

The Role and Rationale of the NPT and its Review Conferences

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What is the NPT?

Treaty types: contracts, law-making and constitutional treaties

Legal scholars distinguish different types of treaties. The categorization of a treaty will normally affect its interpretation. For example, law-making and constitutional treaties benefit from a more dynamic and teleological (purpose-oriented) approach, whereas the interpretative methods of contract treaties normally focus more on the text thereof.

International law started out as a form of private law, leading to a predominant view on treaties as international contracts. The contractual nature of the former type is reflected in the fact that they contain specific obligations for each member, or group of members, in a *quid pro quo*.

Lawmaking treaties create general norms for the future conduct of the parties, and the obligations are basically the same for all parties. This does *not* mean, of course, that there may be no bargain involved in the negotiation of the treaty; as international lawmaking efforts necessarily depend on compromise between sovereign states with possible conflicting interests, this will generally be the case.

These form a subcategory of lawmaking treaties. These treaties do not only set norms but also contain constitutive functions, establish a political order, and establish fundamental institutions and structures. The most obvious examples of such treaties are constituent documents of international organizations with international legal personality such as the Statute of the IAEA. They, too, inherently have an element of a contractual relation, as "any constitution seriously undertaking to constitute and limit political power in the name of 'the people' is historically and/or logically based on the notion of contract". (N. White, 2012).

Interpreting the NPT: significance of the Grand Bargain

The starting point for the determination what kind of treaty the NPT is, its text and preamble, does not prove conclusive. The text of the operative paragraphs contain many obligations that are shared by *all* NPT member states, such as the prohibition to transfer unsafeguarded nuclear material (Article III.2), obligations on peaceful nuclear cooperation (Article IV.2), or nuclear disarmament (Article VI). So does the preamble, which addresses all "States concluding this treaty". On the other hand, the NPT differentiates between obligations for NWS and NNWS in Articles I, II and III, and one of the principles of UNGA Resolution 2028 was that the treaty must embody "an acceptable balance of mutual responsibilities and obligations".

It is rather well-known that the NPT was based on a bargain between different groups of states. The negotiating records reflect that, in fact, there were several bargains made between different negotiating states. Yet, as pointed out above, this does not necessarily mean the NPT is a contract as a result. In fact, discussions at the Eighteen-Nation Disarmament Committee reflect that the intention of the drafters was *not* to create a contractual treaty.

"We must be careful not to condition agreement on one measure or another, so that we achieve a complete impasse and block chances for any significant arms control and disarmament progress anywhere" (US, meeting 241)

"... we think that it would hardly be conducive to our purpose to tie up a series of measures in a single package or to make agreement on any one of these measures dependent on the implementation of other measures." (USSR, meeting 245)

"The first misunderstanding is in regard to the so-called demand of the nonaligned countries for a compensation, for a quid pro quo, in return for something. This is completely wrong. Even as an expression in layman's language, it is a completely wrong exposition of the non-aligned stand." (India, meeting 308)

"Of course, to make horizontal proliferation conditional upon or subordinate to vertical proliferation, simultaneous or previous, is simply and purely equivalent in present conditions to opposing the achievement of a non-proliferation treaty" (Mexico, meeting 304)

States have, in practice, ceased to distinguish between NWS and NNWS in relation to most of the obligations in the NPT, the notable exception being Article VI – but even in this context the push among certain NNWS to erect a nuclear-weapons ban amongst themselves indicates shared responsibility.

"The Conference also calls upon all State parties to refrain from any action that may contravene or undermine the objectives of the Treaty" (Review of Articles I and II NPT, 2000)

"... the Conference calls for the wider application of safeguards to peaceful nuclear facilities in the nuclear weapon States under the relevant voluntary-offer safeguards agreements" (Review of Article III.1, 2000)

The NPT as constitutional treaty

Common, shared goals and obligations

The NPT has one overall purpose, reflected by its negotiations as well as subsequent practice and discussions – maintaining international peace and security by preventing the spread of nuclear weapons and their eventual abolition.

Creation of basic norms and structures

The implementation of this goal rests on different complementary elements: non-proliferation, disarmament, confidence-building and technology transfer. In all these three respective spheres the NPT is the source of authoritative global norms.

Indeterminacy of provisions

Yet like most national constitutions these norms, although they set basic boundaries for behavior, are characterized by a high degree of indeterminacy. They leave large legal gray areas and do not prescribe detailed behavior. Compare, for example, the CWC, which contains annexes with lists of chemicals, definitions, and timelines for destruction of chemical weapons.

Reliance on creation additional legal instruments

In national legal orders, constitutions are supplemented by other laws. The NPT is similar in this sense, as evidenced by treaties and agreements such as UNSCR 1540, the CTBT, the NSG, and various safeguards agreements. The discussions on a nuclear weapons ban or nuclear weapons convention should also be seen in this light.

Evolution through interpretation

Many constitutions are 'living instruments'. This means that the meaning of certain terms and provisions in the treaty text itself can change as conditions and perceptions change. In some countries, it is courts that are tasked with interpreting the constitution; in others, this process takes place by legislation. In the case of the NPT, it is carried out by the practice and agreement of all member states collectively, in accordance with the rules of international treaty law.

Examples of NPT evolution

Articles I-II: non-proliferation obligations

The scope of Articles I and II was originally not considered to extend to non-NPT states (see, for example, Shaker (1970)). In addition, no mention was made in the treaty text of non-state actors. Today, however, non-proliferation obligations are considered to cover also non-NPT states, and various guidelines and UNSCR resolutions are aimed at preventing proliferation through non-state actors.

"The Conference, recalling the obligations of all States parties under articles I, II and III of the Treaty, calls upon all States parties not to cooperate or give assistance in the nuclear or nuclear-related field to States not party to the Treaty in a manner which assists them in manufacturing nuclear weapons or other nuclear explosive devices." (2000)

"The Conference urges all States parties to ensure that their nuclear-related exports do not directly or indirectly assist the development of nuclear weapons or other nuclear explosive devices and that such exports are in full conformity with the objectives and purposes of the Treaty as stipulated, particularly, in articles I, II and III of the Treaty..." (2010)

Article III: safeguards

"[The] reference to the Agency's safeguards system in this first paragraph should not be construed as incorporating the present IAEA safeguards system documents in the treaty in the sense that a treaty amendment would be required to revise the IAEA safeguards documents. This interpretation is reinforced by the preambular expression of support for research and development on safeguards within the general framework of the IAEA safeguards system..." (US, ENDC meeting 357)

"The Conference emphasizes the importance of continued improvements in the effectiveness and efficiency of IAEA safeguards, for example, but not limited to: (a) Uniform and non-discriminatory implementation of safeguards; (b) The expeditious implementation of new instruments and techniques; (c) The further development of methods for evaluation of safeguards effectiveness in combination with safeguards information; (d) Continued increases in the efficiency of the use of human and financial resources and of equipment." (1985)

"The Conference recommends that IAEA safeguards should be assessed and evaluated regularly. Decisions adopted by the IAEA policy bodies aimed at further strengthening the effectiveness and improving the efficiency of IAEA safeguards should be supported and implemented." (Action 32, 2010)

"...new supply arrangements should require, as a necessary precondition, acceptance of the comprehensive IAEA safeguards and internationally legally binding commitments not to acquire nuclear weapons or other nuclear explosive devices." (Review of Article III.2, 2010)

Article IV: peaceful uses of nuclear energy

"the provisions of article IV [are] just as important as those of article III; the wording of that article [is] so general that it [can] not be seen in isolation from article III or indeed from articles I and II" (Austria, 1980)

"The Conference reaffirms that nothing in the Treaty shall be interpreted as affecting the inalienable right of all the parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with articles I, II, III and IV of the Treaty." (Review of Article IV, 2010)

Article V: peaceful nuclear explosions

"Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control." (Article I, CTBT)

"The Conference affirms that the provisions of article V of the Treaty with regard to the peaceful applications of any nuclear explosions are to be interpreted in the light of the Comprehensive Nuclear-Test-Ban Treaty." (Review of Article V, 2010)

Article VI: nuclear disarmament

"... "an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI." (2000)

"The Conference notes the reaffirmation by the nuclear-weapon States of their unequivocal undertaking to accomplish, in accordance with the principle of irreversibility, the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty." (2010)

The significance of Review Conferences

Arms Control Law must combine the benefits of legal certainty with the need for flexibility

NPT Review Conferences are instrumental for the development of treaty norms in accordance with international treaty law

They thereby maintain a balance between flexibility and certainty and as such are crucial for the interaction between law and politics in the context of the NPT

How to proceed from here?

1. Forget about the Grand Bargain.

There is no Grand Bargain 'in' the NPT. There is one at the basis of it, which is as good as meaningless in legal terms; so is the concept of the 'pillars' of the NPT. These are political constructs, as NPT states search for compromise in its implementation, and should be regarded as such.

2. A new approach to the review cycle.

This means that current discussions at Review Conferences, which mix political targets and legal arguments, are often misguided and counterproductive. Review and forward-looking discussions should be clearly separated, and the latter should be conducted in a more open, informal and dynamic manner.

3. Lessen the pressure.

For this to succeed, neither the importance of Final Documents as stand-alone instruments, nor the consequences of the failure to adopt them should be overstated. On themselves, the texts of Final Documents do not bind states. They may reflect a binding interpretation of the NPT, but can only do so when supported by consensual and consistent practice. On the other hand, the NPT and the non-proliferation regime will not collapse if a Review Conference does not end in consensus. The history of the NPT indicates that its norms, once established or developed, have never been eroded by the failure of Review Conferences to reach consensus. It is better to focus on small attainable steps when circumstances are difficult in order to prepare for larger leaps when they improve. This is exactly how the NPT and, with that, the non-proliferation regime have evolved over multiple decades.