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The NPT at 50: Nuclear Disarmament and Non-Proliferation Half a
Century Later

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Introduction:

The Nuclear Non-Proliferation Treaty (NPT) was the first binding multilateral legal agreement to be negotiated specifically with the goal of controlling, reducing and, eventually eliminating nuclear weapons from the globe,¹ it was opened for signature in 1968 and entered into force in 1970². Since that time NPT States parties have met every 5 years at the NPT Review Conference (RevCon), to review the progress of the Treaty and nuclear non-proliferation and disarmament. The 10th NPT RevCon will be held in 2020, marking 50 years since the entry into force of the NPT. The twin aims of non-proliferation and disarmament within the Treaty seem in fits and starts both more realisable and more distant with the developments of the past 5 years. This thesis will examine the legal framework of the global non-proliferation and disarmament regime by looking at the genesis of the NPT from a chronological perspective, culminating in the challenges and developments of the past 5 years, so as to reinforce and emphasize the particular difficulties affecting the (latest) 2020 Review Cycle. In an area which is comprised of so many inter-twining political and legal elements, overarching unity in the global non-proliferation and disarmament regime can be difficult to pinpoint. This thesis aims to provide the reader with a *holistic* overview of the particular nature of the application of international law in the nuclear area:

“The development of nuclear weapons has transformed the world. Few areas of law provoke as much debate and discussion in the international community as issues regarding the regulation of nuclear capacity, non-proliferation and disarmament law ... 'Indeed, it could be argued that nuclear weapons and non-proliferation law should constitute a subject discipline in its own right; separate from other fields of international law, and to be distinguished from conventional weapons law and international humanitarian law'.^{3,4} As such international nuclear legal instruments have evolved in a step-by-step incremental approach throughout the 20th and 21st centuries which, “has left a rather dense treaty regulation in place that requires

¹ It should be noted that other nuclear multilateral fora and instruments, such as the Acheson–Lilienthal Report, the Baruch Plan, the UN Atomic Energy Commission, the UN Scientific Committee on the Effects of Atomic Radiation, the International Atomic Energy Agency (IAEA) and the Partial Test Ban Treaty (PTBT) were all created prior to the NPT; yet none of the above mentioned had the scope or reach of the NPT to target non-proliferation and disarmament.

² As per, Article IX (3) of the NPT: This Treaty shall enter into force after its ratification by the States ... which are designated Depositories of the Treaty [the UK, US and former USSR], and forty other States signatory to this Treaty and the deposit of their instruments of ratification.

³ Jonathan Black-Branch, 'Opening Remarks to the Third Round Table (London) on Nuclear Weapons, Nuclear Energy and non-proliferation under International Law: Current Challenges and Evolving Norms (14-15 February 2013 Oxford and Cambridge Club)'

⁴ Jonathan L. Black-Branch, Dieter Fleck, *Nuclear Non-Proliferation in International Law* -, Volume 1 Asser Press 2014 p. 2

evaluation and comprehensive assessment. Its Central piece, the 1968 Nuclear Non-Proliferation Treaty (NPT) prohibits the proliferation of nuclear weapons beyond the five nuclear-weapon States (NWS) under the Treaty.”⁵

The NPT itself is singularly important to understanding how the entire global non-proliferation and disarmament framework is structured as, “[t]he Treaty has become a cornerstone of international efforts to prevent the spread of nuclear weapons, to eventually eliminate them and to facilitate peaceful use of nuclear energy. With the adherence of 190 countries, the NPT is close to universal world participation... The NPT remains unique as there is no other international agreement based on a bargain between nuclear- and non-nuclear-weapon states.”⁶ However with half a century gone by, a great many additional factors have come into play: a changed global politique; four new nuclear weapon possessing states; three judicial cases regarding nuclear weapons have been brought before the ICJ; nuclear export control guidelines having been brought in place to complement and stand-alone⁷ from the NPT; unilateral, bilateral and multilateral arms control agreements have been concluded and *not* concluded; nuclear weapons development by the U.S. and Russian Federation have been curtailed and now relaunched, whilst China has also made moves to enter the fray of competitive nuclear posturing; while the proliferation activities of Iran, the DPRK and others, present additional challenges; and these developments are notwithstanding the new Treaty for the Prohibition of Nuclear Weapons. With all these factors jostling for dominance the question this thesis will pose, is how fit the NPT still is for its purpose?

⁵ *Ibid* pp. 2-3

⁶ Jacek Durkalec, *The Nuclear Non-proliferation Treaty at fifty: a midlife crisis*, Nato Review Magazine, 29 June 2018, <https://www.nato.int/docu/review/2018/Also-in-2018/the-nuclear-non-proliferation-treaty-at-fifty-a-midlife-crisis/EN/index.htm>

⁷ In the Zangger Committee and The Nuclear Suppliers Group respectively

Chapter 1 - Historical Background:

1.1. The geo-political landscape of 1945

1945 saw the end of the Second World War, and the victors of the War knew that a new arrangement would be needed to ensure that the hard-won-peace not be in vain.

It had been the bloodshed of World War I which had first convinced states of the necessity to create a multinational forum to regulate the peaceful settlement of disputes and provide a structured collective security system; to this end, the League of Nations was founded in 1919. However, the League, was unable to achieve universal participation, and by the 1930s had become inept in arbitrating peace. The shift from using war as a lawful tool of policy achievement was not an altogether smooth process or an overnight success, nonetheless, during the interwar years states had been earnest in their attempts to stop war. The Kellogg-Briand Pact (1928) (named for the foreign ministers of the U.S. and France respectively) also known as the Paris Peace Pact, had sought to outlaw war through the undertaking that parties would renounce the use of war as an instrument of policy toward the other parties to the Pact, however this earnest attempt to delegitimise the use of war for the achievement political aims, unfortunately proved not entirely sufficient because the parties, having renounced the use of war, began to use force, in a manner tantamount to waging wars without declaring them. With no means to enforce the renunciation of war, the resulting use of force became a free-for-all in unabashed aggression resulted in the collapse of the international legal order for maintaining global peace and the unfortunate descent into World War II.

The would be victors of World War II first brought themselves and 22 other aligned global states together in the Declaration of United Nations of 1 January 1942.⁸ The four major powers of this alliance were the U.S., the USSR, the UK and China, who set themselves up as Four Policemen, guarantors of world peace. These Four Policemen (who became five with the addition of France to their number in 1945), would be responsible for keeping order within their spheres of influence and maintenance of global peace under the ambit of the new United Nations system. The United Nations set out a new international legal order in the UN Charter⁹, which built upon the legal structures created in the inter-war period by affirming

⁸ Declaration by the United Nations, January 1, 1942, by China, the UK, the U.S. and USSR joined by the four Dominions of the British Commonwealth (Australia, Canada, New Zealand and South Africa); eight European governments-in-exile (Belgium, Czechoslovakia, Greece, Luxembourg, Netherlands, Norway, Poland and Yugoslavia); nine countries in The Americas (Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, and Panama); and one non-independent government, the British-appointed Government of India. http://avalon.law.yale.edu/20th_century/decade03.asp, accessed 30 April 2018

⁹ UN Charter 1945, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>, accessed 30 April 2018

that international disputes should be settled by peaceful means;¹⁰ but crucially Article 2(4) improved upon the gaps which had been part of the Kellogg-Briand Pact's ambiguity by moving member states to a legal undertaking not just to refrain from war, but to also from the use of, or the threat of force.¹¹ Crucially different from the League the UN Charter also set out a more comprehensive enforcement mechanism for breaches of the peace. The Five Policemen were to become the five Permanent Members (P-5) of the Security Council. The Security Council would be charged with the responsibility of identifying the existence of any threats or breaches of peace, or acts of aggression, and the taking effective action required to re-establish peace¹². In the ashes of World War II, this seemed to create a more robust and fool-proof system for preventing states from falling back into a war; a hybrid amalgamation of the balance of powers doctrine married to a robust international legal framework preventing any legitimate aggressive use of force.

1.2. The Atomic Age and the Cold War:

1.2.1. Initial attempts to eliminate nuclear weapons and prevent proliferation

However, concurrent to the establishment of the UN, the first nuclear weapon, "Trinity", the most indiscriminate and wholly destructive weapon yet conceived in the entirety of human history, was detonated in 1945 by the U.S.. Later in August 1945 the U.S., for the first and only time used nuclear weapons militarily as part of the closing stages of World War II against Japan, in the cities of Hiroshima and Nagasaki and the destructive power of nuclear weapons were self-evident for all to see.¹³ The three signature effects of nuclear weapons lie in their ability to create 'blast, heat and radiation'. The atomic bomb unlike conventional weaponry, not only generated massive explosive capacity (in a manner consistent with conventional weapons), but the forces of uncontrolled nuclear fission generate an intense heat wave which not only will burn (or even vaporise) any unfortunate victim who might happen to be caught within the burn radius of the nuclear weapon's heat wave, but will also combust any incendiary structure, leading to devastating fire-storms. Beyond such devastating effects the fission process emits massive concentrations of nuclear radiation which will linger on long after the detonation of the weapon and will lead to some victims dying of radiation

¹⁰ Article 2(3) of the UN Charter 1945, <http://www.un.org/en/sections/un-charter/un-charter-full-text/>, accessed 30 April 2018

¹¹ This is subject only to the right of self defence as per Article 51 of the UN Charter "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"

¹² Article 39 of the UN Charter 1945

¹³ *The Bomb That Has Changed the World*, Daily Express, UK, Tuesday 7 August 1945

sickness within the immediate aftermath of the explosion, while others may live with health effects caused by radiation, not only for the course of their life-time, but also effecting subsequent generations with radiation associated illnesses and deformities.¹⁴

To the world and especially the Five Policemen, nuclear weapons were a game-changer; one country had a weapon of mass destruction that tipped the balance of power between them all. To rectify this imbalance of strategic power, both the USSR¹⁵ and UK¹⁶ initiated programmes to develop nuclear weapons.

Nonetheless moves to develop nuclear weapon programmes were met by speedy international recognition that there existed a legal black hole as to what international legal obligations should or could exist as regarded atomic energy and this was undoubtedly a *problem*, even as early as one year after the first atomic explosion, the elimination of nuclear armaments was being striven for. To begin to address this problem the very first Resolution adopted by the newly formed United Nations General Assembly on 24 January 1946 dealt with the "Establishment of a Commission to Deal with the *Problem* Raised by the Discovery of Atomic Energy"¹⁷, and how nuclear armaments might be eliminated:

[t]he Commission shall proceed with the *utmost dispatch* and enquire into all phases of the problem... for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction; for effective safeguards... against hazards of violations and evasions.¹⁸

The U.S. meanwhile was not unaware that its possession of nuclear weapons had created problems of global strategic imbalance and that the uniquely destructive nature of nuclear weapons could threaten a war of utterly devastating proportions; and so presented the Baruch

¹⁴ Blast, heat and radiation, International campaign to abolish nuclear weapons, <http://www.icanw.org/the-facts/catastrophic-harm/blast-heat-and-radiation/> accessed 10 August 2019

¹⁵ Immediately after the atomic bombing, the Soviet Politburo took control of the atomic bomb project by establishing a special committee to oversee the development of nuclear weapons as soon as possible: Oleg Bukharin,; Frank Von Hippel, *Making the First Nuclear Weapons*. Russian Strategic Nuclear Forces, MIT Press. (2004). p. 695

¹⁶ The Gen 75 Committee (known informally by Attlee as the "Atomic Bomb Committee"), was set up on 10 August 1945 to examine the feasibility of an independent British nuclear weapons programme, with a decision to proceed was formally made on 8 January 1947 at a meeting of Gen 163, a subcommittee of the Gen 75 Committee: Margaret Gowing,; Lorna Arnold, *Independence and Deterrence: Britain and Atomic Energy, 1945–1952, Volume 1, Policy Making*. London: Macmillan. (1974a). pp. 181-184

¹⁷ Resolution A/RES/1(I) adopted by the General Assembly emphasis added

¹⁸ *Ibid*, emphasis added.

Plan¹⁹ at the first meeting of the UN Atomic Energy Commission in 1946 with a proposal comprised of four main points²⁰:

1. To extend between all countries the exchange of basic scientific information for peaceful ends;
2. To implement control of nuclear power to the extent necessary to ensure its use only for peaceful purposes;
3. To eliminate from national armaments atomic weapons and all other major weapons adaptable to mass destruction; and
4. To establish *effective safeguards*²¹ by way of inspection and other means to protect complying States against the hazards of violations and evasions.

Under the Baruch Plan an Atomic Development Authority would oversee the development and use of atomic energy, manage any nuclear installation with the ability to produce nuclear weapons, and inspect any nuclear facility conducting research for peaceful purposes. The plan also prohibited the possession of an atomic bomb, the seizure of facilities administered by the Atomic Development Authority, and punished violators who interfered with inspections. The Atomic Development Authority would answer only to the Security Council, which was charged with punishing those nations that violated the terms of the plan by imposing sanctions. Most importantly, the Baruch Plan would have stripped all members of the United Nations Security Council of their veto power concerning the issue of United Nations sanctions against nations that engaged in prohibited activities. Once the plan was fully implemented, the U.S. was to begin the process of destroying its nuclear arsenal.²² The plan however came to be rejected by the USSR due to the perception that in the political climate of the 1940s, any realization and/or implementation of a *neutral* verification regime would not be possible, and that such a verification regime would only strengthen the United

¹⁹ The Baruch Plan, submitted to the UN was preceded by, and largely based upon the *Acheson-Lilienthal Plan*, which was the result of an early U.S. internal directed effort. It set forth policy on atomic energy, which made the first proposal for nuclear weapons to be brought under independent international control. Bernard Baruch had been a businessman and philanthropist who had advised President's Wilson and Franklin D. Roosevelt. In 1946 President Harry S. Truman appointed Baruch as the United States representative to the United Nations Atomic Energy Commission (UNAEC). In 1946, Baruch presented his Baruch Plan, to the UNAEC, which proposed international control of then-new atomic energy.

Dean Acheson was U.S. Secretary of State to President Truman; and David E. Lilienthal was an attorney who was appointed to Head the U.S. Atomic Energy Commission.

²⁰ Greville Rumble, *The Politics of Nuclear Defence – A Comprehensive Introduction* Cambridge: [Polity Press](#). (1985). pp. 285 (8–9, 219). Emphasis added

²¹ *Supra* note 19, emphasis added

²² *The Acheson-Lilienthal & Baruch Plans, 1946, "Milestones in the History of U.S. Foreign Relations"*, United States Department of State, <https://history.state.gov/milestones/1945-1952/baruch-plans> , accessed 10 August 2019

States' monopoly position as the sole possessor of nuclear weapons. Moreover, the Soviet Union was reluctant to sacrifice its Security Council veto, being mindful that at that time the other Permanent Members were more closely aligned with the U.S..²³

The non-realisation of the Baruch Plan to rid the world of nuclear weapons was not altogether unsurprising. Only as recently as 25 years previously the Soviet Union had deliberately been excluded from joining the League of Nations due, in part to its status as a communist state, and had then been expelled from the League due to its invasion of Finland in 1939.

Moreover, the failures in the enforcement mechanisms in the League of Nations and thereafter exploitation of the legal gaps in the Kellogg-Briand Pact had shown that the international legal idealism so prominently espoused in the inter-war period was poor substitute for the post-World-War-II-settlement realpolitik.

1.2.2. Unchecked proliferation – the nuclear wild west of the early Cold War

With the failure to implement the Baruch Plan, the nascent calls of the Member States of the UN to eliminate nuclear weapons faded; and from the late 1940s a lawless free-for-all for states to explode nuclear weapons without any need to heed norms ensued. The United States' testing of the first atomic bomb was subsequently followed up by nuclear weapon testing by the USSR in 1949, and the United Kingdom in 1952.

The U.S. testing programme based itself initially in the then U.S. territory of the Marshall Islands²⁴; while testing by the USSR and UK took place on sites located in present day Kazakhstan, Australia and Kiribati. The effect that testing had on native and indigenous populations of these sparsely (though not uninhabited) territories cannot be undersold and has led to consequences which were naively unforeseen:

As well as devastating costs to their health and environment, many affected communities still live with the social, cultural and economic consequences of these tests...Not everyone was compensated, and those affected reported a lack of official accountability. Nuclear tests have adversely impacted mental health, by fostering a climate of fear over radiological exposure in test locations, and through the creation of a culture of social stigma and discrimination.²⁵

²³ *Ibid*

²⁴ Which today is part of the sovereign state of the Marshall Islands

²⁵ Beyza Unal, *A Taboo Still Surrounds the Legacy of Nuclear Testing*, Chatham House The Royal Institute of International Affairs 17 May 2017, <https://www.chathamhouse.org/expert/comment/taboo-still-surrounds-legacy-nuclear-testing> accessed 10 August 2019

Yet it was the Castle Bravo test by the U.S. in 1954 which saw a bomb yield erroneously reach 15 megatons (Mt), 3 times that of the 5 Mt predicted by its designers.²⁶ The accidental fallout, irradiated inhabited areas and a Japanese fishing crew, and contaminated more than 7,000 square miles (18,000 km²) of the surrounding Pacific Ocean.²⁷

This led to a growing recognition at the United Nations that nuclear disarmament would not occur at once, but through an evolving, incremental process”.²⁸ A “mandate for a multilateral treaty on non-proliferation was enshrined in a UN General Assembly resolution sponsored by Ireland in 1961,²⁹ envisioning a simple agreement between nuclear-armed states (which would promise not to pass their weapons on, or help others build them) and non-nuclear armed states (which would promise not to receive weapons, or build their own). In practice, however, serious negotiations on a nuclear non-proliferation treaty could not begin until the superpowers were committed to pursuing one”.³⁰

The wake-up call to implement multilateral non-proliferation came not long after with “the 1962 Cuban Missile Crisis and the accompanying realization among leaders and the public of how close the world had come to the brink that finally added a sense of urgency to the enterprise”.³¹ But the early 1960s saw a second scramble by major powers to gain nuclear capabilities, with France detonating a nuclear device in 1960³² and China following suit in 1964.³³ These tests represented a strategic threat to both the U.S. and USSR – who in the bipolar world of the Cold War both saw the risks of further nuclear proliferation by more states. In March of 1963, U.S. President John F. Kennedy described a world where as many as 25 states possessed nuclear weapons as “the greatest possible danger and hazard.”³⁴

²⁶ Richard Rhodes, *Dark Sun: The Making of the Hydrogen Bomb*, Simon and Schuster (1995) p.541

²⁷ A. Costandina, *Bombs in the Backyard: Atomic Testing and American Politics* Titus, Reno: University of Nevada (2001)

²⁸ *The Future of the Comprehensive Nuclear-Test-Ban Treaty*, UN Chronicle Vol. XLVI No. 1 & 2 2009 | January 2009 <https://unchronicle.un.org/article/future-comprehensive-nuclear-test-ban-treaty> accessed 10 August 2019

²⁹ UN General Assembly Resolution 1665 (XVI), 4 December 1961, A/RES/1665 (XVI)

³⁰ Matthew Harries, *Disarmament as Politics: Lessons from Negotiation of NPT Article VI*, Chatham House, The Royal Institute of International Affairs May 2015, pp. 2-3, https://www.chathamhouse.org/sites/default/files/field/field_document/20150512DisarmamentPoliticsNPTHarriesUpdate2.pdf, accessed 10 August 2019

³¹ Eryn MacDonald, *The Partial Test Ban Treaty: 50 Years Later*, Union of Concerned Scientists Science for a healthy planet and safer world| October 10, 2013, <https://allthingsnuclear.org/emacdonald/the-partial-test-ban-treaty-50-years-later> accessed 10 August 2019

³² Gerboise Bleue; an atomic bomb detonated near Reggane, in the Algerian Sahara desert on 13 February 1960

³³ 596; codename of China's first nuclear weapons test, detonated on October 16, 1964, at the Lop Nur test site.

³⁴ *Treaty on the Non-Proliferation of Nuclear Weapons*, U.S. Delegation to the Nuclear Nonproliferation Treaty Review Conference, 2010 , https://www.un.org/en/conf/npt/2010/statements/pdf/usa_en.pdf, accessed 10 August 2019

Chapter 2 – The Nuclear Non-Proliferation Treaty

2.1. Interpreting the NPT: Treaty law and Three Pillars

Opened for signature on 1 July 1968 and entering into force on 5 March 1970, NPT is, on the face of things, a relatively short and simple document for a global treaty of such importance. Comprised of a preamble and just eleven Articles the Treaty fleshes out the bedrock of the global nuclear non-proliferation regime – the so called ‘Three Pillars’, incapsulating the base legal obligations for *non-proliferation*, *disarmament* and, the *access to the peaceful uses of nuclear energy*. Yet questions of interpretation, revision and synergies between the three pillars of the NPT have remained open question marks throughout its 50-year tenure. “Since it entered into force in 1970, the NPT has been the subject of contentious debate due, in large part, to its plethora of ambiguous provisions”.³⁵

As a multilateral legal agreement, the NPT is subject to the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT) (1969). Article 31 VCLT provides the general rule for the interpretation of Treaties, with Article 32 embodying supplementary means of interpretation. Article 31 (1) provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In divining ordinary meaning, and object and purpose, the entirety of Treaty, i.e. its preamble and annexes, are to be considered. While it has been argued that ‘Three Pillar’ nature of the NPT is a construction of latter practice³⁶, the eleven Articles can actually be broadly assigned to the thematic areas covered by the Three Pillars of the NPT: “Looking to the provisions of the NPT, Articles I, II and III essentially comprise the non-proliferation pillar; Articles IV and V essentially comprise the peaceful use pillar; and Article VI essentially comprises the disarmament pillar. Articles VIII through XI are essentially procedural in nature. ... This understanding of the context of a provision both within and among the three principled pillars of the treaty can have significant implications for interpretation.”³⁷ However while each of the Articles of the Treaty could be scrutinised for their ordinary meaning as well as for the divining of the object and purpose of the NPT, the key to understanding the object and purpose of the NPT lies in: “Examining the preamble

³⁵ David S. Jonas, Ariel E. Braunstein, *What’s Intent Got to Do with It? Interpreting “Peaceful Purpose” in Article IV.1 of the NPT*, International Law Review, Volume 32 Issue 3, <http://law.emory.edu/eilr/content/volume-32/issue-3/articles/intent-interpreting-peaceful-purpose-article-npt.html>, accessed 10 August 2019

³⁶ Christopher Ford, *Misinterpreting the NPT*, 30 September 2011, Hudson Institute, <https://www.hudson.org/research/9046-misinterpreting-the-npt>, accessed 10 August 2019

³⁷ Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, OUP Oxford, May 2011 p.55

of the NPT [which] provides significant evidence of the object and purpose of the treaty... a treaty's object and purpose... of the VCLT's analysis is expressed in the singular, [yet] a treaty's object and purpose can be found to be comprised of multiple principles. As the WTO Appellate Body has explained: [...] most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes".³⁸ As such the preamble of the NPT sets out the object of the drafters of the Treaty: To live in a world free from the nuclear threat, but which also had fully realised and achieved mechanisms necessary for allowing the full unfettered peaceful enjoyment of nuclear energy applications; while the purpose of the NPT was in facilitating a legal framework (namely for non-proliferation and disarmament) for the achievement of such an object; for it is the *dual-nature* of nuclear energy, with the potential to both obliterate indiscriminately, while providing atoms for peace and development, which makes the Three Pillared structure of the NPT unique and vital to realising the object and purpose of the Treaty. "The parties to the NPT signalled clearly through the paragraphs of the preamble that the treaty's object and purpose is to be found *in all three of its principled pillars*, representing the full dual-use nature of nuclear energy, and not in any one principle above the others."³⁹

While it is important not to prioritize any of the pillars in front of the others, it is non-proliferation which is the titular aspect of the Treaty and whose obligations are most comprehensively accounted for: with provision for the implementation of verification under the ambit of IAEA Safeguards to ensure compliance, as well as further undertakings regarding to not export nuclear fissionable material, or especially designed or prepared goods. Though it must be acknowledged, the Treaty did not itself provide additional clarification what IAEA Safeguards would consist of⁴⁰, or provide any clarification for exporters of what either 'fissionable material' or 'especially designed or prepared' goods could be defined as.⁴¹ Of the other two pillars: the access to peaceful uses, and disarmament are even much more ambiguously worded showing that while non-proliferation, disarmament and access to

³⁸ *Ibid* p.61

³⁹ *Ibid* p.64

⁴⁰ Article III (1) NPT obliges: Each non-nuclear-weapon State to undertake 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 the International Atomic Energy Agency and the Agency's safeguards system . . . yet the IAEA Comprehensive Safeguards Agreement was first adopted in June 1972 in the, "Basic Undertaking" of NPT Safeguards Agreement, as per IAEA INFCIRC/153. These IAEA Full Scope Safeguards were not adopted in the NPT forum until the 1995 NPT RevCon, as per Paragraph 12 of "Decision 2: Principles and Objectives for Nuclear Non-Proliferation and Disarmament: "... IAEA full-scope safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices...", 1995 NPT Extension Treaty, NPT/CONF.1995/32/DEC.2.

⁴¹ Interpretation of Article III (2) of the NPT has been taken up by the Zangger Committee.

peaceful uses were pillar of equal importance, the text of the NPT itself was concerned mostly with the framing of the non-proliferation aspect of the ‘grand bargain. The open language of Article IV entreating the: ‘(1) inalienable right of all the Parties to the Treaty to ... nuclear energy for peaceful purposes without discrimination, and (2) 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’. Yet the language of the NPT does not go any further to embellish any ordinary meaning as to what inalienable right, peaceful purposes, without discrimination, or, facilitation of the fullest possible exchange could be expected to entail. Likewise, the scope of disarmament expectations are hard to pin down in the succinct yet roundabout language of Article VI: ‘to pursue negotiations in good faith on effective measures relating ... to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.’ Indeed, the question of what the ordinary meaning of, negotiations pursued in good faith on effective measures entailed, was the subject of an advisory opinion of the ICJ which will be discussed in greater detail later in this thesis. It is only the mandate for a treaty on general and complete disarmament that informs that while disarmament as one of the Three Pillars, is part of the object and purpose of the NPT, the NPT is not a Treaty that is meant to stand alone, but be complemented and supported by an agreement on disarmament. Yet the ambiguity of the Treaty *is* its ordinary meaning, States parties negotiated the NPT, precisely as it is because *what* the Treaty is, is of lesser importance than *why* it is.

To gain an insight into why the NPT is and a more informed interpretation of the NPT, Article 31 VCLT instructs the examination of subsequent practice and agreements, while supplementary interpretation under Article 32 VCLT provides for examination of the *travaux préparatoires*. While subsequent practice is hard wired into the NPT by the Review Process cycles and as such can be inferred especially through those Review Conferences which have produced consensus documents and mandates for multilateral negotiations of instruments.⁴² Nonetheless, while the VCLT is a definitive legal means for Treaty interpretation, the NPT is a political compromise with its three pillars and the ‘grand bargain’ that States parties have chosen to accept. As such subsequent practice in the NPT has been informed on by the political circumstances of the NPT’s inception, therefore it is necessary to not just to analyse the NPT as an international legal document but accord it its political dues by understanding

⁴²Such as Nuclear Weapon Free Zone Agreements and the Fissile Material Cut Off Treaty

how and why the NPT came to be, in its current structure with the three pillars central to the object and purpose of the Treaty, yet unequal in scope within the NPT itself, and what the impacts of its legacy have been both in politics and law.

2.2. Negotiating History

2.2.1. The Eighteen Nation Disarmament Committee

Although the Baruch Plan had not come to fruition, it is often cited as the beginning point in the history of the NPT⁴³, and after the rejection of the Baruch Plan, multilateral efforts towards the negotiation of a treaty to control nuclear activities around the world were again proposed in the 1953 by President Eisenhower; and while no agreement was forthcoming on preventing nuclear proliferation, one of the original vital elements of the Baruch Plan, an atomic authority, the International Atomic Energy Agency (IAEA), came into being in June of 1957, as the UN's nuclear watchdog, to provide the framework for the control of global nuclear activities. Yet calls in the General Assembly by Ireland in 1958: "to study the dangers inherent in the further dissemination of nuclear weapons"⁴⁴; and in 1959, for the, "Prevention of the wider dissemination of nuclear weapons"⁴⁵ saw the General Assembly charge the then Ten-Nation Disarmament Committee (TNDC)⁴⁶ (which operated outside the ambit of the UN), to, consider appropriate means to avert the danger of an increase in the number of States possessing nuclear weapons, including, "the feasibility of an international agreement, subject to inspection and control, whereby the Powers producing nuclear weapons would refrain from handing over the control of such weapons to any nation not possessing them and whereby the Powers not possessing such weapons would refrain from manufacturing them"⁴⁷. The TNDC met in 1960 but "*did not* consider the issue of nuclear non-proliferation"⁴⁸, focusing instead on disarmament. This lack of consideration by the TNDC led to reiterated calls for a permanent agreement to prevent the dissemination of nuclear weapons⁴⁹, and by

⁴³ George Bunn, John B. Rheinlander, *Looking Back: The Nuclear Nonproliferation Treaty Then and Now*, Arms Control Today, September 2008, https://www.armscontrol.org/act/2008_07-08/lookingback, accessed 10 August 2019

⁴⁴ (A/C.1/L.206)

⁴⁵ (A/4125)

⁴⁶ The TNDC was comprised of France, the USSR, the UK, and the USA as well as Bulgaria, Canada, Czechoslovakia, Italy, Poland and Romania

⁴⁷ (A/4125)

⁴⁸ *Treaty on the Non-Proliferation of Nuclear Weapons* New York, 12 June 1968, UN Audio Visual Library of International Law <http://legal.un.org/avl/ha/tnpt/tnpt.html>, accessed 10 August 2019, emphasis added

⁴⁹ Resolution 1576 (XV) of 20 December 1960 and Resolution 1665 (XVI) of 4 December 1961

December 1961 the General Assembly endorsed the establishment of an Eighteen-Nation Disarmament Committee (ENDC).⁵⁰

The ENDC was made up of the membership of the earlier TNDC, but also included membership of eight additional countries, namely Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden and the United Arab Republic, who formed the “non-aligned” States of the Committee. The ENDC set about looking at three main areas: general and complete disarmament; the discontinuance of nuclear testing; and, confidence-building measures to decrease international tensions (e.g., the creation of “nuclear-weapon-free” zones, measures to prevent nuclear proliferation).⁵¹ Thus, while the U.S. and USSR had initially presented draft treaties focusing on creating an agreement which would focus on creating a framework for general and complete disarmament⁵², it was the prescient fear of the 1960s which was focused on preventing a world where possession of nuclear weapon capabilities became the norm, that led to members of the ENDC pushing to focus the work of the Committee exclusively on non-proliferation of nuclear weapons. Therefore, the *raison d'être* of the NPT became non-proliferation.⁵³

2.2.2 Non-Proliferation

The fear in the 1960s that nuclear weapon possession might expand beyond the UN P-5, to upwards of 20 or even 50 states, which would increase the likelihood of global nuclear warfare breaking out, was a prevailing concern in bringing the focus of the ENDC onto creating an agreement which would foremost address the question of nuclear proliferation. So, in formulating the non-proliferation provisions of the NPT, the drafters had three key elements to ensure: Firstly that parties to the NPT would not simply renege on their undertaking to be a non-proliferating state, and not acquire nuclear weapons surreptitiously, which would require a method of verification to ensure states' compliance to the NPT; secondly that those states agreeing to become non-proliferating non-nuclear weapons states would receive an incentive to join and remain parties to the NPT; and thirdly that the NPT contain a political bargain that non-proliferation undertakings incumbent upon non-nuclear

⁵⁰ General Assembly resolution 1722 (XVI) of 20 December 1961

⁵¹ *Foreign Relations of The United States, 1961–1963*, Volume VII, Arms Control And Disarmament, 153. Editorial Note, US State Department, Office of the Historian, <https://history.state.gov/historicaldocuments/frus1961-63v07/d153>, accessed 10 August 2019

⁵² (ENDC/2 and ENDC/30 and Corr.1) 1962

⁵³ Mohamed Shaker, *The Nuclear Non-proliferation Treaty: Origin and Implementation, 1959-1979*, Vol. I, Oceana Publications, 1980 p. 214.

weapon states (NNWS) be balanced against undertakings in disarmament by those states who were already nuclear armed.

Article III of the NPT addresses the undertaking of NPT States parties to accept an IAEA Safeguards Agreement to ensure that materials, equipment and technology for the peaceful use of nuclear energy do not become diverted into nuclear weapons programmes. Moreover, Article III extends this obligation to exports, with States to undertake not to make transfers of nuclear materials or especially designed or prepared goods, unless they be subject to an IAEA Safeguards Agreement. The verification aspect of the NPT as such reads like an odd backward twist on the normal legal burden of proof, as States parties have to constantly and consistently accept independent verification to disavow their guilt as potential nuclear proliferators.⁵⁴

The counterweight incentive for NPT States parties in having to accept independent verification controls on their nuclear activities, is found in Article IV of the NPT: providing States parties with the, “inalienable right... to develop research, production and use of nuclear energy for peaceful purposes”.⁵⁵ In this way Article IV becomes the carrot to the Article III stick – NPT States parties are *compelled* to accept independent verification of their activities in order to have the *right* to access the peaceful uses of nuclear energy. The IAEA also becomes the glue bringing the two areas together – under Article III, verifying States parties’ compliance with Safeguards Agreements and while under Article IV, facilitating States parties access to nuclear technologies.

However, while the NPT was a treaty of non-proliferation, the question of how disarmament could be framed within the NPT was extremely pertinent for the ENDC. Initially the U.S. and USSR had focussed their proposals in the ENDC on creating mechanisms for disarmament; indeed, “A common theme throughout the negotiation of the NPT was that parallel progress on arms control and disarmament would be a necessary condition for the success of nonproliferation. This was not simply a demand made by the non-nuclear weapons states.”⁵⁶ Articles I, II, III, and IV NPT deal with the undertaking, obligations and rights of NNWS to the NPT and how further global non-proliferation would be achieved; to secure the bargain of non-proliferation some undertaking for disarmament needed to be achieved, with UK Foreign Office Minister Fred Mulley noting that: “if it is fair to describe the danger of proliferation as

⁵⁴ Gaps in compliance with IAEA Safeguards occurred in Iraq in the 1990s and 2000s, which lead to economic sanctions and eventual invasion by a US led coalition over concerns that Iraq was developing a nuclear weapons programme, however no such programme was ever uncovered before or after the invasion.

⁵⁵ NPT Article IV

⁵⁶ Harries, *Supra* note 32 p.3

an obstacle to disarmament, it is equally fair to say that without some progress in disarmament the non-proliferation treaty will not last”.⁵⁷

2.2.3 *Disarmament*

Article VI NPT sets out that NWS party to the Treaty undertake to pursue negotiations in good faith on effective measures for nuclear disarmament, it is the heart of the political ‘grand bargain’ of the NPT: that other States parties accept non-proliferation in return for undertaking by the NWS to pursue disarmament.

Because of the overwhelming benefit to states’ security of a stable non-proliferation regime, it is easy to forget quite how unusual the act of signing the NPT as a non-nuclear weapons state is in political terms. Forswearing an option that others have exercised, while accepting obligations different from and more onerous than those taken on by other states, is not a typical feature of multilateral regimes. Demanding progress on nuclear disarmament, and framing the treaty as a step towards that goal, is a predictable political response.⁵⁸

Therefore it is key to remember that the Article VI provision on disarmament is primarily a political ‘bargain’: as the disparity and inequity between the verification obligations assumed by NNWS parties, who are striving towards non-proliferation; and between pursuit of good faith negotiations placed upon the NWS parties, is glaring. Yet if the political nature of the grand bargain sits uncomfortably within a Treaty which is a legal document, the result is that the NPT is an unjust Treaty, by “allowing some states to possess nuclear weapons while preventing others from doing so is inherently unjust. ... this injustice is – for most countries most of the time – a far lesser threat to their interests than the further proliferation of nuclear weapons.”⁵⁹

Consequently the disparity between the vague disarmament language of Article VI and the more detailed non-proliferation obligations was purposefully negotiated to be just so by the ENDC. Due to security concerns the juxtaposition fell between achieving a political bargain, whereby non-proliferation and disarmament could be addressed in single legal agreement; and hard strategy of providing mutual defence guarantees to States parties who had concerns that nuclear weapons were needed to fulfill their national security requirements.⁶⁰ As the U.S.

⁵⁷ ENDC/PV.358, para. 23.

⁵⁸ Harries *Supra* note 32 p.5

⁵⁹ *Ibid* p.2

⁶⁰ This was the case for West Germany who meanwhile, while agitating for disarmament, was also pushing its case for a greater influence in the nuclear defence of NATO; and Japan who was pressurizing NWS for clarity on disarmament measures while negotiating nuclear extended defence with the US. *Ibid* pp. 7 - 8

noted to the USSR, ‘it was not easy to create a political environment in which nations appeared to sign on to third-class nuclear status’.⁶¹ To counter this the ‘non-aligned’ members of the ENDC petitioned to make non-proliferation undertakings conditional upon specific progress in the areas of disarmament, as disarmament was a stated goal of the NPT, however:

holding disarmament as the ultimate goal did not mean that either the United States or the Soviet Union supported a nonproliferation treaty that entailed specific disarmament obligations though some non-aligned nations, including Nigeria and India, proposed such linkage in the early 1960s.⁶² U.S. and Soviet negotiators insisted that it was best not formally to link disarmament and nonproliferation measures, for fear that such a connection would jeopardize chances of achieving either objective⁶³... Some countries, such as India and the then-United Arab Republic (UAR), still pushed for a tight linkage between nonproliferation and disarmament, including reductions of existing nuclear weapons stocks, but this effort failed.⁶⁴

Such conditional linkage itself would itself render the NPT impossible to negotiate as the Swedish delegation noted, “[it would] hardly be feasible in legal terms to enter into obligations to arrive at agreements,” and that “to enumerate some specific measures would be counterproductive”.⁶⁵

Instead the ENDC settled that the NPT would be reviewed on a 5-yearly basis,⁶⁶ to allow States parties the opportunity to review progress on disarmament, although this proved unsavoury to the NWS, whose complaints saw the Review process upgraded from considering just the preamble, which contained the most expansive language on disarmament goals, to the whole of the NPT. Nonetheless, the NWS were ill at ease with the progress on achieving disarmament as per Article VI, being scrutinised in the NPT Review Cycle process, with the UK likening this to “enabl[ing] the non-nuclear states to hold a pistol to the heads of

⁶¹ *Memorandum of Conversation between Rostow and Dobrynin on 27 March, 28 March 1967*, LBJL, NSF, Papers of Francis M. Bator – Subject File – Non-Proliferation, Box 31, Vol.1, No.12, p. 1.

⁶² *International Negotiations on the Treaty on the Nonproliferation of Nuclear Weapons* (Washington, DC: U.S. Arms Control and Disarmament Agency, 1969) pp. 8, 15

⁶³ The United States, for instance, declared early in the NPT negotiating process that such elements should not be “inextricably linked.” The negotiating parties, explained ACDA (U.S. State Department, Arms Control and Disarmament Agency) Director Foster, should accomplish as much as they could if they could not reach agreement on everything initially. *Ibid*, p. 15.

⁶⁴ Christopher Ford, ‘*Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*’, *Nonproliferation Review* 14:3 (November 2007), pp. 405–6.

⁶⁵ ENDC/PV.363, para. 11

⁶⁶ As set out under NPT Article VIII

the nuclear.”⁶⁷ However, other States parties were left scratching their heads as to how such a trigger might be pulled, with Sweden positing, ‘What action is supposed to follow, if the verdict of a review turns out to be “unsatisfactory”’,⁶⁸ States parties would have little option to do anything more than block consensus on a final document.⁶⁹

Nevertheless, on 11 March 1968, the USSR and the U.S. submitted a joint draft treaty on the non-proliferation of nuclear weapons to the ENDC that was subsequently submitted to the General Assembly. On 12 June 1968, the General Assembly adopted Resolution 2373 (XXII), “commending the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)⁷⁰ and requested that it be opened for signature and ratification at the earliest possible date.”⁷¹

Yet the political ‘grand bargain’ was too much for some and India unable to reconcile itself to accepting non-proliferation obligations without conditionality upon disarmament progress, and rejected the NPT outright setting itself firmly on the path to developing its own nuclear weapons. Yet for all the other members of the ENDC, “[a]ccepting the NPT, in other words, meant [and continues to mean] accepting that the value of non-proliferation was such that it was not worth holding the treaty hostage to the agreement of specific measures of arms control and disarmament. ...The more pressing question, however, is whether dissatisfaction at the slow pace of disarmament will create political momentum that cannot be contained, with detrimental side-effects for the NPT.”⁷²

2.3. Nuclear-Weapon States and Non-Nuclear Weapon States, the unequal nature of the NPT

2.3.1. The Unequal Bargain

One of the greatest quirks of the NPT was a self-evident problem from the inception of the Treaty. Namely that a treaty designed to set up a *universalised* global regime of non-proliferation had to contend with the fact that five States, the Permanent 5 (P-5) of the UN Security Council, had, and were continuing to proliferate nuclear weapons programmes. Article IX (3) of the NPT divided States parties in two separate types: the NWS, those states who had exploded atomic devices prior to 1967; and all other states (irrespective of any

⁶⁷ Brief for the Visit of Herr Schütz on non-proliferation, UK National Archives, FCO 10/75, General – briefs and papers, no. 2, 20 January 1967.

⁶⁸ ENDC/PV.363, para.15.

⁶⁹ Harries *Supra* note 32

⁷⁰ Treaty on the Non-Proliferation of Nuclear Weapons (1968)

⁷¹ *Treaty on the Non-Proliferation of Nuclear Weapons New York, 12 June 1968*, UN Audio Visual Library of International Law <http://legal.un.org/avl/ha/tnpt/tnpt.html> accessed 10 August 2019

⁷² Harries, *Supra* note 32 p.4

nuclear weapon possession post-1967) as NNWS. The NNWS parties are subject to the provisions in the NPT to not proliferate, or seek to gain nuclear weapons while the NWS undertake likewise not to proliferate nuclear weapons to NNWS and also are obligated by Article VI of the NPT, to respect provisions on disarmament.

Yet this definition of two different classes of party as either NWS or NNWS parties to the treaty is openly discriminatory... the regime established by the NPT was deeply asymmetrical, since it openly violated the fundamental principle of the modern international state system: the norm of sovereign equality”.⁷³

Legally what has resulted from the NPT’s political aspect is that there are two separate regimes; NNWS are compelled to non-proliferation undertakings, including verification measures. NWS on the other hand are *not* compelled to accept IAEA Nuclear Safeguards⁷⁴; rather their obligations are encapsulated in the undertaking of pursuing *negotiations in good faith* on effective measures relating to nuclear disarmament.⁷⁵

This disparity of obligation, as previously detailed was not unbeknownst or unproblematic to the negotiating parties of the NPT, yet, “[t]he security benefits of the NPT meant that states were not willing to make the nonproliferation obligation conditional on the achievement of specific disarmament measures, which explains the vague language of Article VI”,⁷⁶ and informs on why after 50 years the unequal bargain has become entrenched to give us the world as we know it today. Herein then lies the main legal undercurrent of the problems regarding the NPT, the gap between obligations, of the NPT as previously stated was not palatable for all, and states such as India, Pakistan and Israel have found themselves irreconcilable with the NPT’s non-proliferation pillar, however, for 190 States parties, the importance of a prospect of achieving a world free from nuclear weapons means that the unequal nature of the NPT, has been a bitter pill, but one worth swallowing.

⁷³ Roland Popp, *Small and middle powers in the emergence of a discriminatory regime, Negotiating the Nuclear Non-Proliferation Treaty: Origins of the Nuclear Order*, Routledge 2017, p.1

⁷⁴ Despite not being obligated to accept IAEA Safeguards, the NWS have all concluded Safeguard Agreements with the IAEA (See IAEA documents INFCIRC/263, INFCIRC/288, INFCIRC/290, and INFCIRC/327, INFCIRC/369 for the agreements pertaining to, respectively, the UK, USA, France, the USSR and China.), excluding only areas of national security interest – see: A. von Baeckmann, *IAEA safeguards in nuclear-weapon States A review of objectives, purposes, and achievements*, IAEA Bulletin 1/1988, <https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull30-1/30103552224.pdf> , accessed 10 August 2019

⁷⁵ The eventual aim in this regard has been and remains the creation of a treaty on general and complete disarmament. While discussions have taken part on the initial stages of such as treaty in the UN Conference on Disarmament forum, progress on a Fissile Material Cut-Off Treaty are currently stalled.

⁷⁶ Harries *Supra* note 32, p. 1

2.3.2. *The Four Camps – Parties under the Nuclear Umbrella and Prohibition Parties*

This separation by the NPT of states into legally designated ‘Haves’ and ‘Have nots’ has effectively meant that all NNWS states in the world have been legally cast into one of two positions: NNWS party to the treaty and NNWS not party to the treaty. This legal distinction however belies a more complex political situation, as nuclear equivalence between all NNWS is nigh impossible: ‘Have nots’, while within the legal framework of the NPT, are subject to the same non-proliferation and verification obligations and controls, and as such are all in the same boat; yet the realpolitik of NNWS’s situations have differed considerably, and have, with one or two notable exceptions,⁷⁷ not changed in the past 50 years since the NPT opened for signature. Among the NNWS there has ever been three ‘camps’ of states: Firstly, there are ‘nuclear umbrella’ NNWS, those who live within a nuclear shadow^{78, 79} and find themselves directly or indirectly threatened by nuclear weapon possessing states, and while not possessing nuclear weapons themselves, they have negotiated defence agreements which allow them to be protected by the nuclear umbrella. Those NNWS in the NPT living under the nuclear shadow have aligned militarily to one of the NWS – these states were generally those who during the *travaux préparatoires* of the NPT were seen by the NWS as being next in line to develop nuclear weapons. To counter-act these potential next-generation proliferators, these states were given security guarantees for defence and against other states in possession of nuclear weapons – as a virtue of living under a “nuclear shadow”. Today these states constitute those under the U.S. “nuclear umbrella”, such as NATO⁸⁰ members⁸¹,

⁷⁷ South Africa abandoned its nuclear weapons programme in 1990s and became a founding member the African Nuclear Free Zone. Kazakhstan renounced nuclear weapons in after the break-up of the USSR and became a founding member of the Central Asian Nuclear Free Zone. – However in notable contrast, Ukraine and Belarus while having given up their nuclear weapons, with both states occupying in an global sphere under nuclear shadow, neither have joined a NWFZ.

⁷⁸ “Regions where a nuclear shadow is imminent”, first used in a presentation by Ambassador Mitsuru Kitano of Japan, *The Treaty on the Prohibition of Nuclear Weapons*, Vienna Center for Disarmament and Non-Proliferation Posted on 14 November 2017 • Event Reports, <https://vcdnp.org/the-treaty-on-the-prohibition-of-nuclear-weapons/> accessed 10 August 2019

⁷⁹ The expression “nuclear shadow” encompasses a host of elements related to nuclear weapons ranging from numbers and types of nuclear weapons to nuclear doctrine, deterrence, nuclear signaling, saber-rattling, and political significance. Nuclear shadow consists of all these relevant factors and the significance which nuclear weapons-possessing states attach to them - Mitsuru Kitano, *How to Transcend Differences in Nuclear Disarmament Approaches*, September 2018, Arms Control Today, <https://www.armscontrol.org/act/2018-09/features/transcend-differences-nuclear-disarmament-approaches> , accessed 10 August 2019

⁸⁰ North Atlantic Treaty Organization (1949)

⁸¹ NATO - The North Atlantic Treaty (1949) Article 5 establishes the obligation of collective defence. An attack against one ally is considered an attack on all the allies. Moreover Belgium, Germany, Italy, Netherlands and Turkey benefit from ‘nuclear sharing’ whereby U.S. nuclear weapons are stationed within the territory of the nuclear sharing states.

Australia⁸² Japan⁸³ and the Republic of Korea.⁸⁴

Secondly there are the Nuclear Weapon Free Zone(s) (NWFZ) NNWS in the NPT. Those States parties who are not aligned to a NWS by security guarantees, and who, for the most part, have in the absence of such security guarantees sought to designate an area(s) unilaterally or multilaterally where nuclear weapons are legally prohibited. Even prior to the opening of the NPT for signature in 1968, states had begun to explore the possibility of NWFZ in General Assembly Resolution 2028 (XX) of 19 November 1965, which established the necessity that there should be an acceptable balance of mutual responsibilities and obligation of the NWS and NNWS. General Assembly Resolution 3472 (XXX) B of 11 December 1975 created a definition of a NWFZ as being: “an agreement which a group of states has freely established by treaty or convention that bans the use, development, or deployment of nuclear weapons in a given area, that has mechanisms of verification and control to enforce its obligations, and that is recognized as such by the General Assembly of the United Nations”. NWFZ’s while first established in Latin America and the Caribbean under the Treaty of Tlateloco (1967) was followed up by similar zones in Africa, the Pacific, SE Asia, Central Asia and Mongolia⁸⁵, and since the 1995 RevCon, negotiations have been ongoing towards the goal of establishing a NWFZ by states in the Middle East.⁸⁶ While no NWFZ exists in Europe, some European States who espouse neutrality or pacifist positions, such as Austria, Finland, Ireland, Sweden, Switzerland and the Vatican City have also traditionally aligned themselves with this group of NNWS.

The third group of NNWS are “De-facto NWS”, those NNWS not party to the NPT who as non-parties to the Treaty have exercised their sovereign rights to pursue the possession of nuclear weapons. Yet, when in 1974 non-NPT party India detonated an explosive nuclear device⁸⁷, India continued to be legally regarded as a NNWS despite its de-facto possession being to the contrary. This status as a NNWS in de-facto possession of nuclear weapons has since been extended to the states of Pakistan, the Democratic Republic of Korea (DPRK)⁸⁸

⁸² Australia, New Zealand, United States Security Treaty (1951), formerly applicable to New Zealand too, but today bilateral meetings are held between just Australia and the United States

⁸³ Treaty of Mutual Cooperation and Security between the United States and Japan (1960)

⁸⁴ Mutual Defense Treaty Between the United States and the Republic of Korea (1953)

⁸⁵ To date NFWs have been set up in Antarctica (Antarctic Treaty System) Outer Space (Outer Space Treaty), the Seabed (Seabed Treaty), the South Pacific (Treaty of Rarotonga), South East Asia (Treaty of Bangkok) Africa (Treaty of Pelindaba), Central Asia (Treaty of Semipalatinsk) and Mongolia

⁸⁶ United Nations Security Council Resolution 687 (1991)

⁸⁷ Smiling Buddha was the assigned code name of India's first successful nuclear bomb test on 18 May 1974.

⁸⁸ The DPRK is distinct from the other nuclear weapon possessing states; for while India, Pakistan and Israel have never become State parties to the NPT, and as such have pursued their sovereign right to pursue and

and Israel.⁸⁹

The circumstance of an individual state to align itself under the nuclear umbrella or in a NWFZ correlates more as a factor of geography and historical happenstance than outward long-term planning. After all, “the “nuclear shadow” is imminent in North America, Northeast Asia, South Asia, Europe, Russia, and the Middle East, the regions which have nuclear-weapon states under the NPT and de facto nuclear possessors. This is not the case in Latin America, Africa, Central Asia, Southeast Asia, and the South Pacific, where there are no nuclear weapons possessors whatsoever.”⁹⁰ However throughout 50-years of the NPT Review Process, the position of NNWS as either being under a nuclear umbrella, or a proponent of NWFZ, has informed on whether States parties have supported arguments of nuclear deterrence, or whether States parties subscribe to the necessity for an immediate prohibition of nuclear weapons, as this in turn has shaped the debate and current status of the NPT.

2.4. The NPT Review Conference mechanism, Success or Failure?

It is with these factors that the NPT – the cornerstone of global multilateral nuclear non-proliferation and disarmament efforts – has laboured these past 50 years.

The NPT has been often espoused as the cornerstone of global non-proliferation regime⁹¹, it ensures that States parties’ declared activities are held accountable by verification Safeguards implemented by the independent UN agency – the IAEA.⁹² Indeed as far as nuclear non-proliferation is concerned the NPT has, for the most part, been a success: the NPT had originally been envisaged with a life-span of but 25-years. This meant that the 1995 NPT RevCon, the first post-Cold War Review Conference, had to decide whether the NPT and the ‘grand bargain’, was still relevant in the post-Cold War world:

develop nuclear weapons, the DPRK is a NNWS State party to the NPT, who has withdrawn itself from the Treaty as per Article X, and has then become a nuclear weapon possessing state.

⁸⁹ Israel has never confirmed its possession of nuclear weapons but is widely believed to have developed nuclear weapon capabilities. Officials in an unofficial capability have confirmed this much, this position is can be characterized as “no show, not tell” - "Mordechai Vanunu: The Sunday Times articles". London: The Times. April 21, 2004, <https://www.thetimes.co.uk/article/mordechai-vanunu-the-sunday-times-articles-xj2gfxldbv2>, accessed 10 August 2019

⁹⁰ Mitsuru Kitano, *How to Transcend Differences in Nuclear Disarmament Approaches*, September 2018, Arms Control Today, <https://www.armscontrol.org/act/2018-09/features/transcend-differences-nuclear-disarmament-approaches>, accessed 10 August 2019

⁹¹ *The Global Nuclear Nonproliferation Regime*, Report by International Institutions and Global Governance Program, Council on Foreign Relations, 21 May 2012, <https://www.cfr.org/report/global-nuclear-nonproliferation-regime> accessed 10 August 2019

⁹² IAEA Safeguards and Verification <https://www.iaea.org/topics/safeguards-and-verification> accessed 10 August 2019

In 1995, in perhaps the single greatest strengthening of the regime since its founding, the signatories to the Non-Proliferation Treaty agreed to transform its original twenty-five-year term into an open-ended commitment. In doing so, they committed themselves to a stringent bargain. ... All states did so with the understanding that while the treaty was demonstrably imperfect, it nonetheless made them all safer—individually and collectively.⁹³

The effect of the strengthening of the global non-proliferation architecture beyond its original mandate cemented non-proliferation as encapsulated in the NPT as the normative legal position for States. At the start of the 2020 Review Cycle, only India, Pakistan, Israel and newly sovereign South Sudan have never signed the NPT, and only one State party, the DPRK has withdrawn from the Treaty, under the provision of Article X NPT.

Notwithstanding the achievement of near universal global reach, the NPT RevCon has not solely concerned itself with the obligations of nuclear non-proliferation, but also with obligations for NWS with nuclear disarmament. As previously stated Article VI's good faith requirement negotiations on effective measures relating to nuclear disarmament stands in disparity to the independent verification measures incumbent upon NNWS States parties, and the disparity in achievement between non-proliferation and disarmament is hardly unknown truth in the nuclear non-proliferation and disarmament field.

Only nine countries are nuclear-armed, four more than when the treaty was agreed. Few technologies have ever spread so slowly... on the test of stopping the spread of the bomb the NPT has been a qualified success. But when it comes to actual disarmament, things have gone a bit awry.⁹⁴

It has been difficult for many states to reconcile the successes in non-proliferation with the lack of tangible progress in disarmament over the course of 50 years.

The state of disarmament generated by the NPT in the framework of customary international law can be inferred from the Final Documents⁹⁵ circulated by the NPT States parties at NPT

⁹³ George Perkovich, Jessica Tuchman Mathews, Joseph Cirincione, Rose Gottemoeller, Jon Wolfsthal, *Universal Compliance: A Strategy for Nuclear Security*, Carnegie Endowment 20 June 2007, p.14 https://carnegieendowment.org/files/section_one1.pdf, accessed 10 August 2019

⁹⁴ Matthew Harries, *Nuclear disarmament agreements haven't worked – is there another solution?*, February 2017 Prospect Magazine, <https://www.prospectmagazine.co.uk/magazine/banning-the-bomb-well-all-go-together>, accessed 10 August 2019

⁹⁵ Final Documents were agreed to in 1975, 1985, 2000 and 2010. States parties failed to adopt a Final Document in 1980, 1995, 2005 and 2015

Review Conference, which have been held on a once-every-five-years basis since 1970⁹⁶. These documents, “are instructive at least to show political commitment and to “moderate” the ordinary meaning described [by subsequent practice], in addition to the NPT’s context and object and purpose”.⁹⁷ Undoubtedly those RevCon which achieved Final Documents are the most significant, as they are achieved by a consensus agreement amongst NPT States parties as such provide the main basis for the emergence of customary international law stemming from the NPT.

The most recent NPT consensus document has been the 2010 “Action Plan” taken from the 2010 NPT Rev Con Final Document,⁹⁸ which focuses on, “*implementing* the unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals, the nuclear weapon States commit to undertake *further* efforts to reduce and ultimately eliminate all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures,” which underscores the consensus of States parties regarding lack of implementation taken for disarmament activities and the need for further effort, whether by unilateral, bilateral or multilateral means. Moreover, the Action Plan stated that “[t]he nuclear-weapon States commit to *accelerate concrete progress* on the steps leading to nuclear disarmament... [by]: *Rapidly* moving towards an overall reduction in the global stockpile of all types of nuclear weapons”. This serves only to underscore that the subsequent practice of Article VI has fallen short of original expectations, in that implementation of the unequivocal undertaking of disarmament as iterated by Article VI has not proceeded quickly enough, or substantially enough; tempered by the concession that *any* legal undertaking (whether unilateral, bilateral or multilateral) would be sufficient.

Nonetheless 2010 did present States parties with grounds for optimism that a corner could be about to be turned with regards to improved engagement on disarmament. 2009 had seen U.S. President Barack Obama present a speech in Prague where he set out his vision for a world without nuclear weapons⁹⁹, this coupled with a new agreement (New START) between Russia and the U.S. for arms control, and a consensus document in the Action Plan of the NPT Review Conference of 2010 increased hope of tangible work, and one new group who

⁹⁶ The NPT Review Conference (Rev Con) is preceded by three NPT Preparatory Committee (Prep Com) meetings held in the three years running up to a Rev Con in Vienna, Geneva and New York. The current Prep Com cycle is engaged in the work of the 2020 Rev Con.

⁹⁷ Paul M. Kiernan, “*Disarmament*” *Under the NPT: Article VI in the 21st Century*, Michigan State International Law Review [Vol. 20:2], p.393

⁹⁸ Final Document, Action Plan, NPT Rev Con 2010, NPT/CONF.2010/50 (Vol. I)

⁹⁹ , President Barack Obama, Prague, *A World Without Nuclear Weapons*, Czech Republic, 5 April 2009

sought to tackle disarmament from a left-field position became particularly prominent - the Humanitarian Initiative. The Humanitarian Initiative was originally composed of 16 states who provided a statement during the 2010 NPT Review Conference on the humanitarian impact of nuclear weapons. This was followed up by three conferences in Oslo 2013, Nayarit 2014¹⁰⁰ and Vienna 2014. Crucially the Vienna conference affirmed a pledge fill the "legal gap for the prohibition and elimination of nuclear weapons"¹⁰¹ and featured the attendance by delegations from two NWS, the United Kingdom and U.S. which "seems to have shown that these two NWS at last accept the legitimacy of disarmament-related discussions"¹⁰². The follow up statement by the Humanitarian Initiative at the 2015 NPT Review Conference was delivered on behalf of 159 states¹⁰³ and though many NNWS living under the 'nuclear shadow' were unfortunately absent from this statement, a statement in similar vein was made by Australia on the Humanitarian Consequences of Nuclear Weapons¹⁰⁴. Both statements underlined the importance of greater resolution towards disarmament efforts. Perhaps if the states of both Groups were able to unite inclusively, they could provide greater unity to the calls for disarmament, this could be taken some way to creating greater multilateral effort to work on the obligations of nuclear disarmament within the framework of the NPT, however despite the successes of the Humanitarian Initiative, the 2015 NPT Review Conference failed to provide any consensus document:

[The Chair of the 2015 Review Conference,] Ambassador Feroukhi identified substantial gaps that remained in three areas: effective measures towards nuclear disarmament, humanitarian aspects of nuclear weapons use, and reporting by the recognized nuclear-weapon states... The divide between the NWS – the permanent five members of the UN Security Council – and the other parties to the treaty thus remains readily apparent. South Africa even invoked apartheid in describing the

¹⁰⁰ the statements at the Nayarit Conference were central to the Marshall Islands' alleged dispute in the *Marshall Islands Cases* which will be discussed in Chapter 5

¹⁰¹ The pledge has received the formal endorsement of 127 nations. <http://www.icanw.org/pledge/>, accessed 10 August 2019

¹⁰² *Supra* Note 32, p. 4

¹⁰³ Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered by Austria, 2015 NPT Review Conference, 28 April 2015

¹⁰⁴ Statement on the Humanitarian Consequences of Nuclear Weapons delivered by Australia on behalf of Australia, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Turkey, 2015 NPT Review Conference, 30 April 2015, http://www.un.org/en/conf/npt/2015/statements/pdf/HCG_en.pdf, accessed 10 August 2019

system in place.¹⁰⁵

And therefore, with no signs of a reconciliation before the 2020 Review Conference, and with over 100 countries joining to an Austrian pledge to seek, “effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons”,¹⁰⁶ ‘nuclear apartheid’ is the current norm and the positions of the four camps of NPT NWS and NNWS have become increasingly disparate.

¹⁰⁵ Wilfred Wan, *Why the 2015 NPT Review Conference Fell Apart*, United Nations University - Centre for Policy Research, 28 May 2015, <https://cpr.unu.edu/why-the-2015-npt-review-conference-fell-apart.html>, accessed 10 August 2019

¹⁰⁶ Humanitarian Pledge, March 2015, http://www.icanw.org/wp-content/uploads/2015/03/HINW14vienna_Pledge_Document.pdf, accessed 10 August 2019

Chapter 3 - Non-proliferation and Disarmament legal and political developments alongside the NPT: 1970 - 2015

Since the entry into force of the NPT in 1970, States parties and proponents of the Treaty have had the twin aims of the normalisation of State non-proliferation and to encourage progress for NWS to advance disarmament negotiations in good faith. While the NPT itself is recognised as being the cornerstone of the international nuclear non-proliferation regime,¹⁰⁷ it is important to recognise that the NPT does not, and has not existed in a vacuum: international jurisprudence; legal-political global developments have affected both non-proliferation verification and progress, and disarmament negotiations; as well as, legal regulations negotiated at the multilateral level, and implemented either nationally or supra-nationally for export control regimes tied to, and separated from the NPT, have all been major issues affecting the NPT. This chapter provides an overview of the most crucial aspects of developments between the NPT's entry into force in 1970, and the end of the last review cycle in 2015 when consensus among NPT States parties could not be reached. The pertinence of non-proliferation and disarmament discourse parallel to the NPT is necessitous to understanding the challenges of the current review cycle (2015 – 2020) and the reasonable expectations for the direction of the NPT after half a century.

3.1. Judicial interpretation - Cases relating to nuclear weapons before the ICJ

3.1.1. Nuclear Test Cases – Australia v. France and New Zealand v. France [1974]

Prior to 2016 the ICJ had had just one contentious action brought before regarding nuclear weapons which was in the *Nuclear Test Cases* which were first heard in 1973 and ruled upon in 1974. The action was brought by Australia and New Zealand pertaining to a series of nuclear tests which had been completed by France in the South Pacific. Australia and New Zealand demanded that testing cease immediately due to concerns over environmental damage on their sovereign territories caused by radioactive fallout. Before the case could be completed, France moved for the dismissal of the application, announcing it had completed all atmospheric testing and did not plan any further testing. In light of this declaration the Court did not discuss the substance of the claim concerning nuclear testing.¹⁰⁸ However upon the resumption of French nuclear testing in the South Pacific in 1995 (albeit underground as

¹⁰⁷ *Get the Facts: Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, The Nuclear Threat Initiative, https://media.nti.org/pdfs/npt_fact_sheet.pdf, accessed 10 August 2019

¹⁰⁸ Malcolm Shaw, *International Law*, Cambridge University Press 8th Edition, p.647

opposed to atmospheric testing), ‘New Zealand asked the ICJ to review the situation pursuant to the 1974 judgement and declare that France was acting illegally as being likely to cause the introduction into the marine environment of radioactive material and in failing to conduct an environmental impact assessment’¹⁰⁹, the Court dismissed the action due to the action not concerning atmospheric testing as had the 1974 case.¹¹⁰ Parallels between the 1974 and 1995 decision are easy to infer, the ICJ’s repeated avoidance of consideration of the issues at hand due to its expected knowledge that any aggravating action would be/had been ceased before the Court’s jurisprudence might make a mark.

The case is often discussed by legal commentators with some bewilderment that unilateral statements may be legally binding, indeed *Brownlie* notes that, “the Court in a somewhat contrived manner avoided the problem”¹¹¹. The *Nuclear Tests Cases* jurisprudence has been little applied by the ICJ since, yet within the nuclear non-proliferation and disarmament context, the ICJ’s reticence to wade into a very politicised area of international law, showed that the Court’s ability to stretch judicial interpretation for nuclear pertinent issues, translated into an unwillingness, both by the bench in 1974 and in 1995, to allow States to use judicial process to speed along progress in disarmament and non-proliferation negotiations.

3.1.2. *Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons [1996]*

By the 1990s change was afoot, the Cold War had come to a close and finally there seemed to be a prospect of being able to implement a genuine change in stalled multilateral legal negotiations. As such the States of the UN General Assembly requested the ICJ provide an advisory opinion on the Legality of the Threat or Use of Nuclear Weapons.

The *Advisory Opinion on the Legality or Threat of Nuclear Weapons* represents the landmark of international court opinion to date in delimiting the legal scope for usage or threat of usage for nuclear weapons. The court provided answers to seven separate questions:

- A. The court decided to comply with the request for an advisory opinion;¹¹²
- B. The court replied that "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons";¹¹³

¹⁰⁹ *Ibid* p. 673

¹¹⁰ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 1974 in the Nuclear Tests Case*, ICJ Reports, 1995, pp. 288, 305-6; 106 ILR, pp. 1, 27 - 28

¹¹¹ James Crawford, *Brownlie's Principles of Public International Law*, OUP 8th Edition p.379, p.354

¹¹² *International Court of Justice advisory opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ 2 General List No. 95.*, section 1

¹¹³ *Ibid*, paragraph 105, section 2A

- C. The court replied that "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such";¹¹⁴
- D. The court replied that "A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful";¹¹⁵
- E. The court replied that "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons"¹¹⁶
- F. The court replied that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"¹¹⁷
- G. The court replied that "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".¹¹⁸

Decisions in, on paragraphs A., C. and F. were of split opinion, as 13 – 1, 11 – 3 and 7 – 7 (with the President's deciding vote carrying the motion) respectively.

Judge Oda, clarified his opposition to F. noting that the (unilateral) assurances given by the NWS to NNWS to not use nuclear weapons against them leaving: "almost no probability of any use of nuclear weapons given the current doctrine of nuclear deterrence."¹¹⁹ He concluded his opinion by noting that a decision on the elimination of nuclear weapons "is a function of political negotiations among States ... but not one which concerns this judicial

¹¹⁴ *Ibid*, paragraph 105, section 2B

¹¹⁵ *Ibid*, paragraph 105, section 2C

¹¹⁶ *Ibid*, paragraph 105, section 2D

¹¹⁷ *Ibid*, paragraph 105, section 2E

¹¹⁸ *Ibid*, paragraph 105, section 2F

¹¹⁹ *Ibid*

institution ...”¹²⁰ While this seems like judicial stonewalling, Judge Oda’s reasoning does highlight the acute juxtaposition of politics and the law as regards nuclear weapons, and the perceived risks by the judiciary of involving their opinions in an area where political realities could take primacy over legal doctrine.

Nonetheless the remaining thirteen judges were not as reticent and attempted to frame question within the then international legal framework. Primarily their deliberations focused in on the balance between Article 2(4) of the UN Charter¹²¹; prohibiting the threat or use of force, and Article 51 of the UN Charter¹²²; the inherent rights of individual or collective self-defence if an armed attack occurs. The Court found that: “these provisions do not refer to specific weapons. They apply to *any* use of force regardless of the weapons employed. The [UN] Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. The entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality”.¹²³ In quantifying necessity and proportionality the Court made special reference to both the humanitarian and environmental consequences resulting from the use of nuclear weapons.¹²⁴ In advancing the arguments of international humanitarian law the Court noted the cardinal principles of such law were:

“the protection of the civilian population and civilian objects and establish[ment] [of] the distinction between combatants and non-combatants; *States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets...* [and the] prohibit[ion] to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. [In applying this principle], States do not have unlimited freedom of choice of means in the weapons they use”.¹²⁵

The Court went on to note that: [It] observes that, in view of the unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for the requirements of the law applicable in armed conflict”. This pronouncement effectively means a nuclear weapon could not be used without violating international humanitarian law. However, the Court did conclude that:

¹²⁰ *Ibid*

¹²¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹²² *Ibid*

¹²³ *Supra* Note 117, paras. 37 - 50

¹²⁴ *Supra* Note 117, para. 29

¹²⁵ *Supra* Note 117 paras. 74 – 87 emphasis added

“the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake... accordingly ... the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an *extreme circumstance of self-defence, in which its very survival would be at stake*”.¹²⁶

It is an somewhat uneasy balance that the Court found between international humanitarian law and the doctrine of necessity for self-defence as regards state survival, nonetheless it is this balance that allows the Court to make its decision contained in paragraph F. that the "the threat or use of nuclear weapons would *generally* be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". However, those Judges voting against the decision contained in paragraph F. did so out of concern for the weight of the humanitarian vs. self-defence arguments (with the exception of Judge Oda whose reasoning was discussed above).

It is interesting to note that of those dissenting judges, those who favoured broader legal interpretation permitting the use of nuclear weapons were all from NWS, whereas those wishing to find a general legal prohibition for the use of nuclear weapon, all originated from NNWS, in particular those NNWS which are all members of NWFZ and unto that even the President (who is from a country which under former colonial control is one where nuclear weapons were tested) notes his regret that necessity of self-defence creates a legal window for the use of nuclear weapon. This serves as a reminder of the deeply polarised global opinion of nuclear weapons depending on a person's state of origin and where in the NWS and NNWS camps it was cast after the establishment of the NPT in 1968.

Nonetheless, *the Advisory Opinion on the Legality of Nuclear Weapons* did lead for the progression of nuclear disarmament based on two tenets: Firstly that NWS did have 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”,¹²⁷ which lends distinction to the work of disarmament particularly as undertaken in the ambit of the NPT Article VI, and; secondly that international humanitarian legal considerations (as well as environmental factors) were an area which could restrict and curtail the legality of nuclear

¹²⁶ *Supra* Note 117 paras. 90 - 97

¹²⁷ *Supra* Note 117 para. F

weapons. These two factors have been key aspects in moving the disarmament into the 21st century.

However, the ICJ did also refine that the obligation of nuclear disarmament did go “... beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects ...”¹²⁸ Yet this interpretation of the ICJ that Article VI obligations were honoured by both the effort and achievement of disarmament was caveated but the acknowledgement of the Court that: “This twofold obligation to pursue and to conclude negotiations formally concerns the ... States parties to the Treaty on the Non-Proliferation of Nuclear Weapons. ... Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States”.¹²⁹ Unfortunately this interpretation of disarmament hinging on result as well as conduct has not been taken up as readily by *all* NPT States parties, with rebuke for the ICJ’s interpretation coming from those in NWS, like Christopher Ford, who sit in policy-enacting-positions in the U.S.:

it is not immediately obvious that the ICJ’s “twofold” obligation stands the test of logic. Certainly, the drafters of the NPT knew perfectly well how to state legal requirements clearly. Articles I and II ...are quite unambiguous: nuclear weapon states “undertake not to” help others acquire nuclear weapons, and non-weapon states “undertake not to” acquire them. And Article III is quite clear that each non-nuclear weapon state “undertakes to accept” nuclear safeguards and that specific procedures and safeguards “shall be” accepted and followed. It is thus curious that if the drafters of the NPT really meant “shall pursue and shall conclude negotiations,” they found it impossible to say so.¹³⁰

Yet such rebuke is but from one quarter, and while the ICJ’s advisory opinions are of a non-binding character and its jurisprudence can be ignored, it remains that other NPT States parties have embraced the ICJ’s advisory interpretation and in doing so have given effect to the Court’s interpretation to increasingly demanded that disarmament progress focus on results as well as conduct.

¹²⁸ *Supra* Note 117 Para 99 Emphasis added

¹²⁹ *Supra* Note 117 Para 100 Emphasis added

¹³⁰ Ford, *Supra* note 66, p. 403

3.2. Disarmament progress and developments

3.2.1. Bilateral Agreements and Multilateral Initiatives and Treaties

Nuclear disarmament as encapsulated in NPT Article VI, forms one half of the NPT ‘grand bargain’, the acceptance of a non-proliferation status for progress by the NWS on disarmament. While Article VI of the NPT set out that States parties should forward disarmament negotiations in good faith, the preamble of the Treaty requires States parties to “undertake effective measures in the direction of nuclear disarmament” as well as pursuing “a Treaty on general and complete disarmament under strict and effective international control”¹³¹. So, while the NPT has represented the pinnacle of disarmament obligations within the global multilateral framework; unilateral undertakings as well as bilateral treaties between the U.S. and Russia have formed the backbone of progress. The year after the NPT opened for signature, saw the commencement of negotiations by the U.S. and Soviet Union on disarmament obligations, leading to the Strategic Arms Limitations Treaties (SALT I and SALT II) of 1972 and 1979 which put restraints on the Cold War nuclear arms race. These bilateral treaties focused on either limiting and controlling, or even eliminating nuclear weapon delivery systems or nuclear weapon defence systems, such as the Anti-Ballistic Missile Treaty (1972 – 2002) and the Intermediate-Range Nuclear Forces Treaty (1987 - 2019); or sought to reduce deployed nuclear weapon stockpiles, such as the Strategic Arms Reduction Treaties (START), evidenced by START I (1991), START II (1993 - 2002), the Strategic Offensive Reductions Treaty (SORT) (2002 - 2011) and New START (2010). While figures in the U.S. Government have asserted that these arms control Treaties and unilateral undertaking have allowed for substantial progress in disarmament, with “ a very dramatic reduction... bringing [the U.S.] down to 12% of [its] Cold War peak”¹³² the fact remains that no nuclear weapon possessing State has ever fully disarmed¹³³ and with thousands of nuclear weapons still actively deployed. Resultingly, with New START due to expire in 2021 question marks are abound regarding the feasibility of future bilateral arms control agreements between the U.S. and Russia, and going into the 2020 NPT Review Cycle, NPT States parties have been recalcitrantly awaiting progress on updated arms control measures.

¹³¹ NPT Preamble

¹³² Christopher Ford, Remarks, “*Creating an Environment for Nuclear Disarmament*”, U.S. Department of State, Conference on Disarmament (CD) Plenary, Geneva, Switzerland, 26 March 2019, https://www.youtube.com/watch?time_continue=81&v=G136p-ah3fi , accessed 10 August 2019

¹³³ South Africa underwent a disarmament process when it renounced nuclear weapons, but never actually possessed a nuclear weapon as such.

Meanwhile, Multilateral disarmament efforts have to date been focused in the successor body to the ENDC – the Conference on Disarmament (CD), which after the NPT saw its greatest achievement in nuclear disarmament in negotiating the Comprehensive Test Ban Treaty (CTBT) in 1996¹³⁴. Yet efforts to otherwise produce a multilateral treaty, pursuant to the NPT and calls by the NPT 2010 Action plan, such as the Fissile Material Cut-off Treaty (FMCT)¹³⁵, have otherwise stalled due members of the CD blocking treaty negotiations.¹³⁶ Nonetheless in 1996 the ICJ's advisory opinion as requested by the UN General Assembly in the *Legality of The Threat Or Use Of Nuclear Weapons* opinion¹³⁷, stands out still as the benchmark of legal interpretation for interpreting the disarmament obligations owed by NPT NWS, when it affirmed that there did indeed still exist “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”;¹³⁸ which provided judicial support for continuing disarmament efforts.

3.2.2. *Nuclear Weapon Free Zones*

Legally NFWZs are characterized as being a legal statute, where there is a total absence of nuclear weapons within a delimited territorial area; and are subject to an international form of verification and control compliance to ensure the upholding of the statute.¹³⁹ As previously noted, the first NWFZ formed on inhabited territory, was in Latin America by the Treaty of Tlateloco (1967) and has been followed up by similar zones in Africa, the Pacific, South East Asia, Central Asia and Mongolia.¹⁴⁰ Such has been the perceived success of NWFZs, that efforts in the NPT have focused on encouraging more and more regions of the world to negotiate NWFZ agreements as a means to achieving global disarmament. As a result of this policy the 1995 NPT RevCon mandated the creation of NWFZ in the Middle East region,

¹³⁴ While having been opened for signature in 1996 and having its own Secretariat for verifying compliance with the CTBT, the Treaty itself requires ratification by all 44 States, who in 1996 possessed nuclear capabilities. As the DPRK, India, Pakistan and Israel, as well as the U.S. and China are amongst this number the CTBT has yet to enter into force, over 20 years after being deposited for signature.

¹³⁵ The FMCT discussions in the CD seek to negotiate an agreement whereby states parties would agree to prohibit the production of fissile material for nuclear weapons, or other explosive devices

¹³⁶ *Pakistan a Responsible Nuclear Power, Official Asserts*, The Nuclear Threat Initiative June 18, 2010 <http://www.nti.org/gsn/article/pakistan-a-responsible-nuclear-power-official-asserts/> accessed 10 August 2019

¹³⁷ *Supra* note 117

¹³⁸ *Ibid* 72, paragraph 105, section 2F

¹³⁹ *Comprehensive study on the question of nuclear-weapon-free zones in all its aspects*, General Assembly Resolution 3472 B (1975) [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472\(XXX\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472(XXX)), 10 August 2019

¹⁴⁰ To date NFWs have been set up in Antarctica (Antarctic Treaty System) Outer Space (Outer Space Treaty), the Seabed (Seabed Treaty), the South Pacific (Treaty of Rarotonga), South East Asia (Treaty of Bangkok) Africa (Treaty of Pelindaba), Central Asia (Treaty of Semipalatinsk) and Mongolia

however the fact that Israel, is not a State Party to the NPT, and the assumed fact that Israel is in possession of nuclear weapons has seen the creation of a Middle East NWFZ stall, to the extent that it was credited as the most prominent reason for a failure of consensus at the 2015 NPT Review Conference.¹⁴¹

3.3. Non-proliferation progress and developments

3.3.1. Non-proliferation becoming an international norm and strengthening compliance

When negotiations on the NPT had begun in 1961, there had been fears of a world where upwards of 25 or even 50 nations could possess nuclear weapon capabilities, yet in the intervening years the ‘bargain’ of the NPT has allowed non-proliferation to become the prevailing modus operandi:

“[s]ince the signing of the Non-Proliferation Treaty in 1968, many more countries have given up nuclear weapon programs than have begun them - Six nations abandoned indigenous nuclear weapon programs under way or under consideration in the 1960s: Egypt, Italy, Japan, Norway, Sweden, and West Germany. Since the late 1970s, Argentina, Australia, Belarus, Brazil, Canada, Iraq, Kazakhstan, Libya, Romania, South Africa, South Korea, Spain, Switzerland, Taiwan, Ukraine, and Yugoslavia have abandoned nuclear weapon programs or nuclear weapons (or both) on their territory. North Korea and Iran are the only two states that began acquiring nuclear weapon capabilities in this later period and have not ceased the effort.”¹⁴²

Indeed, upon the collapse of the Soviet Union, States which emerged as new independent entities and possessing nuclear weapons which were left inherited on their territory, such as Ukraine, Belarus, and Kazakhstan made moves to renounce and denuclearise their territories, underlining the international normalisation of non-proliferation and thus implicitly the NPT. The NPT in advocating universalised non-proliferation, created the basis for independent nuclear verification regime, whereby the IAEA was responsible for accounting for declared nuclear materials within a state.¹⁴³ The independence and robustness of the IAEA Safeguards accounting mechanism gained the faith and trust of the international community insofar as that even the NWS adopted IAEA Safeguards agreements for their non-military nuclear

¹⁴¹ Tytti Erästö, *The Lack of Disarmament in the Middle East: A Thorn in the Side of the NPT*, SIPRI Insights on Peace and Security No. 2019/1, January 2019, <https://www.sipri.org/sites/default/files/2019-01/sipriinsight1901.pdf>, 10 August 2019

¹⁴² George Perkovich, Jessica T. Mathews, Joseph Cirincione, Rose Gottemoeller, Jon B. Wolfsthal, *Universal Compliance A Strategy for Nuclear Security, The Strategy of Universal Compliance*, , Carnegie Endowment for International Peace June 2007, p.17

¹⁴³ As per Article III of the NPT, NNWS states undertake to accept IAEA Safeguards as set out in INFRCIRC/153 Corrected (1970)

programmes.¹⁴⁴ However the Iraqi Gulf War of the early 1990s brought to the global attention a dangerous hole in robustness the IAEA Safeguards system. “In 1991, soon after the end of what was known as the Gulf War, IAEA inspectors discovered Iraq’s extensive clandestine programme for producing nuclear weapons”.¹⁴⁵ This clandestine programme had been able to progress due to the fact that the IAEA Safeguards system only accounted for declared nuclear materials. What was needed was a sufficient legal structure to allow the IAEA to account for a states’ *undeclared* nuclear materials. The result is the IAEA Additional Protocol (AP)¹⁴⁶, which currently represents the highest legal verification standard that a state can take with regard to the accounting of nuclear materials.

Since the development of the AP in 1997, it has become the world’s de facto standard for nuclear safeguards...Even NPT nuclear weapons states have adopted versions of the AP that apply to some or all of their civilian nuclear sectors ... To be sure, the Additional Protocol’s full story has yet to be written, for a handful of countries still resist it – and not always for creditable reasons.¹⁴⁷

With 148 States signatory to the AP,¹⁴⁸ verified non-proliferation, as first envisaged in the Baruch plan and realised by NPT Article III is the predominant global norm. Nevertheless, opposition to the AP, which exists from a number of States, has meant that undeclared nuclear activities have failed to be incorporated into the NPT by successive NPT Review Conferences.¹⁴⁹ Indeed such opposition to strengthening the NPT’s verification tools has led to accusation that some NNWS oppose strengthening the Treaty, due to their surreptitious activities to undermine global non-proliferation.

3.3.2. Indian, Pakistani, Israeli, South African and North Korean proliferation

Upon the conclusion of the NPT negotiations in 1968, one member of the ENDC, India, could not be reconciled to the lack of conditional linkage between the progress in non-

¹⁴⁴ See NWS Safeguards agreements note.

¹⁴⁵ Pierre Goldschmidt, *The IAEA Safeguards System Moves into the 21st Century*, Supplement to the IAEA Bulletin, Vol. 41, December 1999, <https://www.iaea.org/sites/default/files/41403450122su.pdf>, accessed 10 August 2019

¹⁴⁶ Iterated in the IAEA Model Additional Protocol Agreement circulated as INFCIRC/540/Corr, 1 December 1998

¹⁴⁷ Christopher A. Ford, Remarks: “*Nonproliferation Lessons Learned*”, the Vienna Center for Disarmament & Non-Proliferation, 19 September 2018 <https://vienna.usmission.gov/vcdnp-nonproliferation-lessons-learned/>, 10 August 2019

¹⁴⁸ IAEA, Status of the Additional Protocol, Status as of March 2019, <https://www.iaea.org/topics/additional-protocol>, accessed 10 August 2019

¹⁴⁹ Gaukhar Mukhatzhanova, *The Nuclear Weapons Prohibition Treaty: Negotiations and Beyond*, Arms Control Today, September 2017, <https://www.armscontrol.org/act/2017-09/features/nuclear-weapons-prohibition-treaty-negotiations-beyond> accessed 10 August 2019

proliferation and disarmament, and by not joining the NPT, reserved its right to develop its own nuclear weapons programme. Thus, when in 1974 non-NPT party India detonated an explosive nuclear device¹⁵⁰, it became the first State outside the NPT to develop a nuclear weapon, yet with the normalisation of the NPT in the 1990s, India continued to be legally regarded by the overwhelming majority of global States who were NPT States parties, as a NNWS despite its de-facto possession being to the contrary.

By 1979 a nuclear flash from a suspected nuclear weapons test was detected in the Southern Atlantic Ocean that is believed to be attributed to a joint test by South Africa and Israel. South Africa later renounced its nuclear weapons programme and was certified as being nuclear weapon free in the early 1990s¹⁵¹, going on to join the NPT as a NNWS and joining to the African NWFZ. However, Israel has sought to avoid engagement on any aspect of its nuclear programme, this has been enabled by the protection afforded to Israel in the UN Security Council and in the IAEA first and foremost by the U.S.. The realpolitik of Israel's status as a nuclear weapon possessing state, in absence of any confirmation or denial from Israel itself, has continued and Israel has remained the only State in the Middle East region outside the global non-proliferation regime.

While in the late 1990s, with the Cold War ended and the NPT extended indefinitely, hopes were that the epoch of nuclear proliferation was over. Yet by May 1998 with regional tensions building in South Asia, in May 1998, India, for the first time since 1974, conducted a nuclear explosive test. The test was met by immediate international condemnation and incurred economics sanctions and the suspension of aid programmes from the U.S., Japan and EU.¹⁵² However by the end of the month responding to India's nuclear test, next-door-neighbour and regional rival Pakistan, had too conducted nuclear explosive tests. By the end of May 1998, with a total of five tests conducted by India (additional to the one test performed in 1974), and six by Pakistan, both States had declared their status as Nuclear Weapon States. The foray of both India and Pakistan into nuclear weapons testing brought unanimous condemnation by the UN Security Council in Resolution 1172,¹⁵³ and when India and Pakistan went to war in the Kargil War in 1999 fears were that regional conflict could

¹⁵⁰ Smiling Buddha was the assigned code name of India's first successful nuclear bomb test on 18 May 1974.

¹⁵¹ Adolf von Baeckmann, Garry Dillon, and Demetrius Perricos, *Nuclear verification in South Africa*, National Reports, IAEA Bulletin 1/1995, <https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull37-1/37105394248.pdf> accessed 10 August 2019

¹⁵² *Finance Ministry Disputes US Sanction Impact While Japan Slaps Another Dose*, Financial Express (Mumbai), 15 May 1998, www.expressindia.com

EU Against Sanctions, but Will Delay Loans for India, Times of India (Mumbai), 27 May 1998

¹⁵³ S/RES/1172 (1998) [https://undocs.org/S/RES/1172\(1998\)](https://undocs.org/S/RES/1172(1998))

overspill into nuclear conflict.¹⁵⁴ Yet the Kargil War ended without nuclear recourse, and by the early 2000s Russia had begun to support India's civil nuclear programme,¹⁵⁵ while China signed nuclear cooperation agreements with Pakistan.¹⁵⁶ This rehabilitation of India and Pakistan into the global community went so far as for Russia to publicly acknowledge the inevitability of recognizing India and Pakistan's status as NWS.¹⁵⁷ However, during subsequent NPT Review Cycles, there has been little to absolutely no appetite from State parties to amend the NPT in any way to acknowledge that any NWS would exist beyond those recognised as possessing nuclear weapons capabilities when the Treaty opened for signature in 1968. Therefore if India and Pakistan would not be persuaded to unilaterally give up their nuclear weapons and the NPT could not be amended to acknowledge India and Pakistan as anything but NNWS, then an alternative process would have to be sought out, to reintegrate India and Pakistan into the international non-proliferation regime. The necessity of finding a way to integrate India and Pakistan, falling not just to desire to forward global nuclear disarmament, but also to the need not to have two nuclear armed States outside the Treaty aiding and facilitating any would be proliferators.

In 2003, the Democratic People's Republic of Korea (DPRK) a.k.a. North Korea, became the first and to date only State to announce its withdrawal from the NPT. The DPRK had acceded to the NPT in 1985 as an NNWS, but IAEA Safeguards Inspections in the 1990s had raised verification concerns regarding the non-compliance of the DPRK with its NPT commitments which was eventually referred to the UN Security Council.¹⁵⁸ Yet upon withdrawing the NPT the DPRK engaged fully in developing a nuclear weapons programme, conducting its first explosive nuclear test in 2006. However, NPT States parties have never accepted the DPRK's reasons for permanently exiting the NPT, and as such see any pursuit or obtainment of nuclear weapons by the DPRK, as contrary to the DPRK's original undertaking as a NNWS NPT State party. Resultingly, the DPRK's nuclear test was met by global condemnation and economic sanctions were levied against the DPRK by the UN Security Council.¹⁵⁹ However the DPRK has continued its nuclear weapons programme and has proclaimed itself as a

¹⁵⁴ *Pakistan 'prepared nuclear strike'*, BBC News, 16 May 2002

http://news.bbc.co.uk/2/hi/south_asia/1989886.stm, accessed 10 August 2019

¹⁵⁵ *India, Russia sign cooperation agreements*, Global News Wire, 12 November 2003

¹⁵⁶ *Pakistan gets approval for nuke plant*, DNA India, 25 November 2006,

<https://www.dnaindia.com/world/report-pakistan-gets-approval-for-nuke-plant-1066118>, accessed 10 August 2019

¹⁵⁷ Vladimir Radyuhin, *Legalize India's N-Status, Says Russia*, Hindu (Chennai), 31 May 2000

¹⁵⁸ *Fact Sheet on DPRK Nuclear Safeguards*, IAEA, <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards>, accessed 10 August 2019

¹⁵⁹ UN Security Council Resolution 1874, S/2009/301, [https://undocs.org/S/RES/1874\(2009\)](https://undocs.org/S/RES/1874(2009)), 10 August 2019

Nuclear Weapons Power, on an equal footing with the other NWS¹⁶⁰, the fallout from this status, has continued into the post-2015 Review Cycle and will be discussed again in Chapter 5.

3.3.3. *Iraqi, Iranian, Libyan and Syrian non-proliferation and (non) compliance*

As previously noted, the crux of the NPT lies in its ‘grand bargain’, that non-proliferation undertakings be balanced with progress in disarmament. Nuclear weapons are possessed by the P-5 of the UN Security Council, who are mainly responsible for upholding, implementing and maintaining global peace. For the P-5 one of the great barriers to furthering disarmament under the NPT lies with those State parties whose non-proliferation track record has not always been creditable. While the DPRK is the only NPT State party to have exited the Treaty, other States parties have been flagged for non-compliance with their NPT IAEA Safeguards verification undertakings. Two historical examples concerned Iraq and Libya: After the 1991 Gulf War Iraq had been found to have been secretly developing a nuclear weapons programme while party to the NPT¹⁶¹; while Libya, who joined the NPT in 1968, was implicated as having developed a nuclear weapons programme when it was revealed that it had along with the DPRK, partaken in an illegal proliferation network run by A.Q. Khan, a physicist who had been attached to the Pakistani nuclear weapons programme.¹⁶² Yet both Iraq and Libya under international pressure, renounced their nuclear weapon programmes.

Two ongoing current examples of concern regarding non-compliance with NPT verification requirements concern Syria and Iran. Syria had a declared and verified nuclear research reactor, but information came to light suggesting that Syria had an undeclared military nuclear reactor, which prompted the Israeli Airforce to destroy the supposed-reactor. In the aftermath of the Israeli military action, Syria allowed the IAEA to inspect the site, which has led to the IAEA concluding that the bombed structure was ‘very likely’ a nuclear reactor which had not been declared by Syria, in contravention of its Safeguards Agreement with the

¹⁶⁰ *Respected Supreme Leader Kim Jong Un’s New Year Address for the Year 2017*, Ministry of Foreign Affairs, DPRK, , January 1 2017 <http://www.mfa.gov.kp/app/uploads/2018/02/2017new-year-address-E.pdf> , accessed 10 August 2019

¹⁶¹ *Comprehensive Report of the Special Advisor to the DCI on Iraq’s WMD, Chapter 4 - Nuclear*, CIA, 30 September, 2004, https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/chap4.html , accessed 10 August 2019

¹⁶² David Albright and Corey Hinderstein, *Uncovering the Nuclear Black Market: Working Toward Closing Gaps in the International Nonproliferation Regime*, Institute for Science and International Security, 4 June 2004. http://www.isis-online.org/publications/southasia/nuclear_black_market.html , accessed 10 August 2019

IAEA. As such the IAEA Board of Governors has (not unanimously) reported to the UN Security Council, that Syria is in non-compliance with its NPT commitments.¹⁶³

Iran began to develop its nuclear power infrastructure in the 1980s, but in 2005 the IAEA found Iran in non-compliance with its Safeguards Agreement and the UN Security Council issued the first of a number of resolutions¹⁶⁴ calling on Iran to halt its uranium enrichment and reprocessing activities and negotiate a settlement with leading global powers. While economic sanctions were applied on Iran for its non-compliance with its NPT obligations, negotiations were pursued between Iran and the P-5+1 (or EU-3+3).¹⁶⁵ By 2015 Iran and the EU-3+3 agreed to the Joint Comprehensive Plan of Action (JCPOA), which for a 15 year period would limit Iran's nuclear programme, and open Iran up to greater verification accountability by the IAEA, in exchange for sanctions relief.¹⁶⁶ Iran's non-compliance has presented the international community with the greatest breach of non-proliferation commitments subscribed to under the NPT. The collective response of the P-5 and other NNWS has been on noteworthy interest, with President Obama declaring, "we will not tolerate actions that flout the NPT, risk an arms race in a vital region, and threaten the credibility of the international community and our collective security,"¹⁶⁷ and, the developments of Iranian nuclear compliance in the post-2015 Review Cycle will be discussed in Chapter 5.

While the NPT bargain for States parties to give up nuclear aspirations, to have the chance to live in a nuclear free world is acute, it is important to remember that such advocacy can provide cover for those seeking to undermine non-proliferation.¹⁶⁸ Therefore with the 50th anniversary of the NPT, it is increasingly important that NPT States parties not lose sight of the fact that non-proliferation is a reward in itself, bringing States both improved security and increased prosperity. To undermine this delicate balance would risk undermining the entire structure of the NPT.

Nevertheless, it important to note that Iran and Syria both find themselves in the Middle East region, where Israel stands as a lone-state in possession of nuclear weapon capabilities and

¹⁶³IAEA, Implementation of the NPT safeguards agreement in the Syrian Arab Republic, Resolution adopted by the Board of Governors on 9 June 2011, GOV/2011/41,

<https://www.iaea.org/Publications/Documents/Board/2011/gov2011-41.pdf>, accessed 10 August 2019

¹⁶⁴ United Nations Security Council Resolution 1737 (2006), S/RES/1737 (2006)

[https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1737\(2006\)](https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1737(2006)), accessed 10 August 2019

¹⁶⁵ Comprising of the U.S., Russia, China, France, Germany and the UK

¹⁶⁶ Nuclear Threat Initiative, *Overview Iran - Nuclear*, NTI, January 2019,

<https://www.nti.org/learn/countries/iran/>, accessed 10 August 2019

¹⁶⁷ U.S. Department of State, *New START Treaty and Protocol*, DipNote. 8 April 2010,

https://blogs.state.gov/index.php/site/entry/new_start_treaty_and_protocol, accessed 10 August 2019

¹⁶⁸ Harries *Supra* note 32 p.2

not party to the NPT. The effect of Israel's suspected nuclear programme has been one of regional imbalance, and while the NPT had tried to correct this by mandating the negotiation of a NWFZ in the Middle East during the 1995 RevCon¹⁶⁹, efforts have stalled, as some Middle East NPT States parties, with a nuclear armed Israel sitting on their doorstep, find themselves unsure of whether the NPT 'grand bargain' is worth the outlay.

3.4. Export Control Regimes

3.4.1. Zangger Committee and the Nuclear Suppliers Group

Article III of the NPT deals with non-proliferation undertakings by States parties, one half of this includes compliance undertakings in the form of IAEA Safeguards. However, Article III (2) NPT sets out that States parties undertake not to provide fissionable material, or equipment or material especially designed or prepared (EDP goods) for fissionable material unless subject to IAEA Safeguards. However, as with most much of the NPT, there was ambiguity in the language, for this undertaking had practical implications: If States parties were to not provide fissionable material or EDP goods, then States would need to jointly coordinate what goods were included under the Article III (2).¹⁷⁰ Therefore, NPT States parties who exported nuclear goods came together, under the Chairmanship of Dr. Claude Zangger of Switzerland, as the Zangger Committee to interpret the obligation of Article III (2) and in 1972 published understandings containing Guidelines for the export of nuclear goods and the 'Trigger List' control lists listing which goods constituted special fissionable material and EDP.¹⁷¹

Yet in 1974 India was able to conduct a nuclear explosion by having repurposed a nuclear reactor transferred to it by Canada for use for peaceful purposes. States became aware that a *more inclusive* control regime was needed, as the Zangger Committee membership was limited to NPT States parties, which left key nuclear supplier states, such as France, who was not Party to the NPT, adrift from implementing non-proliferation. As such nuclear supplier states, meeting as the Nuclear Suppliers Group (NSG), negotiated documents mirroring those of the Zangger Committee, namely: export control Guidelines; and a 'Trigger List' technical control lists which would stand alongside and parallel to those of the Zangger Committee's to

¹⁶⁹ NPT Review Conference 1995, Resolution on the Middle East, NPT/CONF.1995/32 (Part I), Annex

¹⁷⁰ Attempts to define fissionable material and the EDP concept had not succeeded during the drafting of the NPT, and the text of Article III (2) was deliberately left ambiguous, indicating the need for an illustrative list of goods falling under such categorization.

¹⁷¹ Zangger Committee, History, <http://zanggercommittee.org/history.html>, accessed 10 August 2019

provide a multilateral framework for the harmonisation of domestic export controls, but *outside* the direct ambit of the NPT.

Having plugged this gap in the non-proliferation architecture, the NSG ceased to meet after 1978. However, after the 1991 Gulf War when it became apparent that Iraq had succeeded in developing a nuclear weapons programme, not by procuring materials and goods on the ‘Trigger List’, but by sourcing Dual-Use industrial items.¹⁷² The problem was that the NPT made no reference to controls on Dual-Use goods, and while NPT States parties could not agree to include Dual-Use goods under compliance controls, the NSG, as a multilateral non-proliferation group outside the ambit of the NPT, had the capability to institute new export Guidelines and a Dual-Use control list to meet the new proliferation challenges.

Therefore, from the 1990s onwards the NSG, whose membership was now entirely made up of States parties of the NPT who were nuclear supplier States, began to meet regularly to implement more stringent criteria required for the export of nuclear goods to increase controls on all goods and items which could be adapted to proliferation ends. This rise in prominence saw the NSG’s membership expand greatly to include all the major global nuclear supplier states and all the P-5.¹⁷³

3.4.2. *Waiver on nuclear exports to India*

In 1998 India had conducted a second round of nuclear tests and had had international sanctions placed on it, however by 2001 Russia, who as the Soviet Union had provided support for non-aligned India, was exporting nuclear goods for civil nuclear power generation.¹⁷⁴ Such transfers were complicated by the fact that non-NPT States had no obligation not to transfer nuclear materials and goods onto third party States, who might subvert such transfers to nuclear proliferation ends. With the uncovering of the A.Q. Khan covert proliferation network in 2003 involving both Pakistan and the DRPK, and the politicised concerns of the 2000s of terrorist networks attempting to procure a nuclear device for the purposes of executing an attack on civilian populations, greater efforts were undertaken by the U.S. to find an ally in India, who shared the U.S. concerns about state-

¹⁷² Dual Use items are those which have both nuclear and non-nuclear applications. While they may have industrial purposes, they could be also (re)purposed to make a significant contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity.

¹⁷³ Sourced from the Nuclear Suppliers Group History - <http://www.nuclearsuppliersgroup.org/en/about-nsg/history1> and the Nuclear Suppliers Group: Its origins, role and activities, INFCIRC 539 Rev. 6, 2015, <https://www.iaea.org/sites/default/files/infcirc539r6.pdf>, accessed 10 August 2019

¹⁷⁴ Russia Agrees to Sell N-Reactors to India, Indian Express (Mumbai), 26 March 1996, www.expressindia.com

supported Islamic militancy, and who in being brought into the non-proliferation fold, could assist the U.S. with its pushback against Islamic and state sponsored terrorism, while also acting as regional counterweight to the growing ambitions of regional neighbours Pakistan and China.¹⁷⁵ Therefore in 2005 George W Bush announced his support for India to receive an exemption from the NSG export controls, and in September 2008 gained the backing of the NSG to issue a waiver for India to receive Civil Nuclear Cooperation for transfers from NSG members.¹⁷⁶

However, the nagging question to this deal was the how such an exemption for non-NPT India would sit with the NPT itself: did such an action undermine States parties' compliance with the NPT? After all as per NPT Article IV, NPT States parties in conformity with non-proliferation obligations have the right to access the peaceful uses of nuclear energy, without discrimination. "But from its inception, the NSG has *not* drawn its legitimacy from the NPT. The NSG was created because nuclear supplier states, in the shadow of India's nuclear test in 1974, believed that the NPT's provisions did not provide sufficient assurance that nuclear technology, material, and equipment would not be shared with parties seeking to develop nuclear weapons."¹⁷⁷ Rather the NSG has side-stepped linkage to the NPT, by the continued existence of the Zangger Committee: "The Zangger Committee is still alive, and through it [nuclear supplier states] have a direct link with the NPT. [That link doesn't exist] with the NSG because it was created by nuclear supplier states to control trade beyond the NPT's scope."¹⁷⁸ The simple fact of the NSG's ongoing co-existence with the NPT, shows that freedom to operate outside the NPT has allowed States parties greater flexibility in implementing the highest standards of verification controls. In 2011 the NSG adopted new stringent criteria pertaining to the export of sensitive nuclear technology - enrichment and reprocessing equipment. The new criteria, went beyond those mandated under NPT Article III, by making not just IAEA Safeguards but the IAEA Additional Protocol a condition of supply, and being a party to the NPT a precondition of supply.¹⁷⁹

¹⁷⁵ Dhruva Jishankar, P R Chari, *Indo-US Nuclear Deal: A Case Study in Indo-US Relations, Seeking Synergy in Bilateralism*, Routledge 2009 pp.102 - 104

¹⁷⁶Statement on Civil Nuclear Cooperation with India, INFCIRC 734 Corrected, September 2008, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/2008/infcirc734c.pdf>, accessed 10 August 2019

¹⁷⁷ Mark Hibbs, *New Global Rules for Sensitive Nuclear Trade*, Nuclear Energy Brief, Carnegie Endowment for International Peace, 28 June 2011, <https://carnegieendowment.org/2011/07/28/new-global-rules-for-sensitive-nuclear-trade-pub-45203>, accessed 10 August 2019 emphasis added

¹⁷⁸Mark Hibbs, *The Future of the Nuclear Suppliers Group*, Carnegie Endowment for International Peace 2011, https://carnegieendowment.org/files/future_nsg.pdf, accessed 10 August 2019

¹⁷⁹ Daniel Horner, *NSG Revises Rules on Sensitive Exports*, Arms Control Today, 5 July 2011, https://www.armscontrol.org/act/2011_%2007-, accessed 10 August 2019

Yet within the context of the NPT itself, the 2010 NPT Review Conference largely skirted around the question of India's nuclear cooperation agreement and what the impacts of a more globally integrated nuclear India might be on the NPT¹⁸⁰. Nonetheless the news in June 2010 that China and Pakistan had a nuclear cooperation agreement to build nuclear facilities¹⁸¹ and the subsequent announcement in November 2010 that the U.S. was supporting India for membership of the NSG¹⁸², led some to wonder whether the NSG was seeking to bring India and Pakistan in from the cold. Yet by engaging with India and Pakistan, as well as creating new de-facto legal criteria for accessing Article IV of the NPT, does the NSG, as an informal grouping of NPT States parties meeting outside the ambit of the NPT process, have a chance of bringing coherence? For should India and Pakistan wish to participate in the NSG, they will have to show like-mindedness to the NSG's non-proliferation principles, such as safeguards on all new nuclear facilities; CTBT ratification; and a nuclear test moratorium— “[these] are entirely realistic if the expectation is that future NSG members share basic assumptions and approaches about the nonproliferation regime.”¹⁸³ Or would such efforts further fragment the international non-proliferation regime?

David S. Jonas, *What's Intent Got to Do with It? Interpreting 'Peaceful Purpose' in Article IV.1 of the NPT*, FH+H Law Service, 20 April 2018, https://www.fhhfirm.com/interpreting-peaceful-purpose-npt08/Nuclear_Suppliers_Group_NSJ_Revises_Rules_Sensitive_Exports, accessed 10 August 2019

¹⁸⁰ For should India begin to play a role in global non-proliferation mechanisms such as the NSG, and in pursuing nuclear cooperation agreements accede to greater cooperation with the IAEA on Safeguards matters, then the question inevitably becomes one of how the NPT might be amended to include a nuclear-armed India

¹⁸¹ Sharad Joshi, *The China-Pakistan Nuclear Deal: A Realpolitique Fait Accompli*, NTI, 11 December 2011, <https://www.nti.org/analysis/articles/china-pakistan-nuclear-deal-realpolitique-fait-accompli-1>, accessed 10 August 2019

¹⁸² *Obama seeks expanded India-US trade*, Al Jazeera, 7 November 2010, <https://www.aljazeera.com/news/asia/2010/11/2010116132349390763.html>, accessed 10 August 2019

¹⁸³ Pierre Goldschmidt, Toby Dalton, *Conditions on Indian NSG Membership*, Carnegie Endowment for International Peace, June 14, 2011 <https://carnegieendowment.org/2011/06/14/conditions-on-indian-nsg-membership-pub-44594>, accessed 10 August 2019

Chapter 4 – World views: Deterrence vs. Prohibition

While a legalistic interpretation of the NPT can furnish a certain amount of understanding of the Treaty; and knowledge of the main events and agreements running direct and parallel to the NPT's informs of the progress and challenges faced by the Treaty: In order to gain an understanding of how NPT States parties perceive the successes and failings of the NPT, especially vis-à-vis the debate on whether there has been progress on disarmament issues under the NPT, it is important to acknowledge how differing world-view perspectives, have led to differing NPT interpretations. Particularly to realpolitik doctrines such as the maintenance of a balance of power to keep aggressive states in check and the role of the P-5 as global policemen responsible not just for maintaining international peace and security via their position on the UN Security Council, but also as the predominant global military powers.

4.1. Nuclear Deterrence

The proponent states of nuclear deterrence would assert that their potential recourse to nuclear weapons in case of conflict, has deterred the escalation of any serious conflict – this doctrine, has become known that of Nuclear Deterrence. The subscribers to the Nuclear Deterrence doctrine would argue that it is their pursuit of strategic balance which has allowed peace to prevail – it is the uniquely destructive nature of nuclear weapons which has guaranteed the peace.

These Nuclear Deterrence subscribers are those under the 'nuclear umbrella', falling into the camps of: NWS; NNWS who are de-facto nuclear weapon possessors (who have exploded nuclear devices after the NPT imposed 1 January 1967 deadline¹⁸⁴); or are NNWS who live under the 'Nuclear Shadow'. 'Nuclear Shadow' states while not possessing nuclear weapon themselves, have with NWS created legal mechanisms which allow them to enjoy the protection afforded by a nuclear umbrella.¹⁸⁵ The nuclear umbrella became established in the initial years of the Cold War, where bilateral or trilateral agreements sought to address the security concerns of 'Nuclear Shadow' states such as Australia (and for a time New Zealand)¹⁸⁶, Japan¹⁸⁷ and the Republic of Korea¹⁸⁸ by establishing that these states and the

¹⁸⁴ NPT (1968) Article IX (3) For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967.

¹⁸⁵ Nuclear umbrella refers to a guarantee by a nuclear weapons state to defend a non-nuclear allied state.

¹⁸⁶ The Australia, New Zealand, United States Security Treaty (ANZUS) (1951)

¹⁸⁷ Treaty of Mutual Cooperation and Security Between the United States and Japan (1954)

¹⁸⁸ Mutual Defense Treaty Between the United States and the Republic of Korea (1953)

U.S. should each act together to meet a common threat or attack. While collective defence organizations with multilateral scope, such as NATO, an intergovernmental military alliance between states in North America and Europe has required that its members agree that an attack against one or more of them be considered an attack against all of them and respond jointly.¹⁸⁹ The basic effect of the nuclear umbrella is that the ‘Nuclear Shadow’ states have a self-defence recourse to protection by nuclear weapons but can remain non-proliferating NNWS within the spirit of the NPT. The result of the nuclear umbrella has for the nuclear umbrella states has been the benefits and effects of the ‘Long Peace’, where, with the exception of the Kargil War between India and Pakistan, no NWS or nuclear umbrella protected state has been involved in an open armed conflict with each other¹⁹⁰ since subscribing to the doctrine of nuclear deterrence. Therefore, proponents would argue that, “deterrence might be moral even if the weapons themselves, and the manner of their use, might not be”.¹⁹¹

4.2. Nuclear Weapon Prohibition:

For those NNWS who were neither part of the post-World-War-II-settlement nuclear umbrella, and did not as NPT parties have the recourse of the Nuclear Deterrence doctrine, an alternative was to pursue unilateral declarations against nuclear weapon development and possession, which would then involve legal undertakings to prohibit nuclear weapons from their sovereign territories. This evolved into multilateral frameworks for Nuclear Weapons Free Zones. As previously noted the first NWFZ was established in Latin America and the Caribbean under the Treaty of Tlateloco (1967) and has been followed up by similar zones in Africa, the Pacific, South East Asia, Central Asia and Mongolia¹⁹², and a further envisaged NWFZ is under active (though stalled) negotiation for establishment in the Middle East¹⁹³.

¹⁸⁹ NATO Treaty (1949) Article 5: Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. 8

¹⁹⁰ Third parties have attacked the sovereign territory of states possessing nuclear weapons in the Falklands War of 1982, when Argentina invaded the British Overseas Territory of the Falkland Islands, South Georgia and South Sandwich Islands. The UK prevailed in the conflict without recourse to its nuclear arsenal. Otherwise it is believed that Israel likely had recourse to nuclear weaponry during the Yom Kippur War of 1973 when Israeli controlled territory was invaded by Egypt and Syria, but the war was resolved using conventional weaponry.

¹⁹¹ Brad Roberts, *Ban the Bomb? Or Bomb the Ban? Next Steps on the Ban Treaty*, Global Security Policy Brief, European Leadership Network, March 2018, p. 6

¹⁹² To date NFWs have been set up in Antarctica (Antarctic Treaty System) Outer Space (Outer Space Treaty), the Seabed (Seabed Treaty), the South Pacific (Treaty of Rarotonga), South East Asia (Treaty of Bangkok) Africa (Treaty of Pelindaba), Central Asia (Treaty of Semipalatinsk) and Mongolia

¹⁹³ United Nations Security Council Resolution 687 (1991)

There are some European states, such as Austria, who are not in a NWFZ, but as a neutral state¹⁹⁴, and have given consideration to the feasibility of pursuing such an arrangement in Europe.¹⁹⁵ These NWFZ NNWS are for the most part states who by the end of World War II had been the subjects of colonialism and, having not been involved as some of the main brokers/participants of the conflict were thus, from their point of view, excluded or not considered relevant to the Post-War power settlements that established the nuclear umbrella. It is therefore understandable that for these NWFZ NNWS, that the doctrine of Nuclear Deterrence has seemed an immoral one. After all it is a much smaller *number* of states who possess nuclear weapons and/or are beneficiaries of the nuclear deterrence doctrine than who subscribe to a nuclear free world – yet it these deterrent states who possess the ability to destroy any other state in the world and wreck unimaginable humanitarian and environmental suffering. However, it is worth noting that the position of NWFZ NNWS has not just been the recourse of states who did not have the option of the nuclear umbrella. Indeed New Zealand and Australia both acceded to the South Pacific Nuclear Free-Zone Treaty (1985)¹⁹⁶, and NATO member Norway has been a leading member of the Humanitarian Initiative.¹⁹⁷ Moreover South Africa developed a nuclear weapons programme up until the 1980s¹⁹⁸ before joining the Treaty of Pelindaba on the African Nuclear Weapon Free Zone. While former Soviet Republic Kazakhstan under the terms of the Lisbon Protocol¹⁹⁹ transferred nuclear weapons out of their sovereign territory to later become one of the founding members of the Central Asian Nuclear Weapon Free Zone²⁰⁰. Therefore, with the example of states such as New Zealand, South Africa and Kazakhstan, nuclear prohibition proponents argue that there is no reason for the subscribers of nuclear deterrence to cling to so fiercely to their doctrine.

¹⁹⁴ Art. 13 of the Austrian State Treaty 1955

¹⁹⁵ Harald Müller Giorgio Franceschini, Aviv Melamud, Daniel Müller, Anna Péczeli, Annette Schaper, A *Nuclear Weapon-Free Zone in Europe, Concept – Problems – Chances*, Peace Research Institute Frankfurt, 8 May 2015,

https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/NWFZE_Finalversion.pdf accessed 10 August 2019

¹⁹⁶ New Zealand is no longer as part of the US's nuclear umbrella being partially suspended from the ANZUS agreement, as it will not host vessels with nuclear armaments in its territorial waters, however Australia has remained as a full member of ANZUS with its participation in the U.S. Nuclear Umbrella intact

¹⁹⁷ The Humanitarian Initiative, ICAN, <http://www.icanw.org/campaign/humanitarian-initiative/>, accessed 10 August 2019

¹⁹⁸ *Supra* note 158

¹⁹⁹ Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (1991) – was a document signed by representatives of Russia, Belarus, Ukraine, and Kazakhstan that recognized the four states as successors of the USSR and for all four to assume the obligations of the USSR under the START I treaty. The implemented agreement saw Belarus, Kazakhstan and Ukraine give up the nuclear weapons stationed on their sovereign territories and transfer the weapons to the control of Russia.

²⁰⁰ The Treaty of Semipalatinsk

Chapter 5 - The NPT at 50: Disarmament and Non-proliferation developments during the 2020 Review Cycle

The 2010 NPT Rev Con Action Plan gave a new sense of impetus to NNWS²⁰¹ who had for so long felt underwhelmed by the NWS commitment and actions to genuinely achieving a world without nuclear weapons, by recognising the need for great disarmament undertaking by NWS. However, this hope of progress by NWS ground to a frustrating halt in 2015 when the 2015 NPT Rev Con failed to produce a consensus document.

[It was this] backdrop of growing concern among a majority of states about the humanitarian consequences that any nuclear weapon detonation –by accident, mistake or intent – would have, and following the failure of states parties to the NPT to agree on an outcome document at the 2015 Review Conference. That failure reflected an increasingly unbridgeable gap between the NWS and the majority of non-NWS. The latter are frustrated by the NWS' failure to fulfil their disarmament commitments²⁰²

NNWS affiliated to the Humanitarian Initiative, as well as non-governmental bodies, who advocate for a world free from nuclear weapons and global nuclear disarmament, such as the International Campaign Against Nuclear Weapons (ICAN), have sought ways to advance Article VI negotiations by either bringing a continuous action before the ICJ or negotiating new multilateral instruments to prohibit nuclear weapons.

Yet conversely States parties under the nuclear umbrella today have been left wondering how they can integrate nuclear weapon possessing States such as India and Pakistan without damaging the NPT. Moreover, with the 2015 JCPOA signed with Iran looking close to collapse; and Saudi Arabia pushing to receive technology transfers which could allow it to also begin its own covert nuclear weapon programme; and Israel's continued status as a nuclear weapon possessing State; worries abound regarding the undermining of the NPT in the Middle East.

Meanwhile NWS are returning to developing nuclear weapons, renewing their arsenals and capabilities for the first time since the Cold War; yet this is set against a background of consideration (or not) of negotiating a new arms control treaty to succeed New START;

²⁰¹ Both NWFZ and nuclear umbrella states engaged more actively with disarmament issues following on from the 2010 Rev Con, as can be evidenced by the establishment of groups such as the Non-proliferation and Disarmament Initiative (NPDI) during the 2010 Rev Con.

²⁰² Maya Brehm, *Whose Security is it Anyway? Towards a Treaty Prohibition of Nuclear Weapons*, European Journal of International Law, EJIL: Talk! 31 May 2016, <https://www.ejiltalk.org/whose-security-is-it-anyway-towards-a-treaty-prohibition-of-nuclear-weapons/> accessed 10 August 2019

while the U.S. asks the NPT the question of how to achieve the creation of an environment for nuclear disarmament? At 50, the 2020 Review Cycle embodies the ‘nuclear apartheid’, with increasingly disparate visions on what the future of nuclear weapons holds, which is driving NPT States parties’ visions for the future of the agreement.

5.1. Judgement of the ICJ: Marshall Islands v UK, Marshall Islands v. India, Marshall Islands v. Pakistan

Recourse to the ICJ in a contentious action to interpret the scope of nuclear obligations had met with little success in the *Nuclear Test Case* in the 1970s and 1990s, yet the ICJ *Advisory Opinion on the Legality of Nuclear Weapons* of 1996, saw the ICJ (marginally) impart a refined interpretive understanding on the legality of nuclear weapons, as well as an interpretation of Article VI of the NPT, that has not since been challenged. Therefore, it was with momentum building of the newly launched Humanitarian Initiative that NNWS States felt the ICJ could once again be utilised to further a more progressive interpretation of Article VI. Proceedings were filed in 2014 by a member of the Humanitarian Initiative who has suffered one of the most horrific legacies from the use of nuclear weapon, the Marshall Islands, against nine states: the U.S., the Russian Federation, the United Kingdom, France, China, India, Pakistan, the DPRK and Israel; all who either possess or are believed to possess nuclear weapons.

The Marshall Islands of all NNWS contended that its particular status, as the state to have suffered immeasurable consequences from the atomic weapons tests performed on its territory from 1946 until the 1958, gave it special recourse to assert the nine named states had, as nuclear weapon possessing states, failed in their obligations to eliminate their nuclear weapons with good faith undertaking as per the obligations of Article VI of the NPT. The Marshall Islands asserted that this obligation was inherent to all nine named parties as Article VI had become part of customary law and is therefore applicable to all NPT and non-NPT nuclear weapon possessors. Ultimately the Marshall Islands was able to bring action against only three of the named parties, the UK, India and Pakistan²⁰³, as only these three states had made declarations accepting the compulsory jurisdiction of the Court made under Article

²⁰³ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom, Marshall Islands v. India, Marshall Islands v. Pakistan)* (2016) Judgment of 5 October 2016 - CIJ/ICJ

36(2).²⁰⁴ The other six nuclear weapon possessing States choose (unsurprisingly) not consent to the Court's jurisdiction pursuant to Article 38(5) of the ICJ Statute.

The United Kingdom raised objections to the jurisdiction of the Court as well as the admissibility of the application against it, including a preliminary objection based on the alleged absence of a dispute between the parties at the time of the filing of the application and India and Pakistan raised objections which also focused on a lack of alleged absence of dispute.²⁰⁵ However, were the Court to recognise the existence of a dispute between the Marshall Islands and India and/or Pakistan, the effect would potentially be one of subverting the NPT outside the consensus used by State parties in the Review Cycle: For should Article VI exist in customary international law, and India and Pakistan be subject to the obligations of Article VI, then the Court would be recognising India and Pakistan as NWS under customary international law, which would subvert the NNWS status imposed upon India and Pakistan by the Treaty itself. Such ability to transcend the categorisation of NNWS to NWS through customary international law, could therefore have strong knock-on ramifications on the integrity of the NPT itself.

Regarding the action brought against the UK, the ICJ, “[b]y eight votes to eight, by the President’s casting vote, [upheld] the first preliminary objection to jurisdiction raised by the [UK], based on the absence of a dispute between the Parties; and [b]y nine votes to seven, [finding] that it [could not] proceed to the merits of the case”.²⁰⁶ The actions brought against India and Pakistan were too dismissed by the Court, though by the slightly larger margin of nine votes to seven. Because of the similarities between the legal issues in questions, this analysis shall focus solely on the case contended by the UK.

The Marshall Islands alleged its dispute with the UK stemmed,

“over the [UK]’s compliance with its obligation – under both Article VI of the NPT and customary international law – 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. The existence of this dispute is evidenced by the opposing

²⁰⁴ ICJ Statute (1945) Article 36(2) provides that states may make declarations accepting the Court's jurisdiction as compulsory ("optional clause declarations"). Such declaration had been given by the Marshall Islands (24 April 2013), the United Kingdom (5 July 2004), India (18 September 1974) and Pakistan (13 September 1960)

²⁰⁵ Sourced from Fietta LLP International Law, *ICJ declines jurisdiction in Marshall Islands nuclear weapons cases against the United Kingdom, India and Pakistan*, London, UK - http://www.fiettalaw.com/pil_news/icj-declines-jurisdiction-in-marshall-islands-nuclear-weapons-cases-against-the-united-kingdom-india-and-pakistan/ accessed 10 August 2019

²⁰⁶ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Summary of the Judgment of 5 October 2016, ICJ, <http://www.icj-cij.org/files/case-related/160/19228.pdf> accessed 10 August 2019

attitudes of the Parties with respect to the question of the [UK]’s compliance with this obligation. In particular, while the [UK] has repeatedly held the view that its conduct is fully consistent with its obligations under NPT Article VI and customary international law, the Marshall Islands has claimed that the [UK], as well as every State possessing nuclear weapons, has failed to comply with that obligation.”²⁰⁷

The Marshall Islands relied on different veins of argument in support of its contention that it had a dispute with the UK. The Marshall Islands claimed that the genesis of its claims stemmed back to the *Advisory Opinion on the Legality of Nuclear Weapons* when it the ICJ had concluded, unanimously that: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”²⁰⁸

The Marshall Islands underlined its claims that the UK was in breach of its obligations under Article VI of the NPT, by bringing the Court’s attention to a number of statements made by the Marshall Islands in multilateral forums before the date of the filing of the Application which, it viewed, as sufficient in establishing the existence of a dispute. The crux of this assertion by the Marshall Islands, relied on the statement made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, “urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament.” The Marshall Islands further asserted that statements made by its delegation at the Second Conference on the Humanitarian Impacts of Nuclear Weapons, held in Nayarit, Mexico in February 2014 (which had been attended by 146 states, though not by the UK nor by any of the named nuclear weapon possessing states), whereby it had stated, “that in its view the States possessing nuclear arsenals were failing to fulfil their obligations to pursue in good faith negotiations leading to nuclear disarmament”.²⁰⁹ The Marshall Islands noted that the UK had declined to invitations to involve itself in diplomatic initiatives and had not failed in initiating disarmament discussions. These arguments coupled with a differing voting record by the UK and Marshall Islands in various multilateral fora on disarmament demonstrated the evidence of a dispute between the two states. The Marshall Islands further asserted that the UK’s

²⁰⁷ *Ibid* Statement of Observations of the Marshall Islands Re Preliminary Objections Raised by The United Kingdom, para 30, http://www.icj-cij.org/files/case-related/160/20151015_statement_en.pdf accessed 30 January 2018

²⁰⁸ *Supra* Note 117, Para G t

²⁰⁹ Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014

conduct of recent years had been indicative of its breach of obligations under Article VI of the NPT, noting that: “The United Kingdom has also consistently maintained that the "step by step" approach to the disarmament is the best, indeed only, way forward, rejecting demands for the commencement of multilateral negotiations.”²¹⁰

Despite the merits of the Marshall Islands arguments the Judgement of the Court in finding that it did not have any jurisdiction because there was a lack of dispute between the parties, much in a manner similar to the avoidance of substantive issues in the *Nuclear Test Case*, did not discuss any aspects of the nature of nuclear disarmament obligations as per Article VI of the NPT. Rather the Judgement looked at the need to, ‘find the existence of a dispute between the parties’, within the Court’s jurisprudence from the 2011 case of *Georgia v. Russian Federation*.²¹¹ In the Judgement, the ICJ noted that, “the Court had to be fully consistent with its recent jurisprudence relating to the requirement for a “dispute” to exist between the parties”, and “that, in order to determine whether the condition relating to the existence of a dispute has been met ... the Court can only find that it has jurisdiction to entertain a case where each party was or must have been aware on that date that the views of the other party were opposed to its own”.²¹² This approach by President Abraham was somewhat unexpected be that he himself had dissented in *Georgia v. Russia* case, and had provided some thinly veiled contempt for the Court’s jurisprudence of the time, by stating that: “No reason can be found for such a surprisingly narrow approach, one at odds with the thrust of the Court’s most recent jurisprudence in respect of its consideration of the conditions for jurisdiction...”.²¹³ Nonetheless Judge Abraham showed that as regards the *Marshall Islands* case he was ready to eat humble pie and explained that: “even though he expressed reservations at the time [of the *Georgia v. Russia* case] the Court established this jurisprudence [regarding absence of a dispute between the contentious parties], he nevertheless considers himself to be bound by such jurisprudence and therefore voted in conformity with it”.²¹⁴

²¹⁰ *Supra* Note 95, para 40

²¹¹ *Case concerning application of the international Convention on the Elimination of all Forms of Racial Discrimination Georgia v. Russian Federation*: Judgement of the ICJ - 1 April 2011

²¹² *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, Declaration of President Abraham, <https://www.icj-cij.org/files/case-related/160/160-20161005-JUD-01-01-EN.pdf>, accessed 10 August 2019

²¹³ *Case concerning application of the international Convention on the Elimination of all Forms of Racial Discrimination Georgia v. Russian Federation*: Judgement of the ICJ - 1 April 2011, para. 37

²¹⁴ *Supra* Note 71 Summary 2016/5, President Abraham's Declaration

This level of backtracking from previous legal reasoning by the President of the Court smacks of dubious legal reasoning and jurisprudence as potentially long lasting as that which emerged from the *Nuclear Tests Case*, when the Court found a single instance where unilateral declaratory statements were adjudged as being of binding legal nature. Indeed, legal commentators have dispensed with quite a few words in pondering what effect this ‘new’ requirement of parties needing to have been aware of a dispute having existed at the time of a case being filed.^{215, 216, 217}

Yet, the Court answered two questions: Firstly that of whether the ICJ had jurisdiction in the absence of a dispute - was decided by the narrowest of margins, by eight votes (with the President carrying the motion) to eight votes²¹⁸; secondly whether the Court could proceed to the merits of the case was decided by nine votes to seven. The nationalities of the judges and the cast of their vote is of particular note: The President from France issued the Judgement of the Court and was supported by the judges from the UK and Russian Federation, China, the U.S., Italy, Japan and India. Meanwhile; of the eight judges who voted against the Judgement of the Court, their nationalities and their positions were: the Vice-President from Somalia who provided dissent to the Judgement; as well as judges from Slovakia²¹⁹ and Uganda²²⁰ who provided separate opinions; whilst the judges Morocco, Jamaica, Australia, Brazil, Slovakia; and, judge ad hoc Bedjaoui of Algeria, all provided their own separate dissenting opinions.

Is this geographic split of court opinion “[a]n accident? It is certainly surprising that positions on how to interpret the notion of a ‘dispute’ would be correlated with the level of nuclear

²¹⁵ Christian J. Tams, *No Dispute About Nuclear Weapons?*, European Journal of International Law: EJIL Talk, 6 October 2016 - <https://www.ejiltalk.org/no-dispute-about-nuclear-weapons/> accessed 10 August 2019

²¹⁶ Maitê de Souza Schmitz, *Decision of the International Court of Justice in the Nuclear Arms Race Case*, Harvard International Law Journal, 21 November 2016, <http://www.harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/> accessed 10 August 2019

²¹⁷ Edoardo Stoppioni, Quaderni di Sidiblog, *The ICJ Decisions in The Marshall Islands Cases or the Unintended Consequences of “Awareness*, 24 November 2016 <http://www.sidiblog.org/2016/11/24/the-icj-decisions-in-the-marshall-islands-cases-or-the-unintended-consequences-of-awareness/>, accessed 10 August 2019

²¹⁸ In *Marshall Islands v India* and *Marshall Islands v Pakistan* the Court reached the same conclusion on question of jurisdiction in the absence of a dispute, however by nine votes to seven. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* Summary of the Judgment of 5 October 2016 <https://www.icj-cij.org/files/case-related/158/19164.pdf> accessed 10 August 2019; and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* Summary of the Judgment of 5 October 2016, <https://www.icj-cij.org/files/case-related/159/19196.pdf>, accessed 10 August 2019

²¹⁹ Judge Tomka outlines that while he does not support the Court’s arguments pertaining to lack of jurisdiction in the absence of a dispute, that in his opinion the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands’ claims in their proper multilateral context.

²²⁰ Judge Sebutinde’s separate opinion outlines his reasoning into the recognition of a dispute between parties.

armament of one's home country.²²¹ All the judges in support of the Court originate from States who are under the nuclear umbrella. Conversely seven, of the judges not supporting the Court's decision not to find jurisdiction in the case, originate from NWFZ NNWS, and (only) one, Judge Tomka of Slovakia, originates from a NNWS under the nuclear umbrella, yet, while he did not support the Court's decision not to find jurisdiction to the dispute, he joined the agreement of the Court (by nine votes) to not consider the merits (failure of nuclear disarmament obligations) of the case.

In total the *Marshall Islands* case culminated in one Judgement, six dissents, four separate opinions, two declarations. Criticisms and bewilderment from the Judgement's criteria for identifying a dispute between the parties marks a jurisprudence transformation for the Court from a non-formalistic to a formalistic approach and this has been called out both by members of the ICJ, such as Judge Crawford²²² and other commentators.²²³

This all paints a picture of such fractious variance of opinion in the Court that: "It seems clear that the will of the ICJ was avoiding all the politically sensitive issues raised by the case. The reasoning, under the pretext of judicial economy, reflects an avoidance strategy that the Court seemingly deployed in other nuclear cases too."²²⁴ This reminds that the role of nuclear weapons in the global non-proliferation regime and its place in international law has ever been as much a question of politics as much as it is law.

That the *Marshall Islands Cases*, concluded the way they did, was however not of great surprise to nuclear legal commentators, with doubts expressed firstly over the quality of substantive arguments brought during the case:

[the Marshall Islands'] memorial engages in page upon page of very dramatic and sweeping narrative about the general dangers posed by nuclear weapons. When it finally gets around to talking about the actual facts and law relevant to its case against the UK, the memorial is very weirdly and unclearly organized ... the legal analysis of

²²¹ Nico Krisch, *Capitulation in The Hague: The Marshall Islands Cases*, European Journal of International Law: EJIL Talk, 10 October 2016 - <https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/>, accessed 10 August 2019

²²² Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands V. United Kingdom) Judgment of 5 October 2016, Dissenting Opinion Of Judge Crawford, Para 5. <https://www.icj-cij.org/files/case-related/160/160-20161005-JUD-01-13-EN.pdf> accessed 10 August 2019

²²³ Christian J. Tams, *No Dispute About Nuclear Weapons?*, European Journal of International Law: EJIL Talk, 6 October 2016 - <https://www.ejiltalk.org/no-dispute-about-nuclear-weapons/>, accessed 10 August 2019

²²⁴ *Supra* Note 221

Article VI is not then followed by a clearly structured application of the law to the facts of the case.²²⁵

The Court too seems uneasy to be given a decisive role in such an inherently political conflict. The absence of the other six originally named parties to the Marshall Islands' dispute does not go unnoticed. Judge Tomka's separate opinion notes: "The issues raised in the present proceedings are *not of a bilateral nature* between the Marshall Islands and the United Kingdom. I am convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States whose conduct would necessarily also be at issue are not present before the Court to explain their positions and actions."²²⁶

Moreover, the fragility of lacking international consensus is reflected by Judge Sebutinde's analysis that: "the *Advisory Opinion* of the Court, although not legally binding, was well received by the vast majority of NPT States parties, although it was less welcome by those nuclear-weapon States that were of the view that the Court had over-stepped its judicial function by rendering this opinion"²²⁷, reminds of the awareness and wariness of the Court for the views of legal commentators such as Christopher Ford who, as detailed above, have derided the *Advisory Opinion on the Legality of Nuclear Weapons*, rejecting the Court's interpretation that Article VI's obligation is two-fold, being of both conduct and result, as overstepping its bounds in presuming to provide any equivocation on the nature of Article VI²²⁸.

Therefore while the attempt of the Marshall Islands, ICAN and the Humanitarian Initiative to force the conversation onwards was bold, it ultimately saw the diminishing of the ICJ's role in the debate on nuclear disarmament, with the UK withdrawing itself from the compulsory jurisdiction of the Court: "provid[ing] that the ICJ will only have jurisdiction over nuclear weapons or nuclear disarmament disputes when the proceedings involve all five of the NPT nuclear-weapon States"²²⁹.

²²⁵ Daniel Joyner, *The Marshall Islands v. The U.K., Preliminary Memorials*, Arms Control Law, 10 March 2016, <https://armscontrollaw.com/2016/03/10/the-marshall-islands-v-the-u-k-preliminary-memorials/>, accessed 10 August 2019

²²⁶ *Supra* Note 116 Judge Tomka Separate Opinion para 39 emphasis added

²²⁷ *Supra* Note 116 Judge Sebutinde Separate Opinion para 8

²²⁸ *Supra* Note 66

²²⁹ Sir Alan Duncan, *Amendments to the UK's Optional Clause Declaration to the International Court of Justice: Written statement - HCWS489*, The Minister of State for Foreign and Commonwealth Affairs, House of Commons Written Statements, 23 February 2017, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489/> accessed 10 August 2019

The result in the *Marshall Islands Cases* does however allow the drawing of comparison with the *Nuclear Tests Cases*. For although both cases involved different parties, and different points and areas of law, both cases' jurisprudence have been seen in departure from that expected from the ICJ: "What Brigitte Stern wrote criticizing the outcome of the 1974 nuclear cases applies to the Marshall Islands cases, too: "by refusing to decide the case on the basis of preliminary objections in order not to take a position on the evolution of the law, the Court risks to destroy its function at least as much as if it had participated in the emergence of certain new rules or as if it had stopped them"²³⁰.²³¹

The *Marshall Islands Cases* did however, offer the potential of an examination of the crucial question of firstly whether NWS have upheld their obligations under Article VI of the NPT and secondly whether the obligations for NWS contained in Article VI of the NPT have passed into customary international law, and thus bind those NNWS who possess their own nuclear arsenals. Yet, as the first significant action of the 2020 NPT Review Cycle, the Humanitarian Initiative (and the Marshall Islands) found that trying to force the discussion on Article VI progress through the ICJ, ultimately (though by a narrow margin) backfired. With the ICJ more side-lined from the disarmament debate. Throughout the past 50 years, the legal interpretation of the NPT, as evidenced from the lack of consensus at successive NPT Review Conferences, has never ceased to be as much a political as it is legal point of contention. Rather the greatest successes have arisen from points of multilateral consensus. As such were the ICJ to be utilised to interpret the NPT, it should be done as in 1996, from: within the U.N. General Assembly to fashion the right question on Article VI to send to the court for its advisory jurisdiction. This would have removed all of the jurisdictional hurdles that ultimately were the doom of its contentious cases, and would have allowed the court to give its opinion on the merits of the case with regard to all of the nine nuclear weapons possessing states.²³²

The *Advisory Opinion on the Legality of Nuclear Weapons* has been widely accepted and affirmed, and has been the basis on interactions between NPT and non-NPT States parties these last 20 years. It stands to reason that if international legal issues regarding nuclear weapons cannot be advanced by contention, then there remains hope to proceed by advisory

²³⁰ Brigitte Bollecker-Stern, *L'affaire des Essais nucléaires français devant la Cour internationale de justice*, *Annuaire Français de Droit International* Année 1974 20 pp. 299-333

²³¹ *Supra* Note 221

²³² Daniel Joyner, *My Reaction to the Dismissal of the Marshall Islands Cases by the ICJ*, *Arms Control Law*, 10 March 2016, <https://armscontrollaw.com/2016/10/05/my-reaction-to-the-dismissal-of-the-marshall-islands-cases-by-the-icj/> accessed 10 August 2019

means, for while such advisory interpretations by the ICJ are not binding, both the *Nuclear Test Case* and the *Marshall Island Case*, in trying to obtain a binding resolution have failed to make any sort of in-road or actual progress in forwarding disarmament and strengthening the NPT. Rather it has been the softer and more gradual approach, evidenced in the 1996 *Advisory* that, while non-binding upon states, has seen greater acceptance by NWS and NTP States parties and has yielded more encouraging results.

5.2. The Treaty on the Prohibition of Nuclear Weapons

The Award the Nobel Peace Prize in 2017 to ICAN for, “work to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons and for its ground-breaking efforts to achieve a treaty-based prohibition of such weapons.” The Treaty on the Prohibition of Nuclear Weapons (TPNW) represents the first and only multilateral treaty to attempt to provide a legal framework for the abolition and prohibition of nuclear weapons. The negotiation a multilateral treaty, is undoubtedly a great achievement, yet detractors among the NWS have been unflinching in their criticism of the TPNW; therefore it is of great importance to dissect the TPNW and examine its chances for marking the beginning of a new nuclear world order.

5.2.1. Negotiating background: Aims and ambitions for a Prohibition Agreement

The failure of the 2015 Review Conference to obtain progress on disarmament coupled with rise of the Humanitarian Initiative, left NNWS determined to find a way to substantively address nuclear disarmament. On 7 December 2015 the UN General Assembly mandated, inter alia that the UN’s Open Ended Working Group be convened to “substantively address concrete effective legal measures, legal provision and norms that would be need to be concluded to attain and maintain a world without nuclear weapons”²³³ However such negotiations were not straight forward: “The treaty prohibiting nuclear weapons is a highly controversial subject in the NPT context, with NPT states-parties sharply divided on its benefits, dangers, and expected long-term impact.”²³⁴ After all, creating any legal measures, on nuclear weapon disarmament would undoubtedly affect the NPT, and in particular the legal requirements for NWS under Article VI, while impacting on nuclear weapon possessing States as well as those subscribing to deterrence doctrines in the form of a nuclear umbrella. In this light “it was not surprising to see the United States put high-level diplomatic pressure

²³³ Resolution adopted by the General Assembly on 7 December 2015 [on the report of the First Committee (A/70/460)] 70/33. Taking forward multilateral nuclear disarmament negotiations A/RES/70/33

²³⁴ Mukhatzhanova, *Supra* note 155

on states, especially its allies, to stay out ... The ban, to the extent that it succeeds, is an attack on core U.S. security interests.”²³⁵ Indeed upon the commencement of negotiations *all* States under a nuclear umbrella, but with the one exception of the Netherlands,²³⁶ stayed away, making the negotiation of the nuclear weapon prohibition treaty a one-sided affair dictated by the concerns and world view of the NWFZ NNWS. The result of this has been that:

The negotiations were complicated by severe time constraints and the fact that the negotiators could not benefit from the work of preparatory committees or specially designated expert groups. The need for additional technical expertise, for example, was evident during the work on safeguards and nuclear weapons elimination provisions... [but] the core group of Austria, Brazil, Ireland, Mexico, and South Africa pressed early for a “lean” treaty that could be adopted without the need to ask the UN General Assembly for a negotiating mandate extension into 2018.²³⁷

The result is the Treaty on the Prohibition of Nuclear Weapons (TPNW); the first legally binding international agreement to comprehensively prohibit nuclear weapons, with the goal of paving the way towards their total elimination. It was adopted on 7 July 2017, and in the vote on the treaty text, 122 states were in favour, while only one state voted against the TPNW (Netherlands). In order for the TPNW to come into effect, signature and ratification by at least 50 countries will be required. Advocates of the TPNW argue that like the Chemical Weapons Convention (CWC)²³⁸ it will help create a new norm away from deterrence-based behaviour which will change and create dialogue on ending nuclear weapon possession and proliferation:

From [ratification of the TPNW] onwards nuclear weapon states will be regarded as pariah states by treaty adherents and their populations, similar to how the international community regards rogue states. The hope of ban advocates is that the treaty’s stigmatizing effect will trigger a new societal and political debate inside the nuclear weapon states (NWS) and their allies. Non-nuclear weapon states (NNWS) may ask

²³⁵ Matthew Harries, *The Real Problem With a Nuclear Ban Treaty*, Carnegie Endowment for International Peace, 15 March 2017, <http://carnegieendowment.org/2017/03/15/real-problem-with-nuclear-ban-treaty-pub-68286>, accessed 10 August 2019

²³⁶ The Netherlands sent a delegation to New York after the Dutch Parliament urged the government to do so - Dutch parliament to government: Vote yes to start negotiations on a nuclear ban, No Nukes Netherlands, 14 October 2016, <https://nonukes.nl/dutch-parliament-government-vote-yes-start-negotiations-nuclear-ban-2/>, accessed 10 August 2019

²³⁷ Mukhatzhanova, *Supra* note 155

²³⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) (1997) is an arms control treaty that outlaws the production, stockpiling, and use of chemical weapons and their precursors.

the NWS a thousand times to get rid of their nuclear weapons. It will have much stronger effect if the citizens of these countries ask their decision-makers to make this change.²³⁹

However, it must be noted that civil society has a greater role in influencing policy in States with more liberal freedom of speech traditions – leading to the perception that the TPNW is more a political tool to be aimed at Western democratic States:

The target of the treaty is clear: intentionally or not, it is an attack on the nuclear-armed *democracies*—the United States, in particular—and their allies to the near-exclusive benefit of Russia and China. It is an uncomfortable point to make. A world without nuclear weapons would be, in the long term, a better world than today's... But...it is time to be blunt about the practical implications of a ban, as opposed to its principled ambitions.

The ban's advocates also hope that it will affect nuclear procurement choices in France or the UK... What the ban treaty will not do, however, is encourage Russia or China (let alone North Korea) to disarm, or even to participate more actively in bilateral or multilateral arms control initiatives. How could it? Civil society movements in those countries will not be pressuring their governments to make reductions or to halt existing modernization programs. Moral pressure is not a guiding factor in Russian or Chinese decision making on national security. The logic of a ban treaty, which relies on generating such pressure, applies to countries where there is a direct connection between activism and the making of nuclear policy. Supporters of the ban might hope that enforced constraints on the nuclear-armed democracies and their allies will encourage restraint on the part of other, less democratic nuclear-armed states. But this argument willfully misunderstands the motives for Russian and Chinese nuclear armament. Those countries' nuclear programmes are primarily driven not by U.S. extended nuclear deterrence per se...but rather, in the long run, by U.S. conventional military strength. A global nuclear restraint regime is badly needed—but it will have to be negotiated with the *active participation of at least several of the nuclear-armed states*.²⁴⁰

²³⁹ Tom Sauer, *Whether you like it or not, the Nuclear Ban Treaty is here to stay: a reply to Brad Roberts*, European Leadership Network, 29 March 2018, <https://www.europeanleadershipnetwork.org/commentary/whether-you-like-it-or-not-the-nuclear-ban-treaty-is-here-to-stay-a-reply-to-brad-roberts/> , accessed 10 August 2019

²⁴⁰ Roberts *Supra* note 198

5.2.2. *TPNW: Creating a “Crisis of Legitimacy”?*

Supporters “see the TPNW as an important normative statement, by a supermajority of the states in the world, that the development, possession and use of nuclear weapons is immoral and must be prohibited. And some states have expressed hope that this normative statement might contribute to the development of parallel customary international law.”²⁴¹ Yet detractors “argue that the TPNW ... may in fact do harm to the existing legal framework governing nuclear weapons proliferation, by undermining the centrality of the NPT as the nearly-universally-subscribed-to cornerstone of the regime.”²⁴²

Indeed, the TPNW by making reference to nuclear testing, nuclear safeguards, and the stationing of nuclear weapons does step, quite deliberately, on the toes of other multilateral legal instruments; the Comprehensive Test Ban Treaty (CTBT), the NPT, and the North Atlantic Treaty.

Article 18 TPNW, addresses the relationship with other agreements, by stating: “The implementation of this Treaty shall not prejudice obligations undertaken by States parties with regard to existing international agreements... where those obligations are consistent with the Treaty”.²⁴³ Therefore while ratification of the TPNW would not necessarily be incompatible with instruments like the NPT and CTBT, it would be incompatible with any international agreement such as the NATO Charter or such similar agreements with other ‘Nuclear Shadow’ states which might: “Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control”.²⁴⁴ The result is that those NNWS living under the ‘Nuclear Shadow’ may not give serious contemplation to acceding to the TPNW without jettisoning their current nuclear deterrence comfort blankets. This forcing of the ‘Nuclear Shadow’ NNWS into corner where they must choose between their current pragmatic agreements and the advancement of a more optimistic nuclear free world is an exceedingly difficult quandary. The Netherlands, the only ‘Nuclear Shadow’ NNWS which took part in the TPNW’s negotiation process, could not be reconciled to this conflict²⁴⁵.

²⁴¹ Dan Joyner, *The Treaty on the Prohibition of Nuclear Weapons*, EJIL Talk, 26 July, 2017, <https://www.ejiltalk.org/author/djoyner/>, accessed 10 August 2019

²⁴² *Ibid*

²⁴³ TPNW, Article 18

²⁴⁴ TPNW, Article 1 (g)

²⁴⁵ Explanation of vote of the Netherlands on the text of Nuclear Ban Treaty, Kingdom of the Netherlands, 7 July, 2017, <https://www.permanentrepresentations.nl/latest/news/2017/07/07/explanation-of-vote-of-ambassador-lise-gregoire-on-the-draft-text-of-the-nuclear-ban-treaty> accessed 10 August 2019

This disconnect between the States negotiating the TPNW, and those nuclear umbrella states who stayed away, is epitomised by the concerns noted by Australia, who while a member of the South Pacific NWFZ and participant in the Humanitarian Impact of Nuclear Weapon Conferences; “does not share the view that simply banning nuclear weapons will lead to their elimination or will change the current, real, security concerns of states with nuclear weapons or those states, like Australia, that rely on extended nuclear deterrence as part of their security doctrine. To be effective, disarmament efforts must engage all the nuclear-armed states and must focus on practical measures that recognise both the humanitarian and security dimensions of this issue”^{246, 247}

It is clear at any rate that TPNW has done little to bridge the divide between the different camps of NPT states and the declaration of the U.S., France and UK to not "to sign, ratify or ever become party to it" as TPNW is "incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years."²⁴⁸ Even Sweden who advocated and participated in the negotiation of the TPNW gave a realistic assessment of the timeframe expected for the Ban Treaty to create any tangible legal effect, "I expect that this will take a long time, let's not be naïve... Quite a high number of countries are actually interested in saying we have to break the deadlock that has been on this issue for so many years".²⁴⁹

Therefore it is worth noting that the TPNW does not necessarily seek a short term solution in changing the current nuclear weapon status quo, rather the intention is to create what has been termed a “crisis of legitimacy” around the continued possession of all nuclear weapons and the practice of nuclear deterrence by any state”.²⁵⁰ This aim of creating a “crisis of legitimacy” around nuclear deterrence becomes “an important normative statement, by a supermajority of the states in the world, that the development, possession and use of nuclear

²⁴⁶ Australia’s Nuclear Non-Proliferation and Disarmament Policy, Australian Government, Department of Foreign Affairs and Trade, <http://dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/nuclear-weapons/Pages/australias-nuclear-non-proliferation-and-disarmament-policy.aspx> , accessed 10 August 2019

²⁴⁷ Thu-an Pham, *Reading G20 Reactions to the Nuclear Weapons Ban Treaty*, Carnegie Endowment for International Peace, 17 January 2018, <https://carnegieendowment.org/2018/01/17/reading-g20-reactions-to-nuclear-weapons-ban-treaty-pub-75279>, accessed 10 August 2019

²⁴⁸ Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom and France following the adoption of a treaty banning nuclear weapons, 7 July 2017

²⁴⁹ *World's nuclear powers boycott UN talks on weapons ban*, Deutsche Welle, 27 March 2017, <http://www.dw.com/en/worlds-nuclear-powers-boycott-un-talks-on-weapons-ban/a-38149665> accessed 10 August 2019

²⁵⁰ Nick Ritchie, *The Real “Problem” With a Ban Treaty? It Challenges the Status Quo*, Carnegie Endowment for International Peace, 3 April 2017, <http://carnegieendowment.org/2017/04/03/real-problem-with-ban-treaty-it-challenges-status-quo-pub-68510> , accessed 10 August 2019

weapons is immoral and must be prohibited, just as other weapons of mass destruction ... have been the subject of comprehensive prohibition treaties.”²⁵¹ While it is yet to be seen if the drawing of parallels by TPNW advocates between the TPNW and CWC is just or appropriate,²⁵² detractors of the TPNW have also drawn parallels between TPNW an infamous piece of legal idealism, namely the Kellogg-Briand Pact. “Occasionally lawmakers create laws that simply do not align with the world as it is, and especially with the interests of main actors, such that those actors make choices contrary to the intent of the law. Think of the Kellogg Briand Pact of 1928 to renounce the use of force as an instrument of policy... Rather than strengthen international law, the ban may debase it.”²⁵³ This drawing of parallels between the CWC and the Kellogg-Briand Pact underlies the main gulf of difference between TPNW supporters and detractors, This concern of creating a legal instrument with idealistic tendencies that for all its good intentions, may lead down the road to ruin, strikes an ominous chime of history potentially repeating itself.

5.2.3. *Verification – The Normative Nuclear Lynchpin.*

As discussed earlier, finding a way to create a prohibition of nuclear weapons was first attempted at the multilateral level in the Baruch Plan of 1946²⁵⁴, but the sticking point for ridding the world of nuclear weapons fell down due to the inability to provide in an independent manner a truly comprehensive verification regime to ensure that nuclear weapons were disarmed and were not proliferated in secret. Today, however the independence and robustness of the IAEA Safeguards accounting mechanism has gained the faith and trust of the international community, with the Comprehensive Safeguards Agreement and Additional Protocol representing the highest verification standard a state can comply with. Support for the Additional Protocol has been strong, but NPT States parties have not been able to raise the bar for an improved nuclear verification standard in Article III of the NPT²⁵⁵.

²⁵¹ Joyner *Supra* note 246

²⁵² Despite the normative prohibition of producing or using chemical weapons, Syria has used chemical weapons in its civil war as recently as 2018, "Third report of the Organization for the Prohibition of Chemical Weapons United Nations Joint Investigative Mechanism". 24 August 2016, <https://undocs.org/S/2016/738>, accessed 10 August 2019

²⁵³ Roberts *Supra* note 198

²⁵⁴ The origins of the nuclear safeguards concept and perhaps the term itself may be found in the 1946 Acheson-Lilienthal report, the immediate predecessor of the Baruch Plan, which concluded that “a system of inspection imposed on an otherwise uncontrolled exploitation of atomic energy by national governments will not be an adequate safeguard”

²⁵⁵ Mukhatzhanova, *Supra* note 154

However, the question in the negotiation of the TPNW was whether the bar could be raised to compel states to accept a nuclear verification standard. The answer is a disappointing mixed one; under TPNW Article 3: those states who have neither “owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme before 7 July 2017 [i.e. the NWFZ NNWS] ... shall, at a minimum, maintain its IAEA safeguards obligations in force at the time of entry into force of this Treaty ... or shall conclude with the IAEA and bring into force a comprehensive safeguards agreement (INFCIRC/153 (Corrected))”; whereas under TPNW Article 4: any state who has “owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme before 7 July 2017 [i.e. nuclear umbrella states]... shall conclude a safeguards agreement with the IAEA sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in that State Party as a whole. This means that there are two separate verification standards in the TPNW, one for NNWS and one for NWS; in short TPNW is a discriminatory regime.

This disparity in the verification standard has not gone unnoticed, the TPNW “has already come under criticism for insufficiently robust safeguards provisions, and this will likely continue to be a point of contention...the treaty establishes different safeguards requirements for different kinds of states in perpetuity, and it is difficult to imagine that the current nuclear-weapon states would want to accept such an arrangement”.²⁵⁶ Even supporters of the agreement note that “the Ban Treaty is not perfect. But it is a *very good* instrument to start to process”²⁵⁷, however does very good cut it? Even Sweden who actively worked to negotiate the TPNW and voted to pass it, has now announced that it is not able to sign the TPNW, but rather will seek observer status, due to the lack of clear definition in the Treaty.²⁵⁸ What observer status to the TPNW might entail though, is uncertain, as TPNW does not make provision for observer status, however some hope that such a status will allow Sweden, as well as prominent Humanitarian Initiative advocates like Norway and Switzerland, the ability to be, ““disarmament bridge builders” by observing TPNW meetings, re-considering joining at a later date and actively pursuing disarmament steps that complement the TPNW and the NPT.”²⁵⁹

²⁵⁶, *Supra* note 155

²⁵⁷ Sauer, *Supra* note 244 emphasis added

²⁵⁸ Sweden declines to sign UN nuclear ban treaty, AFP/The Local, 12 July 2019, <https://www.thelocal.se/20190712/sweden-declines-to-sign-un-nuclear-treaty>, accessed 10 August 2019

²⁵⁹ Alicia Sanders-Zakre, *How Can Norway, Sweden and Switzerland Stay Engaged with the TPNW?*

Over 20 years ago IAEA Director General Hans Blix was also able to neatly summarize the issue of the nuclear umbrella and nuclear verification:

“For the States which continue to rely on nuclear weapons or on nuclear umbrellas, the process of reduction of nuclear weapons will be accompanied by the demand for increased assurance that such weapons are not being acquired by others. In short, the fewer nuclear weapons there are, the more important it will be that no one is cheating. Thus effective non proliferation verification is an essential prerequisite for the reduction and eventual elimination of nuclear weapons - and therefore likely to become more important in years to come.”²⁶⁰

5.2.4. *TPNW: The Future*

In a world faced with concerns of both Iranian²⁶¹ and Syrian²⁶² nuclear weapons development and the potential for other Middle Eastern nations such as Saudi Arabia²⁶³ and Egypt²⁶⁴ to launch a break-out nuclear programme, it is difficult to genuinely argue that nuclear umbrella states should really place faith and trust in a new nuclear normative agreement which nonetheless still allows for discriminatory application.

However, the TPNW as a legal framework has led to, “[s]ome states [expressing] hope that this normative statement might contribute to the development of parallel customary international law”,²⁶⁵ yet it is worth noting that:

Arms Control Now, February 1, 2019, <https://www.armscontrol.org/blog/2019-02-01/norway-sweden-switzerland-stay-engaged-tpnw>, accessed 10 August 2019

²⁶⁰ Hans Blix, *The Future of Nuclear Verification*, Remarks of the Director General, Dr Hans Blix at the Closing Session of the IAEA Symposium on International Safeguards, 17 October 1997, <https://www.iaea.org/newscenter/statements/future-nuclear-verification-remarks-director-general-dr-hans-blix-closing-session-iaea-symposium-international-safeguards>, accessed 10 August 2019

²⁶¹ The IAEA Board of Governors concluded in September 2005 that Iran had not complied with its safeguards agreement and that its nuclear program raised questions within the competence of the Security Council. Which led to United Nations Security Council Resolutions 1696 and 1737 imposing sanction on Iran regarding its uranium enrichment activities

²⁶² On 24 May 2011, the IAEA Director General Amano concluded that the destroyed building at Dair Alzour was "very likely" a nuclear reactor, which Syria had been required to declare under its NPT safeguards agreement. The June 2011, IAEA Board of Governors voted 17-6 (with 11 abstentions) to report this as non-compliance to the UN Security Council, as per, Implementation of the NPT safeguards agreement in the Syrian Arab Republic, Resolution adopted by the Board of Governors, 9 June 2011, GOV/2011/41

²⁶³ *Pakistan, Saudi Arabia in secret nuke pact, Islamabad trades weapons technology for oil*, The Washington Times October 22, 2003, https://www.globalsecurity.org/org/news/2003/031022-pakistan_saudi-arabia.htm , accessed 10 August 2019

²⁶⁴ See, Implementation of the NPT Safeguards Agreement in the Arab Republic of Egypt, IAEA Board of Governors, GOV/2005/9, 14 February 2005, https://www.globalsecurity.org/wmd/library/report/2005/egypt_iaea_gov-2005-9_14nov2005.pdf, accessed 10 August 2019

²⁶⁵ Joyner, *Supra* note 246

The prohibition movement suggests or implies that it reflects the demands of a large majority of the world and therefore carries a democratic imperative. This is true on one level, yet may be problematic in two ways, one of which is not obvious. First, the states that favor a prohibition treaty do compose more than 60 percent of the world's countries. Yet, in terms of population, more than 60 percent of the world population lives in states that did not support this undertaking. This merely represents the long-standing tension between the international state system (in which each state has an equal vote) and international politics (wherein the population, political influence, and economic and military power of states vary enormously, and governments generally prioritize internal interests over global ones). In this sense, democracy within states (or merely state sovereignty) collides with democracy among states. More than majoritarian democracy, the issue seems better cast as one of respecting the rights of the large, innocent minority of the world's population who could be subjected to death and environmental peril by the actions of one or more nuclear-armed states.²⁶⁶

Therefore realistically it would seem that rather creating a new normative blueprint, the TPNW will exist for the moment as a political statement of intent, seeking to speed along a 'crisis in legitimacy' for nuclear weapons by providing new tool in both the diplomatic bag of tricks and within civil society itself. There is also the hope that TPNW will add volume to the voice for the long-overlooked NWFZ NNWS to be taken seriously in the context of nuclear disarmament. This will keep alive the possibility that one day, when the states under the nuclear umbrella are ready to genuinely consider nuclear disarmament, that a blueprint for their success lies in wait and at the ready.

5.3. The NSG: The Indian and Pakistani membership question

As previously established, neither nuclear armed India or Pakistan have ever joined the NPT, and therefore whenever the NPT Review process is convened, India and Pakistan are omitted from deliberations as though the two nuclear-armed states simply do not exist and therefore have no bearing on the current non-proliferation and disarmament challenges faced by the NPT: "Through bilateral diplomacy and NPT review conferences, states hector India, Pakistan and especially Israel to abandon nuclear weapons and join the NPT. The aim is

²⁶⁶ George Perkovich, *The Nuclear Ban Treaty: What Would Follow?*, Carnegie Endowment for International Peace, 31 May 2017, <https://carnegieendowment.org/2017/05/31/nuclear-ban-treaty-what-would-follow-pub-70136>, accessed 10 August 2019

understandable, but its achievement is not a serious prospect.”²⁶⁷ While this cold shoulder approach fits the legal scenario, it unfortunately is out of step with the realpolitik of the issue. As two of the largest and most populated states on the planet, India and Pakistan have since their nuclear testing in 1998, established themselves as two integral and important regional powers, with aspirations to be equivalent to the P-5 NWS. Indeed, the realisation of this realpolitik has led to ongoing calls for India and Pakistan to be admitted into the NPT as NWS.²⁶⁸ However, with neither India or Pakistan having yet signed the CTBT and with Pakistan blocking the negotiating process of the FMCT, it is doubtful that India and Pakistan’s credentials inspire the confidence in NPT States parties which could see a consensus decision to amend the NPT and admit the two states as NWS.

Nonetheless the NPT cannot afford to ignore India and Pakistan in perpetuity, the *Marshall Islands case* may have not succeeded, but it did come a hair’s breadth away from recognising that Article VI of the NPT has passed into customary international law, which would have meant that India and Pakistan could have been recognised by the ICJ as owing the same obligations (pursuit of good faith disarmament negotiations) as NWS rather than the more onerous obligations applicable to NNWS, contained in Article III of the NPT. Had the ICJ recognised the NWS obligation in customary international law, as applicable to India and Pakistan, then this would indeed have created a severe undermining of the Treaty as it currently stands, by recognising India and Pakistan as NNWS.

Therefore, the quandary for States is how India and Pakistan might be rehabilitated back into the mainstream of the global non-proliferation regime. With both India and Pakistan keen on developing their civil nuclear power profile, the obvious avenue of approach has been through the NSG, which has ever stood just outside the NPT’s ambit; and in 2016 following on from the U.S.’s 2010 announcement to support India’s membership of the NSG, both India and Pakistan formally applied to the NSG to become members.

Yet what are the prospects for either India or Pakistan to enter into the non-proliferation mainstream, through the backdoor of the nuclear supply chain? Firstly, it must be understood that the NSG is not an international organisation and its Guidelines and Control Lists are not treaty based, rather it is a voluntary, non-legally binding association of major supplier

²⁶⁷ George Perkovich, *Strengthening non-proliferation rules and norms—the three-state problem*, Disarmament Forum, The 2005 NPT Review Conference, 4/2004, <https://www.peacepalacelibrary.nl/ebooks/files/pdf-art2187.pdf> , accessed 10 August 2019

²⁶⁸ Saurabh Todi, *Reforming the Nuclear Nonproliferation Treaty for New Realities*, The Diplomat, 4 January 2019, <https://thediplomat.com/2019/01/reforming-the-nuclear-nonproliferation-treaty-for-new-realities/> , accessed 10 August 2019

governments, with no standing secretariat or budget. As such it does not have ‘member states’ but participating governments commit themselves to implementing the NSG Guidelines and Control Lists on a national basis. While the NSG has a number of different standing bodies for participants to consider issues relevant to the Group, recommendations are forwarded to a plenary session, where decisions are taken by *consensus*. Therefore in applying for ‘membership’ of the NSG, India and Pakistan need not only implement the NSG Control Lists domestically, but also factor in that the NSG, not being an international organisation, does not have any fixed criteria for membership, rather it being for each of the individual NSG participants to decide whether a potential candidate, like India and Pakistan, should be welcomed into the Group.²⁶⁹ With all NSG decision making rooted in consensus, NSG participants are all too aware that admitting one state into the Group in front of the other may lead to the blocking of participation by a regional rival indefinitely.

Therefore despite the many declarations of support for India’s application from a number of NSG participants, China has announced that it will not consent to discussions of India’s membership of the Group until the NSG can decide on “a two-step plan that stipulates the need for the NSG members to arrive at a set of principles for the entry non-NPT states and then move forward discussions of specific cases”.²⁷⁰ The practical realities of the structure of the NSG, plus the geopolitical strategic relationship between India, Pakistan and China, mean that it is unlikely that the NSG will be able to admit India and Pakistan separately, but rather that both India and Pakistan will have to work to rehabilitate themselves into the global non-proliferation and disarmament regime. In this way ‘membership’ of the NSG could be viewed as the potential carrot on the stick that integrating India and Pakistan into the global non-proliferation regime could be conditional with conformity with the CTBT, the work on the FMCT and other legal measures needed to provoke confidence in progressing disarmament.²⁷¹ Should this be possible, it may follow that the NPT can find a way to at last reconcile itself and rehabilitate those States who could not accept the ‘grand bargain’.

²⁶⁹ Nuclear Suppliers Group FAQ, <http://nuclearsuppliersgroup.org/en/about-nsg/nsg-faq>, accessed 10 August 2019

²⁷⁰ *China Rules Out India's Entry into NSG Without 'Consensus' on Allowing Non-NPT Countries*, News18, 21 June 2019, <https://www.news18.com/news/world/china-rules-out-indias-entry-into-nsg-without-consensus-on-allowing-non-npt-countries-2198289.html>, accessed 10 August 2019

²⁷¹ Goldschmidt, Dalton *Supra* note 190

5.4. **Proliferation challenges**

5.4.1. *Proliferation in the Middle East*

“By all accounts, the failure of the 2015 conference to produce a consensus outcome document with any substance can be attributed to the discussions around the establishment of a WMD-free zone in the Middle East”²⁷², with the U.S., Canada and the UK blocking a motion to convene a conference on the establishment of a Middle East NWFZ due to the non-inclusion of Israel in such negotiations. As previously discussed, it is widely acknowledged by states that Israel possesses nuclear weapon capabilities, despite Israel neither confirming or denying the fact. Yet in a world where nuclear weapons possessors are held in balance by their regional or global rivals possessing equal capabilities; Israel’s ongoing possession has stood stark to that of other Middle Eastern States who are all NNWS States parties to the NPT. Question marks have been raised about both Syria and Iran, who have been reported by the IAEA over non-compliance with their Safeguards Agreements as per the NPT. Yet as noted previously, Iran had come to an agreement with the EU3+3²⁷³ under the JCPOA, to limit its nuclear activities and open its nuclear programme to greater scrutiny by the IAEA. However, with President Trump coming into the White House, the US has withdrawn from the JCPOA and reimposed economic sanctions on Iran, which has led Iran to suspend its commitments to the JCPOA and resume enriching uranium to levels beyond that permitted by the JCPOA. Efforts are ongoing to salvage the JCPOA and keep Iran within the fold, however the unilateral withdrawal from the agreement by the U.S., has damaged relations with Iran to the extent that it is unlikely that Iran would agree to negotiate any new agreement in good faith the future²⁷⁴.

With concerns that Iran could be back in pursuit of a nuclear weapons programme, another regional power in the Middle East, adverse to Iran, Saudi Arabia is creating concern that it too could be attempting to obtain a nuclear weapon. There was belief that Saudi Arabia had colluded with Pakistan during its nuclear weapons development with the understanding that the Saudis would obtain a nuclear weapon from Pakistan should Iran ever succeed in

²⁷² Wan, *Supra* note 110

²⁷³ Germany, France, the UK, China, Russia and the US

²⁷⁴ The Supreme Leader of Iran, Ayatollah Khomeini declared that, “The Islamic Republic of Iran has no trust in America and will never repeat the bitter experience of previous negotiations with America in the framework of the JCPOA,” - Bozorgmehr Sharafedin, *Iranian leader tells Japan's Abe Trump 'not worthy' of a reply to message*, June 13, 2019, Reuters, <https://www.reuters.com/article/us-iran-japan-usa-khamenei/iranian-leader-tells-japans-abe-he-has-no-reply-to-message-from-trump-idUSKCN1TE14V>, accessed 10 August 2019

producing a nuclear weapon itself.²⁷⁵ However in 2019 evidence emerged that the U.S. White House had approved transfers of sensitive nuclear technology to Saudi Arabia, that should otherwise not be transferred to Saudi Arabia, because of it not having an IAEA Additional Protocol in place, as per the legal standard for transfers in the NSG Guidelines.²⁷⁶ While the transfers themselves are not tantamount to a weapons programme, any State lacking transparency, and showing resistance to stringent IAEA Safeguards standards, is always a concern for compliance with NPT non-proliferation undertakings, and the chance of the 2020 NPT Review Conference being able to progress with the mandate of negotiating a Middle East NWFZ is looking increasingly and disappointingly distant.

5.4.2. *Proliferation in the DPRK*

Despite having been under UN Security Council sanction since 2006 because of nuclear tests performed in 2006, 2009 and 2013, since 2015 the DPRK has conducted additional nuclear tests, 2015 and 2017 to cement its status as a nuclear weapon power. The DPRK asserted that these tests involved the successful detonation of a thermonuclear weapon and because of this, coupled with testing of missiles, the UN Security Council has repeatedly applied stricter and more restrictive sanctions on the DPRK in the last 5 years.²⁷⁷ However sanctions aside, the DPRK has remained resolute its project of becoming a nuclear armed state, “Kim has grasped that nothing short of a nuclear capability will be sufficient to ensure his survival ... Having learned the lessons of Iran, Iraq and Libya, the young leader wants North Korea to be too nuclear to fail.”²⁷⁸ This strategic necessity that the DPRK has placed upon its nuclear programme has been recognized by U.S. officials, noting that the nuclear disarmament of the DPRK is, “probably a lost cause”, ... the best the U.S. could hope for was a cap on the North's capabilities”.²⁷⁹ Nonetheless in a bid for sanctions relief the DPRK has announced its willingness to commence discussions pertaining to denuclearization,²⁸⁰ and to readmit

²⁷⁵ Mark Urban, *Saudi nuclear weapons 'on order' from Pakistan*, BBC News, 6 November 2013, <https://www.bbc.com/news/world-middle-east-24823846>, accessed 10 August 2019

²⁷⁶ Julian Borger, *Saudi Arabia's first nuclear reactor nearly finished, sparking fears over safeguards*, the Guardian, 4 April 2019, <https://www.theguardian.com/world/2019/apr/04/saudi-arabias-first-nuclear-reactor-nearly-finished-sparking-fears-over-safeguards>, accessed 10 August 2019

²⁷⁷ As contained in UNSC Resolution 2094, UNSC Resolution 2321, UNSC Resolution 2270, UNSC Resolution 2375, UNSC Resolution 2371 and UNSC Resolution 2371

²⁷⁸ Scott Snyder, *Why Kim Jong Un Wants North Korea To Be Too Nuclear To Fail*, Forbes, 9 August 2017, <https://www.forbes.com/sites/insideasia/2017/08/09/why-kim-jong-un-wants-north-korea-to-be-too-nuclear-to-fail/#63e0a65f1744>, accessed 10 August 2019

²⁷⁹ *North Korea nuclear: US intelligence chief says disarmament unlikely*, BBC News, 26 October 2016, <https://www.bbc.com/news/world-asia-37771377>, accessed 10 August 2019

²⁸⁰ Robert Carlin, *North Korea Said it is Willing to Talk about Denuclearization...But No One Noticed*, 38 North, 12 July, 2016, <https://www.38north.org/2016/07/rcarlin071216/>, accessed 10 August 2019

international nuclear inspections subject to agreement.²⁸¹ As such the U.S. and DPRK have convened three of summits to discuss denuclearization of the Korean peninsula and how to bring verification procedures back to the DPRK. Should the DPRK be persuaded to readmit IAEA verification controls, this could help lead the way back to normalizing the DPRK's status within the NPT and global non-proliferation architecture; though such normalization contains significant (and possibly insurmountable hurdles) and as such, does seem beyond the pall of tangible results during the 2020 Review Cycle.²⁸²

5.5. Disarmament challenges

As previously noted, up until the 2015 NPT RevCon, disarmament efforts by the NWS had proceeded through a series of bilateral agreements between the U.S. and USSR (and latterly Russia) as well as unilateral undertakings by other NWS such as France and the UK. These measures have not all been empty successes with the U.S. claiming an 88 percent reduction in nuclear warheads from its peak and Russia an 85 percent reduction in nuclear warheads from its peak, while the UK has unilaterally announced downsizing its operational warhead to no more than 120; and France has claimed reductions of a third of its arsenal, with nuclear weapons capped at 300. Yet China of all the NWS has not claimed any reductions, rather noting that it keep its nuclear weapons at the minimal level required by national security.²⁸³ However while the NWS feel that their undertaking to reduce nuclear weapons fulfil their obligations under Article VI to pursue nuclear disarmament NNWS have felt increasingly short changed by NWS's progress:

Progress toward nuclear disarmament remains, however, the most serious bone of contention within the NPT. While the nuclear weapon states highlight what they have achieved so far, a vast majority of non-nuclear weapon states focus on what more needs to be done. Non-nuclear-weapon states criticise nuclear possessors for slow progress and for not fulfilling their promises ... While nuclear-weapon states and U.S. non-nuclear allies claim that further progress toward disarmament must take into account the overall security environment, for the majority of non-nuclear-weapon states the time for nuclear

²⁸¹ *North Korea is reportedly preparing nuclear and missile sites for international inspectors*, Reuters, 31 October 2018, <https://www.cnn.com/2018/10/31/north-korea-reportedly-readies-nuclear-missile-sites-for-inspectors.html>, accessed 10 August 2019

²⁸² *North Korean Nuclear Negotiations 1985 – 2019*, Council on Foreign Relations, <https://www.cfr.org/timeline/north-korean-nuclear-negotiations> , accessed 10 August 2019

²⁸³ Durkalec *Supra* note 7

disarmament is now and arguments from countries relying on nuclear weapons are not convincing.²⁸⁴

This frustration by NNWS has been borne out in the Humanitarian Initiative, as well as the legal action brought by the Marshall Islands to the ICJ to attempt to find Article VI recourse through judicial interpretation and most importantly by TPNW which epitomizes the exasperation felt by many NNWS. Yet the previous two years since the opening of the TPNW for signature has seen gigantic shifts in the nuclear postures of nuclear armed states which poses serious legal and political questions as to how the ‘grand bargain’ can continue.

5.5.1. *The return to a nuclear arms race? U.S., Russian and Chinese nuclear posturing*

In 2017 U.S. Vice President Joe Biden declared that “given our non-nuclear capabilities and the nature of today’s threats, it’s hard to envision a plausible scenario in which the first use of nuclear weapons by the United States would be necessary. Or make sense. President Obama and I are confident we can deter and defend ourselves and our allies against non-nuclear threats through other means.”²⁸⁵

However fast forwarding one year to the Presidency of Donald Trump and the world waited with bated breath for the 2018 U.S. Nuclear Posture Review, after all President Trump had roundly derided arms control agreements such as New START and touted that the U.S. could return to nuclear weapons development. Indeed, shortly before the announcement of the 2018 Nuclear Posture Review, U.S. government officials had started to suggest that the U.S. would cancel its participation in the INF Treaty due to violations by Russia,²⁸⁶ (and on 2 August 2019 the INF Treaty was officially terminated). The U.S. Nuclear Posture Review of January 2018 then did see the U.S. announce the significant strengthening of the salience and recentralization of the role of a broader range of nuclear capabilities in U.S. defense and foreign policies.^{287, 288}

²⁸⁴ *Ibid*

²⁸⁵ Daryl G. Kimball, *Trump’s More Dangerous Nuclear Posture*, Arms Control Association, January/February 2018, <https://www.armscontrol.org/act/2018-01//////////focus/trumps-more-dangerous-nuclear-posture>, accessed 10 August 2019

²⁸⁶ *US Official Identifies Missile Believed to Violate INF Treaty*, Missile Defense Project, 8 December 2017, <https://missilethreat.csis.org/us-official-identifies-missile-believed-violate-inf-treaty/>, accessed 10 August 2019

²⁸⁷ John Gower, *The Dangerous Illogic of Twenty-First-Century Deterrence Through Planning for Nuclear Warfighting*, Carnegie Endowment for International Peace, 6 March 2018, <http://carnegieendowment.org/2018/03/06/dangerous-illogic-of-twenty-first-century-deterrence-through-planning-for-nuclear-warfighting-pub-75717>, accessed 10 August 2019

²⁸⁸ In particular, new Submarine Launched Cruise Missiles with “low-yield” nuclear weapons

Russia then itself did announce in March 2018 investment in new nuclear capabilities, including new delivery systems in a speech by President Putin.²⁸⁹ Such announcements by the U.S. and Russia have also seen ripple-effects in China with a publication by the People's Liberation Army noting China's intention to catch up to the U.S. and Russia's nuclear capabilities.²⁹⁰ Such new build-up in strategic nuclear capabilities has precipitated the cancellation of the INF Treaty and with New START due to expire in 2021 all the step-by-step progress taken in disarmament since the Cold War looks to be erased.

While this change of pace seems like a bolt out of the blue, it can be seen as the end product of a long rapprochement of fall-out from post-Cold War developments and realities. Many of the Cold War nuclear weapons and (as a result) Treaties have ceased to have relevance. The ICJ Advisory Opinion of 1996 affirmed a very narrow circumstance whereby a nuclear weapon could possibly be legally used - where the very survival of the State is at stake; this coupled with the particular acknowledgement that the indiscriminate nature of nuclear weapons so large that they could not be used without breaching humanitarian law, made them, tactically, almost completely redundant. Furthermore, Russian arguments are that agreements such as the INF Treaty have become technologically obsolete,²⁹¹ and that it was the U.S.'s unilateral cancellation of the ABM in 2002, which signalled the dismantling of the atmosphere of trust that neither party would recklessly use their nuclear weapons.²⁹² From this point of view, it is post-Cold War unilateralism by the U.S. which can be said to be blamed for NWS reasserting their nuclear armament policies. This has led to assertion in the U.S. that "Chinese and Russian leader won't always agree, but their deepening cooperation and mistrust of the U.S. is here to stay. Unfortunately, American leaders have shown few signs that they know how to navigate this new reality".²⁹³ But now, almost 30 years after the end of the Cold War, with no environment for nuclear powers to pursue disarmament in, the U.S., Russia and China, have made the disappointing, yet strategically sounder decision to update their nuclear capabilities to fit the new century.

²⁸⁹ Vladimir Putin, Presidential Address to the Federal Assembly, President of Russia, 1 March 2018, <http://en.kremlin.ru/events/president/news/56957>, accessed 10 August 2019

²⁹⁰ *Chinese military paper urges increase in nuclear deterrence capabilities*, Reuters, 30 January 2018, <https://www.reuters.com/article/us-china-security/chinese-military-paper-urges-increase-in-nuclear-deterrence-capabilities-idUSKBN1FJ1A0>, accessed 10 August 2019

²⁹¹ Dimitri Alexander Simes, *Are Russia and America Headed Toward Nuclear War?*, National Interest, 23 July 2019, <https://nationalinterest.org/feature/are-russia-and-america-headed-toward-nuclear-war-6870>, accessed 10 August 2019

²⁹² *Supra* note 296

²⁹³ Alexander Gabuev, *China and Russia's Dangerous Entente*, Wall Street Journal, 4 October 2017

Yet rather than U.S. Nuclear Posture Review, Russian Presidential announcement and Chinese advocacy to keep pace, signalling an imminent descent in Cold War II, it can be asserted that this posturing merely represents a pragmatic affirmation of using nuclear weapons as a tool for international hegemony:

There is a difference between regarding nuclear weapons as a hegemonic tool than using them as a weapon of last resort. If a country considers its nuclear weapons only as a measure of last resort, the quantity or variety of its stockpile would not be of vital importance. However, if a country considers its nuclear weapons as a hegemonic tool, the consequences would be very different. It would consider any nuclear weapons in its rival countries as challenges to its hegemony; it would not tolerate that the number of its nuclear weapons, especially its strategic nuclear weapons, would be less than those in other countries; it would try to increase the types of its nuclear weapons so it could show its nuclear muscle on as many occasions as possible.²⁹⁴

However, it is difficult to imagine how the nuclear powers imagine the development of new nuclear weapons could possibly achieve a nuclear weapon which could be lawfully deployed. When President Trump announced the intention to develop tactical low yield nuclear weapons, as part of the 2018 Nuclear Posture Review, yet how a low-yield weapon could be discriminate left nuclear specialists scratching their heads; for like their higher yield cousins, a low yield nuclear weapon, such as those used in Hiroshima and Nagasaki would still be indiscriminately destructive and could likely not be used without breaching humanitarian law, as per the jurisprudence from the ICJ's 1996 *Advisory Opinion of the Legality of Nuclear Weapons*. Such are the facts that some have decried that nuclear weapons in of themselves have ceased to have any practical function:

They have proved useless militarily; in fact, their primary use has been to stoke the national ego or to posture against real or imagined threats. Few states have or want them, and they seem to be out of reach for terrorists. Their impact on international affairs has been minor compared with the sums and words expended on them.²⁹⁵

²⁹⁴ Li Bin, *Will US Nuclear Posture Review see a return to hegemony?*, Global Times, 26 January 2018, <https://carnegieendowment.org/2018/01/26/will-us-nuclear-posture-review-see-return-to-hegemony-pub-75359>, accessed 10 August 2019

²⁹⁵ John Mueller, *Nuclear Weapons Don't Matter, But Nuclear Hysteria Does*, Foreign Affairs Magazine November/December 2018, https://www.foreignaffairs.com/articles/2018-10-15/nuclear-weapons-dont-matter?utm_campaign=reg_conf_email&utm_medium=newsletters&utm_source=fa_registration, accessed 10 August 2019

Yet unsettlingly recently released documentation from the Pentagon suggests that new contingencies are being put in place to allow the use of low yield nuclear weapons to, “create the conditions for optimal results”.²⁹⁶

However, whether these nuclear weapons, will or will not ever be used becomes almost a secondary concern within the NPT Forum, rather it is the mere suggestion that nuclear weapons can regain any strategic relevance, when NPT States parties are committed to a world free from nuclear weapons: “The TPNW can be interpreted as a symptom of the NPT’s midlife crisis – an expression of the frustration of non-nuclear weapon states, which have a deep sense of remorse for slow disarmament progress”²⁹⁷, and the nuclear postures of the NWS are an affirmation for many amongst the NNWS that the ‘grand bargain’ of the NPT might not be working any longer. If this is to be the way of things, then such arms escalations could risk the whole endeavour.

5.5.2. *CEND – Creating an Environment for Nuclear Disarmament*

Until now, disarmament efforts have been focused around the incremental step-by-step approach to disarm nuclear capabilities gradually, bit by bit, until nuclear weapons are eliminated, and due to the fact that Russia and the U.S. possess nuclear stockpiles which dwarf that of other nuclear possessing states, the burden of these incremental steps have fallen onto the bilateral arms control treaties signed between Russia and the U.S.. However, following the failure to form consensus at the 2015 NPT RevCon, and with multilateral discussions in the FMCT deadlocked and with New START as the only arms control treaty left in place, and due to expire in 2021, it is small wonder that the Humanitarian Initiative felt the time was due to seize the initiative and create a new narrative for disarmament progress. “[TPNW] proponents assert that a step-by-step approach has proved fruitless in moving toward a world free of nuclear weapons. They claim that the prohibition treaty constitutes an effective measure for nuclear disarmament under Article VI of the nuclear Nonproliferation Treaty (NPT) by creating a legally binding prohibition on nuclear weapons.”²⁹⁸ However, the urgency attached to producing the TPNW, has, as discussed in earlier in this paper, created a document which only takes account of how one side of the debate perceives the challenges, for while states living under the nuclear umbrella (with the exception of the Netherlands)

²⁹⁶ Julian Borger, Nuclear weapons: experts alarmed by new Pentagon 'war-fighting' doctrine, The Guardian, 19 June 2019, <https://www.theguardian.com/world/2019/jun/19/nuclear-weapons-pentagon-us-military-doctrine>, accessed 10 August 2019

²⁹⁷ Durkalec, *Supra* note 7

²⁹⁸ Kitano, *Supra* note 94

boycotted the process, the end TPNW has simply sundered the nuclear divide even more. The TPNW is, “fueled by wholly unrealistic expectations of the elimination of nuclear arsenals without the prerequisite transformation of the international security environment.”²⁹⁹

Therefore, the question is how the international security environment can be transformed to allow meaningful disarmament progress to be furthered? Originally floated during the NPT Preparatory Committee meeting in 2018, in March 2019 the U.S. launched an initiative titled the ‘Creating an Environment for Nuclear Disarmament (CEND)’. The U.S. asserting that such an approach is necessitous to forwarding disarmament:

[T]hat disarmament is possible only when and to the degree that the underlying security conditions of the global environment are, or can be made, conducive to such progress. To start with trying to prohibit the tools without working on the security environment is thus to get things precisely backwards — and probably also to doom one’s efforts to failure, however well-intentioned they may be.³⁰⁰

Yet interestingly the CEND initiative has jettisoned the tried, tested and clung to step-by-step disarmament arguments:

This new initiative aims to move beyond the traditional approach that had focused principally upon ‘step-by-step’ efforts to bring down the number of U.S. and Russian nuclear weapons, but that did so in ways that did not provide a pathway to address the challenge of worsening security conditions, did not address nuclear build-ups by China, India and Pakistan, and did not provide an answer to challenges of deterrence and stability in Europe and the Indo-Pacific, and that had clearly stalled.³⁰¹

Nonetheless the CEND can only be a success if other stakeholders in the disarmament debate can enjoin themselves to this initiative. And while initial hopes about the success of the CEND were not high, with the U.S. and Russia embroiled in undiplomatic exchanges during the 2019 NPT Preparatory Committee meeting, to the surprise of many commentators, not only did Russia attend the inaugural CEND Plenary in July 2019, but so did the other NWS,

²⁹⁹ Office of the Secretary of Defense, “Nuclear Posture Review,” February 2018, <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF> , accessed 10 August 2019

³⁰⁰ Christopher Ford, *Lessons From Disarmament History for the CEND Initiative*, Remarks by the Assistant Secretary Bureau of International Security and Nonproliferation, Disarmament Side Event, Third Preparatory Committee For The 2020 NPT Review Conference, United Nations, New York, 30 April 2019, <https://www.state.gov/lessons-from-disarmament-history-for-the-cend-initiative/> , accessed 10 August 2019

³⁰¹ Sourced from, Paul Meyer, *Creating an Environment for Nuclear Disarmament: Striding Forward or Stepping Back?*, Arms Control Today, April 2019, <https://www.armscontrol.org/act/2019-04/features/creating-environment-nuclear-disarmament-striding-forward-stepping-back#endnote04> , accessed 10 August 2019

as well as India, Pakistan and Israel, with commentators noting that an, “absence of acrimony is noteworthy”.³⁰² It is too early to analyse the CEND’s chances of success or failure, nevertheless attempts to confront the disarmament question in the NPT’s framework can only be positive. To this end recent suggestions by Russia at the June 2019 G20 meeting in Osaka to recommit itself to arms control talks³⁰³, keeps the embers of progress glowing, although China’s declaration to not join Russia and the U.S. in such negotiations, will not be a long term solution to forwarding the good faith disarmament obligations incumbent upon NPT States parties.³⁰⁴

³⁰² William C. Potter, *Taking the Pulse at the Inaugural Meeting of the CEND Initiative*, Middlebury Institute of International Studies at Monterey, 15 July 2019, <https://www.nonproliferation.org/taking-the-pulse-at-the-inaugural-meeting-of-the-cend-initiative/>, accessed 10 August 2019

³⁰³ *Putin Says U.S., Russia To Resume Nuclear Arms Talks*, Radio Free Europe, 29 June 2019, <https://www.rferl.org/a/putin-says-u-s-russia-to-resume-nuclear-arms-talks/30027158.html>, accessed 10 August 2019

³⁰⁴ *China welcomes US-Russia talks on arms control but sees no reason to participate in negotiations*, Russia Today, 16 July 2019, <https://www.rt.com/news/464291-china-arms-control-us-russia/>, accessed 10 August 2019

Conclusion

50 years ago when the NPT opened for signature there had been an acute sense that a tool was needed to not only provide a framework for the realisation of non-proliferation of nuclear weapons a global norm; but also for that framework to be the embodiment of the goal of a world free from nuclear weapons, by placing a legal obligation for disarmament upon NWS; yet at the same time recognising the dual-nature of nuclear energy to contribute towards States' peaceful development. The NPT has been ratified by all but four states and only one State party has withdrawn from the Treaty, as per Article X of the NPT. In many respects 50 years ago this would have represented an achievement.

Yet while the Three Pillars of the NPT are equal in importance, with no one pillar to be given precedence over the other two; the Treaty is the 'Nuclear *Non-Proliferation* Treaty', and while it is important not to fragment the interdependency of the Three Pillars: it is plain from the language of the NPT, that it pays lip service to disarmament and access to peaceful uses in Articles VI and IV respectively, within the scope and provisions of the Treaty, only non-proliferation (albeit imperfectly) is given proper definition.

The methods of success for implementing non-proliferation, through a combination of undertakings not to proliferate, independent verification and, putting in place export controls have provided the blueprint for success in implementing global non-proliferation; albeit the blueprint has had to expanded beyond the mandate of the NPT, through the broadened IAEA verification standards like the Additional Protocol, and the NSG's enactment of Dual-Use controls and strengthened controls for accessing sensitive equipment. It is not surprising that disarmament steps have been less easily measured, with the current definitive interpretation on Article VI obligations coming through ICJ's jurisprudence in the *Advisory Opinion on the Legality of Nuclear Weapons*, and while the *Marshall Islands case* has demonstrated the preparedness of some of the judicial bench to interpret Article VI progress more stringently, the ICJ judges, much like NPT States parties, remain split with a slender majority backing the status quo. Nonetheless Article VI does require NWS not only 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", but also "*on a treaty on general and complete disarmament*", which underlies the tension in the NPT, the Treaty while supporting non-proliferation and disarmament, was never intended to be *the* multilateral agreement for ensuring disarmament, the closest legal framework for disarmament remains articulated in the 1946 Baruch Plan. While advocates of the TPNW assert its credentials for moving the disarmament debate forward, the fact remains that the TPNW is an aspirational text written for states and by states

who have not spun themselves any narrative regarding the necessitous role that nuclear weapons have.³⁰⁵ Rather TPNW looks at a world scenario where nuclear weapons are already prohibited, and not at how disarmament may be successfully be implemented and pursued. For the seeds of the ‘nuclear apartheid’ present in the NPT were sown even before the NPT could open for signature in 1968: for States haunted by the carnage of World War II and fearful of Cold War hostilities becoming hot, dependence on the doctrine of deterrence provided by the nuclear umbrella, became politically self-sustaining; and while most states outside the nuclear umbrella *had to* accept the ‘grand bargain’ that non-proliferation and disarmament progress could not be conditionally linked, for a select few this became a deal breaker. Though once India became a nuclear weapon power, the question of how this could be integrated into the NPT has been put off indefinitely. It was impossible to amend the NPT to admit India as a NWS, as doing so would have risked the ‘grand bargain’ keeping NPT States parties obliged to following non-proliferation.

Moreover, for the NWS, who as the P-5, the global policemen, responsible for the maintenance and continuance of global peace, the obligation of disarming their most powerful weapons while states like India, Pakistan and the DPRK would have no such obligation, was such that the pursuit of said obligation has always been postponed, not because the NWS have the explicit intention to not uphold their Article VI obligations in good faith, but because doing so, with nuclear states not subject to the same undertakings, would compromise their undertaking under the UN Charter as the P-5 to police the global peace. The result of Article VI progress would likely be the same, but the conduct could have been markedly improved. Nonetheless since the inception of nuclear weapons in 1945 states have continued to agonise over how they can best realise the elimination of nuclear armaments. The Baruch Plan, in 1946, had proposed verification and enforcement measures which would be independent of world powers, who would be required to surrender their UN veto powers so that no P-5 member would be able to veto a decision to punish states who abrogated their disarmament undertakings. However, such independent verification or

³⁰⁵ Nuclear armed states repeat the mantra that they would be happier were there no nuclear weapons in the world: “it might even be said that no country would be happier than the United States were it possible ... to make nuclear weapons and indeed all WMD permanently vanish from the world tomorrow morning.” - . U.S. Special Representative for Nuclear Nonproliferation Christopher A. Ford, “A Work Plan for the 2010 Review Conference,” remarks to the 2007 NPT Preparatory Committee meeting (April 30, 2007), www.state.gov/t/isn/rls/rm/84044.htm accessed 10 August 2019 – However, nuclear armed states justify their continued possession and maintenance of their nuclear arsenals due to the *necessity* of having such weapons. This belief is the necessity of nuclear armament does not seem to be shared at all by TPNW proponents.

enforcement for NWS has seldom been articulated again, and it seems unlikely to be re-articulated in today's current nuclear hegemony.

Therefore the question is how to integrate the nuclear weapon possessing states with the NWS, amending the NPT is one option, but despite provision for this under Article VIII of the NPT, this option has never pursued due to the problems inherent with the 'grand bargain', and States parties not wanting to reward those who have stayed out of the Treaty.

Alternatively, there lies the possibility of integrating the outliers through other parts of the global non-proliferation regime, such as the IAEA's verification standards and the NSG's export Guidelines and control lists. However, the ramifications of such action on the NPT are still open to debate; after all when the global non-proliferation regime has needed triaging in the past, this effort has often been led outside the direct ambit of the NPT.

Ultimately the recourse to a way forward does seem to lie in Article VI; that an agreement on disarmament does need to be negotiated to complement and stand alongside the NPT; and while the TPNW has aspirations to be just this, it is a treaty of prohibition, not disarmament. To achieve prohibition first the stakeholders in a nuclear armed globe must agree to how they can disarm.

The role of the NPT in achieving such a reality is vital, for non-proliferation is the foundation pillar for achieving a world free from nuclear weapons, and only faith in the commitment engendered by the NPT, can allow disarmament to at last take place, that is the essence of the 'grand bargain'. Yet at 50 it would be callous to disregard global progress to date, the Treaty has weathered the tensions of the Cold War, Indian/Pakistani nuclearization, and proliferation crises in the DPRK and Middle East. Yet it was President Obama's tacit acknowledgment that achieving the stated aim of the NPT to strive towards a world free from nuclear weapons is not a short-term effort and likely is that the NPT may require an additional 50 years yet to achieve its aims: "[A]mong those nations like my own that hold nuclear stockpiles, we must have the courage to escape the logic of fear and pursue a world without them. We may not realize this goal in *my lifetime*, but persistent effort can roll back the possibility of catastrophe".³⁰⁶

³⁰⁶ Text of President Obama's Speech in Hiroshima, Japan, Transcript, New York Times, 27 May 2016 <https://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html> accessed 10 August 2019 emphasis added

Abstract

The Nuclear Non-proliferation Treaty (NPT) is often cited as the cornerstone of the global non-proliferation regime, but while the NPT is first and foremost a legal agreement, it represents an acute political bargain. It encompasses the three objectives of the non-proliferation of nuclear weapons, the disarmament of nuclear weapons and the indiscriminate access to the peaceful uses of nuclear energy. The NPT was opened for signature in 1968 and entered into force in 1970, this thesis looks to evaluate the relevance of the NPT, both legally and politically, half a century after its inception: while the non-proliferation objectives of the NPT have been largely successful, the disarmament obligations incumbent upon Nuclear Weapon States have proven a more contentious subject.

Since the inception of the NPT, there have been continuous efforts to strengthen the global non-proliferation and disarmament regime not just through the inbuilt NPT Review Cycle mechanism, but also via various other legal instruments, both bilateral and multilateral, as well as recourse to decisions and advisory opinions of the ICJ. This nuclear legal architecture has in particular developed in response to historical developments and the need to provide a legal and political response to evolving non-proliferation and disarmament challenges. This thesis endeavours to provide an overview of the legal and political development which have shaped the NPT into its current day form. This thesis will discuss the scope and status of the NPT up until its last Review Cycle in 2015, while assessing the developments in the global non-proliferation and disarmament regime and what impacts such developments have had upon the NPT.

However, in the last five years, as the NPT marks its 50th anniversary, there have been a spate of legal and political developments which have highlighted the disparity of achievement between the NPT's non-proliferation and disarmament objectives. Such developments have included: rulings by the ICJ in the *Marshall Islands Cases*; the Treaty on the Prohibition of Nuclear Weapons; the membership applications of India and Pakistan to the Nuclear Suppliers Group; nuclear weaponization programmes in Iran, the DPRK and the Middle East; and, rearmament plans and disarmament initiatives by nuclear weapon states. This thesis will seek to consider each of these issues and to provide a holistic overview of the interplay of these developments with the NPT and what, at 50, might be in store for the future of the NPT.

Zusammenfassung

Der Atomwaffensperrvertrag, auch Nuklearer Nichtverbreitungsvertrag (NVV) genannt, wird als Eckpfeiler des globalen Nichtverbreitungsregimes gesehen. Obwohl der NVV in erster Linie ein völkerrechtlicher Vertragist, verkörpert der NVV jedoch eine wichtige politische Vereinbarung. Er umfasst die „drei Säulen“ der Nichtverbreitung von Atomwaffen, der Abrüstung von Atomwaffen und der zivilen Nutzung von Atomenergie. Diese Masterarbeit soll die Relevanz des NVV, der 1968 zur Unterzeichnung aufgelegt wurde und 1970 in Kraft trat, sowohl rechtlich als auch politisch ein halbes Jahrhundert nach seinem Inkrafttreten bewerten. Während die Nichtverbreitungsziele des NVV relativ weitgehend umgesetzt wurden, haben sich die Abrüstungsverpflichtungen der Atomwaffenstaaten als weniger erfolgreich herausgestellt. Seit Inkrafttreten des NVV wurden immer wieder Anstrengungen unternommen, um das globale Nichtverbreitungs- und Abrüstungsregime zu erweitern; nicht nur durch den integrierten Mechanismus zur Überprüfung des NVV-Zyklus, sondern auch durch verschiedene bilaterale und multilaterale Verträge und Einschaltung des Internationalen Gerichtshofs. Diese nukleare Rechtsarchitektur hat sich insbesondere als Reaktion auf historische Entwicklungen und die Notwendigkeit, eine rechtliche und politische Antwort auf die sich entwickelnden Herausforderungen der Nichtverbreitung und Abrüstung entwickelt. Die vorliegende Masterarbeit soll einen Überblick über die rechtliche und politische Entwicklung geben, die den NVV in seine heutige Form gebracht hat. In dieser Arbeit werden Umfang und Status des NVV bis zu seinem letzten Überprüfungszyklus im Jahr 2015 erörtert und die Entwicklungen im globalen Nichtverbreitungs- und Abrüstungsregime sowie die Auswirkungen dieser Entwicklungen auf den NVV bewertet.

In den letzten fünf Jahren, als sich die Unterzeichnung des Atomwaffensperrvertrags zum 50ten Mal jährte, gab es jedoch eine Reihe rechtlicher und politischer Entwicklungen, die die Ungleichheit zwischen den Zielen der Nichtverbreitung und der Abrüstung des Atomwaffensperrvertrags aufgezeigt haben. Zu diesen Entwicklungen gehörten: Entscheidungen des Internationalen Gerichtshofs in den Marshall-Inseln-Fällen, der Vertrag über das Verbot von Atomwaffen, die Beitrittsanträge Indiens und Pakistans an die „Nuclear Suppliers Group“, Nuklearwaffenprogramme im Iran, in der DVRK und im Nahen Osten, Wiederaufrüstungspläne und Abrüstungsinitiativen von Atomwaffenstaaten. Diese Masterarbeit versucht, jedes dieser Probleme zu behandeln und einen ganzheitlichen Überblick über das Zusammenspiel dieser Entwicklungen mit dem NVV zu geben und darüber, was nach diese 50 Jahren für die Zukunft des NVV erwartet werden könnte.

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