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Summary:

An overview of the administrative structure of the NPT review conference and the preparatory work leading up to it, as well as potential procedural problems which have not yet been solved.

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**PROGRAMME FOR PROMOTING NUCLEAR
NON-PROLIFERATION**

THE PROCESS OF EXTENDING THE TREATY

"PREPARATIONS FOR THE CONFERENCE"

by

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**PPNN INTERNATIONAL SEMINAR
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PREPARATIONS FOR THE CONFERENCE¹

Salient Features of the Extension Conference

This paper is not intended as a discourse on the process of extending the Treaty on the Non-Proliferation of Nuclear Weapons. Much has been written on that subject, and more will no doubt be published before April 17, 1995, the day the Conference that will be held for this purpose is scheduled to begin. Rather, the paper intends to sketch what needs to be done before to get that Conference under way, and what has been done so far. As a background for that sketch, some features of the Conference should be recalled here, obvious though they may be to the reader.

Article X, 2 of the Treaty on the Non-Proliferation of Nuclear Weapons ["NPT"] says that "[t]wenty-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 ... be extended for an additional period or periods. This decision shall be taken by a majority of the Parties to the Treaty".

At its 47th session, in 1992, the General Assembly adopted a resolution² in which it took note of "the decision of the parties to the [NPT] to form a preparatory committee for a conference to review the operation of the Treaty and to decide on its extension, as called for in article X, paragraph 2, and also as provided for in article VIII, paragraph 3, of the Treaty".

Every fifth year since the Treaty entered into force, in March 1970, there has been a conference to "review the operation of the Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised".³ At each of these four "review conferences" the parties represented there examined how each of the operative articles of the Treaty, and in particular the eighth and tenth preambular paragraphs, had been "implemented", i.e. been given effect, during the five-year period just past.

¹ The views expressed in this paper are those of the author in his personal capacity. They do not necessarily reflect those of the Secretariat of the Preparatory Committee for the 1995 NPT Conference.

²Resolution 47/52 A

³As provided for in article VIII, 3

The fifth "NPT Conference", however, has a new element, in that it not only reviews but must also extend. Or, to put it the other way around: the conference that is called to decide for how long, and how, the Treaty should be extended, also has the character of a review conference. That is one novel and unique element of this event that sets it apart from the four previous conferences.

Another novel feature of this conference is that it will decide the fate of an **existing** international convention. There have been many conferences to devise, discuss, negotiate various treaties and conventions in the area of arms control-/limitation/disarmament, and in fact, on countless other subjects. But those gatherings invariably dealt with **new treaties** or may have had the legal purpose or the practical result of **adding to**, or **changing** existing legal instruments. But the 1995 conference will look at the way a particular existing treaty has been carried out and, against that background, will decide how much longer that Treaty should remain in force.

A third point worth noting is that the decision must be taken not just by the delegates present and voting at the conference - which is the usual formulation - but by a majority **of the parties**.⁴ In other words: to be able to take a valid decision, the conference must be attended by so many delegates of parties to the Treaty, that the number of people who express themselves at the conference in favour of an extension for a given period represents a majority of the - now 165 - parties to the Treaty. The decision therefore must be taken by at least 83 delegates. Unless the decision is taken by consensus - that is to say: there is no vote - this assumes that attendance at the conference will have to be better than it has ever been in the past. In 1975, the NPT had 96 parties; the review conference was attended by 58 of them and a majority of the parties would have been 49. In 1980 the Treaty had 114 parties; the review conference was attended by 75; one would have needed 58 of those to have a majority. In 1985 the number of attendees was 66, while the number of parties to the Treaty had grown to 130; 66 would have been the requirement for a majority. And in 1990, out of 142 parties 84 attended; of those, 72 would have had to vote for a decision. This makes it important that the 1995 conference should be attended by as many delegations as possible.

The stipulation of article X, 2 hides another important element: the majority decision will **bind the other parties**: not only those who stayed away, but - as in any democratic voting process - also those voting against. To give a theoretical example: if two thirds of the present 165 parties, or 110, attend, and 55 stay home, and 83 of those present decided in favour of an indefinite extension of the Treaty, then not only the 27 who had not voted with the majority would be bound by the decision but also the 55 absentees. All would automatically become parties to a treaty of indefinite duration.

⁴ To repeat the last line of article X, 2: "...This decision shall be taken by a majority of the Parties to the Treaty."

Yet another aspect of the conference is that, while the NPT has its origin in the United Nations; its preparations arose from a resolution adopted by the UN General Assembly; and the Secretariat, the venue, the documentation and all the facilities and services for the conference are provided by the United Nations, **this is not a United Nations conference**. It is the parties to the NPT who have called for it, who run it, who appoint its Secretary-General and who pay for it. This means that parties take responsibility for the way the conference is run, and also that they can adopt any operating procedure they consider appropriate.

Obviously, then, it is essential that the **conference should be well-prepared**. Obviously also, those **preparations are not easy**.

Nature of the Preparatory Process

Preparations for the conference take place on three levels.

First, there is the **Preparatory Commission**, which works out the procedures, drafts the agenda, suggests the allocation of items to various committees of the conference, chooses the subjects on which background documents shall be prepared, and generally tries to settle in advance the problems it sees arising at the conference. All this is done in the form of suggestions for the conference, which is the final arbiter on the way it will proceed.

Secondly, the **Secretariat** must make all practical preparations: from finding accommodation for the meetings, engaging staff, including interpreters and translators, preparing documentation, drawing up the budget to servicing the sessions of the Preparatory Committee and any subsidiary bodies it sets up. The Secretariat is responsible for the logistics of the conference.

Thirdly, each of **the parties** must actively prepare for the event. That preparation in the first place concerns itself: it has to select a team of officials and advisers who will represent the country at the conference and who will remain at the capital to issue the instructions for the team, both before and during the conference. All concerned must familiarize themselves as much as possible with the nature of the conference and the issues that will play a role there. They must read the extensive literature that exists on the Treaty, by going through the documents of previous NPT conferences and by attending briefing conferences like those given by regional groups and international organizations, as well as by non-governmental organizations such as the Programme for the Promotion of Nuclear Non-Proliferation (PPNN).

That, in a way, is an inward-directed activity. Countries also have to prepare in another sense, outwardly, by consulting with each other, one-on-one or in groups, to work out joint approaches and agree on policies. Some countries will try to lobby for their points

of view. Among the more active supporters of the NPT, for instance, there are some that may be in a position to inform, advise and help others get ready for the conference.

All three levels of preparation coincide and overlap - none is possible without the others. That is all the more true as the preparations in this case demand much inventiveness and improvisation.

Civil servants, whether national and international, as well as diplomats, always try to rely as much as possible on precedent: why invent the wheel when others have already done so? But in this case, we are dealing with an unprecedented event. There may be situations where it is appropriate to extrapolate from solutions found for kindred problems. But for many aspects there are no rules. That means that new rules will have to be devised. Doing so will require all the inventiveness and foresightedness that those involved in the preparation can muster.

One must expect the unexpected: unprecedented situations will surely arise, for which the conference should be prepared to find solutions. For instance: what happens if there is no clear majority for a given period of extension? Does the Treaty remain in force? If so, for how long? Should a new meeting be called? What if there is such a new meeting, but this does not attract the majority of parties? What if the new meeting again cannot reach a clear-cut decision? What happens in the case of a tied vote?

It may not be possible during the preparatory stage to find solutions for each situation that may arise. It may not even be possible to imagine every exigency that may occur. It is important, however, to try, and to devise procedures that permit the conference to deal with the problems at hand, without giving undue advantages to one side or the other in any contentious situation. For, indeed, procedural problems usually arise from disagreements over substantive issues and the actions to be taken in their regard. Most procedural questions reflect substantive dissension. Good rules of procedure are those that set the stage for objective solutions.

Developing procedures of that level of quality, however, calls for close cooperation and goodwill at the preparatory stage, especially within the Preparatory Committee. During the three sessions which the Preparatory Committee has held so far, that close cooperation and goodwill have not always been in evidence, especially with regard to the Rules of Procedure, more particularly those draft rules that pertain to the extension process and the relationship between decisions on review and extension. Yet, this matter must be settled for the conference to have any productive issue.

Some of the fascinating puzzles that will face the conference will be raised here by others. They are the dream of international lawyers and whatever the outcome, they will provide material for learned dissertations in years to come. The aim of this paper, however, is limited to discussing how to create conditions where puzzles may be solved and choices can be made. Whatever the lawyers say, the wishes of the participants will

decide. It is the preparations that must make it possible for the decisions to be taken, facilitate the talks leading up to them and create conditions for the conference to become a success.

Progress So Far: the Preparatory Committee

a. The First Session

The Preparatory Committee for the 1995 Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons held its first meeting in New York in May, 1993. It was attended by representatives of 128 states. Its main achievements were to set the dates for the Conference as 17 April-12 May 1995 and the venue as New York and its decision to hold three more sessions, each of one week: on 17-21 January 1994 in New York; 12-16 September 1994 in Geneva and 23-27 January 1995 again in New York. Its chairman was Jan Hoekema of the Netherlands. As chairman for the second session it elected Ambassador André Erdős of Hungary. Nigeria was nominated to chair "a future session". There was no decision on the chair of the fourth session. Among further procedural questions the Committee discussed was whether decisions should be taken by consensus or whether voting should be permitted, and the possibility of attendance by representatives of non-party states and non-governmental organizations. These matters, as well as the rules of procedure, the agenda, and the final document(s) of the Conference itself, and the background documents to be prepared for the Conference, were deferred for later decision.

During the session, the Group of Eastern European States announced its endorsement of the candidacy of Poland for the Presidency of the 1995 Conference. On behalf of the Non-Aligned Movement Indonesia informed the Committee of the candidacy of Ambassador Jayantha Dhanapala of Sri Lanka for that function.

b. The Second Session

The second session was attended by representatives of 114 parties. Reverting to the issue of the Presidency, after Poland, which had not nominated a candidate by name, announced the withdrawal of its candidature, the Committee unanimously endorsed that of Ambassador Dhanapala. The Committee decided that its third session, would be chaired by Ambassador Isaac Ayewa, Deputy Permanent Representative of Nigeria to the United Nations in New York. The second session was again largely devoted to procedural matters, both pertaining to the Committee's own work and that of the Conference. On the matter of decision-taking, which had been extensively discussed at the first session, in the words of its Progress Report, it '...decided to make every effort to adopt decisions in accordance with the rules of procedure of the Fourth Review Conference.'

Another subject of debate had been the representation of states non-parties and of non-governmental organisations (NGOs) at sessions of the Preparatory Committee. The Committee agreed to allow representatives of non-party states to attend as observers at those of its not designated as closed, and to receive and submit documents. It further agreed to permit representatives of NGOs to observe open meetings of the Committee from the public gallery and during the third session to hold a briefing 'on the margins of the Committee's deliberations', i.e., in the UN building in Geneva but not to the Committee as such.

No agreement was reached about the rules of procedure. The Committee set up an informal working group, which considered a number of suggestions from Committee members and was set to continue its work at the next session. Regarding background documentation, the Committee identified a number of subjects on which it invited the Secretariat of the United Nations, the International Atomic Energy Agency, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean and the Secretariat of the South Pacific Forum to prepare background documents for the Committee's consideration at its third session. It also outlined the way it wishes those papers to be prepared.

Decisions of the agenda and the final document(s) of the Conference were deferred.

c. The Third Session

The third session of the Preparatory Committee was held at United Nations Headquarters in Geneva, on 12-16 September. It was chaired by Ambassador Isaac Ayewah, of Nigeria; representatives of 89 states participated. The previous decision about admission of observers made it possible for Algeria, Argentina, Brazil, Chile, Israel, Pakistan and Ukraine to attend. Extending that ruling, the Committee decided that representatives of intergovernmental organisations should also be allowed, upon request, to act as observer agencies; the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL) and the League of Arab States availed themselves of the opportunity. The session was further attended by representatives of 51 non-governmental organisations, of whom many participated in a joint briefing for delegations and some also gave separate briefings. Their information material was displayed outside the meeting room and distributed individually to delegates.

Three lessons may be drawn from these statistics. With respect to the venue, the number of parties represented at the session, many fewer than at the previous two sessions (128 and 114, respectively) may be taken as an indication that, as regards attendance, New York would seem a better venue than Geneva. Secondly, the opportunity for non-party states to be present was felt to serve the interest particularly of those states close to accession. And thirdly, the presence of NGOs in no way disturbed the proceedings and was appreciated both by the organisations themselves and by delegations seeking information on technical matters.

The two meetings the Committee devoted to substantive statements reflected attitudes that may be expected to dominate the review and extension process at the 1995 conference. In general terms, speakers from industrialised nations stressed the non-proliferation functions of the Treaty and praised its attainments. The majority of the (more numerous) speakers from developing and non-aligned states underlined the obligations of nuclear-weapon states under article VI of the Treaty, and expressed the view that the implementation of the Treaty had not gone far enough to alleviate the discrimination inherent in it. While the former category of speakers called for the indefinite and unconditional extension of the Treaty, the latter, by and large, expressed preference for an extension by a fixed period or periods. There was much discussion in and around the session about options for extension, including the admissibility of conditional extensions.

In response to the request made by the Committee at its second session, background documents had been prepared by the Secretariats of the United Nations, the IAEA, OPANAL and the South Pacific Forum. These will be amended to take account of comments made, and brought up to date before being submitted to the Conference. Some delegations felt that the paper prepared by the IAEA as usual on its activities under article IV, did not constitute the "comprehensive" background documentation on the implementation of that article requested by the Preparatory Committee at its second session; they asked for a second and more extensive paper dealing with all aspects of the implementation of article IV, including supplier states' controls on nuclear exports. A number of developing nations see those controls as a departure from the terms of article IV and as detracting from their rights under it. That issue was also raised at the General Conference of the International Atomic Energy Agency, a week later, where especially Iran severely criticised the way nuclear supplier nations give effect to article IV. Iran even indicated there that the issue of suppliers' controls might be a ground for withdrawal from the Treaty. There was no consensus in the Committee on the preparation of the additional paper, and the issue was remitted to the fourth session; it will no doubt be the subject of difficult and protracted debate there. More generally, these developments indicate that the issue of peaceful use of nuclear energy may play a more important part at the 1995 Conference than analysts had previously assumed.

The third session of the Committee was mainly preoccupied with the procedural aspects of the 1995 Conference. Its discussions on these items gave a clear preview of the approaches to the substantive issues various political groups are likely to adopt at the Conference. The draft Rules of Procedure for the Conference were discussed in a working group, where agreement was reached on virtually the entire set, with, however, some significant exceptions. The main exception was the question of procedures for voting, if more than one extension option was proposed. It was particularly Iran that held out for a solution to this question and to related issues. However, the fact that other states also had concerns how to handle various options for extension, was illustrated by the support given to a request by non-aligned delegations for a paper by the United Nations Secretariat on the legal interpretation of article X, 2. Resistance to this

suggestion, based on the consideration that the interpretation of article X, 2 should be left to the participants in the Conference rather than being laid down by a body that had no particular standing in this matter prevented consensus. This matter, too, was held over for the next session.

As to the scale of contributions to the budget of the Conference, which is part of the Rules, it was agreed that China, France, Russia, the UK and the USA together would pay 55 per cent of the costs, with the remainder being paid by the other participants in accordance with an adjusted UN scale of contributions. However, the country referred to above insisted that all **parties** should contribute, including those that did not attend. Another state asked for postponement, because its UN contribution was still under discussion. The Committee will also have to discuss this matter again at its January session.

The Agenda for the Conference was also discussed at length and no agreement could be reached, particularly on the order of the items, which is directly connected to the relationship between the review process and the extension. The main issue here seems to be whether absence of agreement on the review of the implementation of the Treaty should hold up a vote on its extension. This issue also has a bearing on the question what final document or documents the Conference should produce to reflect the results of its work? A decision on this point was also referred to the last session of the Committee.

Another matter, indirectly related to these discussions, is the agenda item allocating the review of the implementation of various elements of the Treaty to the respective main committees of the Conference. This, too, was left for later consideration.

The chairmanship of the fourth session of the committee presented an unexpected bone of contention. The Group of Western and Other States had endorsed the candidature of Ambassador Pasi Patokallio of Finland for this function. There is not yet full agreement on the allocation of the chairs of the main committees of the Conference, however. Given the presumed connection between those allocations and the chairmanship of the various sessions of the Preparatory Committee, this matter also had to be left for decision at the fourth session. Amb. Ayewah, was asked in the interim to have consultations on this issue.

Prospects and Conclusions

The preparatory work so far has not yet been able to create the conditions required for the smooth operation of the Conference. As matters stand at present one faces the likelihood of major procedural problems having to be solved at the fourth session of the Preparatory Committee and possibly even at the Conference itself. Unless the outstanding matters are settled in time and to the satisfaction of the great majority of parties to the Treaty, work at the Conference may be handicapped by inadequate

procedures and the achievement of a significant extension of the Treaty may become very difficult.

That would not be in the interest of the majority of states, who feel that it is to their advantage to have a strong and effective NPT, even if many of them have objections to the manner in which the Treaty has been implemented so far.

Those objections pertain to all aspects of the Treaty: to the way its disarmament provisions have been implemented so far, and to the effect given to the article on peaceful uses. Recent developments in Iraq and the Democratic People's Republic of Korea, persistent reports about the nuclear-weapon programmes of non-parties such as India, Israel and Pakistan, and repeated accounts of illicit trade in nuclear material have also led to questions about the effectiveness of the NPT in deterring proliferation. At the same time, and in apparent contradiction with the last point, criticism is also heard about the intrusiveness of the safeguards regime, as well as of its cost.

Most, if not all, of the critics give clear indications of their conviction that the Treaty should be maintained. There seem to be many parties, however, who would not wish to see it extended for a long time without giving the nuclear-weapon states a clear signal that they are unhappy about the implementation of the disarmament provisions, and the industrial states a clear demand that they wish the peaceful-uses provision to be given full effect. Those parties do not want nuclear trade to be paralysed for non-proliferation reasons, and they do not wish to accept discrimination in this regard between one state and another.

Many states are understood to feel that an indefinite extension would present the wrong image and would tend to freeze present inequities. At the same time, most are aware that the Treaty is exceedingly hard to amend, and that it would be virtually impossible to get world-wide agreement on an alternative. Not wishing to jeopardize the positive aspects of the Treaty by withdrawing from it or seeking its early termination, those states seek means to obtain an improvement in its implementation.

To this end, it seems that there are many parties who hold the view that a way should be sought of maintaining leverage on the states most widely thought to be able to give effect to the various provisions of the Treaty, especially the superpowers and the rich nations of the North. Given that one cannot retroactively 'build in' conditions for extension - most legal commentators deny that the present Treaty text leaves an opening for conditional extension - those states are looking for a way to maintain the leverage without amending or terminating the Treaty.

It should be in the interest of all to work together in seeking a solution along these lines. But solutions to exceptionally complicated problems, approached from sharply different points of view, can only be found under the right conditions. This demands at a minimum the existence of sensible and workable conference procedures.

The Treaty on the Non-Proliferation of Nuclear Weapons is many things to many states. It is subject to praise and to criticism. It is the one international instrument that incorporates the obligation to refrain from obtaining nuclear weapons on the one hand, and to get rid of them, on the other. It should be fully implemented. The forthcoming Conference presents a unique opportunity to advance that implementation, but it can only do so if it is properly prepared. It is essential that all concerned should realize this, and should cooperate to complete those preparations as promptly and productively as possible.

Ben Sanders

October 13, 1994