

DUTIES OF NON-NUCLEAR WEAPON STATES UNDER NPT, 1968: AN ANALYSIS¹

1. INTRODUCTION

The Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter, NPT) is an international treaty that was signed in London, Washington, and Moscow by 62 countries on July 1, 1968.² It came into force in March 5, 1970 and has 189 state parties except: India, Israel, Pakistan and North Korea (which withdrew from the treaty in the year 2003)³. The idea was basically mooted by Ireland and Finland. The immediate legislative antecedent of the NPT was the Resolution of the General Assembly “*Prevention of the wider Dissemination of Nuclear Weapons*” of December 5, 1961 Res. 1665 (XVI).⁴ This resolution based on an Irish initiative, was adopted unanimously and called upon all states for the conclusion of a non-proliferation agreement. As early as 1965, both the United States and the Soviet Union submitted drafts for a non-proliferation Treaty to the UN Committee on Disarmament and to the UNGA respectively. The former committee became the main forum for discussions on the above draft. Finally, in 1968 a draft treaty sponsored by USA and Soviet Union was adopted by the General Assembly on June 12, 1968 by a vote of 95 to 4 with 21 abstentions.⁵ The NPT has been founded on the core value that no state should possess nuclear weapons.⁶ The prime aims of the treaty are:

- i. To prevent the proliferation of nuclear arms;
- ii. Promote nuclear disarmament; and
- iii. Encourage the peaceful use of nuclear energy.⁷

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² *The Treaty on the Non-Proliferation of Nuclear Weapons*, July 1, 1968, 729 U.N.T.S. 161, 169.

³ Available at <http://www.cns.miis.edu/research/korea/nptstate.htm>

⁴ NLIU Study Material, 2009.

⁵ See Non-Proliferation Treaty, Historical Background, NLIU Study Material, at p.117

⁶ See Arsalan M. Suleman, “*Bargaining in the Shadow of Violence: The NPT, IAEA and Nuclear Non-Proliferation Negotiations*”, 26 Berkley J. Int’l L. 2006.

⁷ See “*Preventing Repeat Offenders: North Korea’s Withdrawal and the need for revisions to the Nuclear Non-Proliferation Treaty*”, 38 Vand. J. Transnat’l L. 1500 (2005) at p. 1500.

The History, stands testimony to the fact that the only actual violation was committed by the United States when it bombed the cities of Hiroshima and Nagasaki in August, 1945, during the WW II. However, the criminal character of the bombing itself was never considered because of the “victor’s justice” limitation on the war crimes proceedings.⁸ The United Nations came into being in 1945. Victor becomes the law maker. No one could have imagined then that the Security Council’s five permanent members would one day become the elite club of nuclear weapon states. Historically, it has been a common thing for states to volunteer to disarm others. There is a fable of the animals and the birds coming together for a disarmament conference. The lion suggested to the eagle that it should dispense with its talons. The eagle appealed to the bull to give up its horns. The bull urged the tiger to abandon its claws. Finally, the bear proposed that all should join him in disarmament in a universal embrace.⁹ In June, 1946 US proposed freezing the number of NWS at one, however, the USSR countered with a proposal to destroy all atomic weapons. None of this happened. Instead the USSR itself acquired atomic weapons in 1949, the UK in 1952, France in 1960 and China in 1964. Finally, in 1968 NPT froze the number of NWS at 5 and, as of now 8 countries possess nuclear weapons.

The NPT created two categories of states, these were:

- a. The “*Nuclear-weapon States*” this group comprised of the states which have manufactured or exploded a nuclear weapon or other explosive device prior to January 1, 1967. (Article IX (3), NPT). The five nuclear states are Britain, China, France, Russia, and the United States.
- b. The “*Non-nuclear-weapon States*” states belong to this group on the basis of sole criterion of not having manufactured or exploded nuclear device prior to January 1, 1967 and irrespective of the extent to which they have developed nuclear technology.

The NPT Bargain: At the heart of the NPT lies a bargain between nations possessing nuclear weapons and those that do not. The former are bound:

⁸ See R. Minear, “*Victor’s Justice: The Tokyo War Crimes Trials*” (1971) as cited by Richard Falk in “*Towards a legal Regime for Nuclear Weapons*” at p. 111 supra A

⁹ See the comments of Prof. Yoram Dinstein from Israel, in the “*Lawyers and the Nuclear Debate*” ed. Maxwell Cohen, Margaret E. Cohen, University of Ottawa Press (1988) at p.64.

- Not to help the latter in acquiring atomic weapons;
- To share nuclear technology for peaceful purposes with interested nations, that happens to be the quid pro quo for the bargain;
- To make a sincere effort to reduce the level of their nuclear stock-piles;
- To require that nuclear export to NNWS are safeguarded.

While the latter, are required to:

- Not to pursue the acquisition or development of nuclear weapons;
- To place safeguards on all their nuclear materials, whether imported or indigenously produced (full-scope safeguards);
- To share nuclear technology for peaceful purposes with interested nations.

Basically, the bargain was that the NWS will work towards nuclear disarmament while sharing the benefits of the peaceful uses of nuclear energy with the NNWS, who in turn commit to forgo seeking nuclear weapons and to place their nuclear facilities under international safeguards. These understandings have been codified under Articles I. II. III. IV and VI of the NPT.

The “Grand NPT Bargain” is an unbalanced one with greater obligations being placed on the Non-Nuclear Weapon States. Some have equated it to restrictions on their sovereignty.¹⁰ The treaty imposed far greater obligations on the NNWS as compared to the NWS. Further, there is a concern of inequality coupled with lack of any substantial progress towards nuclear disarmament. The treaty was initially effective for a period of 25 years. Until 1995 the treaty was a temporary contract. The NPT Review and Extension Conference¹¹ in the year 1995 extended the treaty indefinitely. In fact the, basic aim of these conferences was to review the operation of this treaty with a view to assuring that the purposes of the treaty are being realized- viz. to ensure that the nuclear powers were fulfilling their disarmament commitments.¹² The NNWS argue that permitting a few states to have nuclear weapons while forbidding the others from

¹⁰ Krateros Ioannou, “Non-Proliferation Treaty”, 3 Encyclopedia of Public International Law, 625 (1997).

¹¹ “The 1995 NPT Conference, Principles and Objectives for Nuclear Non-Proliferation and Disarmament”, Available at http://www.fas.org/nuke/control/npt/text/prin_obj.htm

¹² Cf. William Epstein, “The Last Chance, Nuclear Proliferation and Arms Control”, The Free Press, MacMillan Publishing Co., Inc., New York, London at p.244.

doing so constitute a discriminatory feature of the NPT.¹³ India refused to ratify NPT claiming that, it legitimized the primacy of the great powers by permitting them to retain their arms while freezing the NNWS in a state of permanent inferiority.¹⁴ Forms of abstinence which do not apply to the nuclear “haves” are urged upon all other states. With these issues in mind the paper seeks to analyze and present a critique of the NPT with respect to the duties of NNWS.

2. DUTIES OF NON-NUCLEAR WEAPON STATES: AN ANALYSIS AND CRITIQUE:

The NPT is believed to be the linchpin of the nonproliferation regime. However, the provisions of the treaty are controversial, in the sense that they are fundamentally unjust, particularly because it appears to freeze the nuclear status quo. The lack of significant progress in the arms reduction, even as NNWS parties observed their commitment not to develop nuclear weapons, convinces that the treaty had served to divide the world permanently into nuclear haves and have-nots. It requires the have not states to forswear a weapon capability that their NWS neighbors have apparently found useful, even essential for their security.¹⁵

The provisions:

- Under Article II, each NNWS party to the Treaty undertakes not to:
 - i. Receive the transfer from any state whatsoever of nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly;
 - ii. Manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and

¹³ William Epstein & Paul C. Szasz, “*Extension of the NPT: A Means of Strengthening the Treaty*”, 33 VA. J. INT’L L. 735, 736 (1993).

¹⁴ See Leonard S. Spector, “*Nuclear Proliferation Treaty*”, Ballinger Pub Co. , Cambridge, Mass. (1984) at p. 31.

¹⁵ See David A. Koplow, “*Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*” 1993 Wis. L. Rev. 301.

- iii. To seek or receive any assistance in the manufacture of nuclear weapon or other nuclear explosive devices.
- Under Article III, 1. Each NNWS party to the treaty undertakes to accept safeguards, as set forth in an agreement negotiated and concluded with the IAEA in accordance with the statute of the IAEA and the Agency's safeguard system for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversions of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. The safeguards required shall be applicable on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.
- Under Article III. 4, NNWS party to the treaty shall conclude agreements with the IAEA to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the IAEA.

Analysis and Critique:

- Article I does not prohibit a NWS from receiving such assistance. Hence, it does not limit the ability of NWS, for example, to purchase Uranium for its nuclear program from a NNWS. Further, NWS's are required not to assist NNWS in the manufacture of nuclear weapons but there is a possibility that they can assist each other in their respective nuclear programs in a variety of ways short of the outright transfer of nuclear weapons.¹⁶
- Article III of the Treaty does not require safeguards on the peaceful nuclear activities within the NWS. The requirement of the treaty as to safeguards are different for the haves and have nots, the NNWS are under comprehensive safeguards as compared to the NWS. The latter are not under any safeguard whether they are exporting or importing. The logic given is that the nuclear material used in peaceful purposes are not diverted to weapons, loses its non-proliferation purpose. However, the truth is that if safeguards were applied that would have made the production of Plutonium for weapons more expensive for the

¹⁶The special relation between the USA and UK deserves mention here.

NWS.¹⁷ The Indian view was that, “*Institutions of international control on peaceful reactors and power stations is like an attempt to maintain law and order in a society by placing its law-abiding citizens in custody while leaving its law-breaking elements free to roam the streets...*”¹⁸ “to pursue in good faith” fails to create any juridical obligation on the part of NWS. It is an imperfect obligation with no sanction behind it.

The point is that, it did not attempt to bell the cat rather it was aimed to catch the mice as far as that the provisions of the NPT are directed solely at NNWS.¹⁹

- Nuclear disarmament: The Preamble of the Treaty emphasizes the need for nuclear disarmament. It says, “*...to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effectively measures in the direction of nuclear disarmament.*” Further, under Article VI of the NPT, negotiations are to be pursued in good faith with a view to a general nuclear disarmament, encompassing the NWS. However, the wordings of Article VI only impose a vague obligation on NWS. The Commitment under Article VI is only skin deep. It prescribes no time limit what it requires is only negotiations in good faith. The ICJ’s decision dated 8th of July, 1996, recognizes that the provision of Article VI of the NPT goes beyond a mere obligation of conduct- to pursue nuclear disarmament negotiations in good faith- and actually involves an obligation to conclude those negotiations. The court in its unanimous opinion said that, “*there exists an obligation to pursue in good faith and bring to conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*”²⁰

We had the examples of Libya which in 2003 agreed to abandon its nuclear program and became a party to the treaty, South Africa which developed nuclear weapons by itself and later dismantled them and Brazil before it. However, these 5 Countries continue to build-

¹⁷ See Mason Willrich, “*Non-Proliferation Treaty, Framework for Nuclear Arms Control*”, The Michie Company, Law Publishers, Charlotte Ville, at p. 102

¹⁸ See Mason Willrich, *ibid.* at p. 124.

¹⁹ See Mason Willrich, *ibid.* at p. 98.

²⁰ The Advisory Opinion on the Legality of the threat and use of nuclear weapons, ICJ Reports, 1996, para 105 (2)(F).

up and modernize their respective arsenal. The 5 Nuclear Weapon States together possessed about 39,000 nuclear weapons when the treaty was signed in 1968. Three decades later, these nations reportedly possessed about 36,000 of such weapons. At this rate of reduction these nations will finally reach zero level sometimes in the middle of the 24th Century, just a few years short of the United Nation's 500th anniversary.²¹

However, irrespective of the theoretical equality of states, in practice the choice lies in the hands of the privileged few. The matter of disarmament is effectively in the hands of the NWS.²² Nevertheless, the progress in this direction remains to be minimal, and the provision of Article VI seems to have been only a lip-service. It looks like as if NWS are telling the world, "Do as we say and not as we do". Nuclear disarmament, as contemplated by the nuclear powers, is an idea marked with the stamp "for export only".²³ Today, they don't even need to conduct tests. In so doing they are showing to the rest of the world how much importance they attach to the possession of nuclear weapons. To deny to others what they believe indispensable for themselves is the surest way of whetting the nuclear appetite. At least, it furnishes an easy excuse for future aspirants.²⁴

- The inherent inequity of the non-proliferation regime is compounded by the fact that NNWS are not only deprived but in fact they are penalized for their deprivation. As long as NWS insist on unrestricted and unsafeguarded use, the imposition on others would be seen as discriminatory and therefore inequitable.²⁵ The glacial pace of arms control and growing gap between the superpowers and others serve to sharpen the suspicion that the proponents of the NPT had a totally one sided agenda.²⁶ Some see that the technological

²¹ See, Jayntha Dhanapala, "*Prospects for Disarmament*", NLIU Study Material, 2009 at p. 57.

²² See Julie Dahlitz & George Allen, "*Nuclear Arms Control: With Effective International Agreements*" at p. 60.

²³ See the comments of Prof. Yoran Dinstein from Israel, in the "*Lawyers and the Nuclear Debate*" ed. Maxwell Cohen, Margaret E. Cohen, University of Ottawa Press (1988) at p. 63.

²⁴ See Curt Gasteyger, "*Searching for World Security, Understanding Global Armament and Disarmament*" Francis Pinter Pub. London, (1985) at p. 121

²⁵ See Ted Green Wood, Harold & Theodore B. Taylor, "*Nuclear Proliferation, Motivation, Capabilities and Strategies for Control*" 1980's Project Studies, Council on Foreign Relations, McGraw Hill Books Co. (1977) at p. 7.

²⁶ In fact France tested many times just before the 1995 Review Conference.

gap is widening and NPT is used as a convenient instrument to establish the technological hegemony of a few nations.²⁷

The whole concept underlying the treaty is flawed because it is discriminatory. One view is that, non-proliferation has little to do with the disappearance of nuclear weapons. The concept is actually premised on the dubious tenet that, “What’s mine is mine and what’s yours is negotiable”. And the NPT strives to perpetuate the distinction in the nuclear sphere between the “have” and “have-not” states. The contemporary international law rejects this notion of a designation in terms of have and have not’s. The NPT does not reflect the *de lege feranda* (from the point of view of the law that is desired) that is nuclear weapons should be condemned.

3. CONCLUSION:

The NPT was in fact a modest document invested with terms beyond its powers in fact it failed to draw a balance between the two most crucial levels of international hierarchy.²⁸ The treaty- not an end in itself but a means to an end- has at the most played an educative role and helped to define problems in an area of complex and competing national calculations. The treaty does not in any way curb the NWS; and, since only they can cause nuclear destruction, the fearful shadow is pushed back, and the world, therefore, is not likely to be more secure tomorrow.

A dishonest treaty will have dishonest consequences. Withdrawal of North Korea from the NPT on Jan. 10, 2003 stood testimony to the fact that NPT alone cannot wipe out the scourge of nuclear weapons. The NPT is no guarantee that a pariah state will not turn into a rogue state.

²⁷See Omkar Marwah, Ann. T. Schulz, “*Nuclear Proliferation and the Near-Nuclear Countries*”, Ballinger Publishing Co.; Cambridge, Mass. (1975) at p.143

²⁸ See Omkar Marwah, Ann T. Schulz, “*Nuclear Proliferation and the Near-Nuclear Countries*”, Ballinger Publishing Co.; Cambridge, Mass. (1975) at p.8

NPT can at best freeze the status quo²⁹, until fundamental changes appear in world politics which eliminate all incentives for seeking nuclear weapons.³⁰ The urge to seek greater security by acquiring Nuclear Weapons can't be curbed by a prohibition applied only on those who do not already possess them. It can be eliminated only if we do away with the special status of superiority associated with power and prestige conferred on the NWS by nuclear weapons. The desire to emulate will be difficult to sustain as long as the world lives in a state of imbalance.³¹

Thus it can be said that the treaty takes into account only the fears of the few, and not the preoccupations of all. And after 1995 Review conference it can be said that the treaty had more of its past than future. As the 1995 conference fixed the un-balanced obligations imposed by the treaty. The NWS are not more committed to disarmament today than before 1995. They did not accept any new obligation beyond Article VI. The NNWS in exchange of indefinite extension got nothing. Instead by doing so they surrendered the little leverage they succeeded in 1968, when the treaty was concluded. Some scholars are thus of the view that NPT ceased to be a tool for disarmament after 1995. The NNWS had lived up to their part of bargain by remaining non-nuclear while the NWS failed to fulfill their disarmament obligation.

Much circumspection is necessary to ensure respect for the principle of equality of states.³² The future validity of the treaty will depend on the willingness of the NWS to meet their disarmament obligations. The nuclear weapons are abominable and that no rational society should allow the threat of nuclear holocaust to continue.³³ Much that needs to be done transcends the issue of law. The fundamental problems are the problems of taking responsibilities and assuming the risks that

²⁹ India's explosion of a nuclear device was an emphatic reminder that the NPT has done little to discourage serious nuclear aspirants. The original expectations failed to recognize the independent foreign policy conceptions and requirement of these countries, see "*Nuclear Proliferation and the Near-Nuclear Countries*" ed. by Omkar Marwah, Ann T. Schulz, Ballinger Publishing Co.; Cambridge, Mass. (1975) at the cover page.

³⁰ See George Quester, "*The Politics of Nuclear Proliferation*", The John Hopkins University Press, (1973) at Preface ix.

³¹ See the Statement of Indian Representative (HUSAIN), to the "18 Nation Disarmament Committee: Non Proliferation of Nuclear Weapons", Feb. 27, 1968 (ENDC /PV. 370, pp.4-14) in U.S. Arms Control and Disarmament Agency, Documents on Disarmament, 1968, (Washington D.C.: U.S. Govt. Printing Office, 1969) at p. 111.

³² See Vanda Lamm, A KadeMiai Kiado, "*The Utilization of Nuclear Energy and International Law*", Budapest, 1984 at p.134.

³³ See Richard B. Bilder, "*Nuclear Weapons and International Law*", in "*Nuclear Weapons and Law*", ed. by Arthur S. Miller & M. Feinrider, Greenwood Press (1984) at p. 3.

are involved therein, and the fundamental problems of building trust in the world turned against itself.³⁴ A genuine, universal and non-discriminatory regime will enhance the prospects of a better and more secure world and the central element of such a regime is the elimination of nuclear weapons.

³⁴ See Dinesh Khosla, “*Nuclear Weapons, Global Values and International Law*” *ibid.* at p. 16