects upon the ambitions of nuclear states,¹³ the political willingness to apply sanctions appropriately has and will continue to be lacking. None of the tenets of deterrent punishment have been met, as the sanctions have been neither swift nor severe nor certain. Russia and China have been loath to adopt the United States' hard-line stance on Iran and North Korea, respectively.¹⁴ On the Russian front, the tortured history of antagonistic relations between the United States and Russia augurs against a hopeful interpretation of recent actions by Russia against Iran. Having lost the Cold War, Russia has only modified rather than completely foregone its ambitions to compete with the United States.¹⁵ On the Chinese front, the burgeoning rivalry between the United States and China in general and Chinese concerns with the Korean peninsula in particular mean that there will be no such thing as a perfectly cohesive Sino-American interest.¹⁶ Simply put, the natural geopolitical tensions between the United States and both Russia and China are played out in microcosm within these regional proliferation scenarios, which is in kind no different than similar situations in which the U.S. and the Soviet Union took up different sides taken in disputes from the Middle East to Northeast Asia. In fact, the very same nations find themselves in the middle of current struggles between more powerful nations as they did in the past, though the alignments may have changed.

There is one important distinction, though, between the "great power" struggles being played out between the U.S. and its rivals now and in bygone eras, one that makes all the difference: the nations that used to be just third parties are no longer just intermediaries, but instead players of potentially great impact should they successfully attain a threatening nuclear arsenal. The NPT has become a bargaining chip for these regional players, as seen in Chairman Kim Jong-Il's use of Article X or President Ahmadinejad's use of Article IV. Ironically, the legacy of the NPT in recent years may be such that the NPT is, if anything, contributing to the proliferation in the most worrisome areas of the globe, as these rogue regimes push the nuclear envelope in the knowledge that they may be bribed to stop.

Part III: Next Best Hope

If the NPT has outlived its usefulness, the nonproliferation community must then turn to other tools. Given that the Achilles' heel of the NPT has been revealed as its inability to change with the times, policymakers in the United States have

¹³ Orde F. Kittrie, "Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing Its Deterrence Capacity and How to Restore It," *Michigan Journal of International Law* 28 (2007): 421-22.

¹⁴ Mark Fitzpatrick, "Is Iran's Nuclear Capability Inevitable?" *Double Trouble: Iran and North Korea as Challenges to International Security*, ed. Patrick Cronin (Westport: Praeger Security International, 2008): 34-36, 43.

¹⁵ Mirwaldt and Ivanov 248.

¹⁶ Curtis H. Martin, "U.S. Policy Toward North Korea Under George W. Bush: A Critical Appraisal," *NORTH KOREA'S SECOND NUCLEAR CRISIS AND NORTHEAST ASIAN SECURITY*, eds. Seung-Ho Joo and Tae-Hwan Kwak (Burlinton: Ashgate, 2007): 70.

understandably turned developed an instrument that is notable for its flexibility: the Proliferation Security Initiative (PSI). The PSI does not purport to either establish an end for all time to the threat of nuclear war. On the contrary, it implicitly recognizes both that knowledge and technology related to nuclear aspirations will always be on the move throughout the world and also that nuclear abdication is not a feasible option, at least for the foreseeable future. Therefore, the PSI simply attempts to impede proliferation (primarily at sea) through aggressive techniques, such as interdiction, borrowed from the intelligence and law enforcement communities.¹⁷ Relatively simple bilateral agreements provide the necessary infrastructure among cooperating countries, allowing one nation to utilize the boarding rights of another.¹⁸ While this may seem a case of the tail wagging the dog given that the PSI was originally meant to complement the NPT and other legal mechanisms, the PSI depends more upon political capital than legal compulsion, meaning that the PSI should be able to stand upon its own footing regardless of the NPT's fate.¹⁹ Straightforward security interests should provide an enduring foundation for the PSI, uniting otherwise antagonistic nations such as the United States and Russia, both of whom have experienced trauma as the result of terrorist attacks. This is a marked contrast to the politically charged atmosphere that clouds transnational cooperation on the Security Council, through which NPT-related sanctions must be approved.

Assuming that its membership continues to grow, the PSI has the potential to continue to enjoy similar successes to the one it enjoyed in seizing nuclear components en route to the dictator Muhammad Qaddafi in Libya.²⁰ Beyond achieving this critical mass of membership, the PSI's ability to pull off such coups in the future will depend upon its capacity to perform two interrelated tasks well. First, the PSI must be able to anticipate proliferators' movements and strategies, which can be difficult to detect and are likely to evolve with time (witness the A.Q. Khan episode).²¹ Although this task is exceedingly complicated and often speculative, experts must attempt to foresee the means by which proliferation will occur in the future, such as through alliances between disgruntled scientists and organized crime. Furthermore, PSI actors should be proactive in disrupting such networks through both overt as well as covert methods, making sure

¹⁷ James Baker, *In the Common Defense: National Security Law for Perilous Times* (New York: Cambridge University Press, 2007): 279, 282.

¹⁸ Matthew Fitzgerald, "Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter," *Virginia Journal of International Law* 49 (2009): 475.

¹⁹ Baker 279, 282.

²⁰ Gawdat Bahgat, *Proliferation of Nuclear Weapons in the Middle East* (Gainesville: University Press of Florida, 2007): 16.

²¹ Lyudmila Zaitseva, "Organized Crime, Terrorism and Nuclear Trafficking," *Globalization and WMD Proliferation: Terrorism, Transnational Networks, and International Security*, eds. James A. Russell and James J. Wirtz (New York: Routledge, 2008): 110.

to then evaluate how the proliferation network adapts in response to the interference.²² Second, any information developed by a PSI member must be readily shared with other members, as a failure to promptly and fully circulate critical intelligence can make all the collection and analysis work pointless if that information does not find the right hands.²³ Globalization and its facilitation of information-sharing may have cut in favor of proliferators to date, but such factors can be made to work in favor of the counter-proliferators as well. The United States and its allies must take the initiative back from countries like North Korea and Iran who have thus far been setting the tune and tempo to which the rest of the world has had to react.

Conclusion

The NPT has attempted to remain relevant, but ultimately it cannot catch up to the modern era. The false dichotomy of “peaceful” and non-“peaceful” nuclear capabilities, the disarmament requirement that is no requirement at all, and the all-too-easy escape hatch out of the Treaty are internal flaws that are enough to seriously handicap the Treaty. When these infirmities are coupled with the dual lack of coordinate verification and appropriate remedies, the NPT is destined for impotence. One may argue back that, despite the NPT’s flaws, the world is better off with the Treaty than without it, e.g., even if the “peaceful”/martial distinction is spurious, the NPT is the best that we can do given the background rule of authorized pursuit of nuclear energy. In other words, the backers of the NPT put together a neat syllogism in which the first premise is that the background “rights”, including the right to nuclear energy, the ability to opt out of treaties, and the right to possess sufficient deterrence capabilities, are too settled or proper to be disturbed, and the second premise is that the interest protected by these rules, that of nuclear proliferation, must nonetheless be countered. The conclusion the pro-NPT arrives at is that a grandiose treaty is necessary to combat this problem while preserving the other rights at issue.

Yet this essay is not merely a “trashing” piece that simply calls for the NPT to be torn down with nothing to replace it. There is a third way through this thicket, one which does not require changing the established background “rights” just mentioned (a task likely impossible in any event) nor aspiring to doomed compromises between these claimed entitlements and the goals of the treaty. The answer lies with non-treaty tools, as they do not suffer the same infirmities as treaties. These mechanisms, such as the

²² Phil Williams, “Intelligence and Nuclear Proliferation,” Globalization and WMD Proliferation: Terrorism, Transnational Networks, and International Security eds. James A. Russell and James J. Wirtz (New York: Routledge, 2008): 151-55.

²³ Frederick Hitz, Why Spy? Espionage in an Age of Uncertainty (New York: St. Martin’s Press) 155-56. National Commission on Terrorist Attacks Upon the United States, 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York: W.W. Norton & Company 2004) 381. Baker 148.

Proliferation Security Initiative, must now be given top billing in the nonproliferation regime. And for those who worry that such a strategy gives short shrift to the rule of law and essentially pins nonproliferation success upon the shadowy world of intelligence gathering and interdiction tactics, they should be consoled in that lawyers have long sought to bring order to such affairs. After all, this is the realm of national security (or intelligence) law, and this author for one thinks that the solution for this problem must come from this community, if it is to come at all.²⁴

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²⁴ Baker 23, 280.