

International Law,
the International Court of Justice
and Nuclear Weapons

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THE NON-PROLIFERATION TREATY AND ITS FUTURE

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The United Nations was created in 1945 by the triumphant Allies to ensure a lasting peace. No one could have imagined then that the Security Council’s five permanent members would one day become the world’s five recognized nuclear-weapon States (NWS). Nor could those five nations have imagined that two of the UN’s principal organs would one day turn against them. But that is what has happened recently, first with the request in 1994 by the UN General Assembly (UNGA) for an advisory opinion from the International Court of Justice (ICJ) on nuclear weapons and then the Court’s decision of 8 July 1996. That decision has provided a new legal basis for questioning the threat or use of nuclear weapons and thus the possession of nuclear weapons themselves. It also recognizes that the provisions of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) go beyond a mere obligation of conduct—to pursue nuclear disarmament negotiations in good faith—and actually involve an obligation of result, i.e., to *conclude* those negotiations.

The NPT’s Article VI reads:

Each of the Parties to this 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.

The Court rendered the following unanimous opinion:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.¹

The Court has thus strengthened the hand of the proponents of the elimination of nuclear weapons at a time when the prospects for genuine nuclear disarmament seemed to have been undermined by the NPT’s indefinite and unconditional extension. This chapter assesses the NPT’s future as a vehicle to ensure the conclusion of nuclear disarmament negotiations.

The NPT process

The non-proliferation of nuclear weapons and their delivery vehicles in all its aspects is an issue of the highest priority in the field of disarmament and international security. The establishment of a genuine, universal and non-discriminatory nuclear non-proliferation regime will enhance the prospects of a better and more secure world. And the central element of such a regime is the elimination of nuclear weapons. Some tend to forget that the world was once a nuclear-weapon-free zone and that that should be the aim of nuclear disarmament negotiations.²

Although atomic weapons appeared the same year that the UN was established, there is no mention of them in the Charter. They were not on the minds of delegates to the San Francisco Conference in June of 1945 which is why the Charter is silent on an issue that has since

¹ Advisory Opinion, ICJ Reports, 1996, para. 105(2)(F).

² Regional arrangements such as the 1959 Antarctic Treaty and the treaties of Tlatelolco (1967), Rarotonga (1985), Pelindaba (1995) and Bangkok (1996) constitute important steps towards a nuclear-weapon-free planet. But they are small steps. The idea was once to cover most of the planet with nuclear-weapon-free zones and subject the territories of the NWS to some kind of quarantine. But most NWS are now increasingly deploying their nuclear weapons on warships that roam the high seas. Nuclear weapons are thus present all over the globe.

dominated disarmament discussions. Atomic weapons were first tested a month after the Charter was approved. They were used for the first, and so far only, time in August of 1945, ten weeks before the Charter entered into force. This explains why in its very first resolution the UNGA addressed the question of these weapons of mass destruction.³ But the efforts to return to a nuclear-weapon-free world suffered a setback in June 1946 when the United States proposed freezing the number of NWS at one and the creation of an international agency to ensure that everyone else would use atomic energy for peaceful purposes only. The Soviet Union countered with a proposal to destroy all atomic weapons. None of this happened. Instead, the USSR itself acquired atomic weapons in 1949, the UK in 1952, France in 1960 and China in 1964.

The fear of further horizontal proliferation led to efforts to administer, i.e., to control, the peaceful uses of nuclear energy by non-nuclear-weapon States (NNWS). This was achieved in 1956 with the establishment of the International Atomic Energy Agency (IAEA). In 1968 the NPT froze at five the number of “recognized” NWS. Since then, nuclear disarmament negotiations have been “pursued” in the NPT context. But when the NWS first proposed the NPT, they saw it as a horizontal non-proliferation measure and only reluctantly did they accept the vertical non-proliferation and nuclear disarmament provisions. And even then, the Treaty was not universally supported and had to be adopted by a vote in the UNGA. Many nations, including two NWS (China and France), joined it years and even decades later.

Until 1995 the NPT was a temporary contract between NWS and NNWS. Its non-nuclear Parties undertake to remain just that —non-nuclear. In exchange, the Treaty promotes the transfer of nuclear technology for civilian purposes. More importantly, the NWS (at first the USSR, UK and US, and since 1992 China and France) agreed to move towards nuclear disarmament, including quantitative as well as qualitative measures.⁴ To ensure that the NWS would disarm before rendering permanent their own non-nuclear-weapon status, some countries (Federal Republic of Germany, Italy, Japan and Switzerland) insisted that the NPT remain in force for a limited time, a kind of trial stage, and that it include the possibility of holding periodic review conferences.⁵

The NPT entered into force in 1970 and its five-year reviews (1975, 1980, 1985 and 1990) have served to assess whether or not its provisions and the aims of its Preamble are being realized. Each review conference was preceded by a two-year preparatory process which concentrated on organizational matters, leaving substantive issues for the conferences themselves where discussions centered on the nuclear disarmament provisions. At each review conference the goal has been to reach agreement on a common assessment of how the NPT is being implemented by its Parties. But agreement is by consensus (which any Party can block) and thus reflects the lowest common denominator. One of the mysteries regarding the

³ Resolution 1 (I) of 24 January 1946 established the Atomic Energy Commission, composed of all Security Council members and Canada and charged with the task of submitting proposals to the Council to ensure a) that atomic energy would be used exclusively for peaceful purposes, b) the elimination of atomic and other weapons of mass destruction, and c) a safeguards system, including inspections, to prevent violations and evasions.

⁴ The NPT’s nuclear disarmament provisions are its Article VI and eleventh preambular paragraph which recalls the “determination” of the Parties to the 1963 Partial Test Ban Treaty “to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end.”

⁵ Article X.2 of the NPT reads: “Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty.”

Article VIII.3 reads: “Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised. At intervals of five years thereafter, a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect to the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty.”

NPT is how the Parties agreed to work by consensus at the review conferences while the extension decision was to be taken by a simple majority. Review conferences have become a drafting exercise where the crafting of a document becomes paramount and wordsmithing replaces negotiations and serves to paper over differences.

In the spring of 1995 the Parties to the NPT combined the fifth review with the extension conference called for in its Article X.2. Held in New York from 17 April to 12 May, the Conference reviewed and extended the Treaty. The review process, however, ended in failure as it had in 1980 and 1990. No agreed text was possible due to differences regarding nuclear disarmament, especially a comprehensive test ban treaty (CTBT). And yet, those same nations that could not agree on substance decided without a vote to extend the NPT indefinitely. When that decision was taken on 11 May 1995 it was explicitly linked to two other documents: one containing a set of principles and objectives and the other regarding a strengthened review process.⁶ To many this “package” was a success story. But a closer look points to a different assessment.

The NWS are not more committed to nuclear disarmament today than before 11 May 1995. They did not accept any new undertakings beyond what is stated in Article VI. In fact, in exchange for the NPT’s indefinite extension the NNWS got almost nothing.⁷

To be sure, the NPT’s indefinite extension was backed by the required majority long before the 1995 Conference opened. Put together by some NWS, that majority included countries from all regions and quite a few from the Non-Aligned Movement (NAM). The Treaty’s indefinite extension was therefore a foregone conclusion. But there was an even larger majority for an “indefinite extension plus something else.” A number of countries sought specific commitments towards genuine nuclear disarmament within a concrete time frame. To them, that was in keeping with the original “NPT bargain” and with the spirit of Article X.2. If, as in 1968, their aim had been a nuclear-weapon-free world, then they should have conditioned the Treaty’s extension beyond 1995. But they did not.

Throughout the preparatory process and at the NPT Conference itself, the NWS and many of their allies simply refused to consider any new commitments to nuclear disarmament. The result was the “package” solution based largely on a South African proposal. With the NAM divided and with mounting pressure from the United States and others, it was impossible to reverse the tide.⁸ Or was it? A single NNWS could have refused to accept the NPT’s indefinite and unconditional extension. Had this happened, the dynamics of the Conference would have been very different. Many Parties did not want to resort to a vote (for fear of public opinion) and they would have pressured the NWS to be more forthcoming.

At the 1995 NPT Conference, the international community squandered a unique opportunity to advance the cause of nuclear disarmament. The Treaty’s NNWS failed to agree among themselves to set an agenda that would have advanced the cause of a nuclear-weapon-free world. In contrast, over 200 members of the NGO community established the “Abolition Coalition Caucus” and called for negotiations aimed at the elimination of nuclear weapons. But governments decided in the spring of 1995 “to sign now and talk later.” And by agreeing to extend the Treaty indefinitely and unconditionally, the NNWS Parties surrendered the little leverage they secured in 1968 when the Treaty was concluded.

⁶ The five-year review mechanism was enhanced by making it automatic (past conferences had to be formally requested) and by including substantive discussions during the preparatory process which will now begin a year earlier (three years before the conference).

⁷ The only point that may be considered important is that all Parties agreed to conclude a CTBT by 1996. But even here the result was meager. Four of the five NWS were already committed to that date and France, which had resisted setting a deadline, announced soon after that it was suspending its moratorium and resumed testing. For its part, China carried out another test on 15 May, three days after the Conference ended.

⁸ As early as May 5th Canada submitted a proposal on behalf of 103 (later 111) co-sponsors calling on the Conference to decide that “the Treaty shall continue in force indefinitely.”

The NPT's indefinite extension was a surprisingly smooth process. No country or group of countries ever challenged the decision. A number of factors serve to explain this. First, there was the proliferation "scare." The Iraqi example and the situation in Belarus, Kazakhstan and the Ukraine seemed to call for "an enduring NPT." Then, in this now uni-polar world, there was a campaign of "friendly persuasion." Witness the UN Security Council in recent years. Indeed US influence in multilateral security fora is now largely uncontested and often unquestioned. Third, the Conference was organized in such a way that the discussions were diffused: the Parties embarked on a process of review which was separate from the debate on the extension decision. Fourth, there was virtual silence in the media while the NGO community (so visible in other world conferences) was kept at bay.⁹ Fifth, there is the increasingly ambiguous attitude towards nuclear weapons of a growing number of NNWS, especially in Europe. And sixth, the NNWS demonstrated an unusual degree of docility at the Conference.

The enduring attachment to nuclear weapons is reflected in the thinking of many groups within all five NWS. That attitude which, in varying degrees and styles, all five NWS have been defending for years, was evident at the NPT Conference and at recent UNGA sessions. In the UNGA some NWS have repeatedly relied on parliamentary manoeuvres aimed at shifting the focus away from the nuclear issues. They opposed a number of resolutions but none with the vigor with which they attacked the one requesting an advisory opinion from the ICJ on the legality of the threat or use of nuclear weapons.¹⁰ They also applied bilateral pressure on many countries. The NWS thus revealed their true intentions, and yet the governments of the NNWS did nothing at the NPT Conference.

For decades the NNWS have been seeking to establish a specific calendar of measures aimed at the elimination of nuclear weapons. At the UNGA's first special session devoted to disarmament in 1978, all countries agreed to pursue negotiations within a comprehensive disarmament program aimed at, among other things, the elimination of nuclear weapons. Since then the international community has been seeking ways to engage NWS in such negotiations. And this should have been the principal result of the NPT Conference.

Over the past few years most NNWS have displayed schizophrenic tendencies regarding nuclear disarmament. Whereas they were inordinately docile at the NPT Conference and the two-year preparations that preceded it, they have become increasingly active and demanding at the UNGA sessions. Not surprisingly, at the 1995 UNGA, held a few months after the NPT Conference, the nuclear disarmament issues again took center stage. The debates revealed a high degree of frustration among many countries.¹¹ And the NAM in particular seemed to be trying to achieve in the UNGA what had been impossible to attain at the NPT Conference—a commitment by the NWS to a nuclear-weapon-free world.

As a horizontal non-proliferation measure, the NPT has probably run its course. It has been ratified by almost all countries. Non-parties include Brazil, which is bound by the Treaty of

⁹ NGOs were certainly more active than at previous meetings (held in Geneva) but their access to conference rooms and delegates was restricted. When it comes to the NPT, some NWS and Western European countries prefer to distance themselves from NGOs. This attitude is very different from the one they adopt towards those NGOs dealing with human rights or environmental issues. In these matters they welcome and even encourage the active participation of NGOs in their meetings.

¹⁰ The author has described the "devices" used by some NWS in their attempt to prevent the adoption of the UNGA's resolution requesting the advisory opinion in "The NPT Non-Proliferation/Nuclear Disarmament 'Bargain' on the eve of the Extension Conference," in *Extending the Non-Proliferation Treaty: Perpetuating the Global Norm (Aurora Papers 27)* (Ottawa: Canadian Centre for Global Security, 1995), pp. 59-82, and in "Getting Rid of Nukes: First Erich Geiringer Oration," unpublished speech delivered in Wellington, New Zealand, on November 13, 1996.

¹¹ The NNWS' sense of betrayal by the resumption of French testing soon after the 1995 NPT Conference was translated into a vigorous resolution at the UNGA. After noting that nuclear testing is "not consistent" with the NWS' undertakings at the NPT Conference, resolution 50/70 A "strongly deplores all current nuclear testing."

Tlatelolco, as well as India, Israel and Pakistan which, as South Africa has already done, would have to demonstrate their non-nuclear-weapon status before joining the Treaty. The safeguards administered by the IAEA have also reached their limit. They were designed to uncover activities aimed at acquiring a nuclear-weapon capability in the NNWS but they cannot prevent would-be proliferators from putting together the various building blocks without actually constructing a bomb.

As a vertical non-proliferation measure, the NPT has never been an effective tool. Since 1968 the five NWS have not ceased to develop their arsenals both qualitatively and quantitatively. And while there are now signs that, through the Strategic Arms Reduction Talks (START), Russia and the United States have embarked on a process of actually reducing numerically their stocks of nuclear weapons, this is not the result of a desire to implement the NPT's Article VI. It is rather a practical decision by military planners in both countries aimed at better management of their arsenals. In any case, the Treaty's indefinite extension drastically reduced whatever leverage the NNWS might have had to pressure NWS to proceed to genuine nuclear disarmament.

Preparations for the NPT's review conference in 2000 began in April of 1997. The NAM put forward proposals on a number of issues, including one "to commence negotiations on a phased programme of nuclear disarmament and for the eventual elimination of nuclear weapons within a time-bound framework through a nuclear weapons conventions." It is, however, illusory to expect the NWS to accept now what they adamantly rejected at the 1995 NPT Conference, the UNGA and the Geneva Conference on Disarmament.

Quite obviously, nuclear disarmament will only come about once the decision is reached by policymakers in the NWS. This can occur unilaterally, bilaterally or among all five NWS. But how can the NWS be induced to rid themselves of nuclear weapons? To answer that question, one must bear in mind both those multilateral disarmament negotiations that have been concluded successfully and the way the world finally reached other goals which at one time also seemed unattainable.

There are several ways in which the NWS could be encouraged to eliminate their nuclear weapons. This can be done directly by the governments of the NNWS or indirectly by pressure groups in those countries and elsewhere. The international community has various tools at its disposal to bring about change in many areas. In the last century the zeal of the Abolitionists finally ended slavery. During its first twenty years, the UN was instrumental in dismantling colonial rule in Africa, Asia and Latin America. In both cases the moral argument was definitive and in both cases NGOs and individual citizens played a prominent role. Slave holders and colonial Powers were shamed into changing their behaviour. No one would today dare to defend slavery or colonialism. And yet few couch in similar terms the need to eliminate nuclear weapons.

The ethical questions posed by the appearance of atomic weapons were discussed intensely in the mid-forties especially among the atomic scientists themselves. It is thus difficult to explain how seemingly rational human beings would end up justifying the acquisition, the use and continued development of these weapons of mass destruction. The Allies' efforts to build an atomic bomb were viewed in the context of the crusade against the Axis Powers. When it was used in 1945, the relationship to the "ultimate weapon" changed in the US and elsewhere. Incredible as it seems, the bomb became acceptable to leaders in many nations. The Cold War would only serve to obfuscate the moral argument. But, what would they have said had Nazi Germany and not the United States acquired the bomb first? Probably, "an evil weapon in evil hands." In short, there was no legal or moral justification for acquiring and using atomic bombs then, and there is none today.

The Court's advisory opinion should serve to point the way to a nuclear-weapon-free world and thus redress the damage caused when NNWS rendered the NPT permanent without

demanding anything in exchange. For the five NWS the NPT certainly has a future since it will give them a mechanism to ensure that no other State follows in their nuclear footsteps. It serves to monitor the NNWS's behaviour. For NNWS seeking genuine nuclear disarmament, however, the NPT has more of a past than a future. In 1995 it ceased to be a tool for nuclear disarmament. NNWS will now have to find a different path in order to convince the NWS to do away with nuclear weapons. And most NNWS are not about to seek actively that new path.

The impact of the NPT

Many lessons can be drawn from what one might describe as “the NPT experience.” First, NWS continue to refuse to engage in a process of genuine nuclear disarmament. This is largely due to the inertia of old habits, habits developed over decades. But in part it is also because of the fear of losing their status, a status they would deny others. In fact it might be said that the last to proliferate —the last to “go nuclear”— became an ardent proponent of horizontal non-proliferation. That is why they accepted that the CTBT be turned into a horizontal non-proliferation measure aimed at certain NPT non-parties, especially India, and that is why they were able to accept the CTBT in the first place.

Given the NWS's refusal to engage in genuine nuclear disarmament negotiations, who will do the pressuring? As demonstrated by the NPT Conference, most NNWS are not ready or willing to challenge the NWS on this score. And this is the second lesson of the NPT experience. Most governments and their officials are simply not interested in taking up the flag of nuclear disarmament. They are more concerned with being returned to office and with the so-called bread and butter issues of economic growth. On environmental questions they have to be cajoled into action, and in many countries this is beginning to work. But in the nuclear field, there is still much to be done. There is no head of state or government whose bilateral agenda with a NWS is topped by the issue of the elimination of nuclear weapons.

The vast majority of NNWS, moreover, are developing countries from regions that have already become nuclear-weapon-free zones. They are therefore against the threat or use of nuclear weapons and nuclear weapons themselves. This leaves the developed NNWS, especially those linked militarily to NWS, and the pressure must come mostly from them. But the governments of NNWS will only act if public opinion makes it clear that inaction will have a heavy political cost. For the time being there is no danger that this will happen.

The current attitude of many developed NNWS towards nuclear weapons is not very encouraging. Over the last three decades many European governments have changed radically their position on nuclear weapons. After years of open opposition to nuclear weapons (while, at the same time, seeking to preserve their own nuclear option), they joined the NPT and now seem to have accepted the permanence of the five NWS and NATO's nuclear policy.

This is evident in the debates on a number of aspects relating to nuclear weapons at recent UNGA sessions. The votes over the past three years (1994-1996) on eight resolutions offer a measure of the commitment of States to a nuclear-free world. Two of those resolutions are on ICJ's advisory opinion (49/75 K and 51/45 M); three recognize that, with the end of the Cold War, there is a need to rethink nuclear doctrines and call for negotiations on a phased programme of nuclear disarmament and for the eventual elimination of nuclear weapons within a time-bound framework (49/75 E, 50/70 P and 51/45 O); and three call for negotiations on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances (49/76 E, 50/71 E and 51/46 D).

How have States voted on those eight resolutions? Only 55 of the UN's 185 Member States have opposed one or more of them.¹² Their opposition goes from sporadic or

¹² Iraq and Yugoslavia (Serbia and Montenegro) have not participated in recent UNGA sessions. Switzerland is an NPT Party but not a UN Member. Significantly, the 55 countries do not include China (which voted in favor of all eight resolutions) nor nations that abstained on one or more such as New Zealand (abstained on six), Japan

circumstantial to solid, passing through weak, moderate and strong. Twenty-seven countries have voted against one to four of those resolutions.¹³ Strong opposition has been registered by ten nations: Albania, Bulgaria, Latvia and Slovenia (opposed five and three abstentions); Andorra, Canada, Iceland and Norway (rejected six and two abstentions); and Denmark and Finland (seven rejections and one abstention). Solid opposition (against all eight resolutions) has come from eighteen NATO members, aspirants or sympathizers: three NWS (France, UK and USA) and Belgium, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and Turkey, as well as the Czech Republic, Hungary, Poland, Romania, Slovakia and Monaco.

Those twenty-eight nations represent today the biggest obstacle to nuclear disarmament. The governments of twenty-five of them have embraced the “nuclear posture” of France, the UK and the US. And it is up to the citizens of those countries to pressure their respective governments by insisting on a moral compass in their approach to nuclear weapons. Are they ready to accept a world where nuclear weapons are a permanent feature or do they want to return to a nuclear-weapon-free world? Citizens’ groups should be involved in resolving these issues. Nuclear disarmament is too important to be left to governments and military planners alone. The active participation of NGOs should be promoted and not, as occurred at the NPT Conference, downplayed or ignored altogether. The media should also be more attentive to the moral and legal aspects of nuclear weapons, as it has been recently with regard to landmines. An educated public opinion has moved the position of many militarily important countries from one of defending the use of certain anti-personnel landmines to one of calling for their total elimination. Could not a similar result be attained with regard to nuclear weapons?

Governments and NGOs committed to a nuclear-weapon-free world have four avenues open to them in which to pursue their goal: the Conference on Disarmament, the preparatory process of the 2000 NPT review conference, the proposed fourth UNGA special session devoted to disarmament (planned for 1999), and the UNGA’s annual regular sessions. The first three of those multilateral fora work on the basis of consensus, i.e., a single country can block agreement. And so, little can be expected from them in the coming years. That leaves the regular sessions of the UNGA, whose rules of procedure allow for the adoption of resolutions by a simple majority of its members.

The Advisory Opinion

Although UNGA resolutions are, according to the Charter, mere recommendations (as opposed to the binding nature of Security Council resolutions), many of them can be considered important, even historic, because of the events they spawned or because they marked a turning point in international relations.¹⁴ The international community has also

(abstained on all) and seven former Soviet republics: Turkmenistan (abstained on one); Kyrgyzstan (four); Azerbaijan (six); Belarus and Kazakhstan (seven), and Armenia and the Ukraine (eight).

¹³ Sporadic or circumstantial opposition includes countries that have voted against one resolution: eight (Benin, Cambodia, Comoros, Côte d’Ivoire, Djibouti, Gabon, Mauritius and Senegal) that were pressured into opposing the request to ICJ and two (Tajikistan and Uzbekistan) that have also abstained on several others.

Weak opposition has come from Australia, Georgia and the Republic of Korea which opposed one resolution and abstained on seven; San Marino (opposed two and abstained on one); and Ireland and Sweden (opposed two and abstained on five).

Moderate opposition includes Argentina, Austria, Croatia, Liechtenstein and Russia (opposed two and abstained on six); Malta (three and four); Estonia and Moldova (three and five); and Israel, Lithuania and Macedonia (four and four).

¹⁴ These include the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Partition of Palestine, and the recognition of the People’s Republic as the only legitimate representative of China in the UN.

relied on UNGA resolutions in order to adopt multilateral treaties, including the NPT. And it was through a resolution that in 1994 the UNGA requested an advisory opinion from the ICJ on the legality of the threat or use of nuclear weapons and it was through another resolution that the UNGA expressed its appreciation to the Court for responding to its request, took note of the advisory opinion, issued on 8 July 1996, and underlined “the unanimous conclusion of the Court that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” In that same resolution (51/45 M) the UNGA also called upon “all States to fulfil that obligation immediately by commencing multilateral negotiations in 1997 leading to an early conclusion of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.” Finally, the UNGA decided to include an item in the agenda of its 1997 session regarding the follow-up to the Court’s advisory opinion. In other words, the UNGA has already set the course for future debates regarding the effective implementation of the NPT’s Article VI. And this would not have been possible had not the Court addressed Article VI in the first place and then rendered a unanimous opinion with regard to it.

The ICJ’s decision has thus broadened the scope of the NPT’s Article VI as a code of conduct. For its part, the UNGA has done well to include in its annual agenda an item that will allow NNWS to turn the Court’s opinion into a vehicle for a periodic review of the NWS’s behaviour. This becomes all the more significant since NWS are bound to continue to reject the ICJ’s opinion and to resist “commencing multilateral negotiations” on nuclear disarmament.

The UN Charter is the international community’s principal code of conduct. The UN Security Council can sanction those that break the rules. The NPT is another code of conduct and the Security Council can, in theory, sanction a Party that has not complied with the Treaty’s provisions. The ICJ has now interpreted the NPT’s nuclear disarmament provisions in such a way that the five NWS could be considered in breach of their Treaty obligations. But will the five sanction themselves? That is why the NNWS should follow the UNGA path and begin a process of defying and embarrassing the NWS in the same way that the UNGA dealt with the colonial Powers, South Africa’s *apartheid* regime and many specific human rights situations.

Nuclear disarmament is one of the few fields in which the international community is reluctant to pronounce itself from a legal and ethical point of view. Unlike in the areas of human rights, the environment, labor practices, and trade, the NWS’s behaviour is not judged. There have been, to be sure, UNGA resolutions on a number of nuclear disarmament negotiations, including START. But the UNGA should now begin to assess what the NWS have done to conclude the negotiations envisaged in the NPT. That would serve as a rallying point for citizens groups in many developed NNWS to pressure their respective governments.

By addressing the question of nuclear disarmament in the context of the NPT’s Article VI, the Court has rendered an invaluable service to the international community. Although the specific question was not before the Court, all of its judges agreed to take it up. They did so in light of the “eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons.” And they concluded:

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised

complete nuclear disarmament appears to be the most appropriate means of achieving that result.¹⁵

That is why the Court not only recognized the importance of the provisions of the NPT's Article VI, but also went out of its way to interpret them. This was in keeping with the perennial international debates regarding the contractual nature of the NPT. In fact, at each of the NPT's five review conferences, two fundamental questions have been raised. First, have the NNWS lived up to their part of the bargain by remaining non-nuclear-weapon States? And second, have the NWS fulfilled their nuclear disarmament obligations? Invariably, the answer to the first question has been in the affirmative while the second has been in the negative.

The Court addressed Article VI of the NPT because it is the only treaty provision in which the NWS have undertaken a legal obligation to negotiate nuclear disarmament agreements. In the coming years, however, the NWS, especially France, the UK and the USA, will probably continue to ignore the Court's opinion in this regard. They will continue to turn a deaf ear to calls for multilateral nuclear disarmament negotiations in the Conference on Disarmament, the NPT review process and elsewhere. In the meantime, NNWS can begin to strengthen the legal, as well as moral, arguments against nuclear weapons by insisting, through UNGA resolutions that garner the increasing support of developed NNWS, that the NWS change their current attitude towards nuclear weapons and proceed to abolish them. If they do not, NNWS and NGOs must begin to contemplate the possibility of requesting another advisory opinion from the ICJ on whether NWS are in breach of international law. For that, it will be necessary to create a groundswell of public opinion in favor of the elimination of nuclear weapons and this could be achieved through the UNGA's annual resolution on the follow-up to the Court's 1996 Opinion.

¹⁵ Advisory Opinion, para 99.