

**THE NUCLEAR NONPROLIFERATION TREATY AND ITS 2005 REVIEW
CONFERENCE
A LEGAL AND POLITICAL ANALYSIS
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Nuclear weapons continue to pose the greatest threat to the survival of humanity, and their destructive capacity is so enormous that it is difficult to comprehend.ⁱ It is noteworthy that the very first resolution of the General Assembly of the United Nations called for the elimination of atomic bombs.ⁱⁱ The atomic bomb used against Hiroshima in 1945 was about 12.5 kilotons, the equivalent of 12,500 tons of TNT. By the mid 1950s both the United States and Soviet Union developed nuclear weapons in the megaton range, equivalent to 1,000,000 tons of TNT, some in excess of 20 megatons. One megaton would compare to a freight train stretching from New York to Los Angeles loaded with TNT.ⁱⁱⁱ Thousands remain on hair trigger alert and over 30,000 remain in the world. The horror of these devices is appropriately enormous.^{iv}

Public appreciation of these devices is inadequate. General George Lee Butler, who as former Commander-in-Chief of U.S. Strategic Air Command (1991-92) and U.S. Strategic Command (1992-94) was responsible for all nuclear forces in the U.S. Air Force and Navy, stated forcefully, “Despite all the evidence, we have yet to fully grasp the monstrous effect of these weapons, that the consequences of their use defy reason, transcending time and space, poisoning the Earth and deforming its inhabitants.” Nuclear weapons he concluded are “inherently dangerous, hugely expensive and militarily inefficient.”^v The Nuclear Nonproliferation Treaty (NPT)^{vi}, the central legal instrument containing and constraining their spread, is essential to our security. According to Ambassador Robert T. Grey, a former U.S. arms control negotiator, the NPT is “in many ways an agreement as important as the UN Charter itself.”^{vii}

The NPT arose because intelligence estimates during the 1960s reported that by the end of the 1970s there would be twenty five to thirty states with nuclear weapons integrated into their national arsenals and ready to use. Because of the success of the NPT we do not now have dozens of nuclear weapons states threatening civilization, creating a nightmarish world where it would clearly be impossible to keep these devices out of the hands of terrorists and where nearly every crisis would risk “going nuclear.”^{viii}

The treaty came into force in 1970 and has effectively stopped constrained proliferation. Its success is based on a careful bargain. As Ambassador Thomas Graham, Jr., who led the U.S. negotiating team at the 1995 Extension Conference of the NPT said: “In exchange for a commitment from the non nuclear weapons states (today, some 182

nations) not to develop or otherwise acquire nuclear weapons and to submit to international safeguards intended to verify compliance with the commitment (Article 2), the NPT nuclear weapon states promised unfettered access to peaceful nuclear technologies (e.g. nuclear power reactors and nuclear medicine; Article 4), and pledged to engage in disarmament negotiations aimed at the ultimate elimination of their nuclear arsenals (Article 6).^{xix} To understand the strains of today on the treaty, a brief review of its history is valuable.

During the negotiations at its creation, several prominent non-nuclear weapons states (NNWS) – Germany, Italy and Sweden, for example – would not permit the treaty to be permanent and ensured that it would be reviewed after 25 years and either be extended for a fixed period, be indefinitely extended (Article X), or end. At the 1995 Review Conference, many NNWS were extremely dissatisfied with the progress on disarmament of the nuclear weapons states (NWS) – U.S., Russia, U.K., France, and China – and argued that they would not accept the inequity of a dual global system of nuclear haves and have-nots. They demanded and obtained a bargain. It contained a Statement of Principles and Objectives for Nuclear Nonproliferation and Disarmament, which politically, if not legally, conditioned the indefinite extension of the treaty, pledging to:

- Complete a Comprehensive Test Ban Treaty by the end of 1996
- Reaffirm the commitment to pursue nuclear disarmament
- Commence negotiations for a treaty to stop production of nuclear bomb materials
- Reduce sharply global nuclear arsenals
- Encourage the creation of nuclear weapons free zones
- Vigorously work to make the treaty universal by bringing in Israel, Pakistan and India, who have nuclear weapons and remain outside the treaty
- Enhance IAEA safeguards and verification capacity
- Reinforce negative security assurances already given to NNWS against the use or threat of use of nuclear weapons against them^x

The bargain to extend the treaty centered around a strengthened review process with near yearly preparatory conferences and a rigorous review every five years to ensure the promise of the NWS to achieve:

The determined pursuit by the nuclear-weapon states of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons.^{xi}

Respected legal scholars have argued that compliance with commitments made to gain the extension of the treaty and at review conferences are a test as to whether good faith compliance with the treaty is taking place.^{xiii}

Five years later, the 2000 Review Conference successfully reached a consensus on 13 Practical Steps to advance the commitments to lower the salience of nuclear weapons in policies, reinforce nonproliferation measures, and move toward the

elimination of nuclear weapons. All 187 States Parties agreed on the following issues:

- 1. Signing the CTBT:** The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty (CTBT).
- 2. Stopping Testing:** A moratorium on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of the CTBT.
- 3. Fissile Material Cut Off Treaty:** The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices. The Conference on Disarmament is urged to agree on a program of work that includes the immediate commencement of negotiations on such a treaty with a view to their conclusion within five years.
- 4. Negotiations on Nuclear Disarmament:** The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament. The Conference on Disarmament is urged to agree on a program of work that includes the immediate establishment of such a body.
- 5. Irreversibility:** The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.
- 6. Commitment to Progress on Elimination:** An unequivocal undertaking by 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.
- 7. Upholding Existing Treaties:** The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.
- 8. Implementing Existing Treaties:** The completion and implementation of the Trilateral Initiative between the United States of America, the Russian Federation and the International Atomic Energy Agency.
- 9. Progress by NNWS:** Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all:

- Further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally.
- Increased transparency by the nuclear-weapon States with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to Article VI and as a voluntary confidence-building measure to support further progress on nuclear disarmament.
- The further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process.
- Concrete agreed measures to further reduce the operational status of nuclear weapons systems.
- A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination.
- The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons.

10. Excess fissile materials under IAEA control: Arrangements by all nuclear-weapon States to place, as soon as practicable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification and arrangements for the disposition of such material for peaceful purposes, to ensure that such material remains permanently outside of military programs.

11. General and Complete Disarmament: Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control. This commitment was disjoined from nuclear disarmament obligations.

12. Reporting: Regular reports, within the framework of the NPT strengthened review process, by all States parties on the implementation of Article VI and paragraph 4 (c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament", and recalling the Advisory Opinion of the International Court of Justice of 8 July 1996.

13. Verifying: The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.^{xiii}

The commitments that produced the consensus in 2000 lost the support of the U.S. Without active U.S. leadership, hopes for progress on nuclear nonproliferation and disarmament were dashed from the outset of the 2005 Review Conference, held at the U.N. in May 2005.^{xiv} The States Parties were unable to even generate a timely working agenda and 15 out of 20 days were squandered on procedural battles. The procedural squabbles masked real debate on substantive political differences. The capacity to make

substantive progress on disarmament or nonproliferation was thwarted despite efforts of the world's best diplomats. Time was inadequate even though there had been four preparatory conferences beginning in 2002. Warnings of this deadlock came as early as the Preparatory Conference of 2003 when North Korea was withdrawing, Iran was under severe criticism for its fuel program, and the U.S. administration was pushing to advance its new "bunker buster" nuclear weapon. The Mayor of Hiroshima gravely stated the dangers of failure: "We stand today on the brink of hyper-proliferation and perhaps of repeating the third use of nuclear weapons."^{xv}

At the commencement of the 2005 Review Secretary General Kofi Annan warned when he asked delegates "to imagine, just for a minute," the consequences of a nuclear catastrophe on a great city. He predicted the basis for the ensuing impasse accurately when he stated that "Some will paint proliferation as a grave threat. Others will argue that existing nuclear arsenals are a deadly danger."^{xvi}

The 2005 agenda was stalled along several fault lines. For example, the U.S. would not permit the commitments already made under the treaty review process to be the basis for a working agenda and focused on the proliferation threats posed by Iran and North Korea; Egypt demanded clear expositions based on previous commitments and specifically to work to make the treaty universal, and Iran bated the NWS on their failure to make progress on disarmament, specifically the U.S. for its development of low yield nuclear weapons and pursuit of space weaponization. In the end, no consensus document was generated.^{xvii}

The U.S. unwillingness to specifically respond to demands to have its previous commitments reviewed placed the very integrity of the institution of the NPT at risk. For if commitments made yesterday need not be held to account today, why should any commitments made to the body of the NPT ever be taken seriously? Grave danger was done to international law this past May.

Universally respected nonproliferation goals were not seriously negotiated, not because of a poverty of valid proposals,^{xviii} but because of a failure of political will. Effective means of addressing threats posed by States leaving the treaty, or, like Iran, using the treaty to develop nuclear energy with the potential for using technical advances and fissile materials to develop weapons, as well as the failure of NWS to fulfill their pledges to take practical steps toward elimination were not achieved. The consequences of this failure are serious.

The UN *High-Level Panel on Threats, Challenges and Change*, issued a report in December of 2004 titled *A More Secure World: Our Shared Responsibility*. The panel was headed by Anand Panyarachun, a former prime minister of Thailand, and included Brent Scowcroft, the United States national security adviser under the first President Bush; Yevgeny Primakov, a former prime minister of Russia; Qian Qichen, a former foreign minister of China; and Amr Moussa of Egypt, secretary general of the League of Arab States. It stated in relevant part:

“We are approaching a point at which the erosion of the nuclear regime could become irreversible, and result in a cascade of proliferation.”^{xix}

As an eyewitness to the debacle of the NPT, I witnessed a level of cynicism that was nothing short of shocking given the importance of this legal instrument. All too many diplomats expressed concern that the U.S. was not taking international cooperative security under the rule of law seriously enough. In that regard one cannot overlook statements made this year such as the March 2005 National Defense Strategy of the United States. In the section addressing the Changing Security Environment, there is a new definition of vulnerability, very much at odds with U.S. traditional advocacy of promoting law and diplomacy as a means of achieving security:

“Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”^{xx}

Without U.S. leadership toward international fora and judicial process embodied in arms control agreements and other instruments of cooperative security, even the Heads of State of the world will remain stymied to such an extent that they will simply be unable to address proliferation issues through diplomacy. On September 13, 2005, in addressing the Press regarding the September 2005 Summit at the UN of Heads of State in reference to their Final Statement, Secretary General Kofi Annan said:

“The big item missing is non-proliferation and disarmament. This is a real disgrace. We have failed twice this year: we failed at the NPT [Non-Proliferation Treaty Conference], and we failed now.”^{xxi}

This institutional deadlock has arisen from a profound failure of political will to work cooperatively. It cannot be ignored. When diplomacy fails use of force, war, violence and so much bloodshed result.

Ambassador Paul Meyer of Canada summed up the situation: “We have let short term, parochial interests override the collective long term interest in sustaining this Treaty’s (NPT) integrity. We have witnessed intransigence from more than one State on pressing issues of the day, coupled with the hubris that demands the priorities of the many to be subordinated to the preferences of the few...If there is a silver lining in the otherwise dark cloud of this Review Conference, it lies in the hope that our leaders and citizens will be so concerned by its failure that they mobilize behind prompt remedial action..This is a treaty worth fighting for and we are not prepared to stand idly by while its crucial supports are undermined.”^{xxii}

We are well advised to work with our friends to rebuild cooperative security through the rule of law.

Jonathan Granoff, President of the Global Security Institute, is co-chair of the Blue Ribbon Task Force on Non-Proliferation, Senior Advisor to the Committee on National Security and Member of the Council of the International Law Section of the American Bar Association. He serves on numerous other governing and advisory boards including the Lawyers Committee on Nuclear Policy, the Lawyers Alliance for World Security, the Jane Goodall Institute, the Bipartisan Security Group, and the Middle Powers Initiative. Mr. Granoff has lectured worldwide emphasizing the legal, ethical and spiritual dimensions of human development and security, with a specific focus on the threat posed by nuclear weapons. He is an award winning screenwriter and has been featured in more than 50 publications. For the past four years he has had the privilege of representing the International Peace Bureau, a Nobel Peace Laureate organization, at the Nobel Peace Laureate Summit in Rome where he has chaired a special session on Terrorism and Threats to Humanity. Mr. Granoff earned his B.A. cum laude from Vassar College and his Juris Doctorate from Rutgers University School of Law.

ⁱ “The UN in its 1991 report found that ‘(n)uclear weapons represent a historically new form of weaponry with unparalleled destructive potential. A single large nuclear weapon could release explosive power comparable to all the energy released from the conventional weapons in all past wars.’” Moxley, Charles J. Jr., Nuclear Weapons and International Law in the Post Cold War World. p. 398, 2000. (quoting, World Health Organization, United Nations, "Effects of Nuclear War on Health and Health Services," 7, 2nd ed. 1987; see also, Department for Disarmament Affairs, United Nations, "Nuclear Weapons: A Comprehensive Study," 1991.

ⁱⁱ Resolution I (1) was adopted unanimously on January 24, 1946 at the First Session of the General Assembly of the United Nations. See *Model Nuclear Weapons Convention*, U.N. GAOR 52nd Sess., Agenda Item 71, at 11, U.N. Doc A/C.1/52/7 (1997).

ⁱⁱⁱ Graham, Ambassador Thomas Jr., Commonsense on Weapons of Mass Destruction. p. 10, 2004.

^{iv} Admiral Stansfield Turner, former Director of the United States Central Intelligence illustrated the affects:

“The fireball created by a nuclear explosion will be much hotter than the surface of the sun ... and will be hundreds or thousands of times brighter than the sun at noon. If the fireball is created by the detonation of a 1megaton nuclear weapon, for example, within roughly eight to nine tenths of a second each section of its surface will be radiating about three times as much heat and light as a comparable area of the sun itself... This flash of incredibly intense, nuclear driven sunlight could simultaneously set an uncountable number of fires over an area close to 100 square miles.”

Turner, Stansfield, Caging the Nuclear Genie. 127-28, Note 7, app. A., 1997. According to Turner there is presently the power of nearly 1 million Hiroshima type bombs in today’s approximately 30,000 nuclear warheads, *supra* at 9.

^v Moxley, *supra* at 535 (footnote omitted) (quoting Otto Kreisher, *Retired Generals Urge End to Nuclear Arsenal*, SAN DIEGO UNION-TRIB., Dec. 5, 1996, at A1)

^{vi} See, Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. See also, Roche, Douglas, An Unacceptable Risk. note 4, app. 99, p. 105.

^{vii} See Bipartisan Security Group, *Status of Nuclear Non-Proliferation Treaty, Interim Report* (Global Security Institute, June 2003), preface. The only countries not party to the treaty are Israel, India, Pakistan and, since its withdrawal, North Korea. All other countries in the world are bound by its terms.

^{viii} Graham, *supra* at 10.

^{ix} Graham, *supra* at 52.

^x Graham, *supra* at 53-53.

^{xi} Nicola Butler, Daniel Plesch, Steven Young, 1997 NPT PrepCom, Principles and Objectives on the Agenda, BASIC PAPERS, February 1997, No. 19.

^{xii} Peter Weiss, John Burroughs, Michael Spies **The Thirteen Practical Steps: Legal or Political?** May 2005, Lawyers' Committee on Nuclear Policy, <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>

Series arguments have been made that such compliance has not been forthcoming.

NONGOVERNMENTAL ORGANIZATIONS STATEMENTS' TO THE STATES PARTIES TO THE 7TH REVIEW CONFERENCE OF THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS, May 11, 2005,

<http://www.lcnp.org/disarmament/npt/ArtVIcompliance.pdf>

^{xiii} Reaching Critical Will, <http://www.reachingcriticalwill.org/legal/npt/13point.html>;

See also, Arms Control Today, NPT Review Conference Final Document, June 2000,

http://www.armscontrol.org/act/2000_06/docjun.asp.

^{xiv} Carter, Jimmy. "Erosion of the Nonproliferation Treaty." International Herald Tribune 12 May 2005 <http://www.iht.com/articles/2005/05/01/opinion/edjimmy.php>

^{xv} Roche, Douglas. "Deadly Deadlock." Middle Powers Initiative Briefing Paper (2005), <http://www.gsinsitute.org/2005NPTpoliticalanalysis.pdf>

^{xvi} Roche, *supra* at 6. Secretary General Kofi Annan stated: "Tens if not hundreds of thousands of people would perish in an instant, and many more would die from exposure to radiation. The global impact would be grave. The attention of world leaders would be riveted on this existential threat. Carefully nurtured collective security mechanisms could be discredited. Hard won freedoms and human rights could be compromised. The sharing of nuclear technology for peaceful purposes could halt. Resources for development would likely dwindle. And world financial markets, trade and transportation could be hit hard, with major economic consequences. This could drive millions of people in poor countries into deeper deprivation and suffering."

^{xvii} Johnson, Rebecca. "Politics and Protection: Why the 2005 NPT Failed." *Disarmament Diplomacy* 80 (2005). 30 Nov 2005 <<http://www.acronym.org.uk/dd/dd80/80npt.htm>>.

For a full exposition of the statements of the participating States, reports on the proceedings and NGO Statements, the web site of Reaching Critical Will is outstanding, and gained wide spread praise from many diplomats,

<http://www.reachingcriticalwill.org/legal/npt/nptindex1.html#docs>

^{xviii} The IAEA May 2005 Staff Report, Strengthening the NPT and World Security, for example, listed 7 practical issues that could have been reviewed to good effect.

http://www.iaea.org/NewsCenter/News/2005/npt_2005.html

1. A five-year moratorium on building new facilities for uranium enrichment and plutonium separation. "There is no compelling reason for building more of these proliferation-sensitive facilities, the nuclear industry already has more than

-
- enough capacity to fuel its power plants and research facilities," Dr. ElBaradei said.
2. Speed up efforts to convert research reactors operating with highly enriched uranium (HEU) to use low enriched uranium, and accelerate technical research to make HEU unnecessary for all peaceful nuclear applications.
 3. Establish the "Additional Protocol" as the norm for verifying compliance with the NPT. A move that would expand IAEA inspectors' access to physical structures and information about nuclear programs.
 4. Call on the UN Security Council to act swiftly and decisively on the case of any country that withdraws from the NPT.
 5. Call on all States to act on the Security Council's recent resolution 1540, to pursue and prosecute any illicit trading in nuclear materials and technology.
 6. Call on all five Nuclear Weapon States party to the NPT to accelerate implementation of their "unequivocal commitment" to nuclear disarmament. "Negotiating a treaty to irreversibly ban the production of fissile material for nuclear weapon programmes would be a welcome starting point," Dr. ElBaradei said.
 7. Acknowledge the volatility of longstanding tensions that give rise to proliferation – in regions like the Middle East and the Korean Peninsula – and take action to resolve existing security deficits and, where needed, provide security assurances.

^{xix} *A More Secure World: Our Shared Responsibility*, The High-level Panel on Threats, Challenges and Change, published by the United Nations, November 2004, <http://www.un.org/secureworld/>

^{xx} *National Defense Strategy of the United States*, United States Department of Defense, March 2005, http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005.htm

^{xxi} Press conference by Kofi Annan, United Nations, New York. September 13, 2005, <http://www.un.org/News/briefings/docs/2005/sgsm10089.doc.htm>

^{xxii} Roche, Douglas, *Beyond Hiroshima*, p. 75-76 (Novalis, 2004)