

June 2021

**THOUGHTS ON A PRAGMATIC READING OF THE NPT**

**BY**

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Do non-weapon states have an absolute – “inalienable” -- right under the Treaty on the Non-Proliferation of Nuclear Weapons (the “Treaty” or the “NPT”) to acquire or develop whatever nuclear technologies they wish, especially enrichment and reprocessing capability, as long as such acquisition or development is ostensibly for peaceful purposes in denominated civilian nuclear power programs? I think a strong case can be made that the answer to this question is “no.” Rather, I think it is reasonable to interpret the Treaty’s prohibitions as applicable at least where two conditions are met: (1) the use of the technology is without discernible civilian nuclear power benefits, and (2) safeguards under the Treaty are of questionable effectiveness. Since questions with respect to economics and safeguardability are essentially factual in nature, judgments with respect to the applicability of the NPT’s prohibitions can and should be made on a case-by-case basis in light of all the facts and circumstances surrounding particular nuclear activities or assistance.

Amanda Stricker’s presentation does an excellent job in explaining how the interpretation of the NPT just outlined has been and can be reinforced by individual state and multilateral action and so truly built into a broadly accepted, global legal norm. I find myself essentially in agreement with her analysis and policy prescriptions. I will confine my remarks to the Treaty itself in an effort to underscore why such a norm is most consistent with the language and history of the NPT.

The NPT contains a mixture of carrots and sticks in order to achieve its basic non-proliferation objectives. On the one hand, as Ms. Stricker notes, in Articles I and II, the NPT sets out broad prohibitions on the conduct of weapon and non-weapon states, respectively. On the other hand, Article IV of the Treaty purports to establish broad rights of all parties to the Treaty to participate in the benefits of civilian nuclear power programs and a corresponding obligation on the parties to facilitate such participation. At the same time, Article IV is expressly made subject to the requirements of Articles I and II.

There is, at bottom, a dynamic tension in the Treaty between its prohibitions and its injunction to promote peaceful uses of nuclear energy. Key to resolving this tension, in my judgment, is the phrase “in conformity with” in Article IV, para. 1, which is the link between the NPT’s promises and its prohibitions. I believe that Articles I, II and IV can be read together in such a way that assistance and activities which are ostensibly peaceful and civilian in nature do not as a practical matter lead to the proliferation of nuclear weapons. The NPT, in other words, can be read as permitting the evaluation of such factors as proliferation risk, economic or technical justification and safeguards effectiveness in assessing the consistency of specific or generic types of assistance or activities with the Treaty’s restrictions, in order to ensure that action is not taken in the guise of peaceful applications of nuclear energy under Article IV which in fact leads to violation of the prohibitions of Articles I and II. The Treaty need not be read through an exclusively “explosives lens” and is then something more than the

“straightforward bargain” for non-weapon states – access to any and all nuclear energy technology in exchange for forswearing nuclear weapons -- it has sometimes been called.

My basic argument is that, at some point, particular assistance or activities may become so risky, even though they do not involve the transfer or acquisition of weapons or explosives as such, that they can no longer be deemed in conformity with the requirements of Articles I and II of the Treaty, even though by their stated terms they are for peaceful power applications only. Under such a “pragmatic” reading of the Treaty, the “inalienable right” in Article IV, para. 1, and the obligation to “facilitate” and the “right to participate” in Article IV, para. 2, remain subservient to the prohibitions in Articles I and II, if the practical consequences of the assistance or activity, whether its purpose is denominated as peaceful or not, are likely to lead to the proliferation of nuclear weapons. In short, there may be activities other than final assembly and production of a “bomb”, “warhead” or other “nuclear explosive device” covered by the prohibitions of Articles I and II. A global consensus about what such activities are, as Ms. Stricker points out, will in fact help turn the Treaty into a stronger bulwark against proliferation.

Such an approach makes complete sense in light of the overall purpose of the Treaty to halt proliferation. If risks are great, if there can be no reasonable civilian justification for particular forms of assistance or activities, and if there can be no certainty that safeguards would be effective with respect to such assistance or activities, then a presumption should arise that such assistance or activities are not for a permissible peaceful purpose but are rather for a weapons or explosive purpose and therefore in violation of Articles I and II. This best assures that the NPT’s objectives will be achieved. The case for this interpretation was set out at length in a 1979 report to the Arms Control and Disarmament Agency by Albert Wohlstetter, *et al.*, *Towards a New Consensus on Nuclear Technology* (ACDA Report No. PH-78-04-832-13) (July 6, 1979).

Without going into the history of the Treaty in depth, and whatever its ambiguities, suffice it to say that several elements of the NPT’s history tend to support the argument for a pragmatic reading of the Treaty. First, the negotiators undertook strenuous efforts to establish a comprehensive, loop-hole free agreement primarily aimed at advancing security. Second, the negotiators were operating under the assumption that nuclear-related activities would be economically justified. Third, the negotiators assumed that safeguards as applied would be effective. And, fourth, the negotiators recognized that *per se* rules concerning permissible activities or assistance were inappropriate.

Ultimately, as Adrian Fisher, one of the chief U.S. negotiators of the Treaty, stated several years after its ratification, the NPT “does not require us to do something foolish.” Another way of putting it is that the NPT should not be read as allowing or compelling actions which may increase, rather than reduce, the risk of proliferation. Further, if history is any guide, it would seem appropriate to err on the side of caution or restraint and apply the Treaty’s restrictions to activities which pose unacceptable proliferation risks with no reasonably discernible civilian nuclear power benefits now or in the foreseeable future. Activities should not be given a green light simply because they are denominated as “peaceful”, “civilian”, “power” or “research.” Building a sustainable international norm against the spread of enrichment and reprocessing capability, as Ms. Stricker advocates, will take the global community further down a necessary path toward the institution of meaningful proliferation restraints and best serves the NPT’s overriding purpose of halting the acquisition of nuclear weapons.