CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Dominic McGoldrick and Sarah Williams

I. Recent Developments in International Law Regarding Nuclear Weapons
II. The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms
III. Indigenous Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights

I. RECENT DEVELOPMENTS IN INTERNATIONAL LAW REGARDING NUCLEAR WEAPONS

A. Introduction

This article examines a number of major developments in international law and State policy regarding nuclear weapons which have occurred over the past two years.

However, in order to understand the context and significance of these developments, I must first very briefly address what has gone on previously in this area of international relations.

I have argued elsewhere that over the course of the decade ending in 2008 the original balance of principles underlying the 1968 Nuclear Nonproliferation Treaty (NPT), which comprises the cornerstone of the nuclear non-proliferation legal regime, has been distorted, particularly by nuclear-weapon-possessing governments, led by the United States, in favor of a disproportionate prioritization of non-proliferation principles, and an unwarranted under-prioritization of peaceful use and disarmament principles.[1] I also argue that this distortion of principled balance by nuclear weapon states has resulted in a number of erroneous legal interpretations of the NPT's provisions.

These misinterpretations, in turn, have been used to form the legal basis for NPT Nuclear Weapon States' (NWS) policies relevant to the NPT regime, a number of which have unlawfully prejudiced the legitimate legal interests of NPT Non-nuclear Weapon States (NNWS), pursuant to the NPT's grand bargain. Specifically, these policies have included:

1. The failure of NWS, individually and collectively, to comply with their disarmament obligations in article VI of the NPT, through maintenance and qualitative improvements to their nuclear weapons arsenals, and through failure sufficiently to reduce the role of nuclear weapons in their security policies;

[1] D. Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (OUP, Oxford, forthcoming 2011).

[*ICLQ* vol 60, January 2011 pp 209–224] doi:10.1017/S0020589310000722

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

2. Requiring NNWS to source nuclear material exclusively from a multilateral fuel bank as a condition of peaceful nuclear supply from NWS;
3. Requiring NNWS accession to the International Atomic Energy Agency (IAEA) Additional Protocol as a condition of peaceful nuclear supply from NWS; and
4. Conditioning supply from NWS, and recognition of NNWS' NPT article IV rights to peaceful nuclear technologies, upon NNWS compliance with an IAEA Comprehensive Safeguards Agreement.

It is against this backdrop, by necessity only briefly stated here, of the policies and treaty interpretations particularly of NPT NWS during the decade between 1998–2008, that we can more meaningfully consider patterns of change and continuity in the policies and actions of NPT NWS since the end of 2008.

The changes that have occurred in the direction of NWS nuclear policies and approaches toward the NPT since the end of 2008 can be traced primarily to the change in government administration in the United States from the Presidency of George W Bush to the Presidency of Barack Obama. President Obama has not only changed US policy in significant ways, but has also provided a leadership role, looked to by other NWS, for facilitation of changes to other NWS' nuclear policies as well.

B. 2009

The first sign of a change in US policy on nuclear weapons came in dramatic fashion in a speech given by President Obama on 5 April 2009 in Prague, Czech Republic:

> So today, I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons. First, the United States will take concrete steps towards a world without nuclear weapons. To put an end to Cold War thinking, we will reduce the role of nuclear weapons in our national security strategy, and urge others to do the same . . . To reduce our warheads and stockpiles, we will negotiate a new Strategic Arms Reduction Treaty with the Russians this year . . . And this will set the stage for further cuts, and we will seek to include all nuclear weapons states in this endeavor. To achieve a global ban on nuclear testing, my administration will immediately and aggressively pursue US ratification of the Comprehensive Test Ban Treaty . . . And to cut off the building blocks needed for a bomb, the United States will seek a new treaty that verifiably ends the production of fissile materials intended for use in state nuclear weapons.[2]

President Obama's formally stated commitment to a policy of nuclear disarmament—the actual complete elimination of nuclear weapons from its national arsenal—was the first time a US President had made such a commitment.[3] As President Obama then proceeded to spell out the steps the US will take, some of which (eg a diminished role for nuclear weapons in military policy) were in fact changes of course and some of which (eg a new START treaty) were continuations of older initiatives, these actions were fundamentally re-contextualized as parts of a progressive, programmatic move toward this ultimate policy end. In his Prague speech and in later speeches,

[2] Remarks by US President Barack Obama, Hradcany Square, Prague, Czech Republic, 5 April 2009.

[3] CM Kelleher and SL Warren, 'Getting to Zero Starts Here: Tactical Nuclear Weapons' (2009) 39 Arms Control Today 8, 6 ('Although President Ronald Reagan declared an end goal of zero nuclear weapons, it never became a formal policy position.); See also R Rydell, 'The Future of Nuclear Arms: A World United and Divided by Zero' (2009) 39 Arms Control Today 3, 21–25.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

President Obama essentially changed US nuclear weapons policy to a *disarmament posture*, in contrast to its longstanding *arms control posture*.

Shortly after the Prague speech, in May 2009, NPT parties met in New York for the third and final session of the Preparatory Committee for the 2010 NPT Review Conference. This was the first NPT meeting at which officials of the Obama administration would be in attendance on behalf of the US. Representative Rose Gottemoeller's statement to the 2009 PrepCom was undeniably more balanced in the attention it gave to each of the three principled pillars of the NPT than US statements during the previous decade had been. Its tone was less aggressive on non-proliferation issues, and it gave more serious consideration to disarmament issues in particular.

On article IV peaceful use issues, Gottemoeller's statement was more of a mixed bag, with language more clearly recognizing 'the right of all states to benefit from the peaceful use of nuclear energy,' but at the same time supporting policy initiatives such as a multilateral fuel bank which had been championed by the previous administration. There was some change to the US position on fuel banks, however. Instead of envisioning a multilateral fuel bank as a requisite condition of supply, as it had been envisioned by President Bush, Gottemoeller's statement seemed to abandon that conditional link, and said only that such a fuel bank could

> reassure countries embarking on or expanding nuclear power programs and complying fully with their non-proliferation obligations that they could reliably purchase reactor fuel in the event of commercial supply disruption. It could also demonstrate to them that it is not necessary to pursue expensive enrichment and reprocessing facilities to exploit nuclear energy for peaceful purposes.[4]

Other States participating in the PrepCom voiced their recognition and appreciation of the new policy direction of the US particularly on disarmament.[5] Statements by NWS and NNWS at the 2009 NPT PrepCom raised hopes significantly for a successful Review Conference of the NPT in 2010—hopes which had not been high after the divisive failure of the 2005 NPT Review Conference.

In September 2009, President Obama chaired a meeting of the UN Security Council—the first time a US President has ever chaired a meeting of the Security Council—at which the Council unanimously approved a US-drafted resolution on nuclear security and disarmament. Resolution 1887, which was not adopted under the Council's Chapter VII authority, resolves 'to create the conditions for a world without nuclear weapons,' and to that end encourages States to engage in a number of efforts related to nuclear disarmament and nuclear security. Resolution 1887 does not itself create any particularly new legal obligations in the area of nuclear disarmament. It essentially restates and supports a number of already existing legal obligations, and identifies and supports efforts to create new obligations. However, Resolution 1887 is important, and may mark a significant reorientation of the work of the Security Council from its work over the previous decade in the nuclear area, which focused almost exclusively on dealing with non-proliferation related 'problem cases' like North Korea

[4] Statement by Rose Gottemoeller, Assistant Secretary of State for Verification, Compliance and Implementation, on behalf of the US, to the General Debate of the Third Session of the Preparatory Committee for the 2010 Review Conference 5 May 2009.

[5] See eg Statement by HE Ambassador Abelardo Moreno, Permanent Representative of Cuba to the UN on Behalf of the group of Non-Aligned States Parties to the Treaty on the Non-proliferation of Nuclear Weapons, to the General Debate 4 May 2009.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

and Iran.[6] Resolution 1887 is rather a unanimous statement by the Security Council supporting nuclear disarmament and calling upon UN Member States to redouble their efforts to achieve this goal.

In its treatment of NPT article IV peaceful use issues, however, Resolution 1887 again displays essential continuity from the policy positions espoused by NPT NWS (who are also of course the permanent five members of the Security Council) over the previous decade. The resolution 'Calls upon states to adopt stricter national controls for the export of sensitive goods and technologies of the nuclear fuel cycle;' and encourages further work on establishing multilateral fuel banks. Even more disturbingly from an NPT interpretation perspective, Resolution 1887:

> *Encourages* States to require as a condition of nuclear exports that the recipient State agree that, in the event that it should terminate, withdraw from, or be found by the IAEA Board of Governors to be in non-compliance with its IAEA safeguards agreement, the supplier state would have a right to require the return of nuclear material and equipment provided prior to such termination, non-compliance or withdrawal, as well as any special nuclear material produced through the use of such material or equipment; [and]
> *Encourages* States to consider whether a recipient State has signed and ratified an additional protocol based on the model additional protocol in making nuclear export decisions;

The restrictions and conditions on nuclear supply which the Security Council here encourages States to adopt would appear to be based upon interpretations of both article III and article IV of the NPT which had been maintained by NWS and particularly US officials during the previous decade, and which I have argued elsewhere to be erroneous.[7]

On 9 October 2009 came the surprising news that President Obama would be awarded the Nobel Peace Prize. In its official statement of award, the Nobel Committee explained that in awarding the prize, it 'attached special importance to Obama's vision of and work for a world without nuclear weapons . . . [which has] powerfully stimulated disarmament and arms control negotiations.'

C. 2010

The significant changes in US policy particularly on the subject of nuclear weapons disarmament in 2009 set the stage for three separate, yet interrelated, high profile events in 2010.

1. Nuclear Posture Review

First, on 6 April 2010 the US released a new Nuclear Posture Review (NPR). This was the first comprehensive statement of US policy regarding nuclear weapons since the previous NPR was released in 2002, and the policy changes reflected in the 2010 NPR were significant.[8] The 2010 NPR further formalized in US policy a progressive

[6] See D Joyner, 'Can International Law Protect States from the Security Council?: Nuclear Non-proliferation and the UN Security Council in a Multipolar World,' in M Happold (ed), *International Law in a Multipolar World* (Routledge, London, 2010).

[7] See (n 2).

[8] For more on the 2002 NPR, see D Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP, Oxford, 2009).

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

disarmament posture with regard to the existing US nuclear weapons arsenal. It explained the rationale behind this policy thus:

> The massive nuclear arsenal we inherited from the Cold War era of bipolar military confrontation is poorly suited to address the challenges posed by suicidal terrorists and unfriendly regimes seeking nuclear weapons . . . Therefore, without jeopardizing our traditional deterrence and reassurance goals, we are now able to shape our nuclear weapons policies and force structure in ways that will better enable us to meet our most pressing security challenges.[9]

Further, it recognized, as officials from the previous administration had been reluctant to do, the inherent link between nuclear disarmament and nuclear non-proliferation:

> By reducing the role and numbers of US nuclear weapons—meeting our NPT Article VI obligation to make progress toward nuclear disarmament—we can put ourselves in a much stronger position to persuade our NPT partners to join with us in adopting the measures needed to reinvigorate the non-proliferation regime and secure nuclear materials worldwide . . . By working to reduce the salience of nuclear weapons in international affairs and moving step-by-step toward eliminating them, we can reverse the growing expectation that we are destined to live in a world with more nuclear-armed states, and decrease incentives for additional countries to hedge against an uncertain future by pursuing nuclear options of their own.[10]

Not to be overlooked, this excerpt also contains language which constitutes a significant change in legal interpretation of article VI from that maintained by Bush-era US officials. Here the obligation in NPT article VI is termed to be an obligation 'to make progress toward nuclear disarmament.' This was a far cry from the interpretation of this article given by the US representative in 2007, which held that article VI required only 'good faith effort toward negotiations' on disarmament.[11]

Perhaps the most important sections of the NPR are those devoted to a revision of US policy regarding the role of nuclear weapons in US security strategy. As the NPR states:

> The fundamental role of US nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners. During the Cold War, the United States reserved the right to use nuclear weapons in response to a massive conventional attack by the Soviet Union and its Warsaw Pact allies. Moreover, after the United States gave up its own chemical and biological weapons (CBW) pursuant to international treaties (while some states continue to possess or pursue them), it reserved the right to employ nuclear weapons to deter CBW attack on the United States and its allies and partners. Since the end of the Cold War, the strategic situation has changed in fundamental ways. With the advent of US conventional military preeminence and continued improvements in US missile defenses and capabilities to counter and mitigate the effects of CBW, the role of US nuclear weapons in deterring non-nuclear attacks—conventional, biological, or chemical—has declined significantly. The United States will continue to reduce the role of nuclear weapons in deterring non-nuclear attacks. To that end, the United States is now prepared to strengthen its long-standing 'negative security assurance' by declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.[12]

[9] Nuclear Posture Review, v.

[10] ibid v–vi.

[11] CA Ford, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' (2007) 14 Non-proliferation Review 3, 403 & 411.

[12] Nuclear Posture Review vii–viii.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

Disarmament advocates had hoped that the 2010 NPR would revise the US negative security assurance to provide for a commitment by the US not to use nuclear weapons except in response to an actual or imminent nuclear attack. And while the NPR did recognize this as the 'fundamental role' of US nuclear weapons, the actual commitment expressed in the report was rather more nuanced and enigmatic. It is a commitment by the US not to threaten or use nuclear weapons against non-nuclear weapons states 'that are party to the NPT and in compliance with their nuclear non-proliferation obligations.' And in fact there are further caveats to this commitment:

> Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and US capacities to counter that threat. In the case of countries not covered by this assurance—states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations—there remains a narrow range of contingencies in which US nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners. The United States is therefore not prepared at the present time to adopt a universal policy that deterring nuclear attack is the sole purpose of nuclear weapons, but will work to establish conditions under which such a policy could be safely adopted.[13]

With regard to the primary terms of the commitment—that of no-first-use against non-nuclear weapons states 'that are party to the NPT and in compliance with their nuclear non-proliferation obligations'—the most problematic element is clearly the latter clause requiring compliance with 'nuclear non-proliferation obligations.' The NPR does not provide any further meaning for this term. One must assume that the provisions of the NPT themselves would be contained within the term 'nuclear non-proliferation obligations.' Another almost certainly intended inclusion is the provisions of NPT NNWS safeguard agreements with the International Atomic Energy Agency (IAEA). More questionable is whether subsidiary arrangement agreements entered into between the IAEA and NNWS, pursuant to article 39 of a standard INFCIRC/153 safeguards agreement are contemplated for inclusion in this term's scope.[14]

The most challenging aspect of this stipulation in the US no-first-use commitment is the question of the evidence to which US authorities would look to determine that the limiting force of this stipulation has been triggered. There are also unresolved semantic questions regarding the term 'compliance.'

The essential question on evidence is simply, who gets to decide when an NPT NNWS is not in compliance with the NPT? Is this to be a unilateral judgment made by US authorities? Or one only recognized by the US once a competent international judicial body has made the determination? One can only assume that the former is contemplated. Next, what about compliance with IAEA safeguards agreements? Here, there is authority given in article XII of the IAEA Statute to the IAEA Board of Governors to determine that an NNWS party to a safeguards agreement is in non-compliance with the terms of that agreement. But here is the question of semantics. When the NPR uses the term 'compliance,' does it intend to refer to compliance as defined in the IAEA Statute? Or does it rather intend to refer to compliance in the sense

[13] Nuclear Posture Review viii.

[14] For more on subsidiary arrangements, see D Joyner 'The Qom Enrichment Facility: Was Iran Legally Bound to Disclose?' JURIST (jurist.law.pitt.edu), 5 March, 2010. Available at http://jurist.law.pitt.edu/forumy/2010/03/qom-enrichment-facility-was-iran.php.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

of treaty compliance *a la* article 60 of the 1969 Vienna Convention on the Law of Treaties (VCLT)—ie the absence of material breach of a treaty?[15]

Elsewhere I conclude that a determination by the IAEA that a NNWS is in non-compliance with its safeguards agreement is not per se equivalent to or constitutive of a determination of material breach of the safeguards agreement. I conclude rather that a determination of safeguards agreement noncompliance by the IAEA is better interpreted to comprise a preliminary technical finding of treaty noncompliance, short of material breach, which results in explicitly detailed rights and responsibilities of the IAEA under article XII of its Statute.[16]

So, again, who gets to decide when a State is in noncompliance with its IAEA safeguards agreement, such that the US commitment of no-first-use no longer applies to it? The IAEA? The International Court of Justice? The US unilaterally? The NPR does not tell us, and we are thus left with a great deal of uncertainty as to the contours and means of determination of the principal condition to the 2010 US NPR's no-first-use commitment.[17]

Finally, the 2010 NPR is noteworthy for its position on tactical nuclear weapons. The regulation and reduction of tactical, or battlefield usable, nuclear weapons has never been addressed through non-proliferation treaties. All reductions in tactical nuclear weapons have been accomplished through unilateral undertakings, with the expectation of reciprocity. The Bush administration in the US pursued programs for the development of new and more effective generations of tactical nuclear weapons, even as it was signing and implementing agreements, including the 2002 Moscow Treaty, for the progressive elimination of its strategic nuclear stockpile.[18] The primary military usefulness of these new tactical nuclear weapons was perceived to be their ability to defeat hard and deeply buried targets (HDBT) which even the most sophisticated 'bunker buster' conventional bombs could not reach.[19]

The 2010 NPR appears to change this policy direction of qualitative improvement to the US tactical nuclear weapons arsenal when it states:

> The United States will not develop new nuclear warheads. Life Extension Programs (LEPs) will use only nuclear components based on previously tested designs, and will not support new military missions or provide for new military capabilities.[20]

However, this change may not be as unambiguous or as sweeping as it first appears. Much will depend upon how the Obama administration interprets the terms 'new nuclear warheads' and 'new military capabilities' in implementation of this new policy. As Tom Collina has explained:

> [T]he Air Force plans to begin work in fiscal year 2011 on a new, nuclear-capable long-range cruise missile, according to Department of Defense budget documents. The new

[15] See generally M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 Yearbook of International Environmental Law 123; B Simma and D Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law (2006) 17 EJIL 483, 488–489.

[16] See (n 2).

[17] There is also of course the serious question of whether, with all of its caveats and stipulations, this new U.S. policy statement is in line with international law on the question of the use of nuclear weapons. See 1996 Advisory Opinion: *Advisory Opinion on the Threat or Use of Nuclear Weapons*, ICJ Rep 1996.

[18] See DA Koplow, *Death by Moderation: the US Military's Quest for Useable Eeapons* (CUP, Cambridge, 2009) ch 5.

[19] See ibid 111.

[20] Nuclear Posture Review xiv.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

> missile would replace the current B-52 bomber-delivered air-launched cruise missile (ALCM) that is now in service but slated for retirement by 2030. ALCMs are armed with W80-1 nuclear warheads. Would the new missile count as a new nuclear weapon?
>
> According to an administration source, Obama's reference to 'nuclear weapons' was specific to nuclear warheads, not delivery systems such as missiles and airplanes. Indeed, in addition to the new cruise missile, the administration is moving ahead with a variety of nuclear-capable delivery systems, such as the F-35 Joint Strike Fighter, a replacement for the Ohio-class nuclear-armed submarine, and the modernization of existing strategic ballistic missiles such as the land-based Minuteman III and submarine-based Trident II.[21]

2. 2010 Prague Treaty

The second event, which occurred on 8 April 2010, only two days after the release of the NPR, was the signing by the US and Russia of a new arms reduction treaty to replace the 1991 START I treaty, which had expired in 2009. This new treaty has so far been referred to interchangeably as 'the New START Treaty' or as 'the Prague Treaty.'

The most important provisions of the Prague Treaty are those which legally obligate both the US and Russia to reduce the number of deployed strategic warheads in their arsenals to 1550 warheads each. As the official White House fact sheet boasts, this limit on warheads is '74% lower than the limit of the 1991 START Treaty and 30% lower than the deployed strategic warhead limit of the 2002 Moscow Treaty.'[22] The treaty further provides for a legal limit for both parties of 800 ICBM launchers, SLBM launchers, and nuclear-equipped heavy bombers. Finally, it provides for a separate limit of 700 deployed ICBM's, deployed SLBM's, and deployed nuclear-equipped heavy bombers. Under the treaty, which has at the time of this writing not yet been ratified by either State, the parties are to achieve these limits on their arsenals by 2017.

While the above quoted statement by the White House regarding the warhead limits agreed to in the Prague Treaty, and their relationship to the limits agreed to in previous treaties, is technically correct, there has been a good deal of criticism regarding the accounting terms in the treaty which allow such statements to be made. As Hans Kristensen has observed:

> While the treaty reduces the legal limit for deployed strategic warheads, it doesn't actually reduce the number of warheads. Indeed, the treaty does not require destruction of a single nuclear warhead and actually permits the United States and Russia to deploy almost the same number of strategic warheads that were permitted by the 2002 Moscow Treaty.[23]

Kristensen is referring here to the new counting rule in the Prague Treaty which fictitiously attributes only one deployed nuclear weapon to each nuclear-equipped heavy bomber. Thus, an American B-52 bomber counts as only one deployed nuclear weapon under the treaty's counting method, even though a B-52 can, depending on its configuration, carry more than 20 nuclear weapons at a time. Similarly, Russian heavy bombers can carry up to 16 nuclear weapons at a time.

[21] *What is a 'New' Nuclear Weapon?* (2010) 40 Arms Control Today 3, 30, 32.

[22] Available at http://www.whitehouse.gov/the-press-office/key-facts-about-new-start-treaty

[23] 'New START Treaty Has New Counting,' FAS Strategic Security Blog (www.fas.org), 29 March 2010. Available at http://www.fas.org/blog/ssp/2010/03/newstart.php.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

This is a new counting rule under the Prague Treaty, which broke from the formula used in the 2002 Moscow Treaty. One implication of this new counting rule, according to Kristensen, is that:

> With the 'fake' bomber counting rule the United States and Russia could, if they chose to do so, deploy more strategic warheads under the New START Treaty by 2017 than would have been allowed by the Moscow Treaty by 2012.[24]

While conceding that Kristensen's calculations are correct, Jeffrey Lewis argues that, when viewed holistically, the Prague Treaty's limiting provisions are a modest yet significant step forward from previous agreements including START I and the 2002 Moscow Treaty. Lewis argues that warhead accounting rules under all three of these treaties have been fictitious in one way or another. He argues that the real value of the Prague Treaty is that, while it doesn't definitively limit nuclear warheads themselves, it does put a clear cap on the number of delivery units for nuclear weapons. As Lewis states:

> While the number is warheads is important, the real key to the Prague Treaty is the numerical limit on deployed delivery vehicles—700. Seven hundred is the number of Minuteman III missiles, Trident missiles and B1, B2 and B52 bombers. The United States wanted a much lower warhead number than did the Russians, who were only willing to budge on warhead numbers if the US came down on delivery vehicles. So, the two numbers are tightly integrated.[25]

Lewis's arguments are compelling that the overall significance of the Prague Treaty is in providing for modest yet significant reductions to the nuclear arsenals of the US and Russia, and as importantly in constituting a continuation of diplomatic and legal engagement between the Cold War rivals in furthering the agenda of progressive nuclear arms reduction.

3. NPT Review Conference

With the April release of the US Nuclear Posture Review and its amended policy positions particularly on nuclear weapons disarmament, and the signing days later of the Prague Treaty apparently actualizing these policies in part, there appeared to be considerable momentum for a successful NPT Review Conference in May 2010. This positive momentum was welcome, as the unsuccessful and acrimonious 2005 Review Conference had failed to produce a consensus final document.

The Review Conference lasted for 24 days, between 4 May and 28 May 2010. In the end, a consensus final document was agreed to by the conference. Before moving on to an analysis of the final document itself, we should first take note of the statements made by NWS officials during the course of the Review Conference. Overall, these statements were uniformly more balanced in their prioritization as between the three principled pillars of the NPT than NWS statements had typically been during the 1998-2008 decade. Disproportionate prioritization of the non-proliferation pillar was not clearly evident in any of the NWS statements, or in their combined statement.

[24] ibid.

[25] 'Prague Treaty Cuts are Modest, Real,' ArmsControlWonk.com, 5 April 2010. Available at http://www.armscontrolwonk.com/2682/prague-treaty-cuts-are-modest-real

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

NWS statements adopted a more positive tone and a more encouraging message regarding peaceful uses of nuclear energy generally, often taking note of the 'virtues' of the peaceful atom in facilitating achievement of the Millennium Development Goals and sustainable development, in providing energy security, in addressing vital non-power applications such as nuclear medicine, agriculture and industry, and its potential to address climate change.[26]

Similarly, the Russian representative read a message from Russian President Dmitry Medvedev in which he noted

> 'The peaceful atom' is playing the growing role in satisfying energy demand of the world economy. Existing and future nuclear power plants are instrumental to the economic growth, raising living standards of the millions of people.[27]

These laudatory statements are a far cry indeed from the Russian Representative's statement to the 2008 NPT PrepCom, which made the following observation with regard to the maintenance and spread of indigenous enrichment capabilities by developing States:

> We can see today that countries are increasingly interested in developing nuclear energy as a reliable resource ensuring their energy security . . . One way is that every country can establish its own facilities to enrich uranium, produce fuel and further reprocess it. Yet, it is a very complicated process not only in terms of funds, but also in terms of intellectual, scientific, physical and technical resources. Is moving along this path justified when the world market is capable of meeting both current and future needs in this area? It is unlikely so.[28]

The most important change present in the statements of NWS officials at the 2010 RevCon, however, was in the area of the disarmament pillar of the NPT. Here, there was a sea change in both tone and substance from NWS statements made during the 1998–2008 decade. Not without irony, this change was led by the US. Secretary of State Hillary Clinton stated in her opening address to the conference:

> We also recognize our responsibility as a nuclear weapons state to move toward disarmament, and that is exactly what we are doing.[29]

Expressing the same sentiment, but with more detail and clarity, the Joint Statement of the NWS to the 2010 RevCon states that:

> As nuclear-weapon States, we reaffirm our enduring commitment to the fulfillment of our obligations under Article VI of the NPT and our continuing responsibility to take concrete and credible steps towards irreversible disarmament, including provisions for verification.[30]

This is a truly remarkable statement in light of the minimalist interpretations of the obligation in article VI that were evident in NWS statements during the 1998–2008 decade. Recognizing that article VI establishes an obligation 'to take concrete and

[26] Joint Statement by the China, France, Russian Federation, UK, and the US to the 2010 Non-Proliferation Treaty Review Conference.

[27] Statement by the Deputy Minister of Foreign Affaires of the Russian Federation, Sergey A Ryabkov, to the 2010 Review Conference, 4 May 2010.

[28] Statement by HE Ambassador Anatoly Antonov, Head of the Delegation of the Russian Federation to the Second Session of the Preparatory Committee for the 2010 Review Conference, 28 April 2008.

[29] US Statement to the NPT Review Conference, 3 May 2010, by US Secretary of State Hillary Clinton.

[30] See (n 27).

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

credible steps towards irreversible disarmament,' is nothing less than a sea change from interpretations of article VI previously espoused by NWS officials like John Bolton, Andrew Semmel and Christopher Ford.[31]

However, perhaps the most noteworthy of the statements of NWS officials to the 2010 RevCon is the statement by the representative of the UK, John Duncan. It is a statement like no other among NWS statements since 2000. The statement begins with the following paragraph:

> The Final Document of the 2000 Review Conference set out thirteen practical steps for the systematic and progressive efforts to implement Article VI of the NPT. The following table sets out the UK's *progress to date* against the Thirteen Steps towards nuclear disarmament.[32]

The rest of the statement consists in its entirety of a tabulated representation, wherein the left column of the table lists the 13 steps in order from the 2000 Review Conference final document, and corresponding rows in the right column give information on the efforts of the UK to comply with each respective step in turn.

Why is this so remarkable? First, it is a general statement by an NWS party wholly devoted to the issue of disarmament. Secondly, the substance and format of the statement implicitly and quite clearly accepts the 13 steps from the 2000 final document as having interpretive meaning in the context of NPT article VI. This is a singular effort on the part of the UK, and one to be complimented for its clarity of organization, and accuracy of interpretation.

The final document itself is long and complex, and deciphering its often coded provisions to produce meaning and identify change or continuity is challenging. However, the 2010 Review Conference final document does contain some remarkable language manifesting progress and dynamic change on a number of key issues. Before reviewing these passages, it is important to remember that this document, in its manifestations of 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' has legal significance for the interpretation of the provisions of the NPT.[33] In the specific context of the 2010 Review Conference final document, the portion of the text which represents the fully negotiated, consensus agreement of the parties to the NPT is the section entitled 'Conclusions and recommendations for follow-on actions,' which begins at page 19 of the final document. Pages one through 18 of the document comprise a report by the President of the conference, Ambassador Libran Cabactulan of the Philippines, on the discussions which took place in conference sessions. While the entirety of the final

[31] See eg, Statement by Dr Andrew K Semmel, Alternative Representative of the US to the Second Session of the Preparatory Committee for the 2005 NPT Review Conference. Peaceful Nuclear Cooperation: NPT art IV. Geneva, Switzerland, 7 May 2003; Statement by US Under-Secretary of State for Arms Control and International Security John R Bolton, to the Third Session of the Preparatory Committee for the 2005 Review Conference. 'The NPT: A Crisis of Non-Compliance,' New York, 27 April 2004; 'A Recipe for Success at the 2010 Review Conference,' Dr Christopher A Ford, US Special Representative for Nuclear Non-proliferation, Opening Remarks to the 2008 NPT Preparatory Committee, Palais des Nations, Geneva, Switzerland, 28 April 2008.

[32] UK Statement to the 2010 Non-Proliferation Treaty Review Conference by Ambassador John Duncan, Ambassador for Multilateral Arms Control and disarmament, 19 May 2010.

[33] VCLT art 31(3)(a). See B Carnahan, 'Treaty Review Conferences' (1987) 81 AJIL, 226, 229; Joyner (n 9) 59.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

document was adopted by the conference by consensus, only the section entitled 'Conclusions and recommendations for follow-on actions' represents the consensus agreements of the parties to the NPT.

On NPT article IV and peaceful use issues, the final document calls on all states to:

> Respect each country's choices and decisions in the field of peaceful uses of nuclear energy without jeopardizing its policies or international cooperation agreements and arrangements for peaceful uses of nuclear energy and its fuel cycle policies.[34]

This is an important statement of interpretation of the right to peaceful use in article IV, recognizing that every NPT party has the essential freedom to determine how it wishes to exercise this right, in a manner most in keeping with its sovereign interests, apparently including the indigenous development and maintenance of the full nuclear fuel cycle. It further recognizes that other NPT parties, and in particular supplier States, should respect those determinations and not restrict peaceful nuclear cooperation with a developing State simply because that State's determination of the means of exercising its article IV rights is not the determination that the supplier state wishes it would be.

In addressing the subject of multilateral fuel bank proposals, the final document calls on all NPT parties to:

> Continue to discuss further . . . the development of multilateral approaches to the nuclear fuel cycle, including the possibilities of creating mechanisms for assurance of nuclear fuel supply, as well as possible schemes dealing with the back-end of the fuel cycle without affecting rights under the Treaty and without prejudice to national fuel cycle policies . . . [35]

The importance of this paragraph lies in its explicit caveat that multilateral approaches to peaceful nuclear fuel supply should not attempt to circumscribe in any way the right of all states to indigenously develop and maintain full nuclear fuel cycle capability. This interpretive statement should be seen as disharmonious with and corrective of the extreme interpretations of the conditionality of the article IV right maintained by NWS officials during the 1998–2008 decade, and used by them to justify exclusive-source multilateral fuel bank proposals.[36]

On article VI and disarmament, there is interpretive gold to be found in the 2010 Review Conference final document. There are statements of interpretation in this document which should put to conclusive rest many of the arguments of the limited

[34] Action 47.

[35] Action 58.

[36] See eg, Bolton (n 32), ('In order to address loopholes and the crisis of noncompliance with the NPT, President Bush announced four proposals that would strengthen the Treaty and the governance structures of the International Atomic Energy Agency . . . The first proposal would close the loophole in the Treaty that allows states like Iran and North Korea to pursue fissile material for nuclear weapons under peaceful cover. Enrichment and reprocessing plants would be limited to those states that now possess them. Members of the Nuclear Suppliers Group would refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full-scale, functioning enrichment and reprocessing plants. Nuclear fuel supplier states would ensure a reliable supply of nuclear fuel at reasonable prices to all NPT parties in full compliance with the NPT that agreed to forego such facilities. In this way, nations could use peaceful nuclear power as anticipated by the Treaty, but not to produce fissile material for nuclear weapons. *The Treaty provides no right to such sensitive fuel cycle technologies*.') (Emphasis added).

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

nature of the article VI obligation, and the juridical/interpretive irrelevance of the 13 steps from the 2000 Review Conference final document, that were previously maintained by NWS officials notably including US representative Christopher Ford.[37] As the 2010 final document states by consensus agreement:

> The Conference reaffirms the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under Article VI.[38]

In the same section the conference 'agrees on the following Action Plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons:' In this Action Plan are listed, inter alia, the following 'principles and objectives':

iii. The Conference reaffirms the continued validity of the practical steps agreed to in the Final Document of the 2000 NPT Review Conference.
iv. The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.

The final document goes on to note:

> The Conference reaffirms the urgent need for the nuclear-weapon States to implement the steps leading to nuclear disarmament agreed to in the Final Document of the 2000 NPT Review Conference . . .
>
> The Conference affirms the need for the nuclear-weapon States to reduce and eliminate all types of their nuclear weapons and encourages in particular those States with the largest nuclear arsenals to lead efforts in this regard.
>
> The Conference recognizes the legitimate interests of non-nuclear-weapon States in the constraining by the nuclear weapon States of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons.

Finally, in Action 5 of the agreed Action Plan, the NWS themselves specifically

> commit to accelerate concrete progress on the steps leading to nuclear disarmament, contained in the Final Document of the 2000 NPT Review Conference, in a way that promotes international stability, peace and undiminished and increased security.

The remainder of Action 5 is a list of activities with a view to which the NWS are 'called upon to promptly engage . . . ' At the end of this list, the NWS are 'called upon to report the above undertakings to the Preparatory Committee at 2014.' The Action Plan concludes by stating that 'The 2015 Review Conference will take stock and consider the next steps for the full implementation of Article VI.'

D. Summary Analysis of Change and Continuity Post-2008

Since the end of 2008, there has undeniably been very significant and welcome change in the policy of NWS parties generally, and the United States in particular, on the

[37] See Ford (n 12).

[38] Principles and Objectives I(A)ii, 19.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

subject of nuclear weapons disarmament and the interpretation of NPT article VI. President Obama deserves the lion's share of credit for this dramatic turnaround and, in my opinion, deserves the Nobel Peace Prize for the reasons cited by the Nobel Committee, among which was particularly mentioned his 'vision of and work for a world without nuclear weapons.' These changes in policy have brought the US, in particular, much closer into compliance with the 13 steps agreed upon in the 2000 Review Conference final document.

Even more fundamentally, as one author has observed, the events of 2009–2010 may well constitute a historical pivot point, or paradigm shift in the way we collectively think and talk about nuclear weapons, and from now on all nuclear weapons regulation and reduction efforts will be more clearly contextualized within the communal policy goal of the complete elimination of nuclear weapons from national arsenals.[39] This would indeed be a Nobel-worthy achievement.

However, while not taking anything away from these accomplishments in paradigm shifting with regard to nuclear weapons disarmament, it must also be noted that there has been a more mixed record of change and continuity in the past two years on the subject of the peaceful use of nuclear energy and the interpretation of NPT article IV. At the 2009 PrepCom and the 2010 RevCon, the statements of NWS officials have adopted a much more positive and encouraging tone on issues of peaceful nuclear energy, and on its spread and its virtues for helping humanity and in particular developing countries. These statements represent a welcome rhetorical return to the Atoms for Peace principles enunciated by US President Eisenhower in 1953, which underpin the Statute of the IAEA and the NPT.

And in terms of interpretation of article IV, the 2010 Review Conference final document does appear in places to correct some of the erroneous legal interpretations maintained by NWS officials during the 1998–2008 decade. This has been combined with statements by NWS officials in the past two years which have seemed to drop the exclusive sourcing requirement with regard to multilateral fuel banks.

However, along with these changes there has also been significant continuity in the statements and actions of NWS since 2008 on other aspects of article IV interpretation and related policy. A number of NWS, including the US, continue to push for the creation of multilateral fuel banks to supply NNWS with nuclear fuel. As President Obama himself said in his 2009 Prague speech, such a fuel bank will allow countries to access peaceful power 'without increasing the risk of proliferation.'[40] This is code which can be paraphrased as 'without those countries needing indigenous fuel cycle capability.' While the tone of NWS officials toward peaceful nuclear energy has turned more positive and encouraging over the past two years, the message of internationalizing the sourcing of nuclear fuel (read: sourcing fuel from the West) and the nuclear fuel cycle in order to provide an alternative to NNWS domestic development of fuel cycle capabilities, has not changed.

For their part, NNWS developing countries continue to be suspicious of international fuel bank proposals, and generally in opposition to them, for a number of reasons.[41] First, they have memories. They know the conceptual provenance of

[39] See J Lewis, 'The Pivot,' ArmsControlWonk.com, 7 April 2010. Available at http://www.armscontrolwonk.com/2686/the-pivot [40] See (n 3).

[41] See Statement by the Delegation of the Republic of Indonesia on behalf of the Group of Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, at the

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

multilateral fuel bank proposals and their origin in the Bush administration. They remember the original and clearly stated aspect of exclusive sourcing that accompanied these proposals.[42] They fear that the new tone of the Obama administration only puts sheep's clothing on the original wolfish idea.[43]

Secondly, and related, they fear that, once established, multilateral fuel banks could provide a powerful de facto rhetorical argument to NWS. Even if exclusive sourcing is not formally attached to the fuel bank agreements, NWS could argue once the fuel banks are up and running that it is now truly unnecessary for developing NNWS to maintain indigenous fuel cycle capability, and that NNWS of good will wishing to aid in the cause of non-proliferation will exclusively source their fuel from the multilateral fuel banks. This argument could eventually be issue-linked with other trade and economic decisions to pressure NNWS into 'voluntarily' giving up their indigenous fuel cycle capabilities. This argument might find traction in the Nuclear Suppliers Group (NSG), and NWS adherents to the NSG may convince the group of supplier states to adopt stricter standards for export of enrichment and other fuel cycle technology.

This is not mere speculation. In June 2009, well into the Obama administration, the United States proposed just such a set of revised and tightened standards for adoption by the NSG. The proposal was defeated after concern was expressed by developing state NSG members Turkey, Brazil, South Korea and South Africa, among others.[44] However, the United States appears committed to continuing the push for more restrictive NSG standards on export of enrichment technologies—a position which does not sit easily with recent NWS statements extolling the potential benefits to

Second Session of the Preparatory Committee for the 2010 Review Conference 28 April–9 May 2008. On Cluster 3 Issues: ('The [NAM] Group rejects, in principle, any attempts aimed at discouraging certain peaceful nuclear activities on the ground of their alleged 'sensitivity.' Concerns related to nuclear non-proliferation shall not in any way restrict the inalienable right of all states to develop all aspects of nuclear science and technology for peaceful purposes.'); Statement by H.E. Ambassador Maged Abdel Fatah Abdel Aziz, Permanent Representative of the Arab Republic of Egypt, before the Third Session of the Preparatory Committee to the 2010 NPT Review Conference, 4 May 2009. ('Egypt notes with growing concern attempts by some to reinterpret Article IV of the Treaty in a manner that aims to restrict the ability of non-nuclear weapon states to benefit from their rights by creating artificial categories of 'sensitive' and 'non-sensitive' nuclear technologies or 'responsible' and 'irresponsible' states. Egypt also views with concern efforts by the Nuclear Suppliers Group and other discriminatory arrangements to impose additional restrictions on some but not on others, in a manner that is clearly politicized and does not contribute to the implementation of the NPT's objectives, in particular its universality, as well as interference in the internal affairs of states by attempting to influence the determination of their nuclear energy requirements or to restrict their choice to achieve self-sufficiency in the area of fuel supply.'); See also L Weiss, 'Reliable Energy Supply and Non-proliferation' (2009) 16 Non-Proliferation Review 2, 269, 274. ('Outright denial of transfers of fuel cycle technology to non-nuclear weapon states have also become the norm for nuclear suppliers, leading to complaints that one of the grand bargains upon which the NPT was founded has been reneged on.' At 280).

[42] See, eg (n 28).

[43] See P Lewis, 'Prospects for the NPT and the 2010 Review Conference' (2010) 40 Arms Control Today 2, 19. ('The various proposals for multinational approaches to the nuclear fuel cycle and assurance of supply are having a difficult time gaining traction in the developing world. There are persistent fears that the nuclear supplier countries are plotting price-fixing cartels and that they have a long term aim of infringing on Article 4 rights.')

[44] 'Accord on New Rules Eludes Nuclear Suppliers,' (2009) 39 Arms Control Today 6, 29.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press

humanity to be realized from the spread of peaceful nuclear energy production capacity.[45]

Furthermore, on the subject of the IAEA Additional Protocol, both the US Nuclear Posture Review and UN Security Council Resolution 1887 call specifically for the IAEA Additional Protocol to be made a condition of peaceful nuclear supply.

Finally, there are still problematic policy positions maintained by NWS which betray the continuance of erroneous legal interpretations of NPT article IV, and in particular the relationship between article IV and article III. For example, in her opening statement to the 2010 NPT Review Conference, US Secretary of State Hilary Clinton stated:

> Potential violators must know that they will pay a high price if they break the rules, and that is certainly not the case today. The international community's record of enforcing compliance in recent years is unacceptable. So we need to consider automatic penalties for the violation of safeguards agreements such as suspending all international nuclear cooperation or IAEA technical cooperation projects until compliance has been restored.[46]

Linking safeguards noncompliance to cooperation on peaceful nuclear supply in this way is an essential continuance of Bush-era policies, based upon erroneous legal interpretations of NPT articles III and IV, and constituting actions unlawfully prejudicial to the legitimate legal interests of NNWS under the NPT grand bargain.[47]

Earlier, in July 2009, while discussing recommendations the U.K. would make for discussion at the NPT Review Conference in 2010, the then Prime Minister Gordon Brown said:

> I think we will probably want to have a more tough regime, that the onus will be on the countries that don't have nuclear weapons to prove that they don't have nuclear weapons . . . At the moment, one of the problems that we've had with Iran is the question of whether you can prove or not if someone is developing a nuclear weapon.[48]

This sort of burden shifting is, again, in essential continuance of legally erroneous and prejudicial policies maintained during the pre-2009 decade, and manifests a continuing unbalanced policy position on the three NPT pillars.

DANIEL H JOYNER*

[45] For the most recent developments on this issue at the NSG, see E Grossman, 'Turkish Opposition Prolongs Deadlock on Proposed Nuclear Trade Guidelines,' *Global Security Newswire*, 2 July 2010; D Horner, 'NSG Makes Little Headway at Meeting' (2010) 40 Arms Control Today 6, 45 ('Meanwhile, at their 25–26 June meeting in Muskoka, Canada, the Group of Eight (G-8) industrialized countries extended their policy to adopt on a national basis the proposed NSG guidelines on enrichment and reprocessing transfers.)

[46] See (n 29).

[47] The July 2010 report issued by the US State Department, entitled *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, is replete with interpretive errors regarding Iran and the NPT. On pages 3 and 62, it makes the bald assertion that Iran is in breach of NPT art III, without providing any compelling arguments establishing this allegation. It even, quite enigmatically, argues on page 67 that alleged noncompliance by Iran with its Subsidiary Arrangements agreement with the IAEA constitutes a violation of NPT art III. Again, no legal argument supporting this assertion (indeed, in my opinion there could be none) is attempted in the report.

[48] J Wardell, 'UK PM to Set Out Plan for Nuclear Talks,' *Associated Press* (9 July 2009).

* Associate Professor of Law, University of Alabama School of Law.

https://doi.org/10.1017/S0020589310000722 Published online by Cambridge University Press