

The Untapped Potential of the NPT

Why We Must Reinterpret the Nonproliferation Treaty

What is the Nuclear Non-proliferation Treaty (NPT) good for? Most foreign ministries, including those of Iran and the United States, insist that Article IV of the treaty recognizes every state's "inalienable right" to develop "peaceful nuclear energy." That right was reiterated in the final declaration of the five-year NPT Review Conference in May 2010. The declaration also prohibited reinterpreting Article IV in any way that would "limit" that right, and affirmed the importance of all member states recycling nuclear fuel and moving toward fast reactors—technologies historically associated with making nuclear fuels that can be quickly converted into nuclear weapons. If this interpretation

of the NPT is correct, and it is licit for countries to engage in activities that can bring them to the very brink of acquiring nuclear weapons, then how can the treaty possibly accomplish its stated goal of preventing the spread of nuclear bomb-making technologies?

Some analysts have tried to explain away the apparent contradiction. They contend that the NPT clearly prevents proliferation by requiring the imposition of international safeguards to block any diversions of fissile material from peaceful purposes to military ones. Unfortunately, these inspection procedures, which are required of all non-weapons-state members of the NPT under Article III, are rickety at best. Indeed, International Atomic

Energy Agency (IAEA) nuclear safeguards frequently seem more cosmetic than real. The IAEA's repeated failures to find covert reactors and fuel-making plants (both critical to making bombs) are a matter of public record. And the agency still cannot assure the continuity of inspections over the potentially bomb-usable materials (spent and fresh reactor fuel) at roughly two-thirds of the sites it currently inspects. Even at declared nuclear-fuel-making sites, the IAEA routinely loses account of many bombs-worth of material each year.

Worse still, it is all too easy for violating states to withdraw from the NPT, at least as it is currently interpreted, and the treaty hardly admits of modification. Under Article X, treaty members are free to leave the NPT with no more than three months' notice by filing a statement of the relevant "extraordinary events" that the country "regards as having jeopardized its supreme interests." As North Korea demonstrated with its withdrawal from the NPT in 2003, this requirement is hardly onerous. As for formally amending the treaty, it's nearly impossible: Not only must a majority of NPT members ratify any proposed amendments, but every member of the IAEA governing board and every declared nuclear state must ratify it as well. And even after this, any state that chooses not to ratify is free under Article VIII of the NPT to ignore the amendment.

For all of these reasons, the critics of the NPT see it not just as weak and difficult to improve, but as a legal instrument that actually enables na-

tions to acquire nuclear weapons technology. Former president George W. Bush highlighted this in a February 2004 speech, arguing that the NPT had created a "loophole" in promoting all aspects of civilian nuclear technology including nuclear fuel-making. This has allowed proliferating states to "cynically manipulate" the treaty to develop and acquire nearly all the technology and materials they needed to make nuclear weapons. President Bush attempted to shore up the NPT by calling on those non-weapons states that have not yet developed nuclear fuel-making to fore-swear such activities and to allow more intrusive civilian nuclear inspections in exchange for their assured access to nuclear fuel from those states now producing enriched uranium.

His appeal, however, was unsuccessful: Australia, Canada, South Africa, Jordan, Iran, and Argentina, among other states, were unwilling to give up their "right" to make nuclear fuel. Then, in September 2007, Israel bombed a covert Syrian nuclear reactor that was under construction. This action, which followed months of intelligence consultations with the United States, was a clear vote of no confidence in the IAEA inspections system.

Compounding these setbacks, the U.S. government in 2005 negotiated a civilian nuclear cooperation agreement with India—a non-weapons state under the NPT that had already violated its pledges not to misuse previous U.S. and Canadian civilian nuclear energy aid and that had tested nuclear weapons in 1974 and 1998.

Implementing this agreement prompted Pakistan, Israel, and Iran to call for similar treatment. Finally, as of this writing, Washington and its allies still have not seriously penalized, much less reversed, the nuclear misbehavior of Iran and North Korea—two states that the IAEA found to be in clear breach of their NPT obligations.

Each of these developments has undermined the treaty's nonproliferation credibility, cueing a chorus of pleas from policy analysts for NPT members to take steps to strengthen the treaty. Some of the proposed measures would require non-weapons states to adopt more intrusive inspection procedures; others would increase funding for IAEA safeguards and establish automatic penalties for violations of safeguard agreements. Most of the proposals, however, have to do with implementation of the NPT's Article VI, which deals with disarmament. Under this article,

Each of the Parties to the Treaty undertakes 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.

As to what Article VI might concretely entail, the NPT's preamble is quite explicit: NPT member states should support a global ban on nuclear testing, cease producing nuclear weapons and their means of delivery, and pursue nuclear and general disarmament.

Non-weapons states point out that none of these objectives has been met to date, nor even seriously approached. For all of the reductions that have been made in the world's stockpiles of *active* nuclear weapons—now down from about 75,000 to fewer than 10,000—both the United States and Russia still retain thousands more in storage. Also, the five original NPT weapons states have yet to bring the Comprehensive Test Ban Treaty (CTBT) into force and have yet to reach any agreement to end nuclear weapons production.

To be sure, when one digs deeper, this indictment of the NPT weapons states begins to look more complicated. Most of the declared nuclear weapons states have not only reduced their deployments but also imposed moratoria on the further production of uranium or plutonium for weapons purposes and on the further testing of nuclear weapons. Also, the states most opposed to concluding formal international agreements on nuclear testing and production are not the NPT nuclear weapons states, but rather states outside of the NPT, such as India, North Korea, and Pakistan, or states such as Egypt, which refuses to ratify the CTBT until Israel joins the NPT and eliminates its nuclear weapons.

In light of these complications and the prevailing interpretation of the NPT as a set of nuclear bargains at war with one another, it is quite possible that the treaty is on its way to becoming little more than a diplomatic talking point—a nuclear version of the Biological Weapons Convention, a set

of agreed international goals rather than an international understanding with specific operational consequences. In time, the NPT could become a historical curiosity like the Kellogg-Briand Pact, which tried vainly in 1929 to ban war: a solemn, albeit ineffective legal attempt to prohibit the worst of what is certain to occur.

To save the NPT from this fate, the interpretation of the treaty's Article IV as guaranteeing a broad right to civilian nuclear energy must be significantly softened. True, most non-proliferation analysts insist that any alternative reading is a nonstarter. But that position is unnecessarily fatalistic about how absolute this right is and how inviolate the NPT is. In fact, the NPT *is* open to interpretation and has already been significantly altered.

Consider, for example, the way the NPT's promise in Article V to share the possible benefits of peaceful nuclear explosives has played itself out. When this article was first proposed in the 1960s, most nations, including the United States and Soviet Union, believed that nuclear explosives could be employed as "ploughshares" to create canals and to complete other civil engineering tasks, including mining and excavation. To assure non-weapons states the possible benefits of such nuclear applications, the NPT allowed weapons states to share such benefits by supplying nuclear explosive services to non-weapons states on a turnkey basis (that is, ready to use). To date, however, no state has applied for such assistance and none has offered it, for two unan-

anticipated reasons. First, the "possible benefits of peaceful nuclear explosives" turned out to be negative: Given the costs of cleaning up the radioactive debris that the use of peaceful nuclear explosives would produce, it became clear that it would be far cheaper to use conventional explosives for civil engineering applications. In short, there were no "benefits" to share. Second, the few states that insisted on conducting their own "peaceful nuclear test explosions"—India and Russia—were strongly suspected of using Article V as a cover for nuclear-weapons testing. The United States and most nuclear-supplying states sanctioned India for its 1974 test of a "peaceful nuclear device" by depriving it access to most controlled civilian nuclear supplies. In time, *any* nuclear explosion, "peaceful" or not, came to be seen as a violation of a norm against any form of nuclear testing.

This reinterpretation of Article V suggests that it might be possible to reinterpret Article IV as well to recognize the NPT's explicit qualifications on exercising the right to peaceful nuclear energy. This right, the NPT notes in Article IV, must be implemented "in conformity" with the treaty's clear strictures in Articles I and II. Those two articles, in turn, prohibit nuclear weapons states "in any way to assist, encourage, or induce" non-weapons states to develop or obtain a weapon, and ban non-weapons states from seeking or receiving "any assistance in the manufacture of nuclear weapons."

Properly understood, being "in conformity" with Articles I and II implies

also being in conformity with Article III, the NPT requirement that all non-weapons states accept the imposition of international nuclear safeguards on all of their civilian nuclear activities and materials to prevent their diversion to bomb-making. Certainly a non-weapons state refusing IAEA safeguards would be suspected of violating Article II's prohibition on seeking or producing nuclear weapons—which is why the final declaration of the 2000 NPT Review Conference refers to the need for non-weapons state members to exercise their Article IV activities in conformity with Articles I, II, and III.

The safeguards the IAEA has implemented in support of Article III, though, are hardly capable of preventing military diversions in a reliably timely fashion in every case. Not all nuclear activities and materials can in fact be safeguarded to prevent their diversion to make bombs. Some activities—such as nuclear fuel-making and operating large nuclear programs in hostile, non-cooperative states like North Korea or Iran—cannot be inspected in a fashion that can reliably assure detection of a military diversion early enough to allow an intervention to prevent the production of a bomb. Similarly, some nuclear materials are so weapons-usable (e.g., highly-enriched uranium, separated plutonium, and plutonium-based fuels) that reliable and timely detection of their diversion to make bombs is simply not possible.

This, then, raises the question: If a nuclear activity or material is so close to bomb-making that it cannot be safe-

guarded against military diversion, is it protected as being “peaceful” under the NPT? In the 1970s, it was hoped that the production of nuclear fuel in Japan, Brazil, South Africa, the Netherlands, and Germany could be safeguarded. Yet revelations that hundreds of kilograms of weapons-usable materials went missing from IAEA-monitored nuclear reprocessing and fuel-making plants in Japan and the United Kingdom have raised serious questions as to whether or not these assumptions were ever sound. We also know from experience in Iraq, Libya, Iran, Syria, and North Korea that the IAEA inspections system cannot be relied upon to find covert nuclear-weapon-related activities in states that refuse to cooperate fully with IAEA inspectors.

How, then, ought we to proceed? Should we continue to allow new states to make nuclear fuel even though we know that we cannot safeguard against its military diversion? What of states that we have reason to believe may cheat, such as Egypt, Algeria, and Saudi Arabia—states that have all hidden their acquisition of nuclear technologies or nuclear-capable delivery systems? Should we nonetheless allow them to develop large nuclear energy programs in hopes that IAEA safeguards might somehow work?

Many of the world's less-developed states would answer that the NPT's preamble explicitly stipulates that all of the benefits of peaceful nuclear energy, including “any technological byproducts which may be derived...from the development of nuclear explosive

devices” should be “available” for civilian purposes to all states. This would suggest that the NPT recognizes and protects a *per se* right of all states to get to the very brink of making bombs.

Yet, if the NPT is dedicated to sharing the *benefits* of *peaceful* nuclear energy, there presumably must be measurable benefits and the nuclear materials must presumably be distant enough from bomb-making so that inspections could reliably detect its military diversion well before any bombs might be made. In other words, non-weapons states must not be permitted to pursue nuclear energy that is *unprofitable* and *dangerous*. By this set of standards, what currently is defended as being “peaceful nuclear energy” protected by the NPT should be questioned. Are nuclear fuel-making and large nuclear programs truly economically competitive—which would seem to be the minimum standard for their being “beneficial”—with other sources of power, like oil or natural gas, in places like the Middle East? How economically competitive are such programs against safer alternatives in any region? Under what conditions could nuclear fuel-making be safeguarded with sufficient reliability to ensure the timely detection of diversions into military applications? Isn’t nuclear fuel-making inherently dangerous in *any* non-weapons state? Should these activities be allowed to be expanded in non-weapons states and to new locales? These questions demand answers—answers that must inform how the NPT is read and

what activities are viewed as protected under the treaty.

A similar argument holds for the NPT’s withdrawal clause under Article X. That article has been interpreted to give states like North Korea the freedom to violate the treaty and then withdraw with little or no consequence. Yet, the Vienna Convention on the Law of Treaties points out that states that violate an agreement can and should be held accountable for their transgressions whether or not they choose to withdraw from the agreement. France and the United States now insist that this is the appropriate way to read the NPT.

Reading Article X this way would mean that violating states inclined to leave the NPT, such as North Korea and Iran, would have far greater difficulty doing so with impunity. It is unclear whether this view, which the United Nations Security Council endorsed in 2009 with the adoption of Resolution 1887, will prevail in the long term—but it is a step in the right direction. It represents the kind of creative interpretive challenge that will be necessary if the NPT is to remain effective against further proliferation instead of becoming a litany of empty promises on parchment, offering only a false sense of security.

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