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Rethinking the Non-Proliferation of Nuclear Weapons

Abstract. The article aims to assess the effectiveness of the non-proliferation regime established more than 40 years ago with the adoption of the Treaty on the Non-proliferation of Nuclear Weapons (NPT). Since that time the international community had achieved considerable success in the prevention of nuclear weapons' proliferation. Nevertheless, while noting the results of the NPT and the verification system established under that instrument, one cannot remain silent about the shortcomings of the system and the non-compliance with some of its provisions. By its structure and provisions the NPT has divided States into two groups, distinguishing those possessing and those not possessing nuclear weapons. In effect, the rights and obligations of the Contracting Parties to the NPT are tailored to the group to which they belong, and the gravest violation of the NPT is that when States seek to change their status as defined in the NPT, notably by trying to manufacture or control of nuclear weapons. Under the NPT, research in, production and application of nuclear energy for peaceful purposes are inalienable rights, but their exercise should be in keeping with the basic obligation of non-nuclear-weapon States under the Treaty not to acquire in any form nuclear weapons and not to carry out unauthorized nuclear activities under the guise of their peaceful nuclear programs. While emphasizing the need to strengthen the non-proliferation regime, the article describes in nutshell the nuclear program of two States (the Islamic Republic of Iran and the Democratic People's Republic of Korea) which gave cause for serious international concern.

Keywords: Treaty on the Non-proliferation of Nuclear Weapons (NPT), nuclear weapons proliferation, peaceful utilization of nuclear energy, nuclear-free zones, International Atomic Energy Agency, safeguards, nuclear export, KEDO, Nuclear Suppliers Group, India, Islamic Republic of Iran, Democratic People's Republic of Korea

More than four decades ago that on the 12th June 1968 the United Nations General Assembly, by its resolution 2373 (1968), adopted with a vast majority the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which was the result of more than ten years' negotiations in the United Nations and in the Conference of the Eighteen-Nation Committee on Disarmament.¹

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¹ The solemn signing of the Treaty took place simultaneously in London, Moscow and Washington on 1 July 1968, and the instrument entered into force on 5 March 1970.

This instrument, by which the international community tried to prevent the world-wide spread of nuclear weapons and sought to remove, at long term, this destructive device from the arsenals of States, has been regarded as one of the most important disarmament agreements down to our times. The main purpose of the Treaty was to halt all direct and indirect forms of access of nuclear weapons and nuclear explosive devices by those States which do not possessed them at the time of the conclusion of the Treaty.²

Subject to the remark that the cause of nuclear disarmament cannot be judged from the operation of a single instrument, it may be stated that since the entry into force of the NPT there has been made significant progress towards achieving the objectives the Treaty.

According to some estimates, there would be 30 to 40 nuclear-weapon States today had the Non-Proliferation Treaty not been concluded.³ Unfortunately, however, the number of *de facto* nuclear-weapon States has grown despite the NPT. These States include India and Pakistan, which carried out nuclear test explosions in 1998,⁴ and the Democratic People's Republic of Korea (DPRK, North Korea), which in October 2006 informed world public of having carried out an underground nuclear explosion. Other States, which will be discussed at a later stage, are but supposed to be secretly working on nuclear weapons programs.⁵ In our days there are virtually 9 nuclear-weapon States, namely the 5 nuclear powers as well as India, Pakistan, Israel and DPRK, with none of the latter being a party to the NPT.⁶ It is worth mentioning that to this very day

In our days there is a voluminous literature on the Treaty. Of these publications see in particular Willrich, M.: *Non-Proliferation Treaty: Framework for Nuclear Arms Control*. Charlottesville, Virginia, 1969; Fischer, G.: *The Non-Proliferation of Nuclear Weapons*. London, 1971; Bellamy, I.–Blacker, C. D.–Gallacher, J. (eds.): *The Nuclear Non-Proliferation Treaty*. London, 1985; Delcoigne, G.–Rubinstein, G.: *Non-Proliferation des armes nucléaires*. Editions de l'Institut de Sociologie, Bruxelles, 1970.

² Under Art. 9, Para. 3, of the NPT "For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967."

³ Cf. Timerbaev, R.: What next for the NPT? Facing the Noment of Truth. *IAEA Bulletin*, 46 (2005) No. 2, 4.

⁴ In May 1998 both States carried out a series of 5 nuclear test explosions each and both Governments announced their undertaking a voluntary moratorium on further explosions. On the test explosions by India and Pakistan, see Kile, S.: Nuclear Arms Control and non-proliferation. *SIPRI Yearbook 1999. Armament, Disarmament and International Security*. Oxford, 1999. 520–522.

⁵ Iran, Israel and Libya are usually referred to as such States.

⁶ The nuclear warheads possessed by India, Pakistan, North Korea and Israel number 70 to 120, 30 to 80, 1 to 10, and 75 to 200 respectively. Cf. www.uspw.org.

South Africa is the only State which had formerly possessed nuclear weapons but voluntarily gave up its nuclear arms. In the 1980s the racist regime of South Africa has developed nuclear weapons, but all of these weapons were dismantled in the early 1990s.⁷

It can be claimed as a success by any measure that the NPT, which was originally adopted for a term of 25 years, was extended indefinitely and without condition at the Fifth Review and Extension Conference of 1995 by virtue of Art. X. Para. 2, of the NPT.⁸ Further progress is marked by the fact that today 188 States are party to the Treaty, with all nuclear powers having adhered to the NPT, for the original signatories to the Treaty did not include two nuclear-weapon States, France and China. Precisely for this reason, the accession of China on 9 March 1992 and then of France on 2 August of that year were events of great importance to the prevention of the proliferation of nuclear weapons. The effectiveness of the NPT regime is further evidenced by hundreds of on-site inspections executed annually by the International Atomic Energy Agency (IAEA) by way of verification of the fulfilment of the treaty

A known view claims that in the absence of the NPT nuclear weapons would today be possessed by Argentina, Australia, Belorussia, Brazil, Canada, Egypt, Germany, Indonesia, Japan, Kazakhstan, Netherlands, Norway, Romania, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan and Ukraine, as well as former Yugoslavia along with the 9 States mentioned above. Cf. Bunn, G.: *The world's Non-Proliferation Regime in Time. IAEA Bulletin*, 46 (2005) No. 2. 8.

⁷ South Africa acceded to the NPT in 1991, and until the end of 1992 the IAEA conducted inspections at 75 sites in the country, one at a dismantled uranium-enriching unit and one in a desert region where nuclear tests had been carried out previously.

⁸ See resolution No. 3 adopted at the Fifth Conference on the Review and Extension of the NPT. *United Nations Disarmament Yearbook, 1995*. 27–28.

Review conferences are provided for by the NPT in Para. 3 of Art. VIII, under which on expiry of 5 years from the entry into force of the Treaty the implementation thereof is to be reviewed by a conference and at 5-year periods. Thereafter the majority of the States parties may request the convening of more such conferences. Review conferences were held on that basis in 1975, 1980, 1985, 1990, 1995, 2000 and 2005.

Extension of the term of the Treaty is covered by Para. 2 of Art. X, stating that, by the lapse of 25 years from the entry into force of the Treaty, a conference is to decide whether the NPT should continue in force for an unspecified term, or its operation should be prolonged for a specified term or for further specified terms.

On the Review and Extension Conference of 1995, see Simpson, J.: *The nuclear non-proliferation regime after the NPT Review and Extension Conference. SIPRI Yearbook 1996. Armaments, Disarmament and International Security*. Oxford, 1996. 561–573.

obligations of non-nuclear-weapon States,⁹ as well as by the comprehensive safeguards agreements which the Agency has concluded with 82 States.¹⁰

I. Criticisms levelled at the NPT

Nevertheless, while noting the results of the NPT and its system of verification, one cannot remain silent about the fact that ever since its adoption the Treaty has received several criticisms partly for its deficiencies, partly for non-compliance with some of its provisions. In what follows I wish to single out but a few of them.

a) *The nuclear disarmament*

One of the objections most frequently raised in connection with the NPT concerns the fact that the instrument, apart from the provisions of the Preamble thereto, refers to disarmament in a single provision (Art. VI.), spelling out that

“Each Party to this Treaty undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament as well as to a treaty on general and complete disarmament under strict and effective international control”.

The cited provision is undoubtedly formulated in rather general terms, and, although nuclear disarmament is to be expected primarily from the nuclear-weapon States (since, after the entry into force of the instrument, such weapons

⁹ In virtue of Art. III. of the Non-proliferation Treaty the fulfilment of the obligations undertaken by the non-nuclear-weapon States party to the Treaty is to be verified by the IAEA applying its safeguards system. Under Para. 1 of Art. X, non-nuclear-weapon States are required to subject all their peaceful nuclear activities to the IAEA safeguards.

On this score see Cooley, J. N.: International Atomic Energy Agency Safeguards under the Treaty on the Non-Proliferation of Nuclear Weapons: Challenges in Implementation. In: Avenhaus, R.–Kyriakopoulos, N.–Richard, M.–Stein, G. (eds.): *Verifying Treaty Compliance*. Berlin-Heidelberg, 2006. 61–76.

¹⁰ A review of the IAEA safeguards system had become necessary by the 1990s. In order to strengthen the system and to increase its efficiency, the Agency prepared in 1997 a supplementary model protocol on the safeguards agreements (see IAEA INFCIRS/540). On the model protocol see Priest, J.–Rockwood, L.: Protocols for Strengthened Safeguards: Progress and Prospects. *IAEA Bulletin*, 41 (1999) No. 4. 14–23.

may only be possessed by those States), the NPT makes it an obligation of all Contracting Parties to pursue negotiations in good faith.

A great shortcoming of the NPT consists in containing no further provisions on such negotiations, failing as it does to indicate a deadline for commencing negotiations or a date, if only an approximate one, for the destruction of the world's nuclear arsenal.

As regards the Treaty's provisions on nuclear disarmament talks, it is worth while to note that the International Court of Justice, in its advisory opinion of 1996 on the *Legality of the threat or use of nuclear weapons*, made a special point of Art. VI. of the NPT, emphasizing that the said Art. provides not only for the conduct of negotiations, but also for the need for such negotiations "to achieve a precise result—nuclear disarmament in all its aspects". In the Court's view this twofold obligation applies to all parties to the Treaty, i.e. to the overwhelming majority of the international community (at the time the advisory opinion was rendered there were 182 States party to the NPT).¹¹ An insufficiency of the advisory opinion, as Matheson points out, that it "does not dictate any timetable or negotiating forum for reaching this result".¹² For that matter, Richard A. Falk notes on the advisory opinion that the Court has certainly created a clear situation with respect to the future: "either a specific prohibition of nuclear weapons or nuclear disarmament".¹³

There is no doubt that the past four decades have witnessed considerable step forward with respect to nuclear disarmament. However, the NPT provisions on nuclear disarmament have only been implemented in part, albeit the one-time Soviet Union, or Russia and the United States have signed highly important agreements on the limitation of nuclear weapons¹⁴ and there have

¹¹ Cf. *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion, 8 July 1996. *I.C.J. Reports*, 1966. 263–264.

¹² Cf. Matheson, M. J.: The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons. *American Journal of International Law*, 91 (1997) 434.

¹³ Falk, R. A.: Nuclear Weapons, International Law and the World Court: A Historic Encounter. *American Journal of International Law*, 91 (1997) 75.

¹⁴ See the Strategic Arms Limitation Talks (commonly known as SALT I) which resulted in the conclusion of the 1972 Anti-Ballistic Missile (ABM) Treaty and the SALT II in 1972. One should mention also the Strategic Arms Reduction Talks (START) started in 1982.

been cuts in the number of nuclear weapons possessed by the United States and Russia.¹⁵

Apart from all these results, however, the number of nuclear warheads existing in the world today can be put at 13,000, of which 11,000 are possessed by the United States and Russia.¹⁶

The fact that international agreements have by now established nuclear-weapons-free zones in different parts of the globe can be seen as an important step towards nuclear disarmament. The signing of these treaties is closely interrelated with the NPT, all the more so since Art. VII. of the NPT specifically refers to nuclear-weapons-free zones in providing that

“Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories.”

It is due to all this that one can speak, on the one hand, of certain zones not belonging to any State like Antarctica, outer space and the sea-bed as being free from nuclear weapons and, on the other, of the establishment of regional nuclear-weapons-free zones in Latin America (Treaty of Tlatelolco, 1967) and in the South Pacific Region (Treaty of Rarotonga, 1985), in South-East Asia (Treaty of Bangkok, 1995), in Africa (Treaty of Pelindaba, 1996), and recently in Central Asia (Treaty of Semipalatinsk, 2006).

In the 1990s an outstanding event in the field of nuclear disarmament was the opening of the Comprehensive Nuclear Test-Ban Treaty (CTBT) for signature at New York on 24 September 1996. However, the CTBT has not entered into force to this very day, although it was signed by 180 and ratified by 148 States. This delay in entry into force can be ascribed to the fact that certain States, on whose accession the operation of the Treaty is conditional; have not yet ratified the instrument.¹⁷ These States include two nuclear powers (the United States and China) and several States which, though not deemed to be nuclear-weapon State by the terms of the NPT, have conducted nuclear test explosions or are

¹⁵ On the Soviet-American agreements see Smith, S.: US-Soviet Strategic Nuclear Arms Control. From SALT to START to STOP. *The Nuclear Non-Proliferation Treaty, op. cit.*, 49–74.

¹⁶ Cf. Kile, S. N.–Fechenko, V.–Kristensen, H. M.: World Nuclear Forces, 2006. *SIPRI Yearbook 2006. Armaments, Disarmament and International Security*. Oxford, 2006. 644.

¹⁷ Under its Art. XIV, the Comprehensive Nuclear Test Ban Treaty is to enter into force 180 days after its signature and ratification by 44 States as enumerated in Annex 2. Until August 2008 the Treaty was ratified by 35 out of the 44 States.

capable of doing so.¹⁸ The cause of nuclear disarmament is greatly prejudiced by these States' reluctance to ratify the CTBT, although a reference to nuclear disarmament is also found in the Preamble of the NPT to the effect that the Parties to the Treaty "Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."

However, all these international instruments mentioned above could not hid the fact that there is no result in the conclusion of a convention on the prohibition of the use of nuclear weapons under any circumstances, although the question of nuclear disarmament was on the agenda of the General Assembly and the Conference on Disarmament of Geneva since the beginning of the 1980s.

The only international instrument connected with nuclear weapons concluded in the post-Cold War era was the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005.¹⁹ The making of that instrument was necessitated by the threat that terror agents can construct or acquire nuclear weapons, or they might built "dirty bombs", and by the fear that nuclear installations could be the target of terrorist groups' attack.²⁰

b) Discriminatory character of the NPT

Already from the beginning the NPT was challenged of being discriminatory, pointing out that the Treaty creates unequal obligations for States and distinguishes between the Contracting Parties according to whether in 1967 they were qualified as nuclear-weapon States or non-nuclear-weapon States.²¹ The underlying reason of that argument being that whereas the freedom of action of the non-nuclear-weapon States is greatly restricted by the Treaty, the same does not hold for the nuclear-weapon States. Precisely on this ground it

¹⁸ Among those States, mention may be made of Egypt, India, Iran, Israel, North Korea and Pakistan.

¹⁹ The Convention on Nuclear Terrorism entered into force on July 7, 2007.

²⁰ On the Convention on Nuclear Terrorism see Joyner, C. C.: Countering Nuclear Terrorism: A Conventional Response. *European Journal of International Law*, 18 (2007) 225–251.

²¹ According to Art. IX. Para, 3.

"For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967".

E.g. India refused to accede to the Treaty by invoking its discriminative character.

is maintained by many that “the NPT starts to appear as a device for freezing the world power structure”²².

This claim is absolutely true in so far as the NPT required the non-nuclear-weapon States to renounce acquisition in any form of nuclear weapons and nuclear explosive devices, but it did not do so in respect of the nuclear-weapon States. It should nevertheless be stressed that, since complete nuclear disarmament is by all means the long-term objective—notably the desideratum to remove this destructive type of weapons from the arsenals of States—, there is perhaps a hopeful possibility that mankind will some time come to see that such weapons are not possessed by the nuclear-weapon States either.

It is indisputable that the NPT differentiates between the Contracting Parties by dividing them to nuclear-weapon States and to non-nuclear-weapon States. Most of the rights and obligations of the States Party to the Treaty depend on their status under the Treaty i.e. whether they have the right to possess nuclear weapons and nuclear explosive devices, or this is forbidden to them. In that perspective there is an inequality between the Contracting Parties, five of them have the right to possess nuclear weapons or nuclear explosive devices and all the other Contracting Parties are so called non-nuclear weapon States which had to renounce the possession of these weapons and devices and had to submit all their peaceful nuclear activities to the safeguards system of the International Atomic Energy Agency.²³

However, John Simpson is right in pointing out on this score that the Treaty’s “discriminative” character and the freeze imposed by it on the existing world power structure “do not appear to outweigh the particular security advantages offered by the NPT”²⁴.

It should be stressed that the Treaty intends to keep the above mentioned inequality in certain limits and it tries, especially in the field of the peaceful utilization of nuclear energy, to compensate by the provisions on the cooperation in the peaceful uses of nuclear energy.

²² Cf. Simpson, J.: *The Non-Proliferation Treaty at its Half-Life. The Nuclear Non-Proliferation Treaty. op. cit.* 6.

²³ Under Art. III. the International Atomic Energy Agency has to apply its safeguard system to all nuclear activities of the non-nuclear-weapon States Party to the NPT in order to verify the fulfilment of their obligations assumed in the Treaty with a view of preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.

²⁴ Simpson: *op.cit.* 6.

c) *The withdrawal of the Treaty*

The decades which have passed since the conclusion of the Non-Proliferation Treaty have proved that the instrument's provision on withdrawal is a weakness thereof, namely the fact that the Treaty may be denounced through a rather simple procedure, a State leaving with relative ease the regime which has been designed to prevent the spread of nuclear weapons.

Art. X. Para. 1, of the Treaty runs as follows:

“Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.”

As is noted by Jozef Goldblat, the problem with this provision lies in the State itself being entitled to decide on the existence of “extraordinary events”, on whether such events have occurred at all, the State being under no obligation to justify its action. Furthermore, the kind of extraordinary event the drafters had in mind—other than that the acquisition of nuclear weapons by a potential adversary—is not clear from wording of the Treaty.²⁵ Fortunately, during the past 40 years, the NPT was denounced by one State only, DPRK,²⁶ but at the same time threats to denounce it were also voiced by other State (e. g. Iran) as well.

Another problem with the provisions on withdrawal of the NPT is that if a non-nuclear-weapon State chooses to denounce the Treaty, that is, it leaves the NPT regime, the international community ceases to have any information about the purpose for which that State, once free from its obligations under the NPT, intends to use the nuclear materials it possesses and the technical knowledge it has acquired as a party to the Treaty. This is all the more so since the safeguards agreements on IAEA control will also remain in force until such time as the

²⁵ Goldblat, J.: *Arms Control. A Guide to Negotiations and Agreements*. PRIO. International Peace and Research Institute. Oslo, 1994. 82.

²⁶ In March 1993 North Korea announced its intention to leave the NPT and then, in June of the same year, it suspended the execution of its withdrawal. Yet, with effect from 11 January 2003, it definitely denounced the NPT. We shall revert to the case of North Korea later on.

State concerned is a party to the NPT. Thus, in the last analysis, the international community is exposed to the danger that the denouncing State will undermine the non-proliferation regime as a whole.

Eventual withdrawal from the NPT by a State or States might produce a highly dangerous domino effect in the sense that eventually other States will reconsider their participation in the NPT. Especially because States have undertaken their non-proliferation obligations in respect to each other or to one another is likely to come into play in the case of the NPT more strongly than in that of any other treaty. Considering that a State not possessing nuclear weapons has renounced acquisition, possession, etc. of such weapons in the hope that other States not possessing nuclear weapons will undertake similar obligations, and it would certainly like to receive a guarantee that nuclear weapons will not be used against it. It will be remarked, parenthetically, that the fears of States about the eventual use of nuclear weapons are but increased to some extent by the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* since the Court failed to give a definite answer “as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.²⁷

Obviously, any effort to prescribe stricter rules on withdrawal from the NPT would raise a whole range of legal and political issues. At the same time, however, one must not overlook the fact that the provisions on withdrawal were formulated at the time when the success of the NPT regime was far from sure. It was not by chance that the instrument was originally concluded for 25 years, with a decision on the extension of the Treaty following the expiry of that term. At the time of conclusion it was not possible to know how the first 25 years of the Treaty’s life would shape up and what would happen in international politics during that period. Precisely for that reason, the possible solutions after the first 25 years were articulated in advance. In other words, it was laid down in the Treaty itself that by the lapse of 25 years a decision may be made as to whether (i) to keep the Treaty in effect indefinitely, or (ii) to extend for an additional fixed period or periods.²⁸ These provisions were by all means intended to rule out the possibility to terminate the Treaty after the lapse of 25 years.

²⁷ Cf. *Legality of the Treat or Use of Nuclear Weapons*. Advisory Opinion, 8 July 1996. *I.C.J. Reports*, 1996. 263.

On the Advisory Opinion see Matheson: *op. cit.* 417–435.

²⁸ Cf. Art. X. Para. 2, of the NPT.

However, the four decades since the conclusion of the NPT have proved to the viability of the regime as well as to the fact that the overwhelming majority of the States does make serious efforts to prevent the world-wide proliferation of nuclear weapons. This is borne out by 188 contracting States to the NPT and by the indefinite extension of the Treaty at the Fifth Review and Extension Conference.

As can be seen, the Non-Proliferation Treaty has by our days become a treaty with indefinite duration and is one of the multilateral international instruments of whose importance and necessity the international community of the States is earnestly convinced. All this naturally leads one to ask whether mankind has by now reached the state at which to make the NPT obligations everlasting, keeping in mind the final object of the complete nuclear disarmament. To restrict in some form the withdrawal from the NPT can be conceived of as a first step towards this goals.

Restricting the withdrawal from a treaty is not unknown to international law at all. Typical instances are the conventions on humanitarian law, but also worth noting is the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on their Destruction (Ottawa Treaty), providing in Art. XX. that the “instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal” and that if during the six months of notice of withdrawal “the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.” Incidentally, publicists have recorded treaties which by their very nature are unlikely to be capable of withdrawal are treaties of peace, disarmament and those establishing permanent regimes, such as for the Suez Canal.²⁹

It would obviously be not easy to amend the NPT in the direction of prescribing stricter conditions for withdrawal, yet this question should also certainly be addressed, and it could be on the agenda of the next NPT Review Conference to be held in 2010.

II. The inalienable right to develop, research, production and use of nuclear energy for peaceful purposes

Since the first attempts to restrict the possession of nuclear weapons by certain States it was a long debated question how to reconcile these restrictions with the peaceful utilization and development of nuclear energy. In other words, how to assure the peaceful utilization and development of nuclear energy in

²⁹ Cf. Aust, A.: *Modern Treaty Law and Practice*. Cambridge, 2002. 234.

those States which will renounce of any possession of nuclear weapons. That problem arose because according to a number of States the restrictions on the possession of nuclear weapons influence or even hamper the peaceful utilization and development of nuclear energy.

Knowing that was not surprising that in the 1960s during the talks on the prevention of the proliferation of nuclear weapons, it was a key-issue how to secure the progress of peaceful nuclear industry in States giving up the possession of nuclear weapons, and should they get some reward for that.

At the Geneva talks several delegations tried to present the development of the peaceful nuclear industry in such a way as being dependent to the possession of nuclear weapons. Needless to say that this is totally misinterpretation of the development of nuclear industry in the middle of the 20th century. It is true that the progress of peaceful nuclear industry was stick to the manufacturing of nuclear weapons; or even one can say that the peaceful nuclear industry was to some extent the by-product of the military nuclear industry. But this was due first of all to the military and political situation at end and after the Second World War. The States spent billion of dollars, roubles or pounds to the research works connected to nuclear weapons and as a consequence the nuclear weapon industry developed considerably and also the knowledge on the possibilities of the peaceful utilization of nuclear materials evolved. But if these huge amounts of money were to be spent only to the development of the peaceful nuclear industry, the progress would be the same, as the example of several States without nuclear weapons capacity show to us. One can say that there is no direct connection between the possession of nuclear weapons and the peaceful utilization of nuclear energy. A State could have very developed peaceful nuclear industry without the possession of nuclear weapons. In that connection one can refer to Canada, Germany, and other States as well.

During the negotiations on the NPT a number of small and medium-size non-nuclear-weapon States, in return to undertake not to get any possession and acquisition of nuclear weapons advocated to receive certain compensation and promises for greater cooperation in the field of peaceful uses of nuclear energy.

After long debates two sets of provisions were included in the NPT,³⁰ both of them giving guarantees to the non-nuclear-weapon States to have access to the benefits of the peaceful utilization of nuclear energy.

The first set of these provisions are in the Preamble and Art. IV. securing the right to all parties to the Treaty to develop research, produce and use of nuclear energy. The other guarantees are included also in the Preamble and

³⁰ It is worth mentioning that the American and Russian drafts of 1965 and 1966, contained no provisions on the peaceful use of nuclear energy.

Art. V. of the Treaty providing on the sharing of non-nuclear-weapon States in the benefits from any peaceful applications of nuclear explosions.

The detailed provisions on the share of the non-nuclear-weapon States in the benefits of these explosions are the consequence of the fact that explosive devices used for peaceful nuclear explosions are the same as those built in nuclear weapons, and therefore the Treaty prohibits any kind of acquisition of these devices to non-nuclear-weapon States.

The other reason was that at the time of the conclusion of the NPT there were great hopes in the utilisation of peaceful nuclear explosions in the extraction of mineral resources, construction of canals, tunnels, etc. Therefore the non-nuclear-weapon States had real fearing that by their accession to the NPT they would renounce to utilise that very important tool of civil engineering.

a) The “inalienable right” is not an unlimited right

As it was mentioned before, on the wish of the non-nuclear-weapon States, in the Preamble and in Art. IV. special clauses were included in the NPT on the right of these States to the peaceful uses of nuclear energy. In Para. 1, of Art. IV, the right to the peaceful uses of nuclear energy was formulated by a so called interpretative provision,³¹ which says that

“Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I. and II. of this Treaty”.

According to writers of international law this kind of interpretative provision aims to exclude a certain interpretation given to a treaty, creating a clear situation and prohibiting an otherwise possible interpretation.³²

Speaking on the right of non-nuclear weapon States to the peaceful uses, development, research of nuclear energy, the NPT qualifies that right as “*inalienable*”, which means that the non-nuclear-weapon States could not be deprived of this right or this right is not capable of being taken away.

³¹ This technique is well known in international treaty practice and e.g. one can find similar provision in Art. IV. Para. 1. of the Antarctic Treaty.

³² Cf. Haraszti, G.: *A nemzetközi szerződések értelmezésének alapvető kérdései* (Basic problems of the interpretation of international treaties). Budapest, 1965. 88.

As we could see the inalienable right to the peaceful uses of nuclear energy is subject of two limitations: namely, that right should exist without discrimination and this right is not unlimited and it is subordinated to Art.s I, and II, containing the basic undertakings to prevent the dissemination of nuclear weapons.

The inalienable right to the peaceful uses of nuclear energy is not an unlimited right. Para. 1, of Art. IV, makes clear that the right to the peaceful uses of nuclear energy should be “in conformity with Articles I. and II. of this Treaty”. Thus under Art. IV. the non-nuclear-weapon States’ right to develop research, production and use of nuclear energy for peaceful purposes is secondary to the fundamental obligations accepted by all the Contracting Parties with regard to the prevention of the proliferation of nuclear weapons and to the *fundamental purpose of the Treaty to halt the dissemination of nuclear weapons*. The right to develop research, production etc. of nuclear energy could not serve to the evasion of the basic commitment of the non-nuclear weapons States under the Treaty, not to acquire in any form nuclear weapons or nuclear explosive devices and the development, research, production and use of nuclear energy *could not lead to the violation of the basic provisions of the Treaty*. The subordination of the right to peaceful uses of nuclear energy to Art.s I, and II, indicates, that no kind of peaceful nuclear activity could be tolerated which result in any form of the production or acquisition of nuclear weapons or nuclear explosive devices by the non-nuclear weapons States.

Since the entry into force of the NPT the right to the peaceful utilization of nuclear energy and the interpretation given to Art. IV, of the NPT was dealt by numerous international conferences, forums etc, and among others it was on the agenda of the NPT review conferences, which has special importance in that respect since the task of these conferences is, according to Para. 3 of Art. VIII., to review the operation of the Treaty “with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.”

One can say that all review conferences strongly reaffirmed the right of all parties to the NPT to develop research, to produce and to use nuclear energy for peaceful purposes.³³

³³ See Decision 2 adopted at the Fifth Review and Extension Conference, on “Principles and objectives for nuclear non-proliferation and disarmament”, Para. 14. *Ibid.* 26. In 2000 the Sixth Review Conference not only reaffirmed the inalienable right of all parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Art.s I.–III. of the Treaty, but even it adopted a decision in which the Conference recognized “that this right constituted one of the fundamental objectives of the Treaty”. Cf. Part I, and II. p. 8. Para 2.

b) International cooperation

Para. 2, of Art. IV, treats the international cooperation in the peaceful uses of nuclear energy. The first sentence of that paragraph provides that

“All the parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.”

Thus according to this sentence all parties to the Treaty should facilitate the exchange of information etc. although as we know, not all the Contracting Parties were at the time of the conclusion of the Treaty or even now-a-days in a position to do that. The second sentence of that paragraph regarding international cooperation is more precise because it refers only to those parties to the Treaty which are in an appropriate position (under the Treaty: “which are in a position to do so”) and these States should co-operate in contributing “to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the need of the developing areas of the world”.

Thus in connection with the international cooperation the Treaty expressly says that in the course of international cooperation the Parties should take into consideration the demand of developing areas of the world.

The co-operation in contributing to the further development of the application of nuclear energy could be executed by States Party alone or together with other States or international organizations, which gives broad discretion to the States Party and creates new perspectives for the development of international co-operation in the peaceful uses of nuclear energy. And, as the Third Review Conference stressed, international co-operation in the peaceful uses of nuclear energy could contribute to the elimination of technological and economic differences between the developed and developing countries.³⁴

By comparing the provisions on the exchange of information and cooperation regarding to develop research, production and use of nuclear energy for peaceful purposes (Art. IV.) with those concerning the peaceful nuclear explosions (Art. V.) one can conclude that Art. IV. is far less concrete than Art. V.

³⁴ Cf. Third Review Conference of the NPT. See in *United Nations Disarmament Yearbook*, 10 (1985) 179.

Art. IV. is rather general, while Art. V. lays down the most important conditions of the share of non-nuclear-weapon States in the benefits of peaceful nuclear explosions. Thus under Art. V. the potential benefits of the peaceful nuclear explosions to non-nuclear weapon States i.) should be made available on non-discriminatory basis, ii.) the charge to such parties for the explosive devices used will be as low as possible, iii.) the charge should not include any charge for research and development. iv.) the negotiations on this subject shall start as soon as possible after the Treaty enters into force.

The above mentioned differences between Art. IV. and V. are due, among others, to the fact that at the time of the conclusion of the Treaty it was considered as a big sacrifice by the non-nuclear-weapon States to renounce of the benefits of the peaceful applications of nuclear explosion devices and to calm these States detailed provisions were included in the Treaty on the conditions of non-nuclear-weapons States' shares in the benefits of these explosion devices.

The 1995 Review and Extension Conference when interpreting Art. IV. of the NPT, added two very important conditions to the international cooperation in the peaceful uses of nuclear energy, saying that *preferential treatment* should be given to the non-nuclear weapon States party to the Treaty in all activities designed to promote the peaceful uses of nuclear energy and that the transparency in nuclear-related export controls should be prompted.³⁵

Although the international cooperation in the peaceful uses of nuclear energy is prosperous, both on bilateral basis and under the auspices of the IAEA, there is wide divergence of views between the nuclear-weapon States on the one hand, and the non-nuclear-weapon States on the other, on a number of questions connected with international cooperation. On different occasions several non-nuclear-weapon States have challenged some developed States, particularly the nuclear Powers, not to fulfil their obligations under Art. IV. The nuclear-weapon States, to prevent nuclear proliferation due to nuclear exports and imports, tried to establish special arrangements for nuclear exports, which were again considered by a number of non-nuclear-weapon States as additional restrictions to their access to nuclear technologies.

³⁵ Decision 2 on the "Principles and objectives for nuclear non-proliferation and disarmament". Para. 16. and 17. See *United Nations Disarmament Yearbook*, 20 (1995) 27. The reference to preferential treatment of non-nuclear-weapon States was repeated in the document adopted at the Sixth Review Conference held in 2000.

III. Other proliferation risks

The NPT although containing detailed provisions on the prevention of the proliferation of nuclear weapons it treats only nuclear weapons and explosive devices and is silent on some other nuclear activities which could lead to the production of nuclear weapons.³⁶ It should be mentioned that already not long after the conclusion of the Treaty several authors pointed out to these gaps.³⁷

By our days it has become clear that uranium enrichment and production of plutonium entail tremendous risks to non-proliferation, since the related technologies are capable of obtaining fissionable materials necessary for the manufacture of nuclear weapons. Another short-coming of the NPT can be said to lie in the absence of provisions on the trade of nuclear materials and transfer of nuclear technologies and assuring that they will not result in support for military nuclear programs.

a) *Unranium enrichment and production of plutonium*

The problems relating to uranium enrichment and production of plutonium were addressed by several delegates at the Seventh NPT Review Conference, and Art. 4 of the Treaty was mentioned as one of the weakest provisions thereof. It was claimed that the “inalienable right” of non-nuclear-weapon States potentially allowed those States to put into operation, under the pretext of their peaceful nuclear programs, such facilities which are capable of manufacturing nuclear weapons.³⁸ With a view to averting the inherent proliferation risks, the Review Conference considered the proposals which advocated international cooperation in uranium enrichment and plutonium reprocessing as well as control over repositories for spent fuel and nuclear waste.³⁹ These initiatives, however, were conceived by several non-nuclear-weapon States to place further limitations on their rights of access to nuclear technologies.⁴⁰

More than 25 years after the adoption of the Non-Proliferation Treaty the aforementioned short-coming of the instrument came into the focus of attention principally in connection with Iran’s nuclear program, when several sources

³⁶ On the shortcomings of the NPT see also the present writer’s treatise: *The Utilization of Nuclear Energy and International Law*. Budapest, 1984. 94–97.

³⁷ Cf. Courteix, S.: *Exportations nucléaires et non-prolifération*. Paris, 1978. 4.

³⁸ Cf. Kile, S. N.: Nuclear arms control and non-proliferation. *SIPRI Yearbook 2006*. *op. cit.* 611.

³⁹ *Ibid.*

⁴⁰ *Ibid.* 611–612.

said, as will be discussed later, that under the guise of developing the country's peaceful nuclear industry a secret nuclear program was being implemented, with Iran attempting to produce plutonium and enriched uranium.

b) Nuclear exports

As early as the 1970s there were adopted certain restraints, both in internal laws and on the international plane, in order to ensure that trade in nuclear equipment, materials, etc. should not be allowed except in accordance with the NPT. This issue received still greater emphasis after the nuclear explosion by India in 1974, which led to the formation of the Nuclear Suppliers Group (hereafter NSG) with the aim of blocking the way to unauthorized nuclear activities by nuclear exports.⁴¹

The NSG's activity was of little, if any, relevance for quite a few years, but the NSG became increasingly active as from the 1990s, with its Warsaw session of 1992 resulting in an agreement of States on Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Material and Related Technology (the so-called Warsaw Guidelines).⁴² No doubt that the Guidelines are not deemed to be a binding instrument of international law, but, considering that the substance thereof came to be incorporated in the internal laws of the NSG States, their application is obligatory. Under the Warsaw Guidelines specific rules of verification govern the nuclear materials and equipment that are capable of being used in both lawful and nuclear-weapon-related programs. The Annex to the document has listed the materials, equipment, etc.⁴³ that may only be exported to those non-nuclear-weapon States whose present and future nuclear activities as a whole come under IAEA safeguards. There can be but two exceptions to full safeguards control: on the one hand, an extraordinary circumstance, in which an item on the list is required for the safe operation of a facility subject to safeguards control and, on the other hand, a given transaction takes place on the basis of an agreement signed before 3 April 1992.

These provisions were tightened further after 11 September 2001, when the President of the United States called on the 40 member states of the NSG not to sell equipment and technology necessary for uranium enrichment and plutonium reprocessing to the States not possessing enriching or reprocessing

⁴¹ No treaty was concluded for the establishment of the Group, at present 45 States are participating in the NSG's work. On the NSG see IAEA INFCIRC /539/ rev. 3.

⁴² See IAEA INFCIRC /254/rev.1/ Part 2, July 1992.

⁴³ There are 67 kinds of equipment and material enumerated in the Annex. See IAEA INFCIRC/254/Rev.1/ Part 2, note 91.

facilities in operation. So, according to the American proposal, such installations, equipment and technologies may only be transferred to a state which was a party to the NPT on 1 December 2003 and operates an enriching and reprocessing facility which has not been closed definitively and is subject to IAEA safeguards control. All this means in effect that trade in enriching and reprocessing facilities is limited to the trade among the five nuclear-weapon States, to Japan, and, in the case of enriching facilities, to Argentina, Brazil, Germany and the Netherlands.⁴⁴

The problems relating to the exportation of nuclear materials and equipment have given rise to some concern in respect of India during the most recent years.

As noted earlier, India is not a party to the Non-Proliferation Treaty, and in 1974 it conducted a nuclear explosion, insisting that it was engaged in peaceful nuclear activity. Nevertheless, that explosion turned India into a *de facto* nuclear-weapon State, although it is doubtless that, under the NPT, considered as nuclear-weapon States are only those that carried out a nuclear explosion prior to 1 January 1967. In this connection, however, the real problem concerns not the category to which India is nominally consigned, but the fact that, on the one hand, there is an admittedly nuclear-weapon State which is not a party to the NPT, with only a fraction of that State's nuclear activity being under IAEA safeguards control,⁴⁵ and, on the other hand, one wonder if, from the point of view of trade in nuclear materials and equipment, India is deemed to be a nuclear-weapon or a non-nuclear-weapon State.

It is in recent years that India's status under the NPT has come into particularly sharp focus since in 2005 the United States and India signed an agreement on the peaceful uses of nuclear energy.⁴⁶ As is pointed out by publicists, that

⁴⁴ Cf. Michel, Q.: Critical Reflections on the Treaty on the Non-Proliferation of Nuclear Weapons. *Nuclear Law Bulletin*, 79 (2007) No. 2. 21.

⁴⁵ IAEA safeguards control as applied in respect of India is similar to that implemented in respect of nuclear-weapon States insofar as no more than certain nuclear facilities are under Agency safeguards on the basis of voluntary submission, whereas in the case of non-nuclear-weapon States party to the NPT the totality of a given State's nuclear activities is subject to verification.

⁴⁶ On 18 July 2005 President Bush and Prime Minister Manmohan Singh of India issued a joint statement entitled „Civil Nuclear Cooperation Initiative” containing, among others, a commitment by the US to “work to achieve full civil nuclear energy cooperation” and trade with India; while India pledged to separ its civilian and military nuclear facilities and programmes, to place under IAEA safeguards its civilian facilities, to continue its unilateral moratorium on nuclear testing, etc. That document was followed by a further

agreement has brought a radical change in the non-proliferation policy of the United States, because India nuclear-weapon State not party to the Non-Proliferation Treaty, and whose nuclear activity has not been under IAEA control up to now.⁴⁷ The agreement is therefore open to objection in two aspects, since the question arises, on the one hand, of how such an agreement can be reconciled with the non-proliferation obligations assumed by the United States in various treaties, particularly the NPT,⁴⁸ and, on the other hand, of whether the agreement is not in contradiction with the provisions of different international instruments on the trade of nuclear materials and equipment as well as of the internal law of the United States and India.⁴⁹ It appears that the Indian-American agreement also runs counter to the Warsaw Guidelines accepted by the United States, and that the agreement has for some time divided the NSG States, several of which objected to lifting the nuclear trade embargo which had been ordered against India 34 years before.⁵⁰ By September 2008, however, the NSG States had finally agreed on lifting the embargo, and the United States Congress approved the agreement with India at the end of September of the same year.⁵¹

In order to extend IAEA safeguards on Indian nuclear installations, since November 2007 the IAEA and India conducted negotiations on safeguards agreement, what was finally signed by the Parties in February 2009. In the future, under that agreement additional 14 India nuclear reactors are expected to be under IAEA safeguards.⁵²

accord of the Ministers of Defence on cooperation between the two countries in the field of missile defence.

On the accord see Ahlström, C.: Legal Aspects of the Indian-US Civil Nuclear Cooperation Initiative. *SIPRI Yearbook 2006. op. cit.* 668–685.

⁴⁷ See Michel: *op. cit.* 682–685.

⁴⁸ Along with these treaties, mention may be made of Security Council Resolution 1172 of 1998 calling upon the member States of the United Nations to block trade in any nuclear material or technology that would in any way promote Indian and Pakistani weapons programmes or ballistic missile programmes for nuclear delivery vehicles.

⁴⁹ On this score see Ahlström: *op. cit.* 682–685.

⁵⁰ At the Vienna Conference of the NSG States, held at the end of August 2008, France, Russia and the United States came out for lifting the embargo, while Austria, Ireland, the Netherlands, Norway, Switzerland and New-Zealand were strongly against doing so.

⁵¹ At the time of closing the manuscript of this study, the agreement did not have the Senate's approval required for its entry into force.

⁵² The agreement will enter into force on the date the IAEA receives from India written notification that its statutory and constitutional requirements for entry into force have been met.

IV. A few words about the “problematic” States

1. *The Iranian nuclear program*

The problems with Iran’s nuclear program emerged in 2002, when evidence showed that the Islamic Republic of Iran was constructing two undeclared nuclear fuel facilities south of Teheran.⁵³ The IAEA has since sought to shed light on Iran’s uranium enrichment and heavy water programs first of all in the framework of safeguards agreements.⁵⁴ Teheran, however, has refused to cooperate with the Agency, and the Iranian nuclear program being and remaining intransparent for the IAEA.⁵⁵ The problem with Iran has for long years reside in the fact that, on the one hand, the question is left open whether or not they operate secret nuclear installations in the country and, on the other, whether activities prohibited by the NPT are not being carried out at the declared nuclear installations.

The international efforts for a solution of the problems relating to Iran’s nuclear program have been exerted for years basically along two main lines. One line is that of the IAEA and the Security Council and bears upon Iran’s obligations under the NPT and the safeguards system of the IAEA, and it was submitted to the Security Council and which lead to imposing of sanctions on Iran. The other strand is that of diplomatic efforts, for which the take-off point was marked by the talks which three EU member states (France, Germany and

Some of India’s nuclear facilities (six in number) have for years been under IAEA safeguards by the terms of the agreement between the Agency and India, but this number affects only a fraction of India’s nuclear activity.

IAEA control over additional facilities is not feasible unless India strictly separates its military and peaceful nuclear programmes. On this score see IAEA INFCIRC/731.

⁵³ The start of Iran’s nuclear programme goes back to 1959, when the US-supplied experimental reactor was put into operation. In the Shah’s time it was planned to build 23 nuclear power plants up to 1990. The programme was stagnant for years because of the Iranian revolution of 1979 and the Iraqi-Iranian war, but from the mid-1980s a start was made on its continuation. An Iranian announcement of 2002 said that reactors of a combined capacity of 6,000 Mwe would be constructed during the following 20 years. For Iran’s nuclear programme, see Kile, S. N.: Nuclear arms control and non-proliferation. *SIPRI Yearbook 2004. Armaments, Disarmament and International Security*. Oxford, 2004, 604–612.

⁵⁴ The safeguards agreement between Iran and the Agency is dated 13 December 1974. See IAEA INFCIRC/214.

⁵⁵ In 2003 Iran signed the Additional Protocol to the Safeguards Agreement on verification, but it has not ratified it to date.

the United Kingdom—the so-called EU-3) initiated with Iran in 2003,⁵⁶ with China, Russia and the United States joining in from 2006 and with the active participation of chief EU representative of common foreign and security policy.

As noted previously, the IAEA has for years been dealing with Iran's nuclear program, the Agency's General Conference and Board of Governors adopting numerous resolutions on the matter, Iran, however, failed to comply with the Board resolutions and continued its uranium enrichment-related and reprocessing activities.⁵⁷ This finally led to the Board deciding to report "Iran's nuclear dossier" before the Security Council on 4 February 2006.⁵⁸ Board Resolution 2006/27 emphasized that even more than three years of effort had stopped short of clarifying all aspects of Iran's nuclear program, the gaps in the Agency's information had continued to give cause for concern, and the Agency was not in a position to ascertain whether there were not being carried out any undeclared nuclear activities in Iran.

On 31 July of that same year the Security Council adopted its Resolution 1696 (2006) on Iran's nuclear program,⁵⁹ calling upon Iran to take the steps required by IAEA Board of Governors in its resolution GOV/2006/14 and to suspend all enrichment-related and reprocessing activities. The Resolution made it clear that if Iran failed to comply with that resolution, the Council will adopt appropriate measures under Art. 41. of the Charter. Since Iran had failed to give evidence of having suspended of its uranium enrichment activity and heavy water project, to implement the resolutions of the IAEA Board of Governors, the Security Council adopted several resolutions imposing sanctions against the Islamic Republic of Iran, these were Resolution 1737 (2006), 1747(2007), 1803(2008).⁶⁰ The Council's Resolutions 1737 and 1747 are among its rare

⁵⁶ The legal basis of the talks was provided by the Paris Agreement of 15 November 2004. For the instrument, see IAEA INFCIRC/637.

In the Agreement Iran reaffirmed its intention not to acquire nuclear weapons in keeping with Art. II. of the Non-Proliferation Treaty, and it pledged itself to full and complete cooperation with the IAEA.

For the talks between Iran and the EU-3, see Kile, S. N.: Nuclear arms control non-proliferation. *SIPRI Yearbook 2006. op. cit.* 619–623, 629–630.

⁵⁷ On 1 August 2005 Iran notified the IAEA of continuing its uranium enrichment programme.

⁵⁸ Cf. IAEA Board Resolutions GOV/2006/14. See also IAEA Board Resolutions GOV/2006/15, GOV/2006/27, GOV/2006/38.

⁵⁹ The resolution was carried by 14 votes in favour and 1 vote (Qatar) against.

⁶⁰ These sanctions have banned Iran's arms export, froze the assets of private persons, entities engaged in the country's proliferation-sensitive nuclear activities as well as on the development of nuclear delivery systems. The Security Council resolutions even called upon States to restrain the entry into or transit through their territories of individual who

cases deciding on sanctions by unanimous votes, a fact indicative in the first place of the gravity of the situation and of the proliferation risks inherent in Iran's secret nuclear program.⁶¹

As mentioned earlier, the diplomatic talks seeking a solution to the Iranian nuclear problems have been under way, with longer or shorter interruptions, since 2003. Participating in them are Iran on the one hand and, on the other, six States (China, France, Germany, Russia, the United Kingdom, and the United States) as well as the chief EU representative of common foreign and security policy. The foremost aim of the discussions is to have Iran give up its uranium enrichment program in its entirety. In June 2006 the "Six" presented to Iran a proposal for a long-term comprehensive agreement, with a view to seeking a comprehensive, long-term and proper solution on the problem and to develop cooperation with Iran, based on mutual respect and the establishment of international confidence in the exclusively peaceful nature of Iran's nuclear program.⁶² In its response to the proposal Iran said it was not engaged in any prohibited activity and that otherwise, in developing its peaceful nuclear industry, it was making use of its right to the peaceful uses of nuclear energy as recognized by Art. 4 of the NPT.⁶³ Some progress toward a settlement of the situation is indicated by the events in the summer of 2008; among them emphasis is deserved, on the one hand, by Iran's Note of 16 June to IAEA, in which the Teheran Government expressed its readiness to conduct constructive negotiations within six months,⁶⁴ and, on the other hand, by the Note of 25 June 2008, which, formulated by the "Six" with the support of the chief EU

are engaged in directly or providing support for Iran's proliferation sensitive nuclear activities or for the development of nuclear weapon delivery systems. The names of key persons, entities, etc. concerned were enumerated in the Annexes.

In its resolution 1835(2008) of 27 September 2008 the Security Council reaffirmed the provisions of its previous resolutions on Iranian nuclear issue and called upon "Iran to comply fully and without delay with its obligations under the previous resolutions of the Security Council, and to meet the requirements of the IAEA Board of Governors."

⁶¹ It should be mentioned that this kind of sanctions imposing Security Council's resolutions and the Security Council's anti-terror resolutions were strongly criticised by several authors.

⁶² For the proposal, see UN A/61/514-S, 2006/806.

⁶³ For Iran's response to the proposal, see IAEA INFCIRC/685.

According to some views, Iran's persistence in its nuclear programme is made suspicious by the fact that Iran is one of the world's richest countries in oil resources and that it can in no way be said to face with energy problems. Nonetheless, Iran has repeatedly stated the same, namely that nuclear energy serves to meet national energy needs, while it wishes to use its revenues from oil and gas for increasing its foreign exchange reserves.

⁶⁴ For the Iranian Note, see IAEA INFCIRC/729.

representative of common foreign and security policy, contains very detailed proposals for various facets of cooperation with Iran in the fields of politics, economy and regional security, but makes related negotiations conditional on Iran's ceasing its uranium enrichment and plutonium reprocessing activities in compliance with Security Council Resolution 1803.⁶⁵

However, according to the last report submitted by the Director General to the IAEA Board of Governors in February 2009, since Iran does not implement the transparency measures required by the Security Council, the Agency is still not in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran.⁶⁶

2. DPRK's nuclear issue

The concern about the nuclear program of the DPRK emerged after the country had acceded to the Non-Proliferation Treaty in 1985 and the full-scope safeguards agreement with IAEA as required by the NPT had entered into force in 1992.⁶⁷

From the very beginning there had been contradictions between the data reported by DPRK to the IAEA under the safeguards agreement and the results of the Agency's analysis, and, according to the IAEA, there existed in the DPRK undeclared plutonium. With a view to clarifying the situation, the Agency requested access to additional information and initiated on-site inspections, but the DPRK rejected them and, moreover, informed the world public in March 1993 of its withdrawal from the Non-Proliferation Treaty.⁶⁸ However, as a result of the negotiations between the DPRK and the United States, the DPRK announced, one day before the expiry of the 30 days' notice of with-

⁶⁵ For the proposal, see IAEA INFCIRC/730.

⁶⁶ Cf. IAEA GOV/2009/8.

⁶⁷ The first experimental nuclear reactor of North Korea was built in Yongbyon with Soviet assistance and started operation in the 1960s. From the end of the 1970s North Korea has sought to have its nuclear programme gradually achieve a „status of its own”, without the need to rely on foreign assistance.

For the safeguards agreement, see IAEA INFCIRC/403.

⁶⁸ North Korea said that its withdrawal from the NPT had been motivated by, inter alia, the US military manoeuvres threatening the country with nuclear war. After the notification of withdrawal the three depositaries of the Treaty—the Russian Federation, the United Kingdom and the United States—published a joint declaration questioning the real cause for withdrawal as stated by North Korea to be „exceptional circumstances relating to the substance of the Treaty” under Art. X. Para. 1, thereof and „jeopardizing the higher interests” of the country. At the time the withdrawal by North Korea was also dealt with by the Security Council, which in Resolution 825 (1993) called upon that country to reconsider its decision.

drawal, the suspension of its withdrawal from the NPT for as long “as it considers necessary.”⁶⁹

Since that country continued raising obstacles to IAEA inspections in violations of the safeguards agreement, the case of the DPRK was considered both by the IAEA Board of Governors and, on the basis of its report, by the Security Council. The situation was further complicated by the DPRK’s withdrawal on 13 June 1994 from the International Atomic Energy Agency, of which it had been a member for 20 years. There is no doubt that this step entailed an interruption of relations between the Agency and the DPRK in a certain aspect, but at the same time the country’s withdrawal from the Agency did not affect its contractual obligations under the NPT and the safeguards agreement concluded as required by that Treaty.

In the autumn of 1994 the North Korean nuclear crisis seemed to be lessened somewhat insofar as the United States and the DPRK signed a framework agreement (the so-called Agreed Framework)⁷⁰ at Geneva on 21 October 1994, to the effect that the United States would build two light water reactors in the DPRK⁷¹ in return for the latter country halting the construction of its nuclear research centre in Yongbyon and giving up its nuclear weapon program.⁷²

This notwithstanding, the following years witnessed the continuation of verification-related disputes between the DPRK and IAEA. The greatest problem concerning the DPRK’s nuclear program lay in that the Agency actually never having had an opportunity to receive an overall picture of the DPRK’s nuclear activity and to satisfy itself in a manner admitting of no doubt that the country’s nuclear industry was serving peaceful purposes, and in that, as mentioned already, the IAEA had been of the position since 1993 that the DPRK was not

⁶⁹ Thereafter North Korea agreed to limited safeguards control, but these steps fell short of clarifying the question whether North Korea was really using its declared nuclear facilities for peaceful purposes.

⁷⁰ For the Agreed Framework, see <http://www.Kedo.org/pdfs/AgreedFramework>

⁷¹ Also, the Agreement provided for the normalization of economic and political relations between the two States, the promotion of cooperation in the field of peace and security on the Korean Peninsula, and stated, *inter alia*, that North Korea would remain a party to the Non-Proliferation Treaty.

⁷² With the aim of implementing the agreement of 1994, the United States and North Korea set up in 1995 the Korean Peninsula Energy Development Organization (KEDO), to which adhered later Australia and New-Zealand; Argentina, Chile and Indonesia in 1996; the European Union and Poland in 1997; the Czech Republic in 1999; and by Uzbekistan in 2000. Owing to North Korea’s continuous breach of its obligations under the agreements, the Executive Board of KEDO decided to discontinue the light water project on 31 May 2006.

acting in compliance with the provisions of the safeguards agreement. The Agency's suspicion was heightened by the implementation of secret uranium enrichment programs in the DPRK, the inobservance of the American-North Korean framework agreement of 1994, and the expulsion of IAEA inspectors from the country.

In 2002 North Korea came to openly concede its implementation of a uranium enrichment program for nuclear weapon purposes. That admission not only offended the Non-Proliferation Treaty and the safeguards agreement, but also ran counter to other international documents, such as, *inter alia*, the joint declaration of North and South Korea concerning the denuclearization of the Korean Peninsula.⁷³

Afterwards North Korea was unwilling to cooperate with the IAEA in any way, to comply with the provisions of the safeguard agreement, and announced instead, that it would withdraw from the NPT with effect from 11 January 2003.

In an endeavour to resolve the security problems associated with North Korea's nuclear weapon program there were started negotiations in August 2003 with the participation of the United States, Russia, the Republic of China and Japan, along with the representations of the two Koreas.⁷⁴ The negotiations were conducted in several rounds, with dangers of an ultimate break thereof, when in February 2005, for instance, North Korea announced that it was in possession of a nuclear weapon and concurrently suspended its participation in the six-party negotiations for an indefinite period. The discussions nevertheless ended up yielding results in that the parties adopted a Joint Declaration, in which North Korea, afflicted as it was by immense poverty and famine, undertook in principle, in exchange for food aid and energy sources, to end its nuclear program, return to the NPT, and apply the IAEA safeguards system. Yet, for all that, on 9 October 2006 it informed the world public that it had carried out an experimental nuclear explosion, which consequently led to the interruption of the negotiations.⁷⁵

⁷³ In December 1991 North and South Korea signed a declaration on denuclearization, committing themselves not to possess either nuclear weapons or plutonium reprocessing and uranium enrichment facilities, and to conduct negotiations on a mutual verification system. Still, as early as 1992, the IAEA found evidence that North Korea was secretly engaged in plutonium reprocessing.

⁷⁴ The nuclear program of North Korea was looked at *ab initio* with particular concern by the neighbouring States of Asia, fearing that North Korea's nuclear policy would generate a nuclear arms race in the region. Cf. Lee, K. B.: North Korean nuclear development, missiles and energy crisis. Cf. *Friend of North Korean People*, 18 (2004) 55.

⁷⁵ In the wake of the North Korean nuclear explosion the Security Council, in its Resolution 1718 of 14 October 2006 adopted by a unanimous vote, ordered the application

However, owing to Beijing's pressure on North Korea, the negotiations were resumed in February 2007. On 13 February of that year an agreement was reached in Beijing to the effect that, in return for economic, energetic and humanitarian assistance, North Korea undertook to end its nuclear program for military purposes and to ensure that the shutting down and disablement of its nuclear centre in Yongbyon would take place under IAEA control. First it appeared that North Korea had observed the provisions of the aforementioned agreement for a few months only, and on 24 September 2008 it requested the IAEA to remove the Agency's seal from the Yongbyon centre, while announcing that reprocessing would go on at the installation and that from that point of time the Agency's inspectors would have no access thereto. But, according to the latest information, in the DPRK the IAEA has continued to monitor and verify the shutdown status of the Yongbyon nuclear facilities and the fuel rods discharges from the facility are under Agency surveillance.⁷⁶

Conclusions

The NPT is one of the most important treaties which, concluded in the middle of the 20th century, have considerably enhanced the cause of nuclear disarmament during the past period of more than four decades. When emphasizing the significance of the Treaty one cannot be silent about certain weaknesses of its regime, of which reference is made by many to the discriminative character of the NPT.

By its structure and provisions the Non-Proliferation Treaty has divided the States into two groups, distinguishing those possessing and those not possessing nuclear weapons at the time the Treaty was concluded. In effect, the rights and obligations of the States party to the NPT are tailored to the group to which they belong, and the gravest violation of the NPT is that when States seek to change their status as defined in the NPT, notably by trying to gain control of nuclear weapons or other nuclear explosive devices.

Under the NPT, research in and production and application of nuclear energy for peaceful purposes are "inalienable rights", but their exercise should

of sanctions under Chapter VII of the Charter, calling on Pyongyang not to carry out any further nuclear tests nor to launch ballistic missiles, to return forthwith to the NPT, and to accept safeguards control by the IAEA.

⁷⁶ Cf. IAEA Director General's introductory statement to the Board of Governors on 2 March 2009. However, some weeks later, on 15 April 2009 the DPRK has announced of ceasing all cooperation with the IAEA and asked the Agency's inspectors to leave the country at the earliest possible time.

be in keeping with the basic obligation of non-nuclear-weapon States under the Treaty not to acquire in any form nuclear weapons or other nuclear explosive devices and not to carry out unauthorized nuclear activities under the guise of their peaceful nuclear programs.

The 40th anniversary of the conclusion of the Non-Proliferation Treaty, the four decades that have passed since the Treaty's entry into force, and the next Review Conference will afford a good opportunity⁷⁷ to strengthen the non-proliferation regime, perhaps in form of a protocol annexed to the NPT. Adoption of such a document is necessitated by the fact that there are new dangers of nuclear weapon proliferation coming into view in our days.

If the States of the international community are in real earnest about the cause of preventing the proliferation of nuclear weapons, they should make every effort to assist the non-nuclear-weapon States in the implementation of their peaceful nuclear programmes, for it is abundantly clear that international cooperation, surrounded with reliable guarantees, in the peaceful uses of nuclear energy is of paramount importance to non-proliferation.

⁷⁷ The negotiations concerning the preparation of the next Review Conference, due to be held in 2010, have been under way since 2007.