The Nuclear Non-proliferation Regime: with reference to the U.S-India 123 Agreement

By

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“Nuclear disarmament is proving difficult to achieve through existing International Law agreements and treaties. Therefore, a new approach to non-proliferation is necessary”. Discuss

“Calls for nuclear disarmament are as old as the nuclear age”.\(^1\) Since the atomic bombings of Hiroshima and Nagasaki in 1945 and the release of such destructive power, the international community called for immediate prohibition of its use again and for nuclear energy to be limited to peaceful purposes exclusively. Moreover, the nuclear tension and declared readiness to use nuclear weapons that occurred during the Cold War pushed the International community towards the desired nuclear disarmament. Regardless of the evident role of nuclear deterrence in preventing an outbreak of another nuclear war, international law instruments were created in efforts to regulate non-proliferation. Today, in a drastically different post-Cold War political system, the same strategic doctrines surprisingly continue to be applicable and remain unchanged.\(^2\)

This essay will discuss whether the existing agreements and treaties (e.g. NPT) enable the full realisation of nuclear disarmament and whether other approaches are necessary to be implemented under international law. Therefore, this essay will assess the weaknesses of the existing non-proliferation regime in addition to analysing some attempts and proposals put forward by states and others in order to strengthen the original non-proliferation regime.

Nuclear reality

Both proponents and opponents of nuclear disarmament perceive it as an “absolute condition, an end point beyond which the realities of politics and security no longer seem to apply”.\(^3\) The problem with this view is that it suggests that nuclear danger may disappear indefinitely. Hence, disregarding the political difficulties such as the issues of security and balance of power. Proponents of Nuclear deterrence argue that Nuclear disarmament is impossible to achieve in reality. In other words, the bomb cannot be ‘uninvented’.\(^4\) This is true, but it does not mean that nuclear disarmament is impossible to achieve. Therefore, advocates of nuclear disarmament argue that, although the knowledge of nuclear technology is out there already and cannot be erased; this does not necessarily mean that realistic and achievable steps to control this knowledge cannot be

\(^1\) Cortright and Vayrynen, *Towards Nuclear Zero*, p.13
\(^2\) Goldblat, *Banning the Use of Nuclear Weapons*, p.1
\(^3\) Cortright and Vayrynen, *Towards Nuclear Zero*, p.19
\(^4\) *ibid.*
Comprehending that nuclear capability will never vanish is not an obstacle, but indeed a foundation for building a safe strategy to nuclear disarmament.

The non-proliferation regime

Following the use of nuclear weapons in the Second World War and the tense events of the 1960s, including China joining the group of nuclear weapon States, a collection of measures were constructed in order to prevent or discourage any further use of nuclear weapons. These measures supplemented the International Atomic Energy Agency’s (IAEA) work, which was created in 1957, in implementing audits and investigations, as well as to facilitate the use of nuclear energy for peaceful purposes. The collection of measures created included; firstly, international or national legal agreements and treaties. The most important treaty to this point is the 1968 Non-proliferation Treaty (NPT), which is considered the cornerstone of the non-proliferation regime. Secondly, it included multilateral agreements limiting the nuclear know-how and availability. These multilateral agreements include Nuclear Supplier Group (NSG), the US-led proliferation Security Imitative and many others. Thirdly, Security assurances achieved through state alliances or else were created. This is noted in the NATO and the USJapan cooperation and Security Treaty. Finally, International or national joint funds were constructed, such as the European Union fund to reduce and secure the former Soviet weapons and related infrastructure.

Problems with the NPT

For the purposes of this essay the NPT’s shortfalls will be examined in some detail, rather than examining all existing non-proliferation and disarmament treaties, such as the CTBT. It can be said that the NPT’s inadequacy can be attributed to four underlying problems within its provisions. The first and most evident problem with the NPT regime has failed to achieve any progress on nuclear disarmament by Nuclear States.

The second problem is related to the NPT inability to manage breaches of the treaty and IAEA safeguards. Occasionally, a number of states would act in breach of the obligations imposed by the NPT and the IAEA safeguards in a manner that undermines

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5 ibid., pp19-20
6 Cirincione et al, Deadly Arsenals, Pp29-30
7 Quinlan, Thinking about Nuclear Weapons, p.78
8 The Weapons of Mass Destruction Commision (WMDC), Weapons of Terror: Freeing the world of Nuclear, Biological and Chemical arms, p.63
their power and value. That can be seen in the actions of Iran, North Korea, Libya and Iraq in acquiring nuclear weapons and technology, which undermined the international community’s confidence in the NPT. Also, it is believed that if non-nuclear States began to acquire nuclear weapons without facing serious consequences; that many other States will follow, similarly to the domino effect. This however, does not mean that the world is filled with potential proliferators or with nuclear-capable terrorists. Therefore, providing that great powers maintain relations based on cooperation and that the nuclear tension is not heightened, it is safe to say that there is little reason to fear an impending collapse of the NPT.

The Third problem is that the NPT fails to recognize the seriousness of States’ withdrawal in its withdrawal provision. This is linked to the previous problem and is demonstrated in the case of North Korea. The NPT requires that notices of withdrawal must be brought to all state parties and to the United Nations Security Council’s attention. Thus, the SC and party States will assess the withdrawal and consider whether it deems to be a threat to peace. If, in any case, the SC fails to respond to a withdrawal notice, the other party states are free to decide their level of devotion to the treaty. Therefore, the existing provision simply makes the withdrawal procedural and fails to identify the possible impact of such actions.9

The final evident problem is considered to be of a technical nature. The NPT’s failure to manage and keep check on the implementation of its provisions. Moreover, a provision for standing secretariat in order to assist and guide parties in implementing the treaty is clearly absent, which consequently proved to be inconvenient. In fact, it has been argued that the NPT is the weakest of all WMD treaties in regards to provisions on implementation. Furthermore, it is necessary to clarify that the IAEA was not appointed, as a secretariat of the NPT and neither were the states of Russia, USA and UK. These three depositary states were only delegated the formal role of conducting five-yearly review conferences. Hence, there is a lack of procedural provisions in cases of non-compliance, withdrawal or even provisions to guide the implementation process of the treaty in between the review conferences.10

9 ibid.,
10 ibid., Pp 63-64
The NPT continues to have fundamental support from the international community, regardless of the mentioned inadequacies. The two basic ideas at the core of the NPT are “the more fingers on more nuclear triggers would result in a more dangerous world, and that non-proliferation by the have-nots and disarmaments by the haves will together lead to a safer world”\textsuperscript{11}, continue to receive most of the international support and appreciation. However, the failure to agree on any conclusions at the 2005 Review Conference reflects serious discontent and frustration, which exists among the parties.\textsuperscript{12} It suffices to say that lessons can be learnt from both the NPT’s problems and supported fundamental ideas.

123 Agreement – a challenge to the Non-proliferation regime

The 123 Indo-US Agreement is an unprecedented bilateral treaty signed in 2008. It facilitates the cooperation with a state that is outside the framework of the NPT. It basically includes India’s civil nuclear programme within the non-proliferation regime. The treaty provides that the US is to assist India’s civil nuclear programme by providing nuclear technology and materials. In return, India accepts to subject all its nuclear facilities to the IAEA’s safeguards and scrutiny. In addition, India accepts to use this material and technology for peaceful purposes only.

This agreement was widely criticised and received with considerable controversy. On the one hand, States such as Pakistan argued that the 123 Agreement allows India to increase its arsenal production due to the possibilities for acquiring nuclear technology and material for ‘civil’ purposes. Therefore, the treaty permits India to ‘free up’ its uranium deposits and consequently using it for its weapon programme. On the other hand, many disputed these claims and argued India’s lack of capacity to increase the size of its nuclear arsenal and capability to grow its nuclear stockpiles.\textsuperscript{13} In addition, other objections were raised, including the following: Firstly, that the treaty implies that the IAEA safeguards apply to facilities established and material manufactured by India only following the treaty ratification. Secondly, the agreement does not mention limiting India’s fissile material production. Thirdly, It does not limit India to producing

\textsuperscript{11} ibid.,
\textsuperscript{12} ibid., p.64
\textsuperscript{13} Koplow, Testing a Nuclear Test Ban, pp.34-35
a certain number of nuclear weapons. Fourthly, it has been argued that the treaty takes unnecessary risk.\textsuperscript{14}

The 123 Agreement is said to impact the NPT’s credibility as an effective international law instrument regulating non-proliferation. The deal is damaging to the nuclear regime, as it constitutes a license to proliferate under international law rules. Article I of the NPT provides that nuclear states accept to refrain from assisting non-nuclear states in developing nuclear weapons. President of the Institute for Science and International Security, David Albright, announced that such an agreement could backfire at the US, especially without clear barriers as to what qualifies as ‘civil’ nuclear programmes for India. In addition, this means nuclear weapon States such as Russia or China have the opportunity to bend international rules in future occasions in order to facilitate trading nuclear technology to non-nuclear States.\textsuperscript{15} However, other experts argue that NPT was already failing as an international law instrument in preventing non-proliferation. In fact, The NPT failed to prevent Iraq, Iran, Libya and North Korea from nuclear proliferation, whilst being signatories of the treaty.\textsuperscript{16}

\textbf{Reform proposals:}

It was already mentioned that original non-proliferation regime is being bent in order to accommodate states’ interests and consequently weakening it rather than strengthening it.\textsuperscript{17} Indeed, innovative initiatives to reform the current regime or perhaps replace it are necessary to tackle the issue of proliferation. Thus, reforming the regime requires that nuclear weapon states that are not party to the NPT to be integrated into the non-proliferation regime in order to establish a superior, efficient system.\textsuperscript{18} For instance, the current regime lacks forums and proposals, which include Israel, Pakistan and India. They must be persuaded to accept the same obligations to non-proliferation and nuclear disarmament as other state parties. Although the 123 agreement between India and US is an example of including a nuclear state that is not a party to the NPT, however it has many shortcomings, as mentioned earlier, and it is an agreements that excludes other

\textsuperscript{14} \textit{Bajoria}, \textit{The U.S.-India Nuclear deal}, Online article
\textsuperscript{15} \textit{Roy}, \textit{The Great Non-proliferation Charade}, Online article
\textsuperscript{16} \textit{Bajoria}, \textit{The U.S.-India Nuclear deal},
\textsuperscript{17} \textit{Perkovich}, \textit{Reforming Nuclear Order}, p.14
\textsuperscript{18} \textit{ibid.}, pp14-15
non-nuclear States such as Israel and Pakistan. Thus, ‘Any serious effort to reform the nuclear order- which the India deal is not- would have to establish criteria for bringing Pakistan and Israel into the non-proliferation and disarmament process’\textsuperscript{19} Another requirement to strengthen the non-proliferation order is to use bargaining in order to reach an equitable regime.\textsuperscript{20} Therefore, the regime cannot be merely imposed by the great powers on the international community. The dynamics of the world have changed drastically since negotiating the NPT back in the 1960s. For instance, developing states such as China, Iran, India, Brazil and South Africa have grown both politically and economically and now demand further recognition and power.

**Non-use Treaty**
This is a proposal to establish a multilateral non-use treaty, which outlaws all nuclear weapons. This treaty is proposed to be open to all states and to incorporate Humanitarian law. Moreover, The Geneva Conference on Disarmament could serve as the negotiation forum for the treaty; however, given the weakness of this conference it would be sensible to establish a specialised international body in order to manage the institutional aspects of the treaty. A diplomatic conference led by like-minded states, not necessarily including all states that declared possessing nuclear resources, is possibly a suitable international body to manage such a treaty. However, it is fundamental for this that all nuclear states ratify banning the use of nuclear weapons treaty, or less the treaty will not come into force.

The treaty, unlike the NPT, will properly cover situations of treaty violation, withdrawal and implementations. In case of treaty violation, the state is accountable for an international crime under Humanitarian laws or other seemingly existing international laws such as the Statute of International Criminal Court. In the case of suspicious nuclear activity by a state party, the UN Security Council ought to allow investigations including on-site inspections. Moreover, if a permanent member of the Security Council was accused of treaty violations, the state has the prospect of waiving its veto right on resolutions regarding an investigation of violations. In addition, the waiver should be applicable to SC resolutions, which require actions to be taken against a violation from a great power. Such violations may include assisting an affected state party or

\textsuperscript{19} ibid., p. 15
\textsuperscript{20} ibid., p. 17
compensating a state party for its loss. These restrictions ought to be included to avoid amending the UN Charter and the permanent states’ privileges. However, these privileges could be negotiated and decided within a unilateral joint statement.\textsuperscript{21}

**Multinationally owned/managed enterprise**

A promising proposal to reform the nuclear regime proposes to create a multinational establishment for the management of the world’s fuel-cycle, equitably. It is, in brief summary, a joint enterprise that brings changes in the disposition of the World’s nuclear material.\textsuperscript{22} Accordingly, all new fuel-cycle – enrichment and fuel processing- will be multinationally owned and/or managed, whilst either shutting down or transferring the standing facilities within a specified period.\textsuperscript{23} This means that the newly planned US enrichment and processing plants would be included within this international establishment and therefore multinationalised. Models of this proposed multinational fuel-cycle bank currently exist. For instance, the Eurodif and Urenco models somewhat constitute a European example of this proposed establishment. Also, Brazil and Argentina have been deliberating methods to create a multinational enterprise, while Russia has an undetermined plan to turn its Angarsk enrichment plan to a multinational management as well. However, it is crucial to point out that attempting to transfer management, create a new organization and making multinationalization compulsory will raise numerous challenges on all political, economic and legal fronts. Nevertheless, such complications and set backs must not discourage the international community from addressing such critical issue.

In conclusion, The treaties and international law instrument that regulated nuclear proliferation following the US cold war with Russia surprisingly continue to be applied in our modern day where a state like China is no longer a bystander, while in fact it is now considered one of the greatest developing powers of the world. Thus, reform in the current non-proliferation regime is extremely necessary at this point. Also, the proposals discussed in this essay may be optimistic for such a complicated regime, however complications must not be avoided in as well as making compromises in addressing fundamental issues in such a sensitive regime.

\textsuperscript{21} Goldblat, *Banning the Use of Nuclear Weapons*, p.7
\textsuperscript{22} Shultz et al, *Ending the threat of nuclear arms*
\textsuperscript{23} Perkovich, *Reforming Nuclear Order*, p.18
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