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## **Survival Through Law. Is there a Law Against Nuclear Proliferation?**

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## A. Introduction

The existence of nuclear weapons and the risk of their further proliferation remains one of the most pressing security concerns of our time. Despite initial progress after the end of the Cold War, nuclear disarmament has stalled. It is questionable whether the legal regime for the non-proliferation of nuclear weapons with the Nuclear Non-Proliferation Treaty (NPT)<sup>1</sup> at its core is a suitable answer to the challenge posed by nuclear weapons.<sup>2</sup> Recent developments, such as the nuclear test by North Korea in October 2006 and the unsolved Iranian nuclear dispute, have raised doubts if nuclear non-proliferation will succeed. In particular, the Comprehensive Nuclear Test-Ban Treaty<sup>3</sup> is unlikely to enter into force any time soon. The 2005 NPT Review Conference failed to reach consensus.<sup>4</sup> Therefore, many analysts have pointed out that the regime may be in danger of slow erosion – or even fast implosion.<sup>5</sup>

This raises the question as to the system's persuasive power, its systemic coherence and its capability to strike a bargain between the interests of all concerned. Does it have an intrinsic value for being law – or is it simply an instrument of hegemonic power? Does it have any persuasive authority in situations in which the very survival of a State – and humanity at-large – is at stake?<sup>6</sup>

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<sup>1</sup> Treaty on the Non-Proliferation of Nuclear Weapons, New York, 1 July 1968, in force 5 March 1970, 729 *United Nations Treaty Series* 161.

<sup>2</sup> For a seminal study about current threats to the non-proliferation regime see: The Weapons of Mass Destruction Commission, *Weapons of Terror: Freeing the World of Nuclear, Biological, and Chemical Arms* (Stockholm 2006).

<sup>3</sup> Comprehensive Nuclear Test-Ban Treaty, 10 September 1996, 35 *International Legal Materials* 1439, not yet in force.

<sup>4</sup> For an analysis of the reasons for the failure see Harald Müller, 'The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair', (31) Papers and Studies Provided to the Weapons of Mass Destruction Commission, August 2005 at <http://www.wmdcommission.org/files/No31.pdf> (visited 20 January 2009), Harald Müller, *Vertrag im Zerfall? Die gescheiterte Überprüfungskonferenz des Nichtverbreitungsvertrags und ihre Folgen* (Hessische Stiftung für Friedens- und Konfliktforschung: Frankfurt am Main 2005).

<sup>5</sup> Chamundeeswari Kuppaswamy, 'Is the Nuclear Non-Proliferation Treaty Shaking at its Foundations? Stock Taking After the 2005 NPT Review Conference', 11 *Journal of Conflict & Security Law* (2006), 141-155 at 144; Wade L. Huntley, 'Rebels Without a Cause: North Korea, Iran and the NPT', 82 *International Affairs* (2006), 723-742 at 1; Ramesh Chandra Thakur, 'Managing the Nuclear Threat After Iraq: Is it Time to Replace the NPT Paradigm?' in: Waheguru Pal Singh Sidhu and Ramesh Chandra Thakur (eds), *Arms Control After Iraq: Normative and Operational Challenges* (United Nations University Press: Tokyo 2006), 1-19 at 5-7 and Heike Krieger, 'A Nuclear Test for Multilateralism - Challenges to the Non-Proliferation Treaty as a Means of Arms Control', *German Yearbook of International Law* (2006), 17-50 at 19. Likewise, the UN High-Level Panel on Threats, Challenges and Change stated: 'We are approaching a point at which the erosion of the non-proliferation regime could become irreversible, and result in a cascade of proliferation.' *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, contained in UN Doc. A/59/565 (2 December 2004) at 39.

<sup>6</sup> See ICJ, *Legality of the Use or Threat of Nuclear Weapons, Advisory Opinion*, ICJ Rep 1996, 226-267 at 266.

International legal theory has dealt extensively with the conditions for a system's legality. In addition, an abundant literature exists regarding law's legitimacy.<sup>7</sup> We do not intend to review this debate in a comprehensive fashion. Rather, we intend to focus on the question when, and to what extent, the regime against the proliferation of nuclear weapons in general and the NPT in particular benefit from an intrinsic authority. We ask ourselves when a subsystem of the law, or 'regime', loses such authority and ceases to be a compelling argument for action.<sup>8</sup> We have called this intrinsic character of legal norms their 'authority' to distinguish it both from their normative legitimacy as such and from the empirical analysis of actual compliance with the law.<sup>9</sup> Postmodernist critique has shown the potential of international law as an instrument of power, as a tool for the apology of hegemony.<sup>10</sup> At the same time, late-modern and postmodern writers have emphasized that law also depends on the 'inclusion of the other' (*Jürgen Habermas*)<sup>11</sup> or a 'culture of formalism' (*Martti Koskenniemi*)<sup>12</sup> that seeks to engage the position of all actors on the basis of equality. Liberal writers (*Thomas Franck*) have stressed the importance of fairness in international legal regimes and have dealt with legitimacy as a condition for a system's success.<sup>13</sup>

In the following, we argue that while the quest for a single overarching theory of what law actually 'is' may be futile, it is possible to identify some building blocks for the authority of a legal system. The term 'authority' has to be distinguished from the multifaceted and strained term of legitimacy, a term that has also been (ab)used to de-value and undermine the relevance

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<sup>7</sup> Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press: New York 1990); Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press: Oxford 1995); Allen E. Buchanan, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (Oxford University Press: Oxford 2004); Rüdiger Wolfrum and Volker Röben (eds), 'Legitimacy in International Law' (Springer: Berlin 2008); Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004), 907-931 and Joseph H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 547-562.

<sup>8</sup> On rules, in particular legal rules, as reasons for action see Friedrich V. Kratochwil, 'How Do Norms Matter?' in: Michael Byers (ed), *The Role of Law in International Politics* (Oxford University Press: Oxford 2000), 35-68.

<sup>9</sup> See, e.g., Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press: Oxford 2004); Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', 98 *American Journal of International Law* (2004), 434-461.

<sup>10</sup> Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a new Epilogue* (Cambridge University Press: Cambridge 2005); David Kennedy, *International Legal Structures* (Nomos: Baden-Baden 1987); Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *European Journal of International Law* (1991), 66-96 (in particular at 68).

<sup>11</sup> Jürgen Habermas, *Die Einbeziehung des Anderen* (Suhrkamp: Frankfurt am Main 1996) at 58.

<sup>12</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations - The Rise and Fall of International Law 1870-1960* (Cambridge University Press: Cambridge 2002), at 494-509.

<sup>13</sup> Franck, *Fairness*, supra note 7.

of law.<sup>14</sup> The authority of law is its capacity to be an argument in a debate, its persuasive power. Authority is the reason why law matters in the long run beyond the mere institutional channelling of current interests of the participants in the short term.<sup>15</sup> Centrally, law strives to incorporate reciprocal rights and obligations and to balance the interests of all the parties involved.<sup>16</sup> This reciprocal exchange distinguishes law from a mere verbalization of the mutual interests of the parties. Reciprocity binds the parties together. If this mutuality and reciprocity breaks down, the authority of law will be greatly diminished. Law mutates to a mere expression of power and may ultimately degenerate into imperialism. 'Coalitions of the willing' substitute for lasting institutions.<sup>17</sup> But such law is also in danger to break down the very moment the underlying power relationship is shifting. A synopsis of the concepts outlined above will identify elements of the authority of the law. Against this background, a study of the NPT will reveal key reasons why its authority is dwindling and hint at possibilities of how to restore it.

Based on our analysis, we argue that the success of the law against nuclear proliferation depends on an adequate balance of the interests at stake for all of the participants. To retain the NPT as legal and authoritative regime one has to think of it as a system accommodating the interests of all parties, containing rights and obligations for all. Although it discriminates between States that are entitled to possess nuclear weapons and those that are not, the NPT goes beyond 'freezing' the status quo. Rather, its bargain rests on a unique form of layered reciprocity, which incorporates nuclear disarmament and thus contains a pledge to overcome the very division between nuclear 'haves' and 'have-nots' it provides for in the first place. Moreover, in addition to non-proliferation and disarmament, the NPT provides for cooperation in peaceful uses of nuclear energy. Although implementation and compliance of the non-proliferation obligations are of considerable importance in the short term, the system rests on the viability of the 'grand bargain' in the long term. Only good faith adherence to all elements by both nuclear weapon States and non-nuclear weapon States will preserve its legal authority. However, when major players selectively depart from the NPT's objectives, it is bound to fail. Such a system will break

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<sup>14</sup> Carl Schmitt, *Legalität und Legitimität* (Duncker und Humblot: München 1932); for an English translation see Carl Schmitt, *Legality and Legitimacy* (translated by Jeffrey Seitzer, Duke University Press: Durham 2004).

<sup>15</sup> For a description of the role of law from an institutionalist perspective, see Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press: Princeton, NJ 1984) at 244-245.

<sup>16</sup> On reciprocity, see Bruno Simma, 'Reciprocity' in: Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1992), 29-33; on reciprocity in international treaty law, see Bruno Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot: Berlin 1972).

<sup>17</sup> On 'coalitions of the willing', see Christian Calliess, *et al.* (eds), "'Coalitions of the Willing" - Avantgarde or Threat?' (2006); Alejandro Rodiles, 'Coalitions of the Willing: Coyuntura, Contexto y Propiedades. Un Primer Esbozo', *7 Anuario Mexicano de Derecho Internacional* (2007), 675-702.

down when the capacity of the ‘haves’ to control the ‘have-nots’ is waning. Thus, not only the acquisition of nuclear weapons by so-called ‘rogue States’ threatens the nuclear non-proliferation regime, but also the insiders’ disrespect of their own legal undertakings of comprehensive disarmament as the prize to pay for non-proliferation.

In the first part of our article, we will illustrate some theoretical concepts of international law that may be useful in evaluating the legal fabric and the authority of the non-proliferation regime. We will focus on approaches that explain the classic inter-state law of international security, of which the NPT is an integral element. In a second part, we will identify linkages and common denominators between these theoretical approaches. In a third part, we will analyse the non-proliferation regime against these findings. Our final part will deal with the application of the regime in practice, before we conclude with some thoughts on how to restore and preserve the NPT’s authority.

## **B. Theoretical Approaches**

The regime against the proliferation of nuclear weapons is concerned with fundamental interests of the international community as a whole – namely international peace and security and the survival of States and individuals alike – while at the same time dealing with cardinal particularistic interests of major powers. Moreover, its core obligations are not clear-cut, easy-to-define legal obligations, but are rather indeterminate. It is thus necessarily prone to a critique that portrays it as an instrument of hegemonic power, dividing the world into nuclear ‘haves’ and ‘have-nots’, and thus violating the ‘sovereign equality’ of States enshrined in Article 2(1) of the UN Charter.

Yet although postmodernism has largely destroyed the myth of international law as necessarily servicing the common good, it has, until recently, failed to provide a positive concept of international law that would explain what distinguishes law from power. To fill this gap, *Martti Koskenniemi* has introduced the idea of a ‘culture of formalism’ to describe an international law not captive to hegemonic power.<sup>18</sup> Non-postmodernist authors have established concepts that share some familiarities with *Koskenniemi’s* culture of formalism. *Jürgen Habermas* has written about the ‘inclusion of the other’.<sup>19</sup> Earlier, *Thomas Franck* had introduced the concept of

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<sup>18</sup> Koskenniemi, *Gentle Civilizer*, *supra* note 12, at 500-509.

<sup>19</sup> Habermas, *Die Einbeziehung des Anderen*, *supra* note 11, at 58.

‘fairness’ into international law, understood as a combination of legitimacy and equitable justice as underlying conditions for the success of a legal regime.<sup>20</sup>

However, all these theories are mute if their application in practice does not lead to concrete results. Nevertheless, we suggest that compliance on its own has little to say about the legal character of a particular legal rule. Rather, it is necessary to put compliance into the context of the system of international law. Compliance is likely to stabilize a particular legal regime only if it is regarded as an expression of good-faith adherence to all parts of a particular bargain.

In the following, we do not try to combine the different approaches into a single ‘theory of everything’, explaining what law ‘is’. Rather, we intend to gain insights on how law functions in the ‘hard case’ of nuclear non-proliferation, where the core of State interests, namely survival, is at stake. To that end, we identify common denominators of the theories for a subsequent analysis of the non-proliferation regime.

### ***I. Postmodernist Critique and the Problem of Indeterminacy***

Postmodernist critique claims that the indeterminacy of rules precludes any definite and objective outcome of legal reasoning.<sup>21</sup> According to an ‘internal’ critique, international law oscillates between the utopian quest for a global community and an apology for the egoistical pursuit of narrowly conceived State interests. Consequently, the international legal system as a whole is regarded as inherently indeterminate.<sup>22</sup> Since an indeterminate system is unable to guide behaviour, the value of international law as a normative system turns out to be a myth.

‘External’ critique shows the ideological and political bias incorporated in the international legal system. In this vein, international law serves as a tool for the attainment of political ends. Indeterminacy enables the lawyer to disguise political purposes under the alleged objectivity of legal reasoning, a process termed ‘reification’.<sup>23</sup> Consequently, postmodernist critique ultimately denies the prescriptive character of law. If rules are meaningless, they cannot limit politics. Law yields to power. The conclusion seems to be that all legal reasoning is futile. The result of radical postmodernist criticism of international law is either nihilism or a collapse into politics. Yet

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<sup>20</sup> Franck, *Fairness*, *supra* note 7 at 7-9.

<sup>21</sup> For a more detailed summary of the different schools within the postmodernist school of thought, see Andreas L. Paulus, ‘International Law after Postmodernism: Towards Renewal or Decline of International Law?’ 14 *Leiden Journal of International Law* (2001), 727-755 and Joseph H.H. Weiler and Andreas Paulus, ‘The Structure of Change in International Law or is there a Hierarchy of Norms in International Law?’ 8 *European Journal of International Law* (1997), 545-565 at 551-552.

<sup>22</sup> Koskenniemi, *From Apology to Utopia*, *supra* note 10, at 62.

<sup>23</sup> Carty, ‘Critical International Law’, *supra* note 10, at 67.

postmodernist critique fails to see the relevance of context in addition to semantics for understanding the meaning of a particular norm.<sup>24</sup> Context as well as semantics provides us with the means to ascertain the legality of a particular behaviour: While there may be no definite black or white, there are nevertheless different shades of grey. Without need, radical postmodernist critique thus abandons law as a potent force for limiting power.<sup>25</sup>

Nevertheless, postmodernist critique has put any idea of a single ‘right answer’ of legal analysis into question. Postmodern approaches have drawn attention to the biases built into international law. They show that in order to avoid the pitfall of indeterminacy, any legal system has to be more than a mere account of conflicting interests or a string of formulaic compromises. It is thus appears useful to probe any legal regime as to its inclusiveness and its capability to strike a bargain between conflicting interests.

Several authors have sought to pursue a path in that sense. They have striven to establish new theoretical approaches towards international law, keeping in mind the postmodernist critique while at the same time identifying a role for law as opposed to politics.

## ***II. International Law as Inclusive Process***

Famously, in spite of the potential of law for political abuse, *Martti Koskenniemi* has coined the term of a ‘culture of formalism’ to ground international law in a ‘culture of resistance to power, a social practice of accountability, openness, and equality, whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.’<sup>26</sup> Such a culture ‘builds on formal arguments that are available to all under conditions of equality’ and has to take into account the interests of all the parties concerned, not only those of the powerful.<sup>27</sup> The crucial element of *Koskenniemi’s* culture of formalism is its inclusiveness – it strives to articulate what a particular regime ‘lacks’ to be universal. Only if these gaps are identified, international law may be applied as a system incorporating the interests of all concerned. Consequently, any debate has to subject all interests to critique, instead of posing different ideas, interests or ideologies in an exclusionary argumentative matrix of ‘us against them.’ The basis for a ‘culture of formalism’ is thus respect for diverging interests and their incorporation in a common

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<sup>24</sup> Kratochwil, ‘How Do Norms Matter?’, *supra* note 8, at 50-52.

<sup>25</sup> For a general critique of postmodernism see Jürgen Habermas, *Der philosophische Diskurs der Moderne* (Suhrkamp: Frankfurt am Main 1985) at 273-278; for a more detailed critique of postmodernism in international legal theory see Paulus, ‘International Law after Postmodernism’, *supra* note 21, at 734-735.

<sup>26</sup> Koskenniemi, *Gentle Civilizer*, *supra* note 12, at 500.

<sup>27</sup> *Id.* at 501-502.

framework, while rejecting any ‘permanent’ solutions that would result in a mechanical application of the existing law.

This approach puts *Koskenniemi* in proximity to *Jürgen Habermas*’ ethics of the ‘inclusion of the other’ as ‘a *nonlevelling* and *nonappropriating* inclusion of the other *in his otherness*.’<sup>28</sup> Only norms that can be met with acceptance by all concerned in practical discourse may claim validity.<sup>29</sup> Accordingly, *Habermas* suggests a ‘principle of universalization’ for (moral) norms: ‘A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion.’<sup>30</sup> Consequently, the ‘inclusion of the other’ does not only require respect for the other in his otherness, but also necessitates the inclusion of all relevant arguments in the discourse. Here again an ‘us against them’ is excluded, as any claim brought forward has to be open to critique.<sup>31</sup>

A similar inclusive principle is also favoured by *Thomas Franck*, who describes a principle of ‘no trumping’ as core element of his theory of fairness in international law. Accordingly, no group may claim to be in possession of some absolute truth trumping any argument of the other groups participating in a discourse about fairness – or otherwise the discourse is bound to fail.<sup>32</sup>

Yet, all these principles need to be translated into law for a community that is lacking a democratic process of decision-making and thus a framework that includes and defines the relevant stakeholders in the decision-making process. Fairness, the ‘culture of formalism’ and the ‘inclusion of the other’ need to be incorporated or embedded in a system lacking the

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<sup>28</sup> *Habermas, Die Einbeziehung des Anderen*, *supra* note 11, at 58, in German: ‘Der reziprok gleichmäßige Respekt für jeden, den der differenzempfindliche Universalismus verlangt, ist von der Art einer *nicht-nivellierenden* und *nicht beschlagnahmenden* Einbeziehung des Anderen *in seiner Andersheit*’ (emphasis in the original).

<sup>29</sup> *Id.* at 59, in German: ‘[N]ur die Normen dürfen Gültigkeit beanspruchen, die in praktischen Diskursen die Zustimmung aller Betroffenen finden könnten.’ He applies the same principle also to legal norms, see *Jürgen Habermas, Faktizität und Geltung* (5th edn, Suhrkamp: Frankfurt am Main 1997) at 138, for an English translation see *Jürgen Habermas, Between Facts and Norms* (translated by William Rehg, Polity Press: Cambridge 1996) at 107.

<sup>30</sup> *Habermas, Die Einbeziehung des Anderen*, *supra* note 11, at 60, in German: ‘Er [der Universalisierungsgrundsatz] besagt, daß eine Norm genau dann gültig ist, wenn die voraussichtlichen Folgen und Nebenwirkungen, die sich aus ihrer allgemeinen Befolgung für die Interessenlagen und Wertorientierungen *eines jeden* voraussichtlich ergeben, *von allen* Betroffenen *gemeinsam* zwanglos akzeptiert werden könnten’ (emphasis in the original).

<sup>31</sup> James Johnson, ‘Book Review: The Inclusion of the Other: Studies in Political Theory’, 94 *The American Political Science Review* (2000), 448-449 at 448 aptly summarizes *Habermas*’s concept: ‘Stated oversimply, communicative action necessarily trades on the force of validity claims that in principle can be criticized. It is this susceptibility to criticism that highlights the importance of norms of openness and reciprocity.’

<sup>32</sup> *Franck, Fairness*, *supra* note 7, at 16-18.

prerequisites for a democratic discourse in the domestic sense.<sup>33</sup> Rather, international law is based on the representation of human interests by effective holders of territorial power – a process whose democratic credentials are dubious at best. International law relies on essentially consensual law-making procedures in which no one represented can be bound against its explicit will. In such a situation, the best way to achieve a balanced result is to strive for material reciprocity of rights and obligations, which may translate informal agreement into formal law.<sup>34</sup>

In a formal sense, reciprocity only demands the mutual dependence of the acts of two (or more) different actors. Such formal reciprocity is a prerequisite for the conclusion of treaties. It is comparatively easy to identify. Yet, beyond that, material reciprocity demands the equivalence of the reciprocal obligations. It is difficult to determine, as it depends on the evaluation of the obligations involved, which is necessarily prone to subjectivity. To avoid these difficulties, positive international law has largely excluded the invocation of a lack of material reciprocity as ground for the termination of a treaty. Article 62 of the Vienna Convention on the Law of Treaties<sup>35</sup> permits the invocation of a fundamental change of circumstances as ground for termination of a treaty only under very limited circumstances – and thus only codifies a very restricted form of the *clausula rebus sic stantibus*. Moreover, ‘unequal treaties’ that were concluded by unequal parties from the outset (and did not become so by a fundamental change of circumstances) are not regarded as invalid by reason of this inequality alone.<sup>36</sup> However, the limits to such inequality continue to be a matter of debate – *jus cogens* has a particular function to fulfil in this regard.<sup>37</sup>

Yet the concepts of *Habermas*, *Koskenniemi* and *Franck* all suggest that material reciprocity has to be taken into account as basis for stable and authoritative law. In particular, *Franck* postulates that in addition to the formal aspect of ‘right process’ (or legitimacy) distributive justice

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<sup>33</sup> For an analysis of democracy in international law, see Gregory H. Fox and Brad R. Roth (eds), 'Democratic Governance and International Law' (Cambridge UP: Cambridge 2000); Samantha Besson, 'Institutionalizing Global Democracy' in: Lukas Meyer (ed), *Justice, Legitimacy and Public International Law* (Cambridge University Press: Cambridge forthcoming), and Andreas Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in: Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart: Oxford 2008), 193-213.

<sup>34</sup> On the distinction between formal and material reciprocity, see Simma, 'Reciprocity', *supra* note 16.

<sup>35</sup> Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331. On the customary nature of Article 62 VCLT and that it may only be applied in exceptional cases, see ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep 1997, 7-84, para. 46 and 104.

<sup>36</sup> Simma, 'Reciprocity', *supra* note 16; Anne Peters, 'Unequal Treaties' in: Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2008), online edition, at [www.mpepil.com](http://www.mpepil.com) (visited 20 January 2009).

<sup>37</sup> On *jus cogens*, see, with different emphasis as to the scope of the concept, Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press: Oxford 2006); Andreas L. Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation', 74 *Nordic Journal of International Law* (2005), 297-334. Cf. also Art. 52 VCLT.

constitutes part of law's fairness.<sup>38</sup> Accordingly, reciprocity is based on 'shared moral imperatives and values.'<sup>39</sup> This concept seems to disregard, however, that international law must also deal with situations in which such a value base is weak at best. The non-proliferation regime constitutes a conspicuous example.

In contrast, the 'inclusion of the other' at first glance seems to be a purely formal discursive concept. Yet this is a misleading impression: It is by no means blind to the material aspects of the accommodation of all interests. *Habermas* even goes so far as to postulate that a particular norm is only valid if its 'foreseeable consequences and side effects' could be jointly accepted by all those concerned.<sup>40</sup> This is to be understood against the background of the 'inclusion of the other *in his otherness*' and thus avoids dealing with conflicting moral concepts at this stage – this is left to the discursive process as such. However, *Habermas* speaks here of moral norms. Yet this insight pertains to legal norms as well.<sup>41</sup> The material content of law is its character as a means for striking a substantial bargain that goes beyond providing formulaic compromises, i.e. 'empty shells' without material legal content. Moreover, if law strikes a bargain between conflicting interests, its long term success as a legal system depends on its capability to actually include and reconcile the conflicting interests in practice. This inclusive capability may be understood as a core element of the authority of a legal rule – going beyond a formal concept of legitimacy as 'right process'.<sup>42</sup> The 'culture of formalism' likewise requires that the interests of all concerned have to be taken into account. *Koskenniemi* ranks both reciprocity and equality among the ideals of his 'culture of formalism'.<sup>43</sup>

In the absence of a democratic legislative process, the approaches of *Koskenniemi* and *Habermas* seem to be better tailored to international law than a reliance on substantial fairness based on common values. However, any formal conception is based on substantive premises such as the equality of the parties. Thus, the differences with a more substantive approach are more apparent than real.

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<sup>38</sup> Franck, *Fairness*, *supra* note 7, at 7-9. Other authors include distributive justice into their concept of legitimacy, see for example Christopher Daase, 'Der Anfang vom Ende des nuklearen Tabus', 10 *Zeitschrift für internationale Beziehungen* (2003), 7-41 at 9; Dencho Georgiev, 'To the Editor in Chief', 83 *American Journal of International Law* (1989), 551-556.

<sup>39</sup> Franck, *Fairness*, *supra* note 7, at 10-11.

<sup>40</sup> *Habermas*, *Die Einbeziehung des Anderen*, *supra* note 11, at 60.

<sup>41</sup> While distinguishing between law and morality, *Habermas* himself postulates that positive law refers to morality through the legitimacy components of legal validity, see *Habermas*, *Faktizität und Geltung*, *supra* note 29 at 137; English translation: *Habermas*, *Between Facts and Norms*, *supra* note 29, at 106.

<sup>42</sup> Franck, *Legitimacy*, *supra* note 7, at 24; but see Franck, *Fairness*, *supra* note 7, at 8 (supplementing formal legitimacy with distributive justice).

<sup>43</sup> *Koskenniemi*, *From Apology to Utopia*, *supra* note 10, at 616.

In spite of their different theoretical foundations and ambitions, the concepts surveyed above share some common ground: They stress that the interests involved in a particular dispute have to be taken into account in a fair and equitable manner. Moreover, the theories suggest that a lack of an 'inclusion of the other' will cause a legal system to lose its authoritative character and thus its claim to observance.

This is not to say that a fundamental bargain implemented through a reciprocal agreement is the only possible source of legal authority. On the contrary, the rapid development of international criminal law and human rights law shows that States may establish objective obligations through the acceptance of constraints upon their freedom to act without expecting direct trade-offs – the importance of a reciprocal bargain seems to be reduced in these fields. However, even in human rights law, reciprocity still has a role to play as an important means for implementing and enforcing obligations.<sup>44</sup> This is even more the case in the field of nuclear arms control law: Although it deals with the epitome of a community interest,<sup>45</sup> namely the survival of humanity, its regulatory mechanisms firmly rest on the elements of classic State-centred international law. In the absence of a legislative and executive organ, reciprocity as the most important mechanism for the implementation and enforcement of international law remains of crucial relevance. Therefore, a substantial reciprocal bargain seems to be the most enduring and sustainable building block of authoritative international arms control law in the field of nuclear weapons.

### ***III. Compliance with and the Authority of International Law***

So far, we have dealt with the normative authority of the law, not with actual compliance. However, the authority of a legal regime without a reasonable prospect of compliance is waning. It is a commonplace of legal theory that only a legal system that has a chance of being applied in reality can claim to be law – without such a possibility, it remains dead letter. Even *Hans Kelsen* incorporated efficacy (*Wirksamkeit*) as condition of the legal character of a system into his pure law theory,<sup>46</sup> although he distinguished sharply between validity (*Geltung*) and efficacy.

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<sup>44</sup> For a more detailed analysis, see Bruno Simma, 'From Bilateralism to Community Interest', 250-VI *Recueil des Cours* (1994), 217-384 at 194-219.

<sup>45</sup> On community interests in international law, see *Id.* at 233.

<sup>46</sup> Hans Kelsen, *Reine Rechtslehre* (Deuticke: Wien 1934) at 68-73. For an English translation see Hans Kelsen, *Introduction to the Problems of Legal Theory* (translated by Bonnie Litschweski Paulson and Stanley L. Paulson, Clarendon Press: Oxford 1992). But see also his later additions in the second edition, Hans Kelsen, *Reine Rechtslehre* (2nd edn, Deuticke: Wien 1960) at 215-221 and his newest approach in Hans Kelsen, *Allgemeine Theorie der Normen* (Manz: Wien 1979) at 112-113.

Realist international relations theory went considerably further, claiming that States will comply with rules only if it is in their interest to do so.<sup>47</sup> Realism negates the causal effect of law on action altogether.<sup>48</sup> Some legal writers have taken up this model. *Goldsmith* and *Posner* suggest that States act only in pursuance of their egoistic interests and that the compliance with international law as such is not relevant for political decisions.<sup>49</sup> In spite of their denial,<sup>50</sup> this puts them in close proximity to older realist theories.<sup>51</sup> Like their realist predecessors, they fail to see that even by realist accounts States may view compliance with international law as a reasonable default rule, or may regard their international or domestic reputation as dependent on their compliance with international law.

Yet the realist conclusions have been questioned on their own premises. Regime theory rediscovered the importance of norms (although not necessarily terming them 'international law').<sup>52</sup> Accordingly, regimes consist of a set of norms and principles combined with institutions creating and implementing them.<sup>53</sup> The institutional school argues that international regimes facilitate compliance and create the basis for enforcement through the institutional channelling of common interests.<sup>54</sup> Compliance with norms may be a reasonable default rule. Although institutionalists explain compliance based on State-centred rational choice models,<sup>55</sup> some concede an intrinsic value to rule-based regimes,<sup>56</sup> and thus, at least to some extent, to international law. Consequently, in their view, cases of non-compliance indicate that either no regime exists or that it is dysfunctional.

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<sup>47</sup> Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (5th edn, Knopf: New York 1977) at 285-299. On realist compliance theories see also Markus Burgstaller, *Theories of Compliance with International Law* (Nijhoff: Leiden 2004) at 96.

<sup>48</sup> On this aspect of realist theory see Anne-Marie Slaughter (Burley), 'International Law and International Relations Theory: A Dual Agenda', 87 *American Journal of International Law* (1993), 205-239 at 217.

<sup>49</sup> Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press: Oxford 2005) at 9; however, they primarily deal with customary international law.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> David M. Golove, 'Leaving Customary International Law Where It Is: Goldsmith and Posner's *The Limits of International Law*', 34 *Georgia Journal of International and Comparative Law* (2006), 333-377 at 339-340.

<sup>52</sup> Slaughter (Burley), 'International Law and International Relations Theory: A Dual Agenda', *supra* note 48, at 217-220; see also Kratochwil, 'How Do Norms Matter?', *supra* note 8.

<sup>53</sup> Stephen Krasner describes regimes 'as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.', Stephen Krasner (ed) 'International Regimes' (Princeton University Press: Ithaca, London 1983) at 2.

<sup>54</sup> Keohane, *After Hegemony*, *supra* note 15, at 244-245.

<sup>55</sup> Illustrative in this regard: *Id.* at 245.

<sup>56</sup> See for example Gary Goertz and Paul F. Diehl, who differentiate between different types of norms and state that 'decentralized norms have the potential to modify behavior driven by self-interested or realpolitik concerns.' See Gary Goertz and Paul F. Diehl, 'Toward a Theory of International Norms', 36 *Journal of Conflict Resolution* (1992), 634-664 at 641.

Nevertheless, compliance as such is no conclusive evidence of the legal character of a particular rule – it does not even show that a norm is of particular authoritative value. Firstly, compliance may simply be a result of the inability of a particular actor to violate a rule. For example, the fact that Barbados has never violated the NPT tells us little about the latter's authority, since Barbados is incapable of non-compliance because it lacks the resources and technology necessary to acquire nuclear weapons. Secondly, compliance may be motivated by reasons outside of a particular legal agreement. For example, a great number of NATO States may be motivated not to acquire nuclear weapons because they are protected by the 'nuclear umbrella' of the United States.

Even widespread non-compliance does not constitute conclusive evidence for a lack of authority of a legal system – otherwise many traffic rules would not be authoritative law at all. Some authors suggest that under specific circumstances norms may even be strengthened by acts of non-compliance, when the community reaction is strong enough.<sup>57</sup> Again the circumstances of particular cases are relevant: Do States justify their behaviour under the law or do they openly defy it?<sup>58</sup> How do other States react to cases of non-compliance – do they accept them without objection, do they protest only verbally or do they act upon them?<sup>59</sup> The answer to these questions tells us more about the authoritative capacity of a particular regime than non-compliance as such.

Thus, premature inferences from compliance or non-compliance on the authoritative value, let alone the legal character of a particular regime are not warranted. Rather, compliance has to be put into context. Partial compliance with a treaty may indicate a complete failure of the bargain rather than a partial success if parties implement a treaty selectively, disregarding the *quid pro quo* of the treaty bargain. Before analysing compliance, one thus has to understand a regime's normative content. We thus need a comprehensive and normative look at compliance.

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<sup>57</sup> See Christopher Daase, 'Spontaneous Institutions: Peacekeeping as an International Convention' in: Helga Haftendorn, et al. (eds), *Imperfect Unions: Security Institutions over Time and Space* (Oxford University Press: Oxford 1999), 223-258 at 245-246 and Daase, 'Der Anfang vom Ende des nuklearen Tabus', *supra* note 38, at 16.

<sup>58</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Rep 1986, 14 at 98, para. 186.

<sup>59</sup> Even a 'law without sanctions' is not necessarily an oxymoron. See: Michael Barkun, *Law Without Sanctions* (Yale University Press: New Haven 1968).

In case of the NPT, this necessitates a study of its fundamental bargain before one may evaluate the effects of compliance or non-compliance on the system's viability and its persuasiveness.<sup>60</sup>

In this light, we will revisit the theories of *Franck*, *Habermas* and *Koskenniemi*.

#### **IV. Conclusion**

A synopsis of the theories examined enables us to identify some common ground. Firstly, in order to avoid the collapse of a legal system, one has to avoid the pitfall of indeterminacy as identified by postmodernist authors. Accordingly, a legal system has to integrate the interests of the parties involved into a reciprocal web of mutual rights and obligations. The better the law is able to strike such a bargain, the higher its persuasive value – its authority – will be.

Secondly, reciprocity is a useful means to implement the 'inclusion of the other' in international law, if understood as incorporating both formal and material aspects. It facilitates a consensual insight into the necessity and usefulness of a particular legal regime. Reciprocity thus connects a societal consensus<sup>61</sup> with the legal sphere by enabling a bargain incorporating all interests involved in a fair and equitable manner. Therefore, the maintenance of a substantial bargain understood as both the inclusion and the reciprocal balancing of the interests of all concerned is necessary to preserve the persuasiveness of a legal system. Authoritative law in the field of international peace and security thus has to show a minimum degree of material reciprocity.

Nevertheless, absence of material reciprocity does not annul treaties *per se*. They remain law in the positive sense. Rather, the effect of an absence of material reciprocity is one of degree: While full material reciprocity may be an unattainable ideal, manifest disregard for the accommodation of the interests of others will not lead to a sustainable legal regime, but rather to a law without persuasive value that merely entrenches power relationships. In this case, international law's existence depends on these underlying power relationships without exerting any meaningful effect on them.

Thirdly, a legal system built and implemented according to these principles is likely to show a comparatively high rate of compliance. Regime theory rightly points out that regimes channel common and reciprocal interests and thus facilitate compliance. Yet it fails to see the normative

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<sup>60</sup> For a study of compliance with arms control law, see Richard L. Williamson jr, 'Hard Law, Soft Law and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses', 4 *Chicago Journal of International Law* (2003), 59-82, who concludes at 81: '[T]he data seem to provide support for the compliance hypothesis of theorists such as Hedley Bull and Anthony Arend, with their emphasis on the international community as a social order with shared expectations.'

<sup>61</sup> On the necessity of a societal consensus, see Simma, 'From Bilateralism to Community Interest', *supra* note 45, at 245; Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours* (1993), 195-374 at 221.

and systemic character of the commitments in question. Rules of international law are not isolated islands of common interests in a sea of anarchical struggles for power, but strive to represent elements of a more comprehensive ordering in which rights and obligations are in balance. If rules are designed and applied according to formal and substantive justice, they create a strong pull towards compliance.<sup>62</sup> Conversely, the application of double-standards within a particular legal regime undermines the capability to create such a compliance pull. The compliance pull is a direct result of the persuasive capacity of law. The ‘inclusion of the other’ thus also has to be achieved for the practical reason of facilitating compliance.

Finally, any analysis of a legal system has to take into account its implementation in reality. While compliance is not the ultimate yardstick for legality and legal authority, actual behaviour has repercussions on the cohesiveness of a particular bargain. Consequently, a sustainable legal regime should minimize indeterminacy, rest on a societal consensus incorporating the interests of all concerned, balance the interests according to both formal and material reciprocity in a substantial bargain, and avoid double-standards in its application.

### **C. The Nuclear Non-Proliferation Regime between Apology and Utopia**

The capability to incorporate the interests of all is of particular importance in relation to the NPT, since its success depends on a maximum degree of universality. The strain on the system increases with each defector, as the treaty loses its credibility as an instrument for the prevention of nuclear proliferation. Moreover, the unprecedented destructive capabilities of nuclear weapons and their symbolic political value leave no room for ignoring defectors and nuclear holdout States. In addition, a single holdout State may provide assistance for clandestine defectors – thus undermining the system from the outside.<sup>63</sup> If the NPT does not strike a bargain between all State parties, it will lose its persuasive authority and collapse in the long run.

#### ***I. The Pitfall of Indeterminacy***

Postmodernist critique may help to identify dangerous ‘fault lines’ in the design of the non-proliferation system by identifying indeterminacy and revealing the misuse of legal regimes through politicization and double-standards. Postmodernist critique may portray the regime against the proliferation of nuclear weapons as oscillating between the ‘utopian’ goal of achieving total nuclear disarmament and its ‘apologetic’ nature as a means to justify continuing possession of nuclear weapons by the nuclear weapon States. This is closely related to the dual

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<sup>62</sup> Franck, *Legitimacy*, *supra* note 7, at 49 (focusing on formal justice) and Franck, *Fairness*, *supra* note 7, at 8.

<sup>63</sup> This was prominently shown by the unveiling of the nuclear proliferation network of Abdul Qadeer Khan.

character of nuclear weapons. On the one hand, they are seen as inhumane, indiscriminate and thus abhorrent weapons of mass destruction that should be banned. On the other hand, they accredit international prestige and power: Only States that possess them are on par with the five permanent members of the Security Council, which are also the only 'legal' nuclear weapon States.<sup>64</sup> Accordingly, nuclear weapons are seen as political tools of deterrence and symbols of power and prestige. Nuclear non-proliferation law is thus prone to simply restate the diverging interests in a formulaic compromise. Such purposeful ambiguity then enables States to fend off claims of non-compliance easily.<sup>65</sup> Non-proliferation law would then only be a symbolic exercise without material content in order to appease critical public opinion.

The 2002 Moscow Treaty on Strategic Offensive Reductions (SORT)<sup>66</sup> constitutes a striking example for such an exercise. According to Article I of the treaty, Russia and the United States promised to reduce the number of strategic nuclear warheads to 1,700-2,200 each by 31 December 2012. This seems to constitute an impressive reduction in strategic nuclear weapons. However, closer inspection reveals the treaty's substantial emptiness.

Firstly, the treaty contains no substantial disarmament obligation. According to a statement by President Bush, which is explicitly incorporated in the treaty (Article I), the United States will reduce 'operationally deployed strategic nuclear warheads',<sup>67</sup> which the US interprets as not including warheads in storage or undergoing maintenance.<sup>68</sup> The number of existing warheads may thus remain considerably higher and these warheads may quickly be re-deployed.<sup>69</sup>

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<sup>64</sup> Thus it should be no surprise to postmodernist critique that the clash between these conflicting views led the ICJ to declare its apparent *non liquet* in its Nuclear Weapons Advisory Opinion: ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, at 266 (para. 105 E.). The Court held that, while 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict', it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.

<sup>65</sup> Antonio F. Perez, 'Delegalization of Arms Control – A Democracy Deficit in de facto Treaties of Peace?' 4 *Chicago Journal of International Law* (2003), 19-37 at 21-22.

<sup>66</sup> Treaty on Strategic Offensive Reductions, 24 May 2002, in force 1 June 2003, 41 *International Legal Materials* 799 (2002). For a thorough analysis of the SORT with further reference material, see: Patricia Hewitson, 'Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm', 21 *Berkeley Journal of International Law* (2003), 405-494 at 437-447.

<sup>67</sup> The statement is not annexed to the treaty, but was included in the documents submitted to Congress by the US President on 20 June 2002, available at <http://www.state.gov/t/ac/trt/18016.htm> (accessed 19 March 2008).

<sup>68</sup> 'Article-by-Article Analysis of the treaty on Strategic Offensive Reductions', submitted to Congress by the US President on 20 June 2002, available at <http://www.state.gov/t/ac/trt/18016.htm#4> (accessed 19 March 2008), Article I. This is at least the case for the US nuclear weapons. The Russian declaration does not contain a similar qualification, but the US statements suggest that Russia has the same flexibility. For example, the US administration explicitly stated that, '[...]Russia, like the United States, may reduce its strategic nuclear warheads by any method it chooses.' – see 'Article-by-Article Analysis', Article I.

<sup>69</sup> Likewise, the unilateral reduction in nuclear weapons announced by US President Bush in December 2007 is also easily reversible, since most of the weapons will only be put in storage instead of actual dismantlement. See Hans M. Kristensen, 'White House Announces (Secret) Nuclear Weapons Cuts', FAS Strategic Security Blog, 18

Moreover, according to Article I '[e]ach Party shall determine for itself the composition and structure of its strategic offensive arms, based on the established aggregate limit for the number of such warheads'. The obligations undertaken are thus extremely weak and vague; and as the treaty lacks any monitoring mechanism, compliance is not even verifiable.

Secondly, the Moscow treaty only stipulates a single day on which compliance is necessary, namely 31 December 2012. It does not specify any intermediate steps – thus both parties are free to deploy as many nuclear warheads as they wish within the higher limits set by START I<sup>70</sup> before the said date. Article IV (2) SORT stipulates that the treaty remains in force until 31 December 2012 only. Consequently, both Russia and the United States are free to re-deploy their stored nuclear weapons after this date. Moreover, the SORT withdrawal clause requires only three months notice; no reasons for withdrawal have to be given.

Thus the true character of the Moscow treaty emerges: It is a mere symbolic exercise designed to appease public criticism while at the same time maximising flexibility. 'Internal' postmodernist critique thus will aptly describe it as an inherently indeterminate system incapable of guiding behaviour. Moreover, 'external' postmodernist critique shows that it is an empty promise to the international community, clumsily camouflaged as a legally binding obligation,<sup>71</sup> 'an example of delegalization, given its lack of precision and transparency.'<sup>72</sup> Its persuasive value between its parties is thus negligible – it is merely a loose political commitment without specific legal 'bite'.

Although the Moscow Treaty is a mere non-binding political commitment in legal disguise, this is not necessarily the case of the non-proliferation regime in general. Nevertheless, the SORT illustrates the susceptibility of non-proliferation and disarmament agreements to indeterminacy. It demonstrates that any study of the NPT has to pay particular attention to the susceptibility of disarmament law for purposeful ambiguity that is merely intended as means to appease the public.

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December 2007 at [http://www.fas.org/blog/ssp/2007/12/white\\_house\\_announces\\_secret\\_n.php](http://www.fas.org/blog/ssp/2007/12/white_house_announces_secret_n.php) (visited 20 January 2009).

<sup>70</sup> Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, 31 July 1991, in force 5 December 1994, 28 *International Legal Materials* 1444 (1989).

<sup>71</sup> See also Mitsuru Kurosawa, 'How to Tackle Nuclear Disarmament', 10 *International Public Policy Studies* (2005), 1-16 at 8; Hewitson, 'Nonproliferation and Reduction of Nuclear Weapons', *supra* note 66, at 443-447; John R. Burroughs, 'Arms Control and National Security', 36 *International Lawyer* (2002), 471-505 at 500-501; who are all highly critical in their appraisal of the SORT.

<sup>72</sup> Perez, 'Delegalization of Arms Control', *supra* note 65. Sverre Lodgaard calls the SORT 'unilateralism in bilateral form': Sverre Lodgaard, 'Good News for Non-Proliferation? The Changing Relationship Between Russia, NATO and the NPT', *Disarmament Diplomacy* (2003), available at <http://www.acronym.org.uk/dd/dd69/69op02.htm> (accessed 20 May 2008).

## II. *The NPT as an Inclusive System – The Grand Bargain of the NPT*

### 1) *Discrimination through Non-Proliferation?*

Although numerous treaties,<sup>73</sup> Security Council resolutions<sup>74</sup> and soft law instruments<sup>75</sup> are part of the wider nuclear non-proliferation regime, the NPT forms its core. It has 189 States parties, i.e. all UN Member States (and the Holy See) with the exception of India, Israel, Pakistan and North Korea.<sup>76</sup> It shapes the global order in relation to the possession of nuclear weapons.

In comparison to the other multilateral non-proliferation and disarmament conventions against the proliferation of weapons of mass destruction, namely the Chemical Weapons Convention<sup>77</sup> and the Biological Weapons Convention,<sup>78</sup> the NPT stands out as the only treaty not universally prohibiting the development, production and stockpiling of the weapons it deals with. Instead, it only does so for States that have not conducted a nuclear explosion prior to January 1, 1967 – i.e. all States with the exception of the United States, Russia, the United Kingdom, France and China. Although Article II NPT explicitly prohibits only the acquisition of nuclear explosive devices by non-nuclear weapon States and does not refer to possession, the very term ‘non-nuclear weapon State’ used throughout the treaty shows the exclusiveness of the definition. Its purpose is to dissuade States that stay outside the NPT from developing nuclear weapons before joining.<sup>79</sup> At the same time, through the exclusive definition the NPT aspires to shape the whole

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<sup>73</sup> Among them are: The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, in force 10 October 1963, 480 *United Nations Treaty Series* 43 and the Treaty on the Limitation of Underground Nuclear Weapon Tests, 3 July 1974, in force 11 December 1990, 1714 *United Nations Treaty Series* 29637. In addition there are several treaties establishing nuclear weapon free zones: Treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, in force 22 April 1968, 634 *United Nations Treaty Series* 326; South Pacific Nuclear Free Zone Treaty, 6 August 1985, in force 11 December 1986, 1445 *United Nations Treaty Series* 177; African Nuclear Weapons Free Zone Treaty, 11 April 1996, 35 *International Legal Materials* 702 (1996), not yet in force (it has currently 26 ratifications, yet requires 28 to enter into force).

<sup>74</sup> This includes the ‘legislative’ Security Council Resolutions 1540 (28 April 2004), S/RES/1540 (2004) and 1673 (27 April 2006), S/RES/1673 (2006) dealing with the risk of proliferation of weapons of mass destruction to non-state actors. On the ‘legislative’ function of the Security Council see: Stefan Talmon, ‘The Security Council as World Legislature’, 99 *American Journal of International Law* (2005), 175-193.

<sup>75</sup> Among these soft law instruments are the Nuclear Suppliers Group, the Proliferation Security Initiative and the Zangger Committee.

<sup>76</sup> For the contentious case of North Korea, see Andreas L. Paulus and Jörn Müller, ‘Security Council Resolution 1718 on North Korea’s Nuclear Test’, in 10 (29) *ASIL Insights*, 3 November 2006 at <http://www.asil.org/insights061103.cfm> (visited 20 January 2009) and Krieger, ‘A Nuclear Test for Multilateralism’, *supra* note 5, at 26, 27.

<sup>77</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, in force 29 April 1997, 1974 *United Nations Treaty Series* 45.

<sup>78</sup> Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, in force 26 March 1975, 1015 *United Nations Treaty Series* 163.

international community. Beyond the number of States parties, it deems acquisition of nuclear weapons by any State other than the five nuclear weapon States as objectionable – an element originally also designed to stabilize the balance of power during the Cold War.

This distinction between nuclear weapon States and non-nuclear weapon States is reflected in the NPT's non-proliferation obligations in Article I and II. According to Article II NPT, the non-nuclear weapon States undertake 'not to receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.' In addition, the non-nuclear weapon States may 'not [...] manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices.' Article I NPT contains no such prohibition for the nuclear weapon States. However, they are obliged 'not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly'. The NPT thus stipulated different obligations for nuclear weapon States and non-nuclear weapon States.

Due to this discriminatory character, the NPT has been described as not based on strict reciprocity.<sup>80</sup> If this is indeed the case, its capacity to strike a fair and equitable bargain between all interests concerned would be seriously hampered. Yet there have been assertions to the contrary. Accordingly, all States equally benefit from the preservation of the status quo, since they are thereby assured that all non-nuclear weapon States parties to the treaty will not develop nuclear weapons. Thus the bargain of the NPT is seen as 'the exchange of non-acquisition and non-dissemination pledges between and among nuclear weapons states and non-weapons states alike, to the collective security benefit of all.'<sup>81</sup>

Yet this does not lead to a fully reciprocal bargain. Rather, the burden remains clearly one-sided: Non-nuclear weapon States have to relinquish the uniquely powerful tool of nuclear weaponry, while nuclear weapon States are only barred from disseminating nuclear weapons – something that would be contrary to their vital security interests anyway. While it is correct that all States

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<sup>79</sup> That is why the idea proposed by *David S. Jonas* that States possessing nuclear weapons may nevertheless join the NPT as non-nuclear weapon States without disarming is not only practically inconceivable, but also legally flawed – *David S. Jonas*, 'Variations on Non-Nuclear: May the "Final Four" join the Nuclear Non-Proliferation Treaty as Non-Nuclear Weapon States while retaining their Nuclear Weapons?' 2 *Michigan State Law Review* (2005), 417-459 at 441-450.

<sup>80</sup> *H. Krieger*, 'A Nuclear Test for Multilateralism', *supra* note 5, at 22-24. See also *Daase*, 'Der Anfang vom Ende des nuklearen Tabus', *supra* note 38, at 34.

<sup>81</sup> *Christopher A. Ford*, 'The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes', 39 *New York University Journal of International Law and Politics* (2007), 937-993 at 962.

benefit from nuclear non-proliferation, such an interpretation of the NPT's bargain does not suffice. Instead, the discriminatory part had to be outweighed by other elements of the treaty.<sup>82</sup>

## 2) *Nuclear Disarmament as Crucial Concession*

For these reasons, the non-nuclear weapon States pressed for concessions by the nuclear powers during the NPT negotiations in the Eighteen-Nation Committee on Disarmament (the body that negotiated the NPT).<sup>83</sup> Due to this pressure, both the United States and the Soviet Union included a provision on disarmament in their drafts, which later became Article VI of the NPT. Despite initial US resistance, the idea that this was a *quid pro quo* prevailed and was eventually also accepted by the United States.<sup>84</sup> The nuclear weapon States had to accept that freezing the status quo was not enough for the non-nuclear weapon States. Rather, the ultimate goal of nuclear disarmament had to be reflected in the final bargain.

Non-nuclear weapon States were only willing to accept the discriminatory non-proliferation pledge if the nuclear weapon States committed to the long-term objective of total (nuclear) disarmament. Through the inclusion of Article VI, all States agreed that the nuclear world order provided in the NPT is only a *temporary* status quo. The NPT is thus best described as resting on a layered form of reciprocity: While currently not strictly reciprocal in regard to the possession of nuclear weapons, its bargain includes the assurance on the temporary nature of this state. Eventually, total nuclear disarmament would lead to full material reciprocity. Therefore, despite its cautious wording, Article VI of the NPT is the core concession by the nuclear weapon States.

Nuclear disarmament has remained on the agenda of the non-nuclear weapon States ever since, as numerous UN General Assembly resolutions show.<sup>85</sup> After the end of the Cold War, many

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<sup>82</sup> Joseph Cirincione, *Bomb Scare: The History and Future of Nuclear Weapons* (Columbia University Press: New York 2007) at 30, 31.

<sup>83</sup> See, for example, the Swiss working paper issued circulated during the NPT negotiations that categorized the treaty as a 'lasting juridical discrimination between States according to whether they possess nuclear weapons or not.' Consent to this by non nuclear-weapon states would be 'a heavy sacrifice which is inconceivable unless something is given in return.': *Aide-memoire of the Government of Switzerland presented on 17 November 1967 to the Co-Chairmen of the Conference of the Eighteen-Nation Committee on Disarmament*, UN. Doc. ENDC/204 (24 November 1967), 3. The paper was approvingly quoted by the representative from India, cf. Conference of the Eighteen Nation Committee on Disarmament, Final Verbatim Record of the 351<sup>st</sup> meeting (28 November 1967), ENDC/PV.351, p.8. The verbatim records of the Eighteen-Nation Committee on Disarmament are available in full text at <http://quod.lib.umich.edu/e/encd/> (accessed 30 April 2008). For an introduction to the negotiation history of Article VI see David A. Koplow, 'Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?' *Wisconsin Law Review* (1993), 301-394 at 343-352.

<sup>84</sup> Koplow, *Id.*, at 336-337, in particular fn 152, quoting US President Johnson acknowledging the *quid pro quo* character.

<sup>85</sup> For recent examples see Nuclear disarmament, GA Res. 62/42, 8 January 2008, UN Doc. A/Res/62/42; Renewed determination towards the total elimination of nuclear weapons, GA Res. 62/37, 10 January 2008, UN Doc.

States saw a real chance to finally overcome the nuclear status quo and to achieve the NPT's ultimate goal of nuclear disarmament. This was reflected in Decision 2 of the 1995 NPT Review and Extension Conference, which contained principles and objectives towards the aim of nuclear disarmament.<sup>86</sup> The reaffirmation of the treaty's disarmament component was of particular importance for the assent of many non-nuclear weapon States to the indefinite prolongation of the treaty in 1995; this underlines its importance for the NPT's bargain.<sup>87</sup>

Yet nuclear disarmament is not only a concession to the non-nuclear weapon States for their temporary acceptance of a discriminatory nuclear world order. Rather, nuclear weapon States also have a strong incentive for nuclear disarmament. Firstly, limiting the nuclear arms race has the practical benefit of reducing costs for the maintenance and expansion of the existing arsenal. Secondly, a low level of nuclear weapons reduces the risk of accidents or inadvertent use. Thirdly, a mutual obligation to disarm increases the security of the nuclear weapon States by tying their disarmament efforts together. Therefore, both disarmament and non-proliferation are core ends of the NPT in their own right, which benefit all of its parties, since they serve the treaty's goal of preventing nuclear war – as reflected at the beginning of its preamble.<sup>88</sup>

This result is explicable against the background of a *de facto taboo* against the use of nuclear weapons that emerged during the Cold War.<sup>89</sup> States had to deal with the existence of nuclear weapons and with the logic of 'mutually assured destruction' that prevented immediate total

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A/Res/62/37; Comprehensive Nuclear-Test-Ban Treaty, GA Res. 61/104, 19 December 2006, UN Doc. A/RES/61/104.

<sup>86</sup> Decision 2 adopted on 11 May 1995 at the 17th plenary meeting of the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 11 May 1995, NPT/CONF.1995/32 (Part I), 9-12. The decision was adopted without a vote.

<sup>87</sup> David B. Thomson, *A Guide to Nuclear Arms Control Treaties* (Los Alamos Historical Society: Los Alamos 2001) at 42 and 49; Jonathan Granoff, 'The Nuclear Nonproliferation Treaty and its 2005 Review Conference: A Legal and Political Analysis', 39 *New York University Journal of International Law and Politics* (2007), 995-1006 at 998; David Krieger, 'Nuclear Disarmament' in: Charles Webel and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge: London 2007), 106-119 at 111; Hewitson, 'Nonproliferation and Reduction of Nuclear Weapons', *supra* note 66, at 485.

<sup>88</sup> See Mason Willrich, *Non-proliferation Treaty: Framework for Nuclear Arms Control* (The Michie Company: Charlottesville, Va. 1969), at 31-52 for a contemporary analysis of the rationale behind the policy decision to opt for a general prohibition on the proliferation of nuclear weapons as a means to prevent nuclear war.

<sup>89</sup> Nina Tannenwald, *The Nuclear Taboo* (Cambridge University Press: Cambridge 2007) shows this in relation to the United States. See also Nina Tannenwald, 'Stigmatizing the Bomb: Origins of the Nuclear Taboo', 29 *International Security* (2005), 5-49; Martti Koskenniemi, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *Leiden Journal of International Law* (1997), 137-162 at 152; Martti Koskenniemi, 'The Silence of Law / The Voice of Justice' in: Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press: Cambridge 1999), 488-510 at 497 and Rebecca Johnson, "'Do as I say, not as I do": From Nuclear Non-Proliferation to Counter-Proliferation' in: Waheguru Pal Singh Sidhu and Ramesh Chandra Thakur (eds), *Arms Control After Iraq: Normative and Operational Challenges* (United Nations University Press: Tokyo 2006), 57-79 at 74.

nuclear disarmament. This situation resulted in a paradox: On the one hand, since any first use of nuclear weapons was likely to lead to an all-out nuclear war, nuclear weapons were only legitimate if never used.<sup>90</sup> On the other hand, credible deterrence required to make the opponent believe that one was nevertheless prepared to use such weapons.<sup>91</sup> A way out of this paradox was a *de facto* prohibition on the first use of nuclear weapons. *Nina Tannenwald* shows how this *de facto* prohibition took root in the US administration during the 1960s and was strongly advocated by the non-nuclear weapon States during the NPT negotiations.<sup>92</sup> It was observed by all nuclear weapon States during the conflicts after the Second World War.

Yet the *taboo* goes beyond rational argument based on the logic of deterrence. *Koskenniemi* maintains that it is not based on rational reasoning, but rather on ‘the irrational image of the Apocalypse’.<sup>93</sup> *Nina Tannenwald* identifies its ‘intersubjective’ aspect: ‘it is a taboo because people believe it to be.’<sup>94</sup> It goes beyond a mere policy of no first use. Essentially, it puts nuclear weapons in a class of their own – as abhorrent weapons of mass destruction that should never be used.<sup>95</sup>

Whether or not international law should rise above this pre-legal sphere is the subject of an ongoing debate.<sup>96</sup> Yet short of a total prohibition, international law built upon the *taboo*: ‘[L]egal use has been gradually chipped away through incremental restrictions – an array of treaties and regimes that together circumscribe the realm of legitimate nuclear use and restrict freedom of action with respect to nuclear weapons.’<sup>97</sup> Likewise, *Ramesh Thakur* notes that ‘[n]orms, not deterrence, have anathemized the use of nuclear weapons as unacceptable, immoral and possibly illegal in any circumstance’.<sup>98</sup> The NPT contributes to this *taboo* by establishing a legal regime that singles out nuclear weapons. Although it does not prohibit them altogether for the time

<sup>90</sup> Johnson, ‘Do as I say, not as I do’, *supra* note 89, at 61.

<sup>91</sup> Tannenwald, *The Nuclear Taboo*, *supra* note 89, at 370. For a good illustration of this policy see Robert S. McNamara, *The Essence of Security* (Harper and Row: New York 1968), at 52–53.

<sup>92</sup> Tannenwald, *The Nuclear Taboo*, *supra* note 89, at 155–189 and 241–249.

<sup>93</sup> Koskenniemi, ‘Faith, Identity and the Killing of the Innocent’, *supra* note 89, at 153.

<sup>94</sup> Tannenwald, ‘Stigmatizing the Bomb: Origins of the Nuclear Taboo’, *supra* note 89, at 9. She has shown the normative elements of the *taboo*: Tannenwald, *The Nuclear Taboo*, *supra* note 89, at 286–293, 302 and 370–374.

<sup>95</sup> For an even broader concept of the *taboo*, see Daase, ‘Der Anfang vom Ende des nuklearen Tabus’, *supra* note 38, at 16–22.

<sup>96</sup> See ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, and its reception, in particular the different approaches advocated by David Kennedy, ‘The Nuclear Weapons Case’ in: Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press: Cambridge 1999), 462–472 at 467–469 and Koskenniemi, ‘The Silence of Law / The Voice of Justice’, *supra* note 89.

<sup>97</sup> Tannenwald, ‘Stigmatizing the Bomb: Origins of the Nuclear Taboo’, *supra* note 89, at 11.

<sup>98</sup> Thakur, ‘Managing the Nuclear Threat’, *supra* note 5, at 3.

being, it builds upon the *taboo*, as it intends to minimize the risk of nuclear war by limiting the spread of nuclear weapons, providing for their ultimate complete destruction. Non-proliferation and disarmament are thus mutually reinforcing elements of a bargain that is designed to make nuclear war less likely.

Consequently, both nuclear weapon States and non-nuclear weapon States supported the final documents of the 1995 and 2000 NPT Review Conferences, which both included an urgent plea for increased steps towards nuclear disarmament.<sup>99</sup>

### 3) *Other Concessions: Peaceful Cooperation and Security Guarantees*

Yet before total nuclear disarmament could be achieved, the detrimental effects of the temporary discrimination had to be outweighed by immediate concessions. During the NPT negotiations, many non-nuclear weapon States were concerned that the nuclear weapon States would deny them the right to peaceful nuclear development and would keep advanced nuclear technology secret in order to minimize any proliferation risk and to keep a technological advance.<sup>100</sup> To alleviate these concerns, Article IV NPT was included, spelling out the ‘inalienable right’ to ‘research, production and use of nuclear energy for peaceful purposes’ within the limits of Article I and II NPT. The States parties furthermore committed to facilitate in exchange of equipment, materials and information for peaceful uses.

Although the utopia of unlimited nuclear energy has not come true, the third pillar remains of relevance to many countries wishing to gain access to an independent energy supply. Especially developing countries that lack the technology necessary to build their own nuclear industry accord great importance to peaceful nuclear cooperation, in particular through the IAEA. They therefore insist on active contributions by States with advanced nuclear technology. This is reflected in both Decision 2 of the 1995 NPT Review and Extension Conference and the final document of the 2000 NPT Review Conference, which both stress the importance of peaceful cooperation.<sup>101</sup> The latter also included specific reference to the needs of developing countries. Thus Article IV NPT is an important part of the NPT’s bargain designed to mitigate the economic effects of the nuclear non-proliferation obligation on non-nuclear weapon States.

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<sup>99</sup> Decision 2 of the 1995 NPT Review and Extension Conference, *supra* note 86 and Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 19 May 2000, NPT/CONF.2000/28 (Parts I and II) at 14-15.

<sup>100</sup> See, for example, the statement by the representative of India to the ENDC, Final Verbatim Record of the 298<sup>th</sup> Meeting, May 23, 1967, UN Doc. ENDC/PV.298 at 4-17. For a contemporary introduction to the negotiations in that respect see Willrich, *Non-proliferation Treaty*, *supra* note 88, at 127-150.

<sup>101</sup> Decision 2 of the 1995 NPT Review and Extension Conference, *supra* note 86; Final Document of the 2000 Review Conference, *supra* note 99, at 8, 9.

However, non-nuclear weapon States also feared detrimental security effects through the NPT, since without nuclear weapons they found themselves unable to credibly deter a nuclear attack. They thus pressed for security guarantees to be included in the treaty.<sup>102</sup> Such guarantees may take the form of positive assurances to assist non-nuclear weapon States party to the NPT in case of a nuclear attack. Yet of particular interest were ‘negative guarantees’ by the nuclear weapon States not to attack non-nuclear States parties with nuclear weapons. The nuclear weapon States were reluctant to give such negative guarantees. The Soviet Union was prepared to give them only to States that had no nuclear weapons on their territory.<sup>103</sup> This proved to be unacceptable to the NATO States, since it excluded those among them that had US nuclear weapons on their soil – in particular West Germany.<sup>104</sup>

The United States, the United Kingdom and the Soviet Union then pursued a path through the Security Council, which eventually adopted Resolution 255, welcoming unilateral positive security guarantees and recognizing that the aggression or the threat of aggression with nuclear weapons would constitute a situation in which the Security Council and in particular its permanent members would have to act.<sup>105</sup> It was closely connected to the conclusion of the NPT and was intended to be an additional incentive for non-nuclear weapon States to join the treaty.<sup>106</sup> Yet its language was weak and negative guarantees against nuclear attack were at best only implied.<sup>107</sup> However, several nuclear weapon States issued negative security assurances in

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<sup>102</sup> See e.g. Aide-memoire of the Government of Switzerland presented on 17 November 1967 to the Co-Chairmen of the Conference of the Eighteen-Nation Committee on Disarmament, UN Doc. ENDC/204 (24 November 1967), at 3. For a short synopsis, see Tannenwald, *The Nuclear Taboo*, *supra* note 89, at 247-249. See also Thomson, *A Guide to Nuclear Arms Control Treaties*, *supra* note 87 at 86.

<sup>103</sup> Message dated 1 February from the Chairman of the Council of Ministers of the USSR to the Conference of the Eighteen-Nation Committee on Disarmament, UN Doc. ENDC/167 (3 February 1966).

<sup>104</sup> Consequently, the Federal Republic of Germany accredited great importance to the fact that any guarantees given applied also to itself, see the declaration of the Federal Republic of Germany made at ratification of the NPT, 729 *United Nations Treaty Series* 267-281 at 273 and 278.

<sup>105</sup> Question relating to Measures to Safeguard Non-nuclear-weapon States Parties to the Treaty on the Non-proliferation of Nuclear Weapons, SC Res. 255, 18 June 1968, UN Doc. S/RES/255. The resolution was adopted with ten votes in favour and five abstentions (Algeria, Brazil, France, India and Pakistan). India’s permanent representative sharply criticized the connection made between security assurances and a – at that time future – Non-Proliferation Treaty, see: Record of the 1433<sup>rd</sup> Meeting of the Security Council, UN Doc. S/PV.1433, para 107.

<sup>106</sup> For example, in his statement before the ENDC the US representative explicitly linked the resolution to the desire of the non-nuclear weapon States for ‘appropriate measures to safeguard their security in conjunction with their adherence to the treaty on the non-proliferation of nuclear weapons’, Final Verbatim Record of the Conference of the Eighteen-Nation Committee on Disarmament (Meeting 375), ENDC/PV.375 (7 March 1968).

<sup>107</sup> Mohamed I. Shaker, ‘The Evolving International Regime of Nuclear Non-Proliferation’, 321 *Recueil des Cours* (2006), 9-202, at 108.

the form of unilateral declarations – although they qualified most of these declarations to some extent.<sup>108</sup>

In 1995, during the negotiations for the NPT extension, non-nuclear weapon States again sought some form of security assurances by the nuclear weapon States. This resulted in Security Council Resolution 984, which explicitly called the concern for further appropriate measures to safeguard the security of the non-nuclear-weapon States ‘legitimate’.<sup>109</sup> Moreover, the resolution welcomed the negative security assurances contained in unilateral statements by each of the five permanent members of the Security Council.<sup>110</sup> The close connection to the indefinite extension of the NPT underlines the importance of security guarantees for the NPT’s overall bargain.<sup>111</sup> The exact legal status of the declarations made in 1995 is open to some debate. The nuclear weapon States themselves regarded their declarations as non-binding – and indeed many delegates in the Security Council debate criticized the nuclear weapon States precisely because of the (alleged) non-binding nature of the unilateral guarantees.<sup>112</sup> However, their close connection to the indefinite extension of the NPT and their formal recognition by the Security Council elevates them beyond simple unilateral declarations. Some scholars went so far as to conclude that these declarations are legally binding – either as unilateral declarations under the rationale of the International Court of Justice in its *Nuclear Tests Case*<sup>113</sup> or as customary international law.<sup>114</sup> In its 1995 Nuclear Weapons Advisory Opinion, the International Court of Justice stated that by these declarations, the nuclear weapon States have “undertaken not to use nuclear weapons [...] against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons)”, without making a clear linguistic distinction between these unilateral assurances and those contained in additional protocols in treaties establishing local nuclear weapon free zones.<sup>115</sup> While not clearly ruling on the legal

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<sup>108</sup> For a survey of these declarations see John Simpson, *et al.* (eds), 'MCIS CNS NPT Briefing Book (2008 Edition)' (The Mountbatten Centre for International Studies: 2008), section L.

<sup>109</sup> SC Res. 984, 11 April 1995, UN Doc. S/Res/984, at 1. The resolution was adopted unanimously without abstentions.

<sup>110</sup> They were contained in separate letters to the UN Secretary General and may be found in UN Doc. S/1995/261 through 265.

<sup>111</sup> In the Security Council’s debate on the resolution, several speakers referred to the pending extension of the NPT. See the Record of the 3514<sup>th</sup> Meeting of the Security Council, 11 April 1995, UN Doc. S/PV.3514.

<sup>112</sup> See, for example, the statement by the delegate from Indonesia, *ibid.* at 17 and that by the delegate from Nigeria, *ibid.* at 20.

<sup>113</sup> ICJ, *Nuclear Tests (New Zealand v. France)*, ICJ Rep 1974, 457 at 472-473 (para. 45-49).

<sup>114</sup> George Bunn, 'The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States', 4 *Nonproliferation Review* (1997), 1-17.

<sup>115</sup> ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, at 253 (para. 62).

status of the unilateral security guarantees, the language of the International Court of Justice suggests that it may consider them to be binding in spite of the assertions to the contrary by the nuclear weapon States.

However, this analysis shows that the discussion about security assurances in the 1960s cannot simply be denounced as Cold War power play. On the contrary, although they do not partake in the legal character of the NPT as such, the assurances are important positive incentives for adhering to the treaty.<sup>116</sup> As the discussion about their renewal in 1995 shows, they continue to address threats perceived by a great number of non-nuclear weapon States.

A successful 'inclusion of the other' by the NPT thus also depends on how the States parties honour this external support to the treaty.<sup>117</sup> Yet since negative guarantees so far constitute only heavily qualified unilateral declarations, they lack the authority and persuasive value of a reciprocal legal regime. Therefore, unqualified commitments by the nuclear weapon States of a clearly legally binding character would enhance the overall authority of the NPT by elevating the assurances to an integral part of the NPT's comprehensive bargain.

#### 4) *The NPT's Bargain at a Glance*

An analysis of the NPT's web of rights and obligations thus shows that it is structured so as to achieve an inclusion of all interests concerned – albeit in a highly fragile legal system based on a complex bargain characterized by a layered form of material reciprocity. While its central non-proliferation element is clearly discriminatory, the treaty as a whole is intended to mitigate the effects of that inequality and to finally overcome nuclear weaponry. It is thus committed to the aim of material reciprocity: The elements of its bargain are mutually reinforcing and rest upon a societal consensus on the *taboo* on the use of nuclear weapons. The NPT is thus capable of achieving the 'inclusion of the other'. Yet its persuasive value – its authority – will only be preserved if this bargain is honoured in practice.

The analysis thus shows that a large part of the international community does not regard the NPT as a pure horizontal non-proliferation agreement but rather accredits great importance to all of the regime's pillars. An 'inclusion of the other' has to take into account these concerns. Attempts

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<sup>116</sup> Thilo Marauhn, 'Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law' in: Geir Ulfstein (ed), *Making Treaties Work - Human Rights, Environment and Arms Control* (Cambridge University Press: Cambridge 2007), 243-272. The ICJ also puts them in close connection to the NPT: ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, at 249-253 (para. 59-63).

<sup>117</sup> See also Williamson jr, 'Hard Law, Soft Law and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses', *supra* note 60, at 80.

to re-interpret the treaty as a pure horizontal non-proliferation convention undermine its fundamental bargain and threaten its authority.

## **D. The Pillars of the Non-Proliferation Regime in Practice**

### ***I. Non-Proliferation***

#### *1) Overview*

Especially Western States have repeatedly stressed the importance of non-proliferation, i.e. measures to prevent the spread of nuclear weapons to additional States.<sup>118</sup> Upon first glance, the NPT seems to have achieved this aim to a large extent. The fear of US President Kennedy, who in 1963 stated that in the 1970s the US might have to deal with up to 25 States armed with nuclear weapons,<sup>119</sup> did not materialize. Although a number of non-nuclear weapon States have pursued nuclear weapon programs, only five of these States (India, Pakistan, Israel, South Africa and North Korea)<sup>120</sup> have actually manufactured nuclear weapons. Of these, only North Korea conducted at least part of its program while a party to the NPT. For other States parties, attempts at clandestine defection proved to be expensive and time-consuming, not the least due to the safeguards system of Article III NPT.<sup>121</sup> India, Pakistan and Israel (which never officially admitted to possess nuclear weapons)<sup>122</sup> pursued their programs outside the NPT. South Africa dismantled its nuclear arsenal and joined the NPT as a non-nuclear weapon State in 1996.<sup>123</sup>

Yet there have been attempts to acquire nuclear weapons secretly while being a party to the NPT – and in case of North Korea the NPT ultimately failed. Two other attempts are largely uncontested, namely those of Libya (up to 2003) and Iraq (prior to the 1991 Gulf War) –

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<sup>118</sup> See, for example, the National Security Strategy of the United States of America, March 2006, <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> (accessed 20 October 2008), Chapter V, 18-24 and the EU Strategy Against Proliferation of Weapons of Mass Destruction, adopted 12 December 2003 by the European Council, EU Doc.-No. 15708/03, <http://www.consilium.europa.eu/uedocs/cmsUpload/st15708.en03.pdf> (accessed 20 October 2008).

<sup>119</sup> President John F. Kennedy, News Conference Number 52 (21 March 1963), John F. Kennedy Library and Museum, Washington DC, available at [http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Press+Conferences/003POFO5Pressconference52\\_03211963.htm](http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Press+Conferences/003POFO5Pressconference52_03211963.htm) (visited 20 October 2008).

<sup>120</sup> For detailed information on the nuclear capabilities and the history of the nuclear weapon programs of the States mentioned, see Joseph Cirincione, *et al.*, *Deadly Arsenals: Nuclear, Biological, and Chemical Threats* (2nd edn, Carnegie Endowment for International Peace: Washington, D.C. 2005).

<sup>121</sup> Williamson jr, 'Hard Law, Soft Law and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses', *supra* note 60, at 75.

<sup>122</sup> However, Prime Minister Ehud Olmert listed Israel among States that possess nuclear weapons in an interview in December 2006, see, 'Calls for Olmert to Resign After Nuclear Gaffe' *The Guardian*, 13 December 2006, 15.

<sup>123</sup> Cirincione, *et al.*, *Deadly Arsenals*, *supra* note 120, at 407-418.

although both States finally abandoned their programs.<sup>124</sup> In the case of Iran, the IAEA concluded that the country had violated its safeguards agreement.<sup>125</sup> Occasionally, other countries have been accused of violating the NPT or their respective safeguards agreements, although there has been little hard proof. For example, the US recently accused Syria of attempting to develop a nuclear weapons' capability with North Korean aid.<sup>126</sup>

Upon a first glance the record of compliance thus seems to be somewhat mixed. Yet as has been said above, the concrete circumstances of compliance or non-compliance have to be taken into account. Instructive in this regard is the nuclear dispute with Iran,<sup>127</sup> which shows the problems the regime faces when dealing with a possible defector.

## 2) *The Case of Iran and the Role of the Safeguards Agreements*

To understand fully the legal implications of the nuclear dispute with Iran a closer look at the NPT safeguards system is warranted, including some more technical aspects of NPT law.

Under Article II of the NPT, Iran is not allowed to 'manufacture' nuclear weapons. However, the content of this obligation is not as clear as it may seem. While assembling a nuclear weapon is unquestionably illegal, it is less clear which preparatory steps amount to 'manufacture'. Yet this is of crucial importance, since assembling a crude nuclear weapon is comparatively easy, once the resources have been secured and the technologies mastered.<sup>128</sup> Simply outlawing all preparatory steps is not an option, since many of these are also useful or necessary in a civilian nuclear program. The most important example of such a 'dual use' activity is that of uranium enrichment. Its mastering is both a huge step towards the development of nuclear weapons and at the same time necessary for the production of fuel for nuclear reactors and thus for a fully independent nuclear fuel cycle.

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<sup>124</sup> For a comprehensive summary of all these programs see: Id.

<sup>125</sup> Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Report by the Director General, 15 November 2004, IAEA Doc. GOV/2004/83 at 23.

<sup>126</sup> Robin Wright, 'U.S. Details Reactor in Syria' *The Washington Post*, April 25 2008, A12.

<sup>127</sup> For analyses of the Iran situation, see Michael Spies, 'Iran and the Limits of the Nuclear Non-Proliferation Regime', 22 *American University International Law Review* (2007), 401-443 and in particular Tanya Ogilvie-White, 'International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance', 18 *European Journal of International Law* (2007), 453-476.

<sup>128</sup> The so-called 'gun-type design' of the Hiroshima bomb was considered so reliable that it was not tested before being used. For this reason, South Africa chose this design in its nuclear weapons program. A comprehensible introduction about nuclear weapon designs and the technology and resources necessary to manufacture them is given by Cirincione, *et al.*, *Deadly Arsenals*, *supra* note 120, at 45-54. See also the historic description given by Cirincione, *Bomb Scare*, *supra* note 82 at 1-13 and the insight into the South African nuclear weapons program given by Thomas Graham jr., *Common Sense on Weapons of Mass Destruction* (Seattle 2004) at 16-17.

Due to this problem of dual-use activity, Article II NPT was re-drafted several times during the negotiations.<sup>129</sup> Nevertheless, the wording finally adopted provides little guidance on what actually amounts to 'manufacture'. Instead, the problem of dual-use was left for the safeguards system of Article III: All non-nuclear weapon States have to conclude safeguards agreements with the IAEA that cover all 'source or special fissionable material' in peaceful activities.<sup>130</sup> These agreements require States to declare such material and are intended to prevent diversion of these substances to non-peaceful purposes.<sup>131</sup> Moreover, numerous States have concluded an additional protocol<sup>132</sup> with the IAEA, which allows for extended inspections with the aim to determine if a State has indeed declared all nuclear material as required.<sup>133</sup> This necessitates extensive investigation; it usually takes several years of inspections until such a declaration may finally be made.<sup>134</sup> However, there is no obligation to conclude an additional protocol under the NPT.<sup>135</sup> Nevertheless, as of 25 April 2008, additional protocols are in force for 87 States.<sup>136</sup>

Consequently, safeguarded activities that have a manifest use in a peaceful nuclear program cannot be considered to amount to 'manufacture' in the sense of Article II. The definition of what amounts to manufacture is thus not found in Article II, but is rather determined through the

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<sup>129</sup> Willrich, *Non-proliferation Treaty*, supra note 88, at 91, 92.

<sup>130</sup> For an overview and assessment of the IAEA safeguards system see Laura Rockwood, 'The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and IAEA Safeguards Agreements' in: Geir Ulfstein (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press: Cambridge 2007), 301-323.

<sup>131</sup> These Safeguard Agreements are based on a document approved by the IAEA Board of Governors called The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 1972, IAEA Doc. INFCIRC/153 (Corr.). As of 25 April 2008, 30 non-nuclear weapon States parties to the NPT have not yet brought into force such an agreement. However, all of these States (with the notable exceptions of Saudi Arabia and Qatar) are developing countries that do not seem to possess sufficient resources for a nuclear weapons program. See IAEA, *NPT Comprehensive Safeguards Agreement – Overview of Status*, at [http://www.iaea.org/Publications/Factsheets/English/nptstatus\\_overview.html](http://www.iaea.org/Publications/Factsheets/English/nptstatus_overview.html) (accessed 12 May 2008).

<sup>132</sup> Model Protocol Additional to the Agreement(s) Between State(s) and the Agency for the Application of Safeguards, 1997, IAEA Doc. INFCIRC/540 (Corr.) for an analysis of the practical challenges faced by the IAEA in implementing this new safeguards system, see Jill N. Cooley, 'International Atomic Energy Safeguards under the Treaty on the Non-Proliferation of Nuclear Weapons: Challenges in Implementation' in: Rudolf Avenhaus, et al. (eds), *Verifying Treaty Compliance: Limiting Weapons of Mass Destruction and Monitoring Kyoto Protocol Provisions* (Springer: Berlin 2006), 61-76.

<sup>133</sup> Cooley, 'IAEA Safeguards', supra note 132, at 62.

<sup>134</sup> Spies, 'Iran and the Limits of the Nuclear Non-Proliferation Regime', supra note 127, at 429. In its Safeguards Statement for 2006, the IAEA made such a declaration for 32 states, while the examination continues in 43 states (including Germany) that have accepted the Additional Protocol to the Safeguards Agreement, see IAEA Safeguards Statement for 2006, available at <http://www.iaea.org/OurWork/SV/Safeguards/es2006.pdf> (accessed 20 May 2008).

<sup>135</sup> The Final Document of the 2000 Review Conference, supra note 99, at 7 (para. 45) stresses the importance of the additional protocol, but only goes so far as to 'encourage' the conclusion of additional protocols.

<sup>136</sup> An updated overview is available at [http://www.iaea.org/OurWork/SV/Safeguards/sg\\_protocol.html](http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html) (accessed 12 May 2008)

operation of the safeguards system. The safeguards agreements serve as technical tools ascribing concrete meaning to the obligation contained in Article II NPT.

However, the safeguards are dependent on their implementation by the IAEA. Under the individual safeguards agreements, the IAEA is entitled to conduct inspections and its Board of Governors has the right to make binding decisions on questions of compliance.<sup>137</sup> The safeguards agreements refer to Article XII.C of the IAEA Statute,<sup>138</sup> according to which the Board of Governors may sanction non-compliance (e.g. through the curtailment or suspension of assistance given or through the suspension of membership rights). Yet it may not rule on compliance with the NPT as such. Instead, according to Article XII.C of the IAEA Statute, the IAEA Board of Governors has to report any case of non-compliance with the safeguards agreements to the IAEA member States, the UN General Assembly and the Security Council. Since the latter's competences under the Charter as a political decision-making body cannot be affected by Article XII.C of the IAEA Statute, the Security Council may take an independent decision. Consequently, it may take into account additional evidence and the circumstances of a particular case of non-compliance. This includes the previous conduct of a State.

The Security Council thus assumes a central role. Yet its task is not only tainted by the well-known concerns as to its composition and legitimacy, but also by the fact that its five permanent members are identical to the NPT's nuclear weapon States. Their 'double role' thus renders Security Council action susceptible to criticism, especially if the nuclear weapon States are seen as not faithfully adhering to their part of the NPT's bargain.

The nuclear dispute with Iran demonstrates the difficulties that are connected to this system. The IAEA Director General concluded that Iran's concealment of certain nuclear activities for a prolonged period amounted to 'many breaches' of its comprehensive safeguards agreement.<sup>139</sup> Due to the crucial role of the safeguards agreement in distinguishing between peaceful and non-peaceful activities, its violation is a serious indication for an attempt to manufacture nuclear weapons. Consequently, at least a partial shift of the burden of proof has occurred – Iran now has to rebuilt confidence in the peacefulness of its nuclear activities before it can expect to be treated in the same way as States with a clean slate in relation to their nuclear activities. This assessment was shared by the IAEA Board of Governors that, when it found Iran to be in non-compliance

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<sup>137</sup> See IAEA Doc. INFCIRC/153 (Corr.), *supra* note 131, at para 18.

<sup>138</sup> Statute of the International Atomic Energy Agency, 23 October 1956, in force 29 July 1957, 276 *United Nations Treaty Series* 3.

<sup>139</sup> IAEA Doc. GOV/2004/83, *supra* note 125, at 23.

with its safeguards agreement, deemed it necessary for Iran to take certain confidence-building measures and reported the case to the Security Council.<sup>140</sup>

Since Iran refused to fully cooperate, the Security Council then inter alia requested it to suspend its enrichment activities and imposed sanctions, acting under Article 41 of the UN Charter.<sup>141</sup>

Although Iran has made progress towards clarifying some aspects of its program,<sup>142</sup> it refuses to comply with these resolutions. Moreover, since February 2006 Iran no longer implements its Additional Protocol to its Safeguards Agreement, which it had previously applied voluntarily without ratification. It was requested to continue to do so by the IAEA Board of Governors,<sup>143</sup> a decision three times affirmed by the Security Council acting under Chapter VII of the UN Charter.<sup>144</sup> By not complying, Iran does not only defy both the Security Council and the IAEA, but also cancelled the arguably most important confidence-building measure it has at its disposal.

Nevertheless, Western States had to struggle considerably to rally support for actions by both the IAEA Board of Governors and the Security Council. In this line, *Tanya Ogilvie-White* concludes that the surprise break-up of previous solidarity among the non-aligned States with its member Iran in 2005-2006 points at an emerging, albeit highly fragile consensus towards decisive action in cases of non-compliance with the NPT's non-proliferation goal.<sup>145</sup> Yet the consensus depends on widespread support. Not only are the votes of additional non-Western States needed in the IAEA Board of Governors, they also have to maintain tight export controls and apply diplomatic pressure on Iran. Yet support for such decisive steps does not come out of nowhere – States have to be convinced of both the necessity and the prudence of action taken in relation to a possible

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<sup>140</sup> Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution of the IAEA Board of Governors, 24 September 2005, IAEA Doc. GOV/2005/77 at 2; Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution of the IAEA Board of Governors, 4 February 2006, IAEA Doc. GOV/2006/14 at 2.

<sup>141</sup> SC Res. 1737, 23 December 2006, UN-Doc. S/RES/1737; re-affirmed in SC Res. 1747, 24 March 2007, UN-Doc. S/RES/1747 and SC Res. 1803, 3 March 2008, UN Doc. S/RES/1803.

<sup>142</sup> Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran, Report by the Director General, 7 September 2007, IAEA Doc. GOV/2007/48 at 5. The United States Intelligence agencies estimated that Iran has halted its nuclear weapons program in 2003; see: 'Iran: Nuclear Intentions and Capabilities', National Intelligence Estimate, November 2007, available at [http://www.dni.gov/press\\_releases/20071203\\_release.pdf](http://www.dni.gov/press_releases/20071203_release.pdf) (visited 20 January 2009). However, the IAEA Director-General identified several serious issues where further clarification is needed, for the latest assessment see Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007) and 1803 (2008) in the Islamic Republic of Iran, 15 September 2008, IAEA Doc. GOV/2008/38.

<sup>143</sup> IAEA Doc. GOV/2006/14, *supra* note 140.

<sup>144</sup> SC Res. 1737, *supra* note 141; SC Res. 1747, *supra* note 141; SC Res. 1803, *supra* note 141.

<sup>145</sup> Ogilvie-White, 'International Responses to Iranian Nuclear Defiance', *supra* note 127, at 467-473.

defector. Moreover, they have to be convinced that the system as a whole is maintained in the interest of all concerned – and not only of a small group of powerful States.

Maintaining the persuasive value of the NPT regime is thus crucial for rallying the necessary support among non-nuclear weapon States. Otherwise, possible defectors such as Iran are not seen as outsiders, but may portray their defiance as legitimate revolt against a discriminatory hegemonic regime. They may even be able to rally support for their seemingly just cause. Therefore, successful non-proliferation depends on both the effective application of the IAEA verification measures for detecting non-compliance and the implementation of the other NPT pillars that address the concerns of the non-nuclear weapon States. Thus not only theoretical insights, but also practical wisdom suggests that the ‘inclusion of the other’ has to be achieved for the NPT to be successful.

### 3) *NATO Nuclear Weapon Sharing*

Contrary to popular belief, the Western States do not have a clean slate when it comes to the application of the non-proliferation pillar of the NPT. In particular, NATO nuclear weapon sharing has repeatedly been criticized as contrary to Article I NPT by numerous non-aligned non-nuclear weapon States.<sup>146</sup>

NATO nuclear weapon sharing dates back to the 1960s and constitutes an integral part of NATO’s nuclear strategy. Accordingly, US nuclear free-fall bombs are stored on various air bases of NATO members in Europe.<sup>147</sup> They remain within US custody and under full and exclusive US command during peace time. In wartime, the bombs will be delivered by planes and pilots from the host country.<sup>148</sup> This requires a transfer of control, since it is the host country’s pilot that ultimately delivers and detonates the bomb. Yet according to Article I NPT, nuclear weapon States are obliged ‘not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly...’.

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<sup>146</sup> See, for a recent example, the statement by the foreign minister of Malaysia on behalf of NAM at the 2005 NPT Review Conference – <http://www.un.org/events/npt2005/statements/npt02malaysia.pdf> (visited 20 January 2009) at 3.

<sup>147</sup> The number of weapons involved has been reduced considerably after the end of the Cold War. NATO claims to have reduced the number of nuclear weapons available for its sub-strategic forces in Europe by over 85 per cent since 1991, see <http://www.nato.int/issues/nuclear/position.html> (visited 20 January 2009). For a comprehensive study, see Hans M. Kristensen, ‘U.S. Nuclear Weapons in Europe: A Review of Post-Cold War Policy, Force Levels, and War Planning’, February 2005 at <http://www.nrdc.org/nuclear/euro/euro.pdf> (visited 20 January 2009)

<sup>148</sup> Currently US nuclear weapons are based in Belgium, Germany, Italy, the Netherlands, Turkey and the United Kingdom (but weapons in the UK are only earmarked for delivery by US planes). For a detailed study, see Id..

Despite this apparent contradiction, NATO member States have always maintained that their practice is in line with their NPT obligations. The United States specifically stated that the NPT ‘does not deal with arrangements for deployment of nuclear weapons within allied territory as these do not involve any transfer of nuclear weapons or control over them unless and until a decision were made to go to war, at which time the treaty would no longer be controlling.’<sup>149</sup> This amounts to the introduction of a form of a *clausula rebus* in the treaty: In case of war, the circumstances on which the treaty rests have fundamentally changed and consequently it is no longer binding. This was inferred from the preamble, which refers to the prevention of nuclear war as objective of the treaty. Sensing the evident danger that such an interpretation may lead others to conclude that any minor military clash will invalidate the NPT, US Secretary of State *Dean Rusk* clarified that only ‘general war involving the nuclear powers’ would terminate or suspend the treaty.<sup>150</sup> Although the US communicated its interpretation to several members of the Eighteen Nation Disarmament Committee without objection,<sup>151</sup> this interpretation was not, and still is not, shared by a great number of non-aligned States. There is also no general rule of customary international law that an armed conflict between States party to a multilateral treaty leads to its automatic termination or suspension.<sup>152</sup> Rather, the International Law Commission proposes a multitude of criteria, including the treaty’s object and purpose, its subject-matter and the nature and extent of the armed conflict in question.<sup>153</sup>

Moreover, any transfer of nuclear weapons increases the number of individuals that have a say in their use. Consequently, the prevention of nuclear war as central aim of the NPT is better served if no transfer occurs even after the outbreak of a ‘general war involving the nuclear powers’ – at least if nuclear weapons have not yet been used by the opponent.<sup>154</sup> In addition, such transfer

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<sup>149</sup> Message from the President of the United States, Transmitting treaty on the Non-Proliferation of Nuclear Weapons to the Senate of the United States, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Ex. H. at 6, reprinted in U.S. Senate, Hearings Before the Committee on Foreign Relations, Nonproliferation Treaty, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Ex. H., 262, 263 (1968). The statement quoted appears as an annex to the letter of submittal of 2 July 1968 by Secretary of State Dean Rusk, which was also transmitted to the Senate.

<sup>150</sup> Testimony of Secretary of State Dean Rusk, U.S. Senate, Hearings Before the Committee on Foreign Relations, Nonproliferation treaty, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Ex. H., 27, 28 (1968).

<sup>151</sup> Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation', *supra* note 107, at 28.

<sup>152</sup> The issue was extensively debated in the International Law Commission, which elaborated ground-breaking draft articles on the issue. They found that there exists no rule on automatic termination and inscribed this state of customary law into Article 3 of the ILC Draft Articles on the Effects of an Armed Conflict in Respect of Treaties Between States, see Report of the International Law Commission, 60<sup>th</sup> session, Official Records of the General Assembly, 63<sup>rd</sup> Session, Supplement No. 10, 2008 (UN. Doc. A/63/10), in particular the commentary at 93-94.

<sup>153</sup> See Article 4 of the ILC Draft Articles, *id.*

<sup>154</sup> Willrich, *Non-proliferation Treaty*, *supra* note 88, at 90.

before nuclear weapons have been used may undermine the ‘*nucler taboo*’, since nuclear weapons may then become weapons for use rather than for deterrence.

Yet the US interpretation may also be seen as merely pointing to the fact that during an all-out nuclear war the whole public international law order would collapse, including the NPT.<sup>155</sup> However, it is a truism that such a war would change the world – and the international legal order with it – beyond recognition. Such a declaration therefore is of little legal significance. Rather, what matters is the question if it is legal to prepare for a possible termination now, i.e. prior to the outbreak of any hostilities. As Article I NPT only deals with actual transfer and not with preparations, a narrow interpretation may conclude that NATO nuclear weapon sharing is in conformity with the NPT. Yet as has been said above, not only compliance, but the whole stance of an actor towards a legal regime has to be taken into account. In this regard, the practice undermines the non-proliferation goal of the NPT, as it allows for the creation of proto-nuclear weapon States.<sup>156</sup> In addition, the approach seems to be at odds with the object and purpose of the NPT, namely the avoidance of nuclear war.<sup>157</sup> In that sense, the NPT may be seen as among a number of treaties “foreshadowing a future general prohibition on the use of such weapons”, in the words of the ICJ.<sup>158</sup> Creating proto-nuclear States in the preparation for nuclear war – even if the strategic approach is only defensive – runs counter to the ultimate aim of preventing the use of nuclear weapons. There is no reason to believe that the practice originally intended to demonstrate United States determination to defend Europe continues to add anything to the security of central Europe. It is thus legally questionable and politically superfluous and arguably even dangerous to the NPT’s bargain.

#### 4) *US-India Nuclear Cooperation*

Another Western activity in regard to non-proliferation which has been sharply criticized for its alleged incompatibility with Article I NPT is the agreement between India and the United States on civilian nuclear cooperation, signed on 10 October 2008.<sup>159</sup> In departure from US practice

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<sup>155</sup> This also seems to be what Secretary of State Dean Rusk was implying in his testimony, see *supra* note 141.

<sup>156</sup> Kristensen, ‘U.S. Nuclear Weapons in Europe: A Review of Post-Cold War Policy, Force Levels, and War Planning’, *supra* note 147, at 71, who points out that if China were to equip North Korean forces with the capability to deliver Chinese nuclear weapons and to train them for that purpose, ‘the United States and NATO would raise hell – and rightly so.’

<sup>157</sup> See above, C.II.2), in particular note 88.

<sup>158</sup> ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, at para. 62.

<sup>159</sup> Agreement For Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy, 10 October 2008. The agreement is available in full text at <http://www.hcfa.house.gov/110/press091108h.pdf> (visited 20 January 2009). For a detailed analysis of the

dating back to India's nuclear test explosion in 1974, it enables trade in nuclear technology and material (including fissionable material) between the two States. According to its Article 10, all material transferred will be subject to safeguards as required by Article III (2) NPT.

However, since India is technically a non-nuclear weapon State in the terminology of the NPT despite possessing nuclear weapons, the agreement may be in contravention of Article I NPT. Critics argue that the provision of fissionable material by the US to India would free the limited Indian domestic resources for use in its nuclear weapons program. Whether this is in fact true is open to some debate.<sup>160</sup> Yet even if this were correct, this does not necessarily amount to illegal 'assistance' under Article I NPT. According to economic theory, any form of trade beneficial to India's economy frees resources that may be used in a nuclear weapons program.<sup>161</sup> Yet the NPT is clearly not intended to suffocate trade. Moreover, according to its Article IV (2) one of its aims is to facilitate nuclear cooperation among the States parties. Since such cooperation is almost always potentially useful to a nuclear weapons program,<sup>162</sup> the question of what amounts to 'assistance' is of crucial importance. Again the answer may be found in Article III, which clarifies that the transfer of source or special fissionable material and of equipment needed for the processing, production or use of special fissionable material is legal, as long as it is covered by safeguards that prevent the diversion to military purposes. These safeguards have to cover the concrete material or equipment that is transferred. The US-India Agreement requires such limited safeguards and is thus technically not in violation of the NPT.<sup>163</sup>

Nevertheless, the deal may have detrimental effects on the non-proliferation regime as it may be portrayed as rewarding India for constantly defying the nuclear world order provided for by the NPT. It constitutes a departure from the established non-proliferation practice of the Nuclear

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agreement see Jörn Müller, 'The Signing of the U.S.-India Agreement Concerning Peaceful Uses of Nuclear Energy', 1 *Göttingen Journal of International Law* (2009), forthcoming.

<sup>160</sup> Ashley J. Tellis, *Atoms for War? U.S.-Indian Civilian Nuclear Cooperation and India's Nuclear Arsenal* (Carnegie Endowment for International Peace: Washington 2006), at 37, concludes that India's resources are sufficient to both pursue a civilian and a large scale nuclear weapons program. In contrast, a study by the International Panel on Fissile Materials (IPFM) concludes that India's current Uranium production is not sufficient for both its civilian reactors and its current nuclear weapons program, see: Zia Mian, *et al.*, 'Fissile Materials in South Asia: The Implications of the U.S.-India Nuclear Deal', Report published by the International Panel on Fissile Materials (IPFM), September 2006 at [http://www.fissilematerials.org/ipfm/site\\_down/ipfmresearchreport01.pdf](http://www.fissilematerials.org/ipfm/site_down/ipfmresearchreport01.pdf) (visited 20 January 2009). In addition, Zia Mian and M.V. Ramana, 'Wrong Ends, Means, and Needs: Behind the U.S. Nuclear Deal With India', 36 *Arms Control Today* (2006), 11-17 describe numerous benefits to the Indian nuclear weapons program if India acquires access to external fuel for its civilian reactors.

<sup>161</sup> Tellis, *Atoms for War*, *supra* note 160, at 10.

<sup>162</sup> Willrich, *Non-proliferation Treaty*, *supra* note 88, at 94.

<sup>163</sup> The safeguard agreement between India and the IAEA has been negotiated approved by the IAEA Board of Governors. It is available in full text at <http://www.hcfa.house.gov/110/press091108g.pdf> (visited 20 January 2009).

Suppliers Group (NSG),<sup>164</sup> which required so called 'full-scope safeguards' covering all nuclear activities within a country as prerequisite for any nuclear cooperation in order to diminish proliferation risks.<sup>165</sup> Nevertheless, the NSG chose to grant an exception from its established practice, thus possibly setting a precedent. Other concessions to India's demands are also remarkable. For example, in Article 6 of the Agreement the United States in principle grants the right to reprocess and enrich nuclear material and thus tolerates proliferation-sensitive activities it intends to limit among other non-nuclear weapon States. Moreover, a clear signal is missing that the US would terminate the agreement in case of a nuclear test by India.<sup>166</sup> In addition, Article 5 (6) of the Agreement contains language committing the United States to secure a reliable supply of nuclear fuel to India. Nevertheless, these provisions are so broad and general that they constitute more of a declaration of political intent than a concrete legal obligation.

The US-India Agreement thus amounts to a concession to India's demands. It requires no steps towards a de-nuclearization of India's defence policy and thus signals that persistent resistance to the NPT pays off in the long run.<sup>167</sup> This may undermine efforts to convince nuclear threshold countries such as Iran to stay in the regime. Consequently, it has drawn sharp criticism.<sup>168</sup> Yet upon closer inspection, its more contentious parts contains rather general language and thus depend upon their implementation in practice. Its immediate practical impact thus seems to be limited. Nevertheless, the unilateral path chosen by the US is regrettable. The problem of the nuclear holdout States is better addressed on a multilateral plane incorporating the interests of the non-nuclear weapon States party to the NPT. This is even more the case as the NPT seems to contain a rather peculiar loophole that affects the relationship between non-nuclear weapon States inside and outside of the NPT: The NPT does not clearly prohibit a non-nuclear weapon

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<sup>164</sup> The Nuclear Suppliers Group is a group of currently 45 States that have agreed on guidelines on nuclear transfers, without concluding a formal treaty to that end. The United States is a NSG member and has been its main facilitator. Further information may be found on the group's website at <http://www.nuclearsuppliersgroup.org> (visited 20 January 2009). The NSG approved the agreement between India and the US on September, for the wording of the decision see IAEA Information Circular ('Statement on Civil Nuclear Cooperation with India'), 19 September 2008, IAEA Doc. INFCIRC/734 (Corrected).

<sup>165</sup> The NSG guidelines are included in the following IAEA information circulars: IAEA Information Circular ('Guidelines for Nuclear Transfers'), 7 November 2007, IAEA Doc. INFCIRC 254/Rev.9/Part 1 and IAEA Information Circular ('Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology'), 20 March 2006, IAEA Doc. INFCIRC/254/Rev.7/Part 2.

<sup>166</sup> Wade Boese, 'U.S.-Indian Nuclear Deal Advances', 37 *Arms Control Today* (2007), available at <http://www.armscontrol.org/epublish/1/109> (visited 20 January 2009).

<sup>167</sup> The concerns voiced by William C. Potter in 2005 were thus not taken into account; see William C. Potter, 'India and the New Look of U.S. Nonproliferation Policy', 12 *Nonproliferation Review* (2005), 343-354.

<sup>168</sup> Kesav Murthy Wable, 'The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime', 33 *Brooklyn Journal of International Law* (2008), 719-759. For a different view, see Kate Heinzelman, 'Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime', 33 *Yale Journal of International Law* (2008), 447-478.

State party to the Treaty to assist a non-party in a nuclear weapons program.<sup>169</sup> However, if one regards general non-proliferation as one of the NPT's central ends, such assistance would run counter to the object and purpose of the treaty. This may be inferred from Article III (2) NPT, which requires safeguards to be applied to any nuclear exports including those to a non-nuclear weapon State not party to the NPT. Nevertheless, such a conclusion is by no means invulnerable to criticism, since the safeguards system covers only certain types of equipment and only refers to the transfer for peaceful purposes.<sup>170</sup> Consequently, the arguments advanced by the United States<sup>171</sup> and the Soviet Union<sup>172</sup> for closing the gap have been met with some degree of scepticism.<sup>173</sup> The US-India nuclear deal may thus revive the argument about this apparent loophole – certainly not a welcome side effect, given the fact that at least some legal uncertainty remains.

## ***II. Nuclear Disarmament: An Empty Promise?***

### *1) The Content of Article VI NPT*

The disarmament obligation of the nuclear weapon States is the crucial *quid pro quo* for the discriminatory non-proliferation pledge. According to Article VI, the parties to the treaty undertake 'to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.' At first glance, this obligation seems to be rather irrelevant, apparently suffering from indeterminate language in a similar way as the SORT does. Yet it differs from the SORT since it is incorporated in a web of mutual rights and obligations contained in the NPT. Moreover, it is possible to identify several concrete obligations that are embedded in the general language of Article VI NPT.

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<sup>169</sup> Willrich, *Non-proliferation Treaty*, supra note 88, at 96; Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979* (Oceanea Publications: London 1980) at 268.

<sup>170</sup> Article III (2) reads: 'Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.'

<sup>171</sup> The US argued that in case of such assistance 'the presumption would immediately arise that these acts had the purpose of developing nuclear weapons for itself, in violation of the treaty.' Statement by the US Representative to the Eighteen Nation Committee on Disarmament, 27 February 1968, UN Doc. ENDC/PV.370, at 28.

<sup>172</sup> The Soviet Union argued that since Article III (2) NPT requires safeguards to be applied to the transfer of equipment or material to any non-nuclear weapon State even if that State is not a party to the NPT, it is designed as a barrier against any assistance in a nuclear weapons program. See the Statement by the USSR Representative to the Eighteen Nation Committee on Disarmament, 27 February 1968, UN Doc. ENDC/PV.370, at 20-21.

<sup>173</sup> Willrich, *Non-proliferation Treaty*, supra note 88, at 96.

To begin with, Article VI NPT links the issues of nuclear disarmament and complete disarmament. Thus non-nuclear weapon States have to take an active role in contributing to a positive security environment so that nuclear weapons are considered to be no longer necessary – the non-nuclear weapon States thus have to go beyond ‘instigating a catalytic role’.<sup>174</sup>

Nevertheless, the obligation laid down in Article VI necessarily falls chiefly upon the nuclear weapon States.<sup>175</sup> They possess more than 27,000 nuclear weapons (more than 90 per cent of them in the United States and Russia) of which possibly more than 10,000 are still deployed.<sup>176</sup> In this vein, not much has changed since the NPT negotiations. Writing in 1969, *Mason Willrich* concluded that ‘the durability of the treaty and the underlying policy of preventing further horizontal proliferation will depend, perhaps decisively, on the future success of efforts to control the nuclear arms race among the nuclear-weapon States.’<sup>177</sup>

While the primary addressees of Article VI NPT are thus easy to identify, it is more difficult to determine what they actually have to do. According to Article VI NPT, the means to achieve disarmament are ‘negotiations in good faith’ – the pitfall of indeterminacy seems to be unavoidable. However, the preamble offers interpretative guidance: The States parties declare to ‘undertake effective measures in the direction of nuclear disarmament’ and urge all States to cooperate to achieve this end. This clarifies that total nuclear disarmament is not to be achieved in an (illusory) immediate one-off measure, but rather through a series of steps towards this end. In addition, the 1995 NPT Review and Extension Conference laid down general principles that were further clarified at the 2000 Review Conference, which unanimously adopted thirteen ‘practical steps for the systematic and progressive efforts to implement article VI’.<sup>178</sup> By identifying these concrete steps and explicitly agreeing upon their necessity for the implementation of Article VI, the States parties have thus indicated on how they interpret the disarmament obligation. Despite the language used (‘[t]he Conference agrees’), these final declarations do not necessarily amount to binding interpretative agreements in the sense of

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<sup>174</sup> Yet this is how Mohamed Shaker understates the role of the non-nuclear weapon States, Shaker, ‘The Evolving International Regime of Nuclear Non-Proliferation’, *supra* note 107, at 143.

<sup>175</sup> This is also the interpretation by the States parties: See Decision 2 of the 1995 NPT Review and Extension Conference, *supra* note 86, para. 4, lit (c).

<sup>176</sup> Shannon N. Kile, *et al.*, ‘Appendix 13A. World Nuclear Forces, 2006’, *SIPRI Yearbook* (2006), 639-668. For another detailed overview of nuclear weapon capabilities and arsenals see Cirincione, *et al.*, *Deadly Arsenals*, *supra* note 120, for an overview of the current US arsenal see also Robert S. Norris and Hans M. Kristensen, ‘U.S. Nuclear Forces, 2006’, *62 Bulletin of the Atomic Scientists* (2006), 68-71.

<sup>177</sup> Willrich, *Non-proliferation Treaty*, *supra* note 88, at 160-161.

<sup>178</sup> Final Document of the 2000 Review Conference, *supra* note 99, at 14-15.

Article 31 (3) (a) of the Vienna Convention on the Law of Treaties (VCLT).<sup>179</sup> Yet the thirteen practical steps constitute important evidence on how the States parties themselves interpret the disarmament obligation. Their relevance in relation to the interpretation of the NPT is comparable to the importance accredited to UN General Assembly resolutions when interpreting the UN Charter.<sup>180</sup> The impact of the 1995 and 2000 declarations on the interpretation of the obligation of nuclear disarmament is enhanced by the fact that they were adopted unanimously.

In addition, the general principles adopted in 1995 have to be seen against the background of the indefinite extension of the NPT. Since the NPT's ultimate aim of total nuclear disarmament had not been achieved by that time, renewing the discriminatory non-proliferation pledge required the re-affirmation of the disarmament goal and agreeing upon a way forward. This underlines the importance of the principles adopted in 1995 for the treaty's overall bargain.

In these documents, the States parties to the NPT have identified two concrete treaties that constitute indispensable intermediate steps towards nuclear disarmament. The first is the Comprehensive Nuclear-Test-Ban Treaty (CTBT) – its necessity is stressed in both documents. The second is a 'non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices' (commonly called Fissile Material Cut-Off Treaty, or FMCT), which also was referred to both in 1995 and 2000.<sup>181</sup> Thus the approach taken towards these treaties is crucial when determining if Article VI NPT is honoured by its addressees.

The thirteen practical steps included in the 2000 NPT Review Conference Final Document added further elements, inter alia calling for an early entry into force of START II<sup>182</sup>, for strengthening

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<sup>179</sup> For a detailed analysis of what amounts to such an agreement see: Anthony Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press: Cambridge 2007) at 238-241 and Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press: Oxford 2008) at 216-225.

<sup>180</sup> On the legal nature and status of UN General Assembly resolutions see Kay Hailbronner and Eckart Klein, 'Art. 10' in: Bruno Simma (ed), *The Charter of the United Nations A Commentary* (2nd edn Oxford University Press: Oxford 2002), para. 43-59. However, Anthony Aust argues that UN General Assembly resolutions may amount to a subsequent agreement within the meaning of Article 31 (3) (a) VCLT, Aust, *Modern Treaty Law and Practice*, *supra* note 179, at 240.

<sup>181</sup> The quote is from 1995 document, see: Decision 2 of the 1995 NPT Review and Extension Conference, *supra* note 86, para. 4, lit (a) and (b). As early as 1993, the UN General Assembly also called for the conclusion of a FMCT, see: General and complete disarmament, GA Res. 48/75, 16 December 1993, UN Doc. A/RES/48/75.

<sup>182</sup> START II (Strategic Arms Reduction Treaty II), available at <http://www.state.gov/www/global/arms/starhtml/start2/str2txt.html#1.0> (accessed 2 October 2008). The treaty never entered into force.

the ABM Treaty<sup>183</sup>, for unilateral reductions of nuclear arsenals and a diminishment of the role for nuclear weapons in national security policies.<sup>184</sup>

In addition, the thirteen practical steps shed some light on the content of ‘negotiations in good faith’ by stressing effective verification, as well as the irreversibility and transparency in relation to the implementation of disarmament agreements.<sup>185</sup> Therefore, lofty declarations without practical effect do not constitute negotiations in ‘good faith’.<sup>186</sup> Non-verifiable arms control treaties that use indeterminate language may suggest false security and provide cover for clandestine defectors.<sup>187</sup> Consequently, negotiations have to be aimed at verifiable, transparent and irreversible nuclear disarmament. The conclusion that Article VI goes ‘beyond a mere obligation of conduct’, as the ICJ declared, is thus well-founded.<sup>188</sup>

## 2) *Disarmament in Practice*

It is unquestionable that progress was made towards nuclear disarmament in the 1990s. The United States, Russia, France and the United Kingdom reduced their nuclear weapons considerably by withdrawing large numbers of strategic and especially tactical nuclear warheads.<sup>189</sup> The United States cancelled the development of new nuclear warheads in the 1990s. Bilateral negotiations also bore fruit: START I entered into force on 5 December 1994, reducing and limiting the number of delivery systems. Since START I also includes an elaborate monitoring and inspection mechanism, these reductions are also verifiable and transparent. Negotiations on the CTBT were successful and the treaty was opened for signature on 24 September 1996. After the last nuclear test by France in January 1996, a testing moratorium has been observed by all nuclear weapon States parties to the NPT.<sup>190</sup> Additionally, they supported

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<sup>183</sup> Treaty on the Limitation on Anti-Ballistic Missile Systems, 26 May 1972, in force 3 October 1972 – 13 June 2002, 944 *United Nations Treaty Series* 13. The bilateral US-Russian treaty was terminated on 13 June 2002, after the US had announced their withdrawal six months earlier.

<sup>184</sup> Final Document of the 2000 Review Conference, *supra* note 99, at 14-15.

<sup>185</sup> *Id.* at 14 explicitly refers to ‘[t]he principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.’

<sup>186</sup> Koplou, ‘Parsing Good Faith’, *supra* note 83, at 378.

<sup>187</sup> Jack M. Breard, ‘The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention’, 101 *American Journal of International Law* (2007), 271-321.

<sup>188</sup> ICJ, *Nuclear Weapons Advisory Opinion*, *supra* note 6, at 264 (para. 99). See also Krieger, ‘A Nuclear Test for Multilateralism’, *supra* note 5, at 24.

<sup>189</sup> However, in the US thousands of nuclear weapons are only withdrawn from operational deployment but remain in storage. See Robert S. Norris and Hans M. Kristensen, ‘What’s Behind Bush’s Nuclear Cuts?’ 34 *Arms Control Today* (2004), 6-12.

<sup>190</sup> The non-NPT parties India and Pakistan carried out nuclear weapon tests in May 1998 and North Korea in October 2006.

the outcome of the 1995 and 2000 NPT Review Conferences, including the thirteen practical steps that strengthened nuclear disarmament.

However, some authors have argued that such declarations only constitute ‘diplomatic gesture politics’, with little practical relevance.<sup>191</sup> Therefore, the subsequent conduct by the nuclear weapon States has to be examined – and the record since then is not encouraging: Total nuclear disarmament is still far beyond reach. Within the limits set by START I,<sup>192</sup> the United States and Russia continue to deploy huge nuclear inventories. These arsenals only make sense either as first strike capability against an opponent almost equally strong, or as means of deterring an attack by another State with a comparable nuclear weapon capability.<sup>193</sup> While it may be doubtful if the peaceful outcome of the Cold War was due to deterrence in the form of ‘mutually assured destruction’,<sup>194</sup> even Cold War realists have come to realize that ‘[t]he end of the Cold War made the doctrine of mutual Soviet-American deterrence obsolete’.<sup>195</sup>

Yet despite these insights, little to no progress has been made since the year 2000. All nuclear weapon States (and NATO) unequivocally adhere to a continuing role of nuclear weapons in their strategic doctrines. The United States withdrew from the ABM Treaty in June 2002.<sup>196</sup> The Bush administration has been particularly slow in dismantling nuclear weapons.<sup>197</sup> The CTBT is stalled, especially due to the lack of support by the US and China, which have not ratified the treaty, although their ratifications are necessary for it to enter into force according to Article XIV

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<sup>191</sup> Johnson, ‘Do as I say, not as I do’, *supra* note 89, at 76.

<sup>192</sup> Art. 1 of START I permits 6,000 nuclear warheads and 1,600 strategic nuclear delivery vehicles for each side. Strategic Nuclear Delivery Vehicles consist of intercontinental ballistic missiles (ICBMs), submarine-launched ballistic missiles (SLBM) and heavy bombers. Each delivery vehicle may carry more than one warhead. Tactical nuclear weapons are not covered.

<sup>193</sup> For an in-depth study about how Cold War doctrines continue to dictate nuclear planning and force structure in the US see: Ivan Oelrich, *Missions for Nuclear Weapons after the Cold War* (Federation of American Scientists: Washington, D.C. 2005), Federation of American Scientists Occasional Paper No. 3, January 2005, available at <http://www.fas.org/resource/01282005175922.pdf> (visited 30 April 2008). This is also reflected in the NATO strategic concept, which specifically refers to deterrence as reason for maintaining a nuclear force, see NATO strategic concept of 24 April 1999, para. 62, available at <http://www.nato.int/docu/pr/1999/p99-065e.htm> (visited 20 January 2009).

<sup>194</sup> For a short introduction to the question see Marc Pilisuk, ‘Disarmament and Survival’ in: Charles Webel and Johan Galtung (eds), *Handbook of Peace and Conflict Studies* (Routledge: London 2007), 94-105, at 99. See also Scott D. Sagan and Kenneth N. Waltz, *The Spread of Nuclear Weapons - A Debate Renewed* (2nd edn, Norton: New York 2003).

<sup>195</sup> George P. Shultz, *et al.*, ‘A World free of Nuclear Weapons’ *Wall Street Journal*, 4 January 2007, A15.

<sup>196</sup> ‘Announcement of Withdrawal from the ABM Treaty’, Statement by the White House Press Secretary, 13 December 2001, available at <http://2001-2009.state.gov/t/ac/rls/fs/2001/6848.htm> (visited 20 January 2009).

<sup>197</sup> The announcement of cuts in US nuclear weapons in December 2007 changes this picture only marginally, since only few warheads will actually be dismantled. The strategic analyst *Hans M. Kristensen* concludes that ‘the current administration has demonstrated the lowest warhead dismantlement rate of any U.S. government since the Eisenhower administration.’ See Kristensen, ‘White House Announces (Secret) Nuclear Weapons Cuts’, *supra* note 69.

(1) CTBT.<sup>198</sup> The US has accumulated arrears of 28 million US-Dollars to the CTBTO Preparatory Commission,<sup>199</sup> which signals that despite its signature it has at least partly disconnected itself from the object and purpose of the CTBT.

At the same time, the Conference on Disarmament is stalling since 1996. Some nuclear weapon States, in particular the United States, but also the United Kingdom and France, resist attempts to prioritize nuclear disarmament in multilateral negotiations. In particular, no progress has been made towards a Fissile Material Cut-Off Treaty (FMCT). In this context, a rather peculiar twist in US negotiation policy alienated a great number of other States: While initially supporting a FMCT with a verification regime, the United States abandoned this goal in 2004 and now advocates a non-verifiable treaty.<sup>200</sup> Yet a non-verifiable treaty is clearly not in line with the requirements laid down in the thirteen practical steps of 2000.

The nuclear powers' policies seem to be characterized by the determination to shift the blame for the repeated collapse of nuclear disarmament negotiations on others, instead of exploring feasible steps towards nuclear disarmament. In turn, notorious spoilers may then agitate against what they depict as 'imperialistic behaviour'. This poisons the atmosphere, making consensus on any substantive work impossible. The operation of this 'blame game' was illustrated by the failure of the 2005 NPT Review Conference: At the outset, both the United States and France refused to reaffirm the thirteen practical steps adopted five years earlier, thus directly challenging the consensus that had already been found.<sup>201</sup> The reaction of the group of non-aligned non-nuclear weapon States was predictable: They focused on security assurances, nuclear disarmament and the situation in the Middle-East – thus completely sidelining issues that were of concern to many (especially Western) States, such as the question of how to deal with

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<sup>198</sup> According to Article XIV (1) and Annex 2, 44 states have to ratify the CTBT for it to enter into force. So far, 35 of these states have ratified the treaty. China, Egypt, Indonesia, Iran, Israel and the United States have signed, but not ratified; North Korea, India and Pakistan have neither signed, nor ratified the treaty. In sum, 148 States have ratified the CTBT (state as of 27 January 2009).

<sup>199</sup> 'CTBTO faces budgetary challenges', CTBTO press release, 22 June 2007, available at <http://www.ctbto.org/press-centre/press-releases/2007/ctbto-faces-budgetary-challenges/> (visited 20 January 2009).

<sup>200</sup> Wade Boese, 'Bush Shifts Fissile Material Ban Policy', 34 *Arms Control Today* (2004), . The US seems to not have learned from the BWC experience, where absence of a verification mechanism allowed the Soviet Union to conduct a massive clandestine biological weapons program despite being a party to the BWC, see: Breard, 'The Shortcomings of Indeterminacy', *supra* note 187, at 280 and 282-283 with further references.

<sup>201</sup> Müller, 'The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair', *supra* note 4, at 2. See also Johnson, 'Do as I say, not as I do', *supra* note 89, at 70 and Peter Weiss, 'Six Reasons why Nuclear Weapons are more Dangerous than Ever', 22 *American University International Law Review* (2007), 393-399 at 397. For an in-depth study of the reasons for the failure of the 2005 NPT review conference see Müller, *Vertrag im Zerfall*, *supra* note 4.

cases of withdrawal from the NPT.<sup>202</sup> Consequently, heated debates about the agenda ensued, blocking any substantial work. When finally an agenda was adopted, time was too short to agree on a substantive declaration.<sup>203</sup> While certainly a small number of spoilers contributed to the failure,<sup>204</sup> it was the United States and France refusing to approve what had already been agreed upon in 2000 in the first place,<sup>205</sup> which alienated a great number of non-nuclear weapon States that were originally sympathetic to strengthening the non-proliferation pillar of the NPT.<sup>206</sup> The same 'blame game' was in operation again little later, when the 2005 World Summit was unable to reach agreement on nuclear disarmament and non-proliferation.<sup>207</sup>

Moreover, action taken by the nuclear weapon States leaves little room for confidence that we will see substantial steps towards verifiable and irreversible nuclear disarmament in the near future. United States strategic planning failed to decrease the role for nuclear weapons. Instead, according to leaked elements of the 2002 Nuclear Posture Review<sup>208</sup> the US initiated a shift in its strategic planning. The new doctrine no longer focuses on possible threats, but calls for the maintenance or even expansion of nuclear capabilities to counter future, unpredictable threats.<sup>209</sup> Consequently, the Nuclear Posture Review stipulates new roles for nuclear weapons, including new earth-penetrating weapons ('bunker busters').<sup>210</sup> This puts into question the United States commitment to the goal of nuclear disarmament. Moreover, such a shift in doctrine and the

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<sup>202</sup> Procedural and other arrangements for the effective and successful outcome of the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 2 May 2005, NPT/CONF.2005/WP.17.

<sup>203</sup> Weiss, 'Six Reasons why Nuclear Weapons are more Dangerous than Ever', *supra* note 201, at 397, aptly calls this process 'the agenda gambit'.

<sup>204</sup> Harald Müller identifies Egypt, Cuba and Iran as particularly uncooperative, see: Müller, 'The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair', *supra* note 4, at 12.

<sup>205</sup> Granoff, 'The Nuclear Nonproliferation Treaty and its 2005 Review Conference', *supra* note 87, at 1004.

<sup>206</sup> Thakur, 'Managing the Nuclear Threat', *supra* note 5, at 6.

<sup>207</sup> Müller, 'The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair', *supra* note 4, at 1-4.

<sup>208</sup> The report itself is classified. The cover letter by the Secretary of Defense, Donald H. Rumsfeld, containing a short overview and a detailed press conference is available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1108> (visited 20 January 2009).

<sup>209</sup> Johnson, 'Do as I say, not as I do', *supra* note 89, at 66.

<sup>210</sup> Paul Richter, 'U.S. Works Up Plans for Using Nuclear Arms' *Los Angeles Times*, 9 March 2002, A.1 and Michael R. Gordon, 'U.S. Nuclear Plan Sees New Targets and New Weapons' *The New York Times*, 9 March 2002, both referring to a leaked version of the Nuclear Posture Review. For a legal analysis of the Nuclear Posture Review see also Hewitson, 'Nonproliferation and Reduction of Nuclear Weapons', *supra* note 66, at 469-477. Currently, the US only has one nuclear bunker buster in its arsenal, though its capability seems to be limited. For more background information, see Robert S. Norris, *et al.*, 'The B61 Family of Nuclear Bombs', 59 *Bulletin of the Atomic Scientists* (2003), 74-76. A great number of previously classified documents released under the US Freedom of Information Act together with extensive commentary is available at the website of the Nuclear Information Project entitled 'The Birth of a Nuclear Bomb': B61-11' at <http://www.nukestrat.com/us/afn/B61-11.htm> (visited 20 January 2009).

development of small 'usable' nuclear weapons challenges the *taboo* on the use of nuclear weapons, since they are no longer seen as weapons for deterrence only.<sup>211</sup>

However, United States Congress repeatedly denied funding for these earth penetrating nuclear weapons and consequently the project had to be abandoned.<sup>212</sup> Moreover, Congress has cut funding for the modernization of the US nuclear arsenal.<sup>213</sup> There are also signs that the shift in strategic planning has been reversed to some extent.<sup>214</sup> These belated steps mitigate the damage to the NPT somewhat, although the credibility of the United States has already suffered a serious setback. What is needed to fully restore confidence is a credible policy shift that signals a return to the approach taken during the 1990s as reflected in the thirteen practical steps of 2000 – something that may be forthcoming after the inauguration of a new US president in 2009.

Yet it is not only the US that is to blame. On the contrary, the other nuclear weapon States are either modernizing their nuclear forces or planning to do so in the near future. A few facts illustrate this: The UK Parliament voted to support plans for a new generation of nuclear ballistic missile submarines in March 2007.<sup>215</sup> Russia has tested a new ballistic intercontinental missile in August 2007 and launched a new nuclear ballistic missile submarine in April 2007, the first in more than 15 years.<sup>216</sup> China is apparently expanding its nuclear force, but doing so in secrecy, trying to avoid public criticism.<sup>217</sup> Although France has announced some minimal cuts in its nuclear arsenal, it is modernizing its fleet of nuclear ballistic submarines.<sup>218</sup> While not necessarily in contravention of Article VI NPT, these steps signal that the nuclear weapon States are not prepared to prioritize nuclear disarmament.

In sum, the disarmament record since the conclusion of START I is disappointing. No significant agreement advancing nuclear disarmament entered into force. The SORT, as the only apparent

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<sup>211</sup> Tannenwald, *The Nuclear Taboo*, *supra* note 89, at 383-387.

<sup>212</sup> Walter Pincus and Juliet Eilperin, 'Washington in Brief' *The Washington Post*, 26 October 2006, A08.

<sup>213</sup> Walter Pincus, 'Administration Urges Full Warhead Funding' *The Washington Post*, 26 July 2007, A09.

<sup>214</sup> Hans M. Kristensen, 'A Closer Look at China's New SSBNs', FAS Strategic Security Blog, 15 October 2007 at [http://www.fas.org/blog/ssp/2007/10/a\\_closer\\_look\\_at\\_chinas\\_new\\_ss.php](http://www.fas.org/blog/ssp/2007/10/a_closer_look_at_chinas_new_ss.php) (visited 20 January 2009).

<sup>215</sup> Philip Webster and Greg Hurst, 'Trident given go-ahead but party revolt damages Blair and Brown' *The Times*, March 15 2007, 6.

<sup>216</sup> , 'Russia ready to produce missile after successful long-range test' *Financial Times*, 6 August 2007, 8.

<sup>217</sup> A good overview of China's capabilities can be found in Hans M. Christensen, *et al.*, *Chinese Nuclear Forces and U.S. Nuclear War Planning* (Federation of American Scientists and Natural Resources Defense Council: Washington, D.C. 2006), available in full text at <http://www.nukestrat.com/china/chinareport.htm> (visited 20 January 2009). The report concludes that China is upgrading its nuclear forces, but strongly criticizes the abundant exaggerations of Chinese nuclear capabilities. According to recent reports, China has launched new strategic nuclear ballistic submarines, Kristensen, 'A Closer Look at China's New SSBNs', .

<sup>218</sup> Molly Moore, 'Sarkozy Announces Cuts in Nuclear Arsenal' *The Washington Post*, 22 March 2008, A08.

exception, is an empty shell without any legal content. Thousands of nuclear warheads are still deployed and the nuclear weapon States are apparently not inclined to take significant steps towards total nuclear disarmament in the foreseeable future. Non-ratification of the CTBT, unconstructive negotiating in the NPT Review Conference and in the Conference on Disarmament and signs for an increased role of nuclear weapons in strategic doctrines add up to a problematic United States record.<sup>219</sup> The United States and, to a lesser extent, the other nuclear weapon States, have detached themselves from the thirteen practical steps and thus from the consensus of the 2000 NPT Review Conference. Given the importance of these steps for the implementation of Article VI NPT, they have thus partly abandoned their commitment to nuclear disarmament. The disarmament pillar is thus currently not effectively implemented in practice.

### ***III. Co-operation for Peaceful Purposes and Security Assurances***

#### *1) Peaceful Cooperation*

One of the main concerns of many States during the NPT negotiations was to ensure that nuclear non-proliferation did not adversely affect the development of peaceful uses of nuclear energy. To address these concerns, Article IV (1) NPT was included in the treaty. It spells out the 'inalienable right' to conduct 'research, production and use of nuclear energy for peaceful purposes' within the limits of Article I and II NPT. Beyond merely recognizing the right, Article IV (2) NPT commits the States parties to facilitate in exchange of equipment, materials and information for the peaceful uses of nuclear energy. It thus requires some form of active contribution on behalf of all States parties. Moreover, there is a corresponding right included in Art. IV (2) 1 NPT which entitles all States parties to participate in the exchange.

In addition, Art. IV (2) NPT also contains an obligation to contribute to the further development of peaceful uses of nuclear energy. As this obligation rests only upon States 'in a position to do so', a certain level of technological competence and possibly also economical capacity is required. Therefore, the nuclear weapon States and other States with advanced nuclear technology are the primary addressees of this obligation.<sup>220</sup> Any co-operation is subject to the safeguard requirement, which is intended to mitigate the inbuilt strain between the NPT's non-proliferation goal and Article IV NPT.

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<sup>219</sup> *Peter Weiss* therefore goes so far as to conclude that 'Article VI is dead. Article VI no longer constitutes a commitment for the United States...', Weiss, 'Six Reasons why Nuclear Weapons are more Dangerous than Ever', *supra* note 201, at 394.

<sup>220</sup> For a proposal of how to identify these states, see Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation', *supra* note 107, at 123.

Although the right to peaceful uses has been affirmed in several NPT Review Conference documents, little to no clarification has been given on its exact content. On the contrary, there is reason to believe that the term was deliberately intended to be ambiguous.<sup>221</sup> The problem of interpretation thus seems to parallel that of exactly defining the term of ‘manufacture’ in Article I and II NPT. Eventually, Article III seems to provide the only feasible solution for clarifying the relationship between the disarmament and the non-proliferation component of the NPT: While any activity that may have a manifest peaceful use is theoretically covered by the ‘inalienable right’, its limits are determined through the application of the safeguards system. Such activities may only be termed peaceful if covered by adequate safeguards.

However, peaceful nuclear co-operation is not necessarily limited to States parties to the NPT. Art. IV (2) 2 NPT does not prohibit cooperation with States that are not party to the NPT.<sup>222</sup> Yet the wording stresses that co-operation shall take place ‘especially’<sup>223</sup> with those States party to the treaty, thus suggesting some form of preferential treatment for them. This is also in line with the purpose of Article IV as a positive incentive for joining and adhering to the NPT. While the term ‘inalienable right’ suggests that the right to develop nuclear energy is independent from the NPT,<sup>224</sup> the additional benefit granted by the NPT is that of a right to participate in nuclear cooperation. Thus preferential treatment for non-parties foils the character of Article IV NPT as a positive incentive. The preferential treatment the United States accredits to India<sup>225</sup> is thus also highly problematic in regard to Article IV NPT.

## 2) Security Assurances

Recently, the already limited impact of security assurances has been further reduced. In 2006, the United States for the first time decided to vote against a resolution in the UN General Assembly calling for the negotiation of legally binding negative security assurances.<sup>226</sup> Prior to this, the commitment of the United States to negative security assurances had already eroded, since the US repeatedly stressed the qualifications of their unilateral assurance and its non-binding

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<sup>221</sup> Zhang Xinjun, 'The Riddle of "Inalienable Right" in Article IV of the treaty on the Non-Proliferation of Nuclear Weapons: Intentional Ambiguity', 5 *Chinese Journal of International Law* (2006), 647-662.

<sup>222</sup> Shaker, 'The Evolving International Regime of Nuclear Non-Proliferation', *supra* note 107, at 124.

<sup>223</sup> The equally authentic French and Spanish texts use the term ‘en particulier’ and ‘especialmente’ respectively.

<sup>224</sup> Other treaties are not so clear in this respect. For example, Article 17 of the Treaty for the Prohibition of Nuclear Weapons in Latin America does not qualify the right as inalienable.

<sup>225</sup> See *supra* at D. I. 4).

<sup>226</sup> GA Res. 61/57, 7 January 2007, UN Doc. A/RES/61/57. The resolution was adopted on 6 December 2006 with 119 votes in favour, one vote against (the US) and 59 abstentions; see Record of the 67<sup>th</sup> plenary meeting, 6 December 2006, UN Doc. A/61/PV.67 at 6.

character.<sup>227</sup> Moreover, no attempts have been made to address the security concerns of non-aligned non-nuclear weapon States through confidence-building measures or through a clear commitment to a no first use policy. The potential of security guarantees as powerful positive incentives is thus not used in practice.

#### ***IV. The NPT in Practice – An Assessment***

Despite signs for increased strain, the NPT has remained intact as a legal regime. In particular, the non-proliferation pledge continues to be a sharp tool for rallying support in the nuclear disputes with North Korea and Iran. The NPT has been a key argument for isolating North Korea and applying international pressure. It has been instrumental in shutting down the nuclear weapons programs of Libya and Iraq. Likewise, it remains of decisive importance in the efforts to contain the Iranian nuclear program. Constant pressure by the NPT States parties and the IAEA inspections slow down the Iranian nuclear program. Moreover, the NPT is the only legal regime that is capable of furnishing persuasive legal arguments against the current Iranian nuclear aspirations, especially since the IAEA has determined that Iran has violated its safeguards agreement.

Yet despite this assessment, the persuasive value of the NPT has suffered considerably during the last decade. Its persuasive value is not only challenged by the North Korean defection and the attempts to do so by Libya, Iraq and Iran. It is also threatened by the continued disregard for their own legal undertakings by the nuclear weapon States and their allies. The analysis of the NPT practice has shown that the record of the nuclear weapon States is by no means above reproach. Major Western States have chosen to turn a blind eye on the concerns of non-nuclear weapon States. Instead they maintain the strategy of NATO nuclear weapon sharing – a practice highly questionable as to its compliance with Article I and II NPT. Moreover, the agreement about civilian nuclear cooperation between India and the United States may further undermine Western credibility, since the unilateral approach chosen fails to incorporate the concerns of other relevant actors.

However, the most worrisome development is the disregard of the nuclear weapon States of their disarmament obligation under Article VI NPT. Lack in progress towards disarmament frustrates a great number of non-nuclear weapon States and undermines the treaty's credibility as a system based on mutual obligations and benefits. It invalidates a key incentive for non-nuclear weapon States to join and comply with the treaty and participate in its implementation, and, when

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<sup>227</sup> For a concise account of the US approach towards negative security assurances see George Bunn and Jean du Preez, 'More than Words: The Value of U.S. Non-Nuclear-Use Promises', 37 *Arms Control Today* (2007/6), 16-22.

necessary, its enforcement.<sup>228</sup> *Ramesh Thakur* aptly notes: ‘The lack of compliance and enforcement of NPT obligations of the nuclear-weapon States de-legitimizes the NPT’s normative claims in the eyes of others.’<sup>229</sup>

In particular, the United States strives to shape the non-proliferation and disarmament regime while it is at the same time reluctant to accept legal limits on its own exercise of power, opting for flexibility instead.<sup>230</sup> Instead of strengthening the NPT’s authority through meticulously sticking to its bargain, the United States instead attempts to modify it. The US emphasizes non-proliferation while at the same time downplaying the importance of the NPT’s other pillars.

In a similar vein, some authors denounce the NPT as flawed. Some call for an international non-proliferation order by Security Council decree.<sup>231</sup> Others advocate a ‘duty to prevent’ countries ‘run by rulers without internal checks on their power’ from acquiring weapons of mass destruction, justifying unilateral action as means of last resort.<sup>232</sup> They consider the NPT to be deficient, since it treats all non-nuclear weapon States in the same way.<sup>233</sup> The focus is thus not so much on weapons of mass destruction as inherently dangerous, but rather on the internal characteristics of States that strive to own them.<sup>234</sup>

Yet a re-interpretation of the NPT as a pure non-proliferation treaty is bound to fail in the long run. The non-proliferation bargain on its own, without the supporting pillars of peaceful cooperation and, in particular, nuclear disarmament, is clearly discriminatory, since it distinguishes between nuclear haves and have-nots. The deficiency in reciprocity is only compensated for by the other pillars of the NPT, in particular the disarmament pledge, which stipulates to eventually abandon the discriminatory distinction between nuclear weapon States and non-nuclear weapon States. Article I and II NPT alone are thus not capable of achieving the ‘inclusion of the other’, since they do not incorporate all legitimate concerns. Modifying this bargain by disregarding some of its elements or by adding yet another discriminatory element is

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<sup>228</sup> See Johnson, ‘Do as I say, not as I do’, *supra* note 89, at 75.

<sup>229</sup> Thakur, ‘Managing the Nuclear Threat’, *supra* note 5, at 12.

<sup>230</sup> Cf. Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *European Journal of International Law* (2005), 369-408 at 399. Müllerson also describes this problem in his review essay, see: Rein Müllerson, ‘Review of Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*’, 3 *European Journal of International Law* (2002), 727-735.

<sup>231</sup> Ordre F. Kittrie, ‘Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and how to Restore it’, 28 *Michigan Journal of International Law* (2007), 337-430 at 419.

<sup>232</sup> Anne-Marie Slaughter and Lee Feinstein, ‘A Duty to Prevent. Disarming Rogues’, 83 *Foreign Affairs* (2004), 136-150.

<sup>233</sup> *Id.*, at 144.

<sup>234</sup> Jonas, ‘Variations on Non-Nuclear’, *supra* note 79, at 432.

a dangerous modification of the NPT's bargain. In particular, the 'duty to prevent' opens the floodgates to a politicization and the application of double-standards. Rather, any modifications aimed at strengthening the NPT have to be carefully designed so as to not exacerbate concerns about its perceived focus on Western interests.<sup>235</sup>

Efforts to re-interpret the NPT as a pure non-proliferation treaty are 'as dangerous to the system as striking cases of non-compliance.'<sup>236</sup> While emphasizing non-proliferation obligations of the non-nuclear weapon States may have been suitable for applying pressure on defectors such as Libya and North Korea, their effect is likely to evaporate quickly if not accompanied by steps that reaffirm the NPT's overall bargain and thus its authority. The US push for flexibility by re-interpretation of the NPT is illustrative of a 'culture of dynamism' as described by *Koskenniemi*.<sup>237</sup> Yet in the field of nuclear non-proliferation this is a particularly dangerous path. While the United States may be able to afford a bifurcated international order and stay outside legal regimes in other fields,<sup>238</sup> its commitment to the NPT is a *condition sine qua non* for its continued success. Sheer US power is not sufficient alone for keeping nuclear challengers at bay, as the case of the acquisition of nuclear weapons by North Korea has demonstrated. Rather, the NPT's authoritative value has to be preserved. Yet the NPT will only continue to constitute an argument in the debate when its fundamental bargain is not constantly put into question or portrayed as flawed, but reaffirmed and implemented in practice. The 'inclusion of the other' depends on the even-handed application of all pillars of the NPT system. Successful non-proliferation depends on widespread support – and, in the absence of any other credible regime, the NPT is the most important legal and political tool for rallying this support.

Therefore, the behaviour of the nuclear weapon States and of their allies may easily be portrayed as the application of double-standards, thus de-legitimizing efforts towards non-proliferation.<sup>239</sup> The vicious circle of recrimination seen at the 2005 NPT Review Conference may well erode the NPT.<sup>240</sup> An international order biased towards Western security interests would not be the solution, but rather become part of the problem.<sup>241</sup> This is so *a fortiori* due to the multiple roles of the nuclear weapon States as special subjects of the NPT, primary addressees of its

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<sup>235</sup> Gareth Evans, 'Uneasy Bedfellows: "The Responsibility to Protect" and Feinstein-Slaughter's "Duty to Prevent"', available at <http://www.crisisgroup.org/home/index.cfm?id=2560&l=1> (accessed 20 January 2009).

<sup>236</sup> Krieger, 'A Nuclear Test for Multilateralism', *supra* note 5, at 50.

<sup>237</sup> Koskenniemi, *Gentle Civilizer*, *supra* note 12, at 496.

<sup>238</sup> Krisch, 'International Law in Times of Hegemony', *supra* note 230, at 399.

<sup>239</sup> Ogilvie-White, 'International Responses to Iranian Nuclear Defiance', *supra* note 127 at 475.

<sup>240</sup> Thakur, 'Managing the Nuclear Threat', *supra* note 5, at 6.

<sup>241</sup> See Koskenniemi, *From Apology to Utopia*, *supra* note 10, at 608-609.

disarmament obligation and, at the same time, as crucial actors in the enforcement of the NPT's non-proliferation obligations through their permanent Security Council membership.

Nonetheless, there is reason for hope that the path stipulated for in the NPT, in the individual safeguards agreements and in the IAEA Statute may be successfully pursued. However, as shown above, this path is by no means perfect, as the composition of the organs tasked with monitoring compliance and ultimately enforcing the safeguards agreements and the NPT, namely the IAEA Board of Governors and the Security Council, makes them susceptible to accusations that they focus on the interests of nuclear weapon States and technologically advanced Western States only. However, by taking credible steps to renew trust in their continued commitment to the whole bargain, the nuclear weapon States and their allies that rely on nuclear weapons (i.e. NATO) could alleviate these concerns. This could take the form of a significant reduction of nuclear weapons, decreased reliance on them in security doctrines, a credible policy of no first use, renewed attempts to achieve the CTBT's entry into force and clear determination to succeed in negotiating a Fissile Material Cut-Off Treaty.

## **E. Conclusion**

A thorough analysis of the NPT has revealed its normative structure. The treaty is designed to overcome the situation it currently regulates, namely the existence of nuclear weapons, by containing their spread and by providing for their ultimate abolishment. It strives to achieve an 'inclusion of the other' through an unprecedented mechanism of layered reciprocity. However, the NPT's authority in the face of increased pressure on the system depends on the parties' capacity to maintain this carefully crafted bargain in practice. In this regard, the system rests on the viability of the 'grand bargain' struck between the 'haves' and the 'have-nots'.

In particular, our analysis has revealed the crucial importance of nuclear disarmament to the overall bargain. The NPT's disarmament pillar sets the ultimate goal of full material reciprocity in the field of nuclear weapons. The discriminatory distinction between nuclear weapon States and non-nuclear weapon States is only acceptable to the latter if this ultimate goal is not abandoned. Otherwise, the NPT will no longer incorporate all interests and lose its inclusive character and therefore its authority. Continuing efforts to re-define the NPT as a pure non-proliferation treaty that negate the importance of nuclear disarmament do away with the system's inclusive capacity. Yet without its alignment towards long-term material reciprocity, the NPT will no longer constitute a valid argument in the decision-making of States about nuclear proliferation. On the contrary, it may then easily be depicted as a hegemonic tool cementing current power relationships instead of striking a bargain between all States concerned. The

NPT's existence would then depend on the underlying power relationships. Yet States may be tempted to challenge these power relationships – a rather dangerous path to take in a field where the very survival of States and even humanity at large is at stake.

Therefore, if States do not wish to deprive themselves of the authoritative value of the NPT for the prevention of nuclear proliferation, they do not only have to address striking cases of non-compliance in the field of non-proliferation, but also the deficient implementation of the NPT's disarmament pillar. The NPT will only be able to have an impact on the behaviour of its parties if its original bargain is honoured in practice.

However, insight into the necessity to maintain the original bargain seems to grow – at a time when staunch realists such as *Henry Kissinger* forcefully argue for nuclear disarmament.<sup>242</sup> After the sobering experience of the war against Iraq – that was to a large extent justified as a war of counter-proliferation<sup>243</sup> – at least part of the current US administration and legislature seem to have realized that the exclusive focus on counter-proliferation has failed.<sup>244</sup> In addition, the case for nuclear disarmament has been prominently made by the new US President Barack Obama,<sup>245</sup> giving reason for the expectation that the new administration will return to a more progressive approach in the field of nuclear disarmament. According to press reports, the new US administration proposes drastic reductions in nuclear weapons and intends to negotiate a binding follow-up agreement to START I to that end.<sup>246</sup> These messages from the Obama administration are encouraging and give also reason for optimism that a renewed commitment by the US to multilateralism may break the deadlock of the Geneva Conference on Disarmament.

Moreover, the current crisis of the NPT may be used to good account. Once States have stared into the abyss of unrestrained nuclear proliferation in a similar way as they did in the 1960s, they may also again realize the value of multilateral mechanisms in the same way as they did then. Several States could take the lead by signalling their commitment to nuclear disarmament. The

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<sup>242</sup> Shultz, *et al.*, 'A World free of Nuclear Weapons'. See also Robert S. McNamara, 'Apocalypse soon', *Foreign Policy* (2005), 28-35 and his assessment of the foreword to the book by Graham jr., *Common Sense* at vii-x, also stressing the importance of Article VI NPT and proposing radical reductions in nuclear weapons by the nuclear weapon States.

<sup>243</sup> See the statement by US Secretary of State Colin Powell to the UN Security Council, 4701<sup>st</sup> meeting, 5 February 2003, UN Doc. S/PV.4701 at 2-17.

<sup>244</sup> See footnote 212 and 213 above.

<sup>245</sup> Barack Obama's campaign website stated that 'Obama and Biden will set a goal of a world without nuclear weapons, and pursue it' and that they are committed to strengthening the NPT; see [http://origin.barackobama.com/issues/foreign\\_policy/#nuclear](http://origin.barackobama.com/issues/foreign_policy/#nuclear) (accessed 20 October 2008). See also 'Arms Control Today 2008 Presidential Q&A', available at [http://www.armscontrol.org/system/files/Obama\\_Q-A\\_FINAL\\_Dec10\\_2008.pdf](http://www.armscontrol.org/system/files/Obama_Q-A_FINAL_Dec10_2008.pdf) (accessed 15 January 2009).

<sup>246</sup> Tim Reid, 'President Obama seeks Russia deal to slash nuclear weapons', *Timesonline*, 4 February 2009 at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article5654836.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5654836.ece) (visited 4 February 2009).

new US administration may send a powerful signal by unequivocally abandoning plans for new nuclear warheads and by initiating deep reductions in nuclear weapons. Based on the recent nuclear agreement with India, it could also initiate a multilateral process aimed at bringing the current outsiders closer to the NPT. Moreover, a binding and verifiable follow-up agreement to START I with Russia would demonstrate renewed determination in the field of nuclear disarmament. Likewise, China may send a clear signal by putting an end to secrecy about its nuclear weapons and by stopping the apparent expansion of its nuclear ballistic submarine fleet. Russia could announce deep cuts into its nuclear arsenal and stop developing and testing new ballistic missile designs. France and the United Kingdom may even go so far as to stop deterrence patrols by their nuclear submarine force altogether. NATO could send a powerful signal by abandoning the practice of nuclear weapon sharing. If these or comparable steps were taken by the nuclear weapon States, combined with renewed efforts to revive multilateral disarmament negotiations, this would strengthen both disarmament and non-proliferation. They would thereby show that they honour their obligation under Article VI NPT, thus restoring the overall authority of the NPT not only with regard to disarmament, but to the system as a whole. The first serious test if such a path may be successfully taken will be the 2010 NPT Review Conference.

While the key to preserving the NPT as an authoritative legal system thus currently rests with the nuclear weapon States, the non-nuclear weapon States also have a crucial role to play. If they both unequivocally commit themselves to all elements of the NPT's bargain, the treaty is likely to remain the central building block for achieving a world without nuclear weapons.