

The New Zealand Permanent Mission
to the United Nations

is pleased to invite you to a Discussion with

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author of

**Strengthening the NPT: International Law and
Effective Measures for Nuclear Disarmament**

A Discussion Paper

**Thursday 22 October
1.15-2.30**

CR 6

Commentators:

H.E. Ms Dell Higgin (Chair)

New Zealand Ambassador for Disarmament

Ms Kathleen Lawand

Head, Arms Unit, ICRC

commenting on "Nuclear Weapons under IHL"

Mr Michiel Combrink

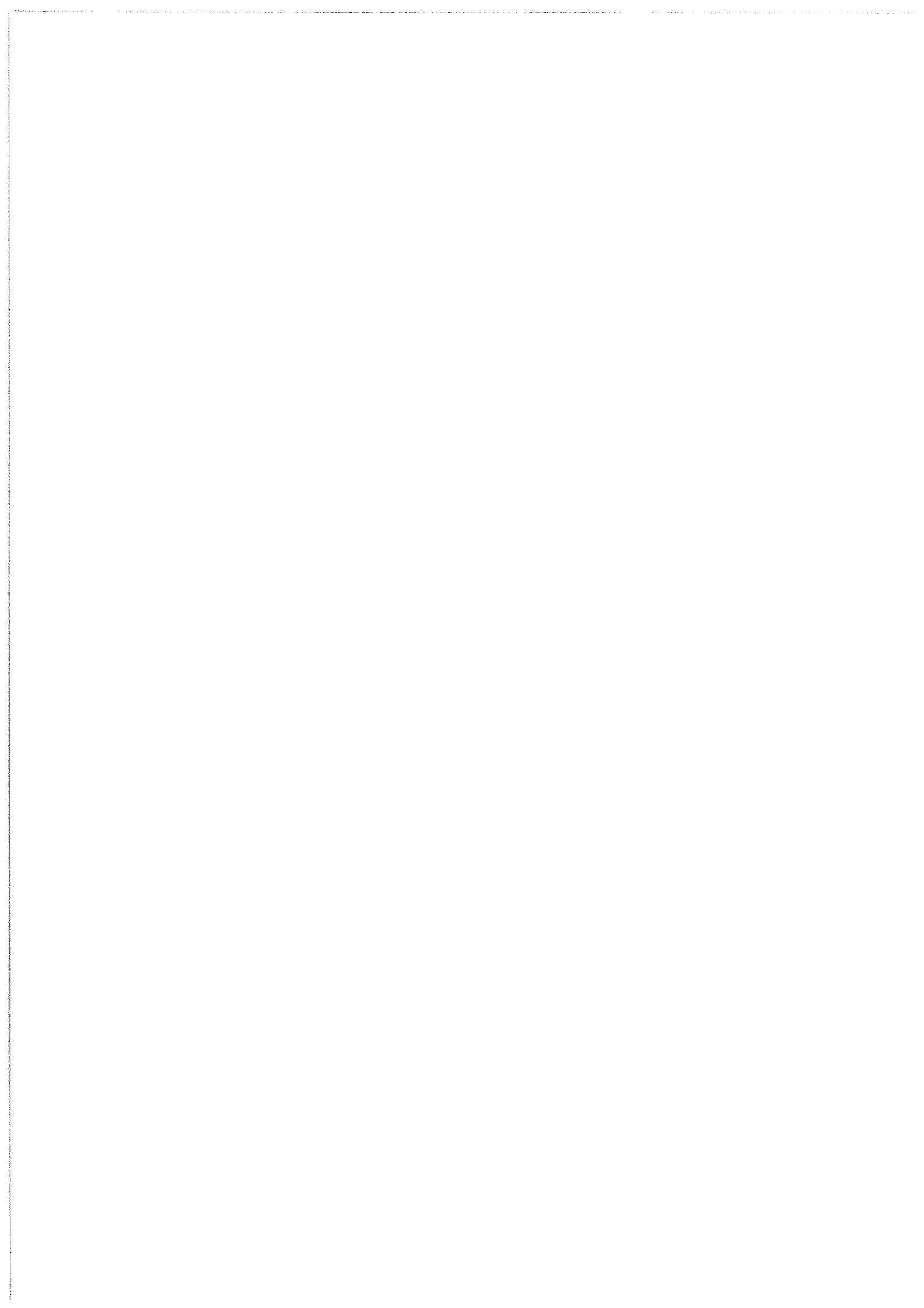
Dep. Dir, Disarmament & Non-Prol, South Africa

*commenting on "NAC Proposals for Article VI's
Effective Measures"*

All are welcome to attend

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***Strengthening the NPT:
International Law and Effective Measures for
Nuclear Disarmament***

A Discussion Paper

October 2015

Strengthening the NPT: International Law and Effective Measures for Nuclear Disarmament

Treasa Dunworth*

EXECUTIVE SUMMARY

A new legal instrument on nuclear disarmament will strengthen the Treaty on the Non-Proliferation of Nuclear Weapons 1968 (NPT). It will also constitute an important step in the implementation of its Article VI obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament.

A new legal instrument will not disturb the ongoing legal obligations arising from the NPT. Successive treaties dealing with the same subject matter are a common feature of the international legal system and there are well-developed rules to manage any overlapping provisions between treaties (Part II). The inclusion of key prohibitions (such as testing, possession, use, transfer and stationing) in a new legal instrument would strengthen existing NPT obligations (Part III). Compliance by states with the new obligations can be internationally verified without compromising the NPT (Part IV).

I Introduction

Discussions on taking forward multilateral negotiations on nuclear disarmament have recently gained momentum. Whatever the actual form or precise content of the legal instrument resulting from such negotiations, it will not supplant the NPT, which has been, and no doubt will remain, the cornerstone of the nuclear non-proliferation and disarmament regime. A new legal instrument on nuclear disarmament would constitute an important step in the implementation of the obligation in Art VI of the NPT to pursue negotiations in good faith on effective measures relating to nuclear disarmament. Additionally, the new instrument would complement and indeed reinforce the NPT, for example by repeating obligations or by making explicit what is already implicit in the NPT.¹

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¹ As highlighted in Working Paper 9 submitted by the New Agenda Coalition to the 2015 NPT Review Conference, for “those States Parties to the Treaty that are non-nuclear-weapon States, the key obligation in any new legal instrument would effectively be a reiteration of their existing obligation under article II of the Treaty. Reiteration would not, however, undermine this obligation: it would, indeed, strengthen it (in the same way that reiteration, for example, of the right to life in a range of human rights treaty regimes has strengthened, not undermined, that right).” (NPT/CONF.2015/WP.9)

II A new legal instrument will not disturb the ongoing legal obligations arising from the NPT

The existence of two or more treaties on nuclear weapons-related issues poses no legal problems for the international community. Successive treaties on the same or similar subject-matter are a commonplace feature of today's international legal system. As such, there are long-standing and firmly established rules that govern the consequent legal relationships — these are articulated in the Vienna Convention on the Law of Treaties 1969 (VCLT). When the Parties to a later treaty do not include *all* the Parties to the earlier treaty, the general rule is that the conclusion of a new treaty or agreement dealing with the same subject-matter does not disrupt the existing treaty relationships for states that have not joined the new treaty.² For the NPT, it is unlikely (at least initially) that all States Parties to the NPT will join the new legal instrument. Thus, in the event that any States Parties to the NPT choose to remain outside the new legal instrument their legal rights and obligations will not be affected by it.

In practice, when negotiating a treaty on a subject matter already covered in part or in whole by an earlier instrument, states do not rely exclusively on these rules of general treaty law. Rather, negotiating states ensure that the relationship between the earlier treaty and the new treaty is articulated clearly in the new instrument.³ A good example is provided by Article XIII of the Chemical Weapons Convention 1993, which provides that nothing in that treaty shall be interpreted as in any way limiting or detracting from the obligations earlier assumed by any state under either the 1925 Geneva Protocol or the Biological Weapons Convention 1972.⁴ A further example is Article VIII of the Biological Weapons Convention, which provides that nothing in that treaty is to be interpreted as in any way limiting or detracting from the obligations assumed under the 1925 Geneva Protocol.

By adopting these kinds of provisions in the new legal instrument, as undoubtedly would be the case, states can have absolute confidence that the rights and obligations enshrined in the NPT would not be undermined.

III Prohibitions in a new legal instrument will strengthen the NPT

The inclusion of prohibitions against for example testing, possession, use, transfer and stationing of nuclear weapons in a new legal instrument, far from imperiling or otherwise weakening the NPT, will in fact strengthen it including by giving effect to the Art VI obligation to pursue effective measures relating to nuclear disarmament and by reducing the incentive to proliferate.

² See Arts 30 and 59 VCLT.

³ See in particular Art 30(2) VCLT.

⁴ Compare to provisions in other treaties where the stated intention is to over-ride the earlier treaty. For example, Art 59 of the First Geneva Convention 1949 (concerning the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) expressly states that the Convention replaces earlier treaties of 1906 and 1929 on the same subject.

The prohibitions discussed below are not the *only* prohibited acts that might be included in a new legal instrument on nuclear disarmament but have been covered here either because they are the key prohibitions typically included in treaties governing disarmament of other weapons types or because they have featured prominently in discussions on nuclear weapon prohibitions. Much of the analysis, however, is equally applicable to the full range of other prohibitions which might be included in the instrument (for example development, production, acquisition, stockpiling, deployment and threat of use).

A Testing of nuclear weapons

Any new treaty containing a prohibition on nuclear testing will sit within a well-established network of treaty law prohibiting the testing of nuclear weapons.⁵ That network includes the Partial Test Ban Treaty 1963, the five Nuclear-Weapon-Free Zone (NWFZ) treaties,⁶ as well as other treaties prohibiting testing in certain environments.⁷ Although the Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT) is not yet in force, pursuant to that Treaty, any nuclear test carried out by a signatory or ratifying state would be a breach of the obligation imposed on states not to defeat the object and purpose of a treaty pending its entry into force.⁸ The NPT does not explicitly address nuclear testing but does implicitly prohibit the testing of nuclear weapons by the non-Nuclear Weapon States (NNWS). Article II obliges NNWS not to “manufacture or otherwise acquire” nuclear weapons. It is difficult to imagine circumstances in which a NNWS could test a nuclear weapon and still be in compliance with this provision.⁹

Therefore, there is already an extensive network of treaty prohibitions on conducting nuclear testing. It is important to note that seven of the existing treaties articulating some kind of limit on nuclear testing were concluded *after* the NPT was agreed. In none of these cases was there any suggestion that they compromised or undermined the NPT. In fact, a legally effective ban on nuclear testing is widely seen (and actively sought) as a means to strengthen the international nuclear non-proliferation and disarmament regime, including the NPT. For example, at the 2010 NPT Review Conference, NPT States Parties:¹⁰

reaffirm[ed] the essential role of the Comprehensive Nuclear-Test-Ban Treaty within the nuclear disarmament and non-proliferation regime and that by achieving the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and

⁵ For discussion of the legal framework on nuclear testing, see generally Lisa Tabassi “The Nuclear Test Ban: *Lex Lata* or *De Lege Ferenda*?” (2009) 14 *Journal of Conflict and Security Law* 309.

⁶ Treaty of Tlatelolco 1968; Treaty of Rarotonga 1985; Bangkok Treaty 1995; Treaty of Pelindaba 1996; Treaty of Semipalatinsk 2006.

⁷ Antarctic Treaty 1959; Sea-Bed Treaty 1971; Outer Space Treaty 1967.

⁸ Art 18 VCLT.

⁹ For discussion, see Lisa Tabassi, above n5. See also Don MacKay “Testing Nuclear Weapons Under International Law” in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds) *Nuclear Weapons under International Law* (Cambridge University Press, Cambridge, 2014) at p. 299.

¹⁰ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Outcome Document NPT/CONF.2010/50 (Vol 1) at para. 83.

qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, the Treaty combats both horizontal and vertical proliferation.

More recently, the opening paragraph of the 2015 Final Declaration of the Conference on Facilitating the Entry into Force of the CTBT stated that “a universal and effectively verifiable Treaty constitutes a fundamental instrument in the field of nuclear disarmament and non-proliferation”.¹¹

In light of the widely held and often expressed view that a legally binding ban on testing would support the nuclear disarmament and non-proliferation system, it is difficult to understand how a comparable provision in any new treaty could be considered as anything other than a means to strengthen the NPT.

B Possession of nuclear weapons

Article II of the NPT implicitly prohibits the possession of nuclear weapons by NNWS because, in the same way that testing nuclear weapons is implicitly prohibited, it is difficult to understand Article II's prohibition on acquisition without accepting that possession is also prohibited. Indeed, because non-proliferation of nuclear weapons was a key object and purpose of the Treaty, it is a logical reading of Article II.

Additionally, many NNWS are bound by an explicit prohibition on possession through their membership of one of the NWFZ treaties. Of the 182 NNWS to the NPT, 108 have ratified one of the NWFZ treaties, each of which has provisions prohibiting the possession of nuclear weapons.¹² These treaties are rightly seen as a mechanism by which the non-proliferation objectives of the NPT are bolstered (indeed, they are anticipated by the NPT).¹³

For the NWS in the NPT, or indeed for states outside the NPT, there is currently no legal prohibition on possession of nuclear weapons.¹⁴ Accepting such a prohibition in a new legal instrument clearly would not undermine the NPT but would fulfil the obligation of Article VI and advance the Treaty's objects and purposes overall. By moving beyond the discriminatory framework of the NPT this new legal instrument would enhance the global nuclear non-proliferation and nuclear disarmament regime more generally.

¹¹ Final Declaration and Measures to Promote the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty 2015 at para. 1, available at <www.ctbto.org>. See also in the United Nations General Assembly: Joint Ministerial Statement on the Comprehensive Nuclear-Test-Ban Treaty A/69/629 (2 Dec 2014) and Resolution on the Comprehensive Nuclear-Test-Ban Treaty A/Res/69/81 (11 Dec 2014), first preambular paragraph.

¹² Art 1(b) Treaty of Tlatelolco 1968; Art 3(a) Treaty of Rarotonga 1985; Art 3(1)(a) Bangkok Treaty 1995; Art 3(a) Treaty of Pelindaba 1996; Art 3(a) Treaty of Semipalatinsk 2006.

¹³ Art VII of the NPT provides 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.”

¹⁴ India, Israel, Pakistan, South Sudan (and the Democratic People's Republic of Korea since its withdrawal) remain the only states outside of the NPT. None of these states have signed or ratified a NWFZ Treaty.

C Use of nuclear weapons

The NPT does not explicitly address the use of nuclear weapons. However, for NNWS, the practical consequence of their obligation not to acquire nuclear weapons under Article II (as well as their obligations under their respective Safeguards Agreements) is that the possibility of the use of nuclear weapons simply does not arise.¹⁵ Thus, for NNWS, a new legal instrument banning the use of nuclear weapons would make explicit what is already de facto prohibited to them.

This same logic of a de facto prohibition does not apply to NWS, although the NPT is also silent on the question of their use of nuclear weapons.¹⁶ That said, all five NWS have made negative security assurances stating that they will not use nuclear weapons against NNWS.¹⁷ A legally binding prohibition on use for NWS would have two important legal effects. First, it would translate their assurances from political undertakings into binding legal obligations. Second, it would eliminate the conditionality of those undertakings.¹⁸ Such a development would strengthen the NPT by removing a key incentive for proliferation.

In this way, for both NNWS and NWS, a legally binding ban on the use of nuclear weapons — articulated as one component of a broader framework of prohibitions on possession and testing — would not only constitute an important step in supporting the non-proliferation provisions in the NPT, but it would also be a very important step in honouring the requirements of Art VI.

D Transfer of Nuclear Weapons

By virtue of Article I of the NPT, NWS are prohibited from transferring “nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly”. Thus, a prohibition on transfer of nuclear weapons in any new instrument would simply repeat and therefore strengthen the existing prohibitions on NWS already set out in the NPT.

The NPT does not explicitly prohibit NNWS from transferring nuclear weapons because they are presumed not to have such weapons to transfer.¹⁹ As with

¹⁵ Quite apart from any international law or international humanitarian law obligations that would arise — discussion of which is outside the scope of this paper.

¹⁶ The NWS to the NPT are bound by international law obligations, in particular international humanitarian law obligations, regarding the use of nuclear weapons — discussion of which is outside the scope of this paper.

¹⁷ The NWS gave negative security assurances in the form of statements to the United Nations Security Council on 6 April 1995: Statement by Russian Federation S/1995/261; Statement by United Kingdom S/1995/262; Statement by United States of America S/1995/263, Statement by France S/1995/264; Statement by People’s Republic of China S/1995/265.

¹⁸ France, Russia, United Kingdom and the United States of America have all pledged not to use or threaten to use a nuclear weapon against an NPT NNWS except in the event of an attack on themselves or their allies. China is the only NWS which has pledged unconditionally never to be the first to use a nuclear weapon against any other state under any circumstances.

¹⁹ For discussion, see David Jonas “Significant Ambiguity in the NPT: A Continuing Issue” (2011) 40 *Georgetown Journal of International and Comparative Law* 37. NNWS are, of course, by virtue of Article II of the NPT prohibited from receiving the transfer of nuclear weapons.

testing and use, however, it is difficult to see how NNWS could transfer without otherwise breaching their obligations under the NPT not to acquire a nuclear weapon. As such, an explicit prohibition on the transfer of nuclear weapons by NNWS cannot do anything but strengthen the existing implicit prohibition.

E Stationing of Nuclear Weapons

Stationing of nuclear weapons is not explicitly addressed in the NPT, and the question of whether it is permitted under that Treaty is a matter of some dispute among States Parties. Given that a new legal instrument would certainly put in place an absolute prohibition against possession and use of nuclear weapons on all its States Parties, the instrument would also need to explicitly prohibit stationing of nuclear weapons.

An explicit prohibition on stationing goes beyond the explicit language of the NPT (although, some states argue, not the Treaty's *intent*) and would therefore be an advance on its current text.

IV Compliance by states can be verified without compromising the NPT

To implement the above prohibitions effectively and ensure compliance by states, a new legal instrument will need to incorporate, or otherwise provide for the subsequent elaboration of, a system of verification. For NNSW, the ongoing application of the existing NPT Safeguards Agreements operated by the International Atomic Energy Agency (IAEA) should provide sufficient verification of most of the obligations imposed by the new instrument.²⁰ The new explicit prohibition on testing could be verified using the system established and provisionally operated in accordance with the CTBT, recognising of course that there may be additional legal issues to work through regarding the sharing of information and the possibility that a new treaty might go further than the CTBT (for example with respect to sub-critical tests).²¹

As there is no multilateral treaty system of verification for nuclear disarmament one must be established to ensure that states possessing nuclear weapons are meeting their obligations under the new instrument (or will meet them if the obligations are included as part of a later framework), whether or not they are currently parties to the NPT.²² Whether that system is constituted as a new regime, or draws on existing structures such as the IAEA, its establishment and implementation would only strengthen the NPT.

²⁰ Art III.4 NPT and III.A.5 IAEA Statute.

²¹ Despite the CTBT not being in force, its International Monitoring System (IMS) has become an important means of providing information on suspected nuclear tests. For example, it was through the IMS that all three of the nuclear tests conducted by the Democratic People's Republic of Korea in 2006, 2009 and 2013 were detected and confirmed.

²² There is, of course, a bilateral treaty in force between the United States and the Russian Federation, the New Strategic Arms Reduction Treaty 2010 (New START), which requires reduction of deployed nuclear missiles (rather than destruction of nuclear weapons) and which provides for a system of verification.

It is important to address a specific concern that has been raised to the effect that a multilateral verification regime for nuclear disarmament might actually compromise the NPT. In essence, this concern seems to be that, by involving personnel from NNWS in an inspection team, the new verification regime could result in NWS breaching their Art I obligation not “in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons ...”.²³

This concern is misconceived. Providing access to nuclear weapons, facilities, stockpiles or components to an international inspectorate for the purposes of verifying progressive disarmament does not by itself constitute “assisting, encouraging or inducing” the manufacture or acquisition of nuclear weapons on the part of a non-nuclear-weapon state. To suggest otherwise does not take account of the fact that it was always envisaged that there would ultimately need to be some future international control system involved in the disarmament process. The Art 1 prohibition must therefore be read with this expectation in mind. The Chemical Weapons Convention contains similar prohibitions and there has been no suggestion in that context that the international inspectorate created by that Treaty and housed within its implementing body, represents a chemical weapons proliferation risk.

Further, there is a range of technical and legal mechanisms that can be utilised to ensure that a proliferation risk does not eventuate. The Trilateral Initiative conducted between the IAEA, the United States and the Russian Federation from 1996–2002 explored the technical means of dealing with any potential risk.²⁴ There is also scope to draw from the work and experiences of the Organisation for the Prohibition of Chemical Weapons.

It is clear, then, that a verification system cannot represent a threat to the NPT - rather, by providing evidence of nuclear disarmament and non-proliferation, it will strengthen and complement the successful implementation of the three pillars of that Treaty.

V Conclusion

A new legal instrument dealing with nuclear disarmament would sit comfortably alongside the NPT and would indeed enhance it. Though views continue to vary on the form and scope of the legal instrument, and the urgency with which it should be negotiated, this paper should at least confirm for all states that, in pursuing it, they will be strengthening the NPT.

²³ See for example, Torbjorn Graff Hugo *About a Ban: Dismantling the idea of a ban on nuclear weapons* (International Law and Policy Institute, Policy Paper No.3/2013) at p.8. See also the explanation of this concern in Thomas E. Shea and Laura Rockwood *Nuclear Disarmament: The Legacy of the Trilateral Initiative* (Deep Cuts Working Paper No. 4, March 2015).

²⁴ See generally Shea and Rockwood, above n23. See as well the work of the UK-Norway Initiative on Nuclear Warhead Dismantlement Verification.