

ISSUE BRIEF

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CNS Issue Brief

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Who is afraid of consensus? The NPT review process*

by Jayantha Dhanapala

The failure of the Ninth Review Conference of the Treaty for the Non-Proliferation of Nuclear Weapons (NPT RevCon) in 2015 has led inevitably to some mutual recrimination between the nuclear-weapon states (NWS) and non-nuclear-weapon states (NNWS). Many close observers of the treaty are wondering what is next.

There have been few constructive proposals on how to strengthen the NPT review process to ensure the future viability of this vitally important treaty. The 2015 RevCon failure is in part explained by the overwhelming focus by the United States and its allies on finalizing a nuclear deal with Iran. In contrast to the efforts invested in the successful 2010 NPT Review Conference, the less-focused attention paid to preparing for 2015 could arguably explain the 2015 RevCon failure. The current silence is therefore ominous, as the different groups retreat to their tents to ponder strategies, against the backdrop of an uncertain political future for the United States.

The apparent end of the humanitarian initiative movement¹ and the divided vote² at the conclusion of the Open-Ended Working Group on Disarmament—on both of which civil society's hopes had soared—leave realists in favor of nuclear disarmament dispirited and even desperate with an unpredictable US presidential election on November 8 looming large in the background.

Although few proposals for strengthening the treaty have been tabled recently, Robert Einhorn's suggestion—to forgo the pursuit of consensus in favor of a factual conference report—is unhelpful in this regard. By deploring consensus as the barometer of revcon success, Einhorn argues:

It is not the revcons themselves that operationalize and implement such recommendations, but specialized international bodies such as the International Atomic Energy Agency Board of Governors, the Nuclear Suppliers Group, the 1540 Committee, and the Conference on Disarmament, as well as national policy making and executive authorities.

* *Who's Afraid of Virginia Woolf?* is a 1962 play by Edward Albee. It examines the breakdown of the marriage of a middle-aged couple, Martha and George, famously portrayed in the film version by Elizabeth Taylor and Richard Burton. My satirical adaptation of the title refers to the bargain between the nuclear-weapon states and the non-nuclear-weapon states, now in its thirty-sixth year, facing great challenges to its decision-making process.

*The likelihood of these specialized entities putting revcon recommendations into practice has little to do with whether they were contained in a consensus document.*³

The gap between revcon recommendations and implementation is caused precisely by the lack of political commitment on the part of the NWS, even after recommendations have been adopted by consensus, as is apparent in the weak track record of fulfilling the “Thirteen Steps” of the 2000 Final Document and the 64-point program of the 2010 Document.

What Einhorn prefers is a feel-good report along the lines of the reports of the Geneva-based Conference on Disarmament (CD) noting some delegation said this and other delegations said that, however contradictory the opinions may be. No effort is made to reconcile differences. He also favors a listing of all recommendations tabled at revcons. This in fact is already done in all the preparatory committee reports, which are annexed to the revcon reports with no consequential results. No wonder, then, that the CD has remained unproductive for several years with no pressure even to reconcile differences in their report at the end of each year.

While delegations might prefer to avoid the frustratingly hard diplomatic effort of reaching consensus, the adoption of such a consensus is certainly no guarantee of implementation. We need therefore to look more closely at the purpose of treaty review conferences of which the NPT was a pioneer. Failure to implement agreed decisions can be attributed to a number of factors. The United States, for example, the major NWS, often uses a democratic change of regime—most often a turnover from Democratic Party control to Republican Party—as an occasion to renege on past commitments made in international forums, e.g., UN Law of the Sea (UNCLOS), negotiations on a verification protocol for the Biological Weapons Convention (BWC).

An outstanding example is the 2000 NPT Review Conference’s Final Document adopted by consensus. It embodied the famous “Thirteen Steps” on the initiative of the New Agenda Coalition—a transcontinental group of countries favoring early nuclear disarmament, including Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, and Sweden which provided a set of “practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.”⁴ This was achieved during the Bill Clinton administration. At the 2005 Review Conference, the “Thirteen Steps” were disavowed by the George W. Bush administration.

The United States, of course, is not the only country that experiences democratic changes of government. If every new government chooses to reject commitments made under its treaty obligations by its predecessor, chaos will prevail. The law of

succession governing adherence to international treaties in world affairs should apply to commitments made in conferences held within the framework of such treaties and relating to treaty obligations. The Charter of the United Nations states that its purpose as a “centre for harmonizing the actions of nations in the attainment of these common ends.”⁵ That is equally true of treaties.

Thus NPT review conferences that restate differences among treaty parties without resolving them through the search for consensus would be acting contrary to the interests on global peace and security. Inconsistent policies of the NWS in relation to proliferation by outlier states such as Israel and India are another reason why consensus would be difficult to achieve. Where consensus could be achieved with some effort, such as on North Korea’s nuclear weapon program, some NPT parties bury their heads in the sand by maintaining that North Korea’s withdrawal procedure did not follow legal guidelines and therefore is not valid.

A refreshing contrast to Einhorn’s attempt to abandon consensus building is Steven E. Miller’s essay, “Nuclear Collisions: Discord, Reform & the Nuclear Nonproliferation Regime” published by the American Academy of Arts & Sciences.⁶ Miller’s basic approach is to emphasize that international legal regimes depend on consent and that treaty regimes survive with the assent of member states. He advocates an interests-based approach rather than one based on rights.

To Vote or To Strive for Consensus

The watershed in the history of the NPT is without doubt the Review and Extension Conference of 1995. In the absence of an agreement on the rules of procedure, the painstakingly negotiated package of “Three Decisions and the Resolution on the Middle East” was adopted by consensus. There was no disagreement on consensus as a decision-making tool in that instance because it served the interests of the NWS and their allies.⁷

For that reason, among others, we need to re-examine Decision I (“Strengthening the Review Process for the Treaty”), originally proposed by the South African delegation as one of its conditions for agreeing to the indefinite extension of the NPT, which it had first opposed. A preparatory committee meeting of ten working days in each of the three years prior to review conferences with the optional provision for an additional meeting in the conference year was agreed. The purpose was clearly stated in paragraph 4 of the decision, which makes the discussions substantive and not merely procedural, as the NWS would have preferred. Already the conclusions of preparatory committee meetings are in the form of chairman’s reports, adopted on the responsibility of the chairman. Building on this, the report could be adopted by the entire committee, which would fulfill the intention of Decision I by making preparatory committees into stepping stones to the Review Conference.

Another deviation from Decision I is in the issue-specific subsidiary bodies. Although explicit provision was made for subsidiary bodies to be established within the three Main Committees for the purpose of “focused consideration” of “specific issues relevant to the Treaty,” it has become a constant battle for the NNWS to establish such bodies in the preparatory committees and in the main revcon. Finally, Decision 1 declared that revcons should “look forward as well as back” and “identify areas in which, and the means through which, further progress should be sought in the future.” These were ambitious goals for the quinquennial review process and must be honored since *pacta sunt servanda*—agreements must be kept—is a fundamental rule in international law.

Rules of procedure exist for the preparatory committee meetings and for revcons. These provide for voting if all efforts at reaching a consensus fail. Rule 28 states:

- 1. The task of the Conference being to review, pursuant to paragraph 3 of article VIII of the Treaty, the operation of the Treaty with a view to ensuring that the purposes of the preamble and the provisions of the Treaty are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted.*
- 2. Decisions on matters of procedure and in elections shall be taken by a majority of representatives present and voting.*
- 3. If, notwithstanding the best efforts of delegates to achieve a consensus, a matter of substance comes up for voting, the President shall defer the vote for forty- eight hours and during this period of deferment shall make every effort, with the assistance of the General Committee, to facilitate the achievement of general agreement, and shall report to the Conference prior to the end of the period.*
- 4. If by the end of the period of deferment the Conference has not reached agreement, voting shall take place and decisions shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in the Conference.*
- 5. If the question arises whether a matter is one of procedure or of substance, the President of the Conference shall rule on the question. An appeal against this ruling shall immediately be put to the vote and the President’s ruling shall stand unless the appeal is approved by a majority of the representatives present and voting.*

It is a tribute to the patient diplomacy of the NNWS, and in particular the Non-Aligned Movement (NAM), that no pressure for actual voting has emerged, although the right exists in the NPT Rules of Procedure. In the United Nations’ early days of the 1950s, the United States and the Western alliance had a majority,

and voting was routinely adopted as a form of decision making in the UN General Assembly, as it still is. The tide changed with the influx of newly independent countries from Asia and Africa all joining NAM in the 1960s and '70s and voting *en bloc*. In that situation, the West favored consensus to voting.

Einhorn's represents another undemocratic proposal that would favor the West in multilateral decision making. The NAM has a long history within their procedures for defining consensus as a convergence of views and not a lowest common denominator. It draws on traditions from the countries that comprise NAM. In Asia, for example, *musyawarah* and *mufakat* (deliberation and consensus) are a traditional decision-making rule in Indonesia, which has often been observed in village meetings.

Nelson Mandela drew from his tribal tradition in South Africa when he said, "Majority rule was a foreign notion. A minority was not to be crushed by a majority."⁸

Mandela's concepts of leadership were also deeply rooted in the African tribal tradition and the functioning of the chieftaincy where everyone was given a hearing until consensus was reached. Drawing on these political and social traditions in the majority of NAM's 120-member group, it is not surprising that NAM has consensus as its tool for decision making. Indeed, the Cartagena Document on Methodology adopted at the 14th NAM Summit in Havana in 2006 stated

The practice of the Movement has been to make all decisions by consensus. Consensus has enhanced the solidarity and unity of the Movement. This practice should be maintained insofar as it presupposes understanding of and respect for different points of view, including disagreement and implies mutual accommodation on the basis of which agreement can emerge by a sincere process of adjustment among member nations in the true spirit of Non-Alignment.

The concept of consensus that currently exists in NAM should be maintained and the present method of conducting a Non-Aligned Meeting—which allows for broad consultations prior to the meeting and extensive debates in the meetings themselves— should be continued as it contributes to the broadening of the area of agreement and thereby strengthening the unity of the Movement.

It is worth noting that consensus, while signifying substantial agreement, does not require or imply unanimity. In this regard, consensus and the methods of promoting it—as enunciated by the Chairman in the 1973 Preparatory Committee of Non-Aligned Countries for the Non-Aligned Summit in Algiers and the relevant decision of the Sixth Summit Conference in Havana in 1979—are still valid.

On sensitive issues, particular attention should be paid to openness and the holding of extensive consultations with the broadest possible participation. The Bureau of the Meeting, with its representative capacity, should render its assistance. Reservations should be kept to a minimum. Consensus decisions thus arrived at will be more easily implemented and will enhance the credibility and the effectiveness of the Movement. Every effort should be made so that the positions of the Non-Aligned Countries in different fora are congruous with the positions of the Movement. Member Countries should lend full support to the institutions created by consensus decisions of the Movement.⁹

That the NWS and their allies seek now to circumscribe the review process and its decision-making process is a violation of the firm understanding reached in 1995 at the conference over which I was privileged to preside.

The Task Before Us

2016 is a gap year in the traditional review process, with the preparatory committee meetings for the Tenth NPT Review Conference on 2020 beginning in 2017. That respite should be used for wise introspection by all. The NPT review process was deliberately strengthened in 1995 as part of another bargain when the NPT was extended indefinitely. Sadly, there is no evidence that the bargain is being honored. A number of fundamental political issues are close to the surface and we would do well to focus on them rather than propose new ways of drafting revcon final documents. 2017 will be an auspicious year to begin the new NPT review cycle. The world will have a new US president, for better or worse. There will be a new UN secretary-general. And the European Union will have adjusted to the exit of the United Kingdom. Amidst all the challenges that this will entail, a fresh approach to the NPT—given its global importance as the cornerstone of the nuclear nonproliferation regime—will be vitally important.

Tariq Rauf, a seasoned observer of several NPT review conferences, has written:

In sum, the failure of the 2015 NPT Review Conference can be placed on the inflexibility of many delegations, improper implementation of the strengthened review process and an absence of leadership. Though the Treaty will continue in force, the failure in 2015 is deeply disappointing as it represents a wasted opportunity to advance the objectives and goals of the NPT, which is universally regarded as the cornerstone of the global nuclear non-proliferation and nuclear disarmament regime.

This failure means that the agreed '64 actions' of the 2010 NPT Review "been lost to agree on ways and means of strengthening the NPT regime.

While the NPT will survive, the credibility of the regime has been severely damaged by the inflexibility of states parties and dangerous new tendencies and developments are on the rise. These include an unchecked resurgence in the saliency of nuclear weapons in European security, setbacks for reducing and eliminating nuclear weapons, increasing discord both between and amongst the NNWS and NWS, deteriorating confidence in the NPT by the Arab states parties, and an overall loss of credibility in the nuclear disarmament pillar of the NPT.¹⁰

We must thus sift through the debris of the 2015 NPT Review Conference to analyze how we can do better. I have three concluding observations about this event.

Whither Article VI?

First, what do we do about Article VI? That crucial disarmament article of the NPT imposes the only disarmament obligation on the five nuclear-weapon possessing state parties to get rid of their weapons which, twenty years ago, the 1996 Advisory Opinion of the International Court of Justice amplified and endorsed. President Obama's nebulous nuclear-weapon-free world promised in his Prague speech of April 2009 is nowhere near fulfillment, with only one modest nuclear disarmament treaty with the Russians—the 2010 New Strategic Arms Reduction Treaty—and four nuclear security summits as achievements.

Speculation is rife in the United States that President Obama will take executive action in his final months in office to have the UN Security Council adopt a resolution under Chapter VII to convert the *de facto* moratorium on nuclear weapon testing into a *de jure* ban, thus circumventing the need for ratification of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) for the treaty to enter into force. In the United States, that will be controversial, since the Republican-dominated Senate will see the move as circumventing the Senate's constitutional duty. It is therefore best if this UN Security Council resolution was an exceptional parallel process, letting the CTBT entry-into-force happen according to treaty provisions—ratification by the requisite forty-four states. The resolution's value would be that the nuclear-weapon test-ban would be much stronger under international law than a moratorium and would apply to more than North Korea.

Another likely rumored step is the declaration of a "no-first-use" policy on nuclear weapons, which would be a radical change of nuclear doctrine as formulated in the 2010 Nuclear Posture Review. In it, the United States asserts that nuclear weapons would not be used against NNWS in good standing with the NPT. The Obama administration resisted efforts to go the extra mile and to forswear first use of nuclear weapons. Now, Obama is reportedly ready to do that despite alarmist cries from sections of the Pentagon, his own cabinet, and some Pacific allies like Japan.¹¹ It is the only legacy that will be consistent with his Prague 2009 speech and the vision of a nuclear-weapon-free world. As the Asian Pacific Leaders Network states

No First Use policy would have both symbolic value and significant practical implications. Its potential benefits greatly exceed possible downsides. It would encourage a shift away from high-risk doctrines and weapons deployments. A NFU policy would avoid the need for forward deployment, launch-on-warning postures, and pre-delegation of authority to battlefield commanders, significantly dampening the prospects of accidental and unauthorized use. It would also speak to the world's growing humanitarian concerns on nuclear weapons.

If adopted by all nuclear armed states, the policy could become the centrepiece of a global nuclear restraint regime, strengthen strategic stability, mute crisis instability, solidify the boundary between nuclear and conventional weapons, and further entrench the norm against the use of nuclear weapons¹²

The question remains whether US hawks will allow this major change. If implemented, it would relieve some pressure on the NWS within the NPT. However, another contradiction remains, involving the US nuclear modernization program. As a *New York Times* editorial stated:

The Air Force has formally begun the process of asking defense contractors to submit proposals for a new long-range cruise missile and a new land-based intercontinental ballistic missile. These two weapons, capable of carrying nuclear payloads, will cost billions of dollars. The first is unnecessary; the second, debatable. The invitations are ostensibly aimed at modernizing the nation's nuclear arsenal. The weapons' dubious value aside, the requests also seem to contradict President Obama's 2009 promise to change American nuclear policy in ways that would make the nation safer by reducing threats from the world's most lethal weapons.¹³

All NWS are pursuing modernization at huge costs. Whether the proposed changes in US nuclear policy will be followed up by Obama's successor is, of course, unpredictable.

CTBT ratification by the eight remaining states—six (if we include North Korea) of which are party to the NPT—would also be a confidence-building measure for the NPT state parties. This will depend to a large extent on the political complexion of the US Senate after the November elections this year. Even better would be finding a compromise on current US-Russia disagreements over Crimea, Ukraine, and NATO deployments like the missile defense system located on Russia's borders, which could help make possible negotiations on a fresh nuclear arms reduction treaty between the United States and Russia.

Serious efforts in the Middle East

The second observation is one of the main causes of failure at the 2015 Review Conference: the bad-faith neglect of the 1995 Resolution on Middle East, over

which there was an agreement in 2010. No one seriously expected the Conference on the Middle East Weapons of Mass Destruction Free Zone (MEWMDZFZ) to have been concluded by 2015, but a *bona fide* start could have been made, instead of a unilateral announcement by the United States aborting it without the association of either of the other depository states of the NPT nor the UN Secretary-General, despite the 2010 RevCon vesting them with this task.

It is well known that an important driving force in the negotiations for the JCPOA was the European Union and, in particular, Federica Mogherini, High Representative of the EU for Foreign Affairs and Security Policy Federica Mogherini, who was dedicated to pursuing the negotiations to their successful conclusion. The 2020 Review Conference can be preceded by an initiative of the European Union to resume MEWMDZFZ negotiations with the European Union as the principal negotiator, replacing the Finnish diplomat Jaakko Laajava whose mandate has expired, an idea proposed by Pierre Goldschmidt of the Carnegie Endowment for Peace:

As a first step in the right direction, the EU should play a constructive role by actively promoting the establishment of a nuclear-test-free zone in the region. The failure of the 2015 NPT Review Conference to produce a final document, although disappointing, was not a surprise. As Andrey Baklitskiy has observed, "The issue of the creation of a zone free of weapons of mass destruction (WMD) in the Middle East" was "the straw that broke the camel's back in 2015.

It is encouraging that the executive secretary of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Lassina Zerbo, said in January 2016 that having Iran and Israel ratify the CTBT together would "certainly" lead to ratification by Egypt, which would in turn help lead to a nuclear-test-free zone in the Middle East. The EU is therefore in a good position to use its diplomatic skills to promote the establishment of such a zone in the Middle East.

The EU initiative could be announced at the first preparatory committee meeting in 2017, in a year when, significantly, we will have new US political leadership, a post-Brexit Europe and a Middle East exhausted by the several wars that have benighted this region. Such an initiative must be welcomed.

Nonproliferation erosion

Lastly, the NWS have failed to sufficiently realize how disastrously their opportunistic behavior has eroded the nonproliferation pillar. Quite apart from the historical record of how Israel, India, and Pakistan got their nuclear weapon capability, there are the more recent exceptions made for the 2006 Indo-US nuclear co-operation agreement and the attempts in 2016 to smuggle India into the Nuclear Suppliers Group. Again, Tariq Rauff in SIPRI states,

There also is the rise of a disturbing tendency: of non-parties to the Treaty being given preferential treatment and protection at the expense of states parties, especially by some depositary states. Examples include the 2005 US-India nuclear cooperation agreement and the so-called exemption in 2008 by the Nuclear Suppliers Group, as well as the preferential treatment for Israel both in the NPT and the IAEA contexts. Rhetorical calls for NPT universality are then left with no effective follow-up.¹⁴

Conclusion

There are, of course, many other reforms to the NPT review process that can be proposed credibly but the change in the practice of decision making from consensus to factual conference report writing is not among them. Both nuclear disarmament and nonproliferation share a common goal: universal acceptance. In this sense, side-stepping consensus is simply not a viable option.

Jayantha Dhanapala is a former UN under-secretary-general for disarmament; a former Sri Lankan ambassador to the United States and the UN Offices in Geneva and Vienna; president of the 1995 NPT Review and Extension Conference and current president of the Noble Peace Prize-winning Pugwash Conferences on Science & World Affairs. The views expressed are his own.

NOTES

¹ Following the conferences in Norway (2013), Mexico (2014), and Austria (2014), no additional country has volunteered to host further gatherings on the subject.

² “A majority of states expressed support for the commencement of negotiations in the General Assembly in 2017, open to all states, international organizations, and civil society, on a legally binding instrument to prohibit nuclear weapons, leading toward their total elimination, which would establish general prohibitions and obligations as well as political commitment to achieve and maintain a nuclear-weapon-free world. Representatives of civil society supported this view.” (Voting 68-22-9) <<http://reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/A-AC.286-CRP.3.pdf>>.

³ Robert Einhorn, “The NPT Review Process: Time to Try Something New,” James Martin Center for Nonproliferation Studies, April 12, 2016, <www.nonproliferation.org/wp-content/uploads/2016/04/the-npt-review-process-time-to-try-something-new.pdf>.

⁴ Sweden and Slovenia were also founding members that subsequently left the New Agenda Coalition. See “New Agenda Coalition,” Nuclear Threat Initiative, April 11, 2016, <www.nti.org/learn/treaties-and-regimes/new-agenda-coalition/>.

⁵ Charter of the United Nations, June 26, 1945, Article I, paragraph 4.

⁶ Steven E. Miller, “Nuclear Collisions: Discord, Reform & the Nuclear Nonproliferation Regime,” American Academy of Arts & Sciences, April 2012, <http://belfercenter.ksg.harvard.edu/publication/21875/nuclear_collisions.html>.

⁷ See Jayantha Dhanapala and Randy Rydell, *Multilateral Diplomacy and the NPT*, (Geneva: UNIDIR/SIPRI, 2005).

⁸ Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Boston: Back Bay Books, 1995).

⁹ 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, (NAM 2006/Doc.6/Rev.2/Corr.1), Havana, Cuba, September 11-16, 2006, <www.mea.gov.in/Images/pdf/Documentmethodology1.pdf>.

¹⁰ Tariq Rauf, “The 2015 NPT Review Conference: setting the record straight,” Stockholm International Peace Research Institute, June 24, 2015, <www.sipri.org/media/newsletter/essay/june-15-NPT>.

¹¹ Secretary of State John Kerry, Secretary of Defense Ash Carter, and Secretary of Energy Ernst Moniz also oppose a no-first-use protocol. See Paul Sonne, Gordon Lubold, and Carol E. Lee, “‘No First Use’ Nuclear Policy Proposal Assailed by U.S. Cabinet Officials, Allies,” *Wall Street Journal*, August 12, 2016, <www.wsj.com/articles/no-first-use-nuclear-policy-proposal-assailed-by-u-s-cabinet-officials-allies-1471042014>.

¹² “APLN No First Use Statement 2016,” August 16, 2016, <www.apln.org/statements/statements_view/APLN_No_First_Use_Statement_2016>.

¹³ Editorial Board, “A Nuclear Legacy Within Reach,” *New York Times*, August 7, 2016, <www.nytimes.com/2016/08/08/opinion/a-nuclear-legacy-within-reach.html?_r=0>.

¹⁴ Rauf, “The 2015 NPT Review Conference.”

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