

## **Preparing for 2010: Getting the Process Right**

*presentation notes from Rebecca Johnson*

Here we go again: another year, another PrepCom for another NPT Review Conference.

Difficult though it may be, especially after the demoralising events of the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to raise enthusiasm for the next review process, the risk of nuclear proliferation is too grave for the international community to shirk its responsibilities.

2010 is the next benchmark for the NPT review process, but though this will be the focus of diplomacy, there is a parallel timeline that needs to be recognised – the proliferation timeline.

It will be of little use to refine the review process for the NPT if by 2010 the treaty and non-proliferation regime have been further eroded and discredited as a result of (for example):

- a use or threat of use of a nuclear weapon, whether by a defined or de facto nuclear weapon state or a non-state actor that had acquired nuclear capabilities through purchase or theft;
- a breakdown in the recent agreement with North Korea leading to further nuclear tests and/or further demonstrations from Kim Jong Il's regime to persuade the international community that North Korea has developed and produced nuclear weapons;
- acceleration of uranium enrichment by Iran or the bombing of Iran's known nuclear facilities with the ostensible intention of forestalling a nuclear weapons capability;
- any other states developing rationales or programmes intended to provide a nuclear weapon capability or option in the future;
- revaluing of nuclear weapons for status, regional or international power projection or security, and/or significant continued reliance on nuclear weapons for deterrence, prestige or domestic party political gain;
- developments of new types of nuclear weapons – including modernisation – by any of the NPT nuclear weapon states;
- decision by the British government to build a new generation of nuclear submarines to carry Trident beyond the 2020s, irrespective of whether a small reduction in warheads or missiles is undertaken;
- withdrawal from the Intermediate-range Nuclear Forces (INF) Treaty by Russia or the United States;
- new or extended doctrines or missions for tactical or strategic nuclear weapons;
- the continuation, extension or further development of capabilities for enriching uranium or separating plutonium.

You may have your own nuclear-related concerns to add to this list, such as key countries holding open the option for further nuclear tests and blocking entry into force of the Comprehensive Test Ban Treaty. The point is that the NPT needs to develop more effective ways to deal with such real world threats. Considering the review process without this context will accelerate the NPT's erosion, so that instead of being strengthened to prevent proliferation it is turned into diplomatic wallpaper – a superficially good-looking piece of paper that temporarily covers up the underlying damage and distracts political attention while the deep cracks in the foundations of international

security grow deeper and wider. To get the NPT process right means making it relevant for addressing actual proliferation developments and reducing current and potential nuclear threats.

### **Development of the review process**

The current review process came about in three stages. The NPT in Article VIII.3 provided for review conferences every five years after entry into force, “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”. These review conferences caused a few weeks of flurried diplomatic attention and were used either to air grievances or embarrass a rival, exert regional pressure on hold-out states or, occasionally, to boost efforts to get a nuclear test ban or strengthen some aspect, such as safeguards. They attracted little attention from civil society, other than a handful of non-proliferation academics, and got even less press coverage.

If the core bargain of the original treaty was non-proliferation in return for progressive disarmament, 1995 brought about a further trade-off: a more relevant and frequent review process in return for indefinite extension of the treaty. Many states had feared that making the treaty permanent would sacrifice what little leverage they had on the defined weapon states to devalue and eliminate their nuclear arsenals. The South African compromise, brokered by the President of the 1995 Conference, Jayantha Dhanapala, created a politically binding package that comprised a strengthened review process, agreed principles and objectives for nuclear disarmament and non-proliferation and the extension decision. In addition, to meet regional concerns and bring a number of relevant states into the emerging consensus, the three depositaries put forward a Resolution on the Middle East. The three decisions and resolution were all adopted by consensus.

Decision 1 on “Strengthening the Review Process for the Treaty” decided that there should be more substance-oriented preparatory committee (PrepCom) meetings held for 10 working days in the three years prior to the quinquennial review conferences, with a possible fourth in the run up, understood to be primarily for “procedural preparations”. The purpose of the PrepComs “would be to consider principles, objectives and ways in order to promote the full implementation of the Treaty, as well as its universality, and to make recommendations thereon to the Review Conference”. Importantly, the meetings would not only consider implementation of the preamble and articles of the treaty, but also the decision on principles and objectives for nuclear non-proliferation and disarmament and, by implication, any further agreed documents and decisions that might result from future review conferences.

The role of review conferences was also significantly enhanced. They were to “look forward as well as back... evaluate the results of the period they are reviewing, including the implementation of undertakings of the States parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future. Review Conferences should also address specifically what might be done to strengthen the implementation of the Treaty and to achieve its universality.” In addition to retaining a structure based on three main committees, the 1995 decision agreed that subsidiary bodies could be established “for specific issues relevant to the Treaty, so as to provide for a focused consideration of such issues”.

Though the conduct of some of the actual PrepComs was problematic, States Parties made fairly effective use of the strengthened review process in its first few years, culminating in the substantively significant agreements contained in the consensus final document of the 2000 Review Conference. There were, however, some frustrations: instead of the open main committees of past review conferences, the first Chair set a precedent for closed ‘cluster’ sessions whose usually innocuous debates were unable to be formally recorded or observed by civil society (finally rectified on the initiative of the secretariat and authoritative chairs); the first PrepCom developed paragraphs on a large spectrum of every NPT-related issues, which subsequent chairs tried to use as a rolling text that became far too complex, bracketed and unwieldy to be of any use to the review conference, which effectively started again from scratch; the subsidiary bodies were formalised on the basis of political horse-trading and “balance” rather than the needs of the regime or the intrinsic merits or timely relevance of specific issues; some subsidiary bodies did little more than duplicate the cluster debates, and there was also a tendency for diplomatic inertia to ensure that once a subsidiary body was agreed on a particular issue in one year, there was an institutional impetus to renew its mandate in subsequent years rather than enduring the process of negotiations to determine whether there were new or more pressing priority issues for subsidiary bodies to address.

While the majority of states parties focussed on getting agreement on the substantive agreements – most notably the disarmament plan of action, which became known as the ‘thirteen steps’, a small group around the President, Abdallah Baali, came up with a paper on “improving the effectiveness of the strengthened review process for the NPT”, which was tacked onto the final document with little debate. This made explicit that the PrepComs and Review Conferences should consider “specific matters of substance relating to the implementation” not only of the Treaty text, but also the 1995 decisions and resolution on the Middle East “and the outcomes of subsequent Review Conferences, including developments affecting the operation and purpose of the Treaty”. So far so good – the 2000 final document had clarified that the PrepComs and review conferences were empowered – indeed, required – to deal with NPT-related developments in the real world. Since previous attempts to make the PrepComs produce a rolling text had resulted in a messy dog’s dinner, a noble attempt was made to avoid the temptation by requiring that the first two PrepComs should transmit a report that “factually summarised” the deliberations, while the third “should make every effort to produce a consensus report containing recommendations to the review conference”. The 2000 tinkering upheld that subsidiary bodies can be established at review conferences “to address specific relevant issues” but also recommended that “specific time be allocated at sessions of the Preparatory Committee to address specific relevant issues”.

### **Learning from the past: the PrepComs of 2002-4**

Though the changes were intended to improve the review process, it is debatable whether they succeeded. At the first PrepCom, in 2002, the factual summary was the product of language crunching by the Chair, Henrik Salander, and a few key aides. This enabled the PrepCom to be managed smoothly, but at the cost of the political engagement that comes when there’s a relevant negotiating role. That is not to say that the meeting was without its challenges. Salander had to conduct the first week’s work without obtaining agreement on the agenda. On this occasion, he obtained agreement that in addition to the traditional clusters of nuclear disarmament, safeguards and nuclear weapon free zones (NWFZ) and nuclear energy, equal time should be given to three special issues: practical disarmament (based on the 2000 programme of action); regional issues; and

the safety and security of the nuclear fuel cycle. However, the US and France obstructed agreement on the agenda for nearly a week by objecting to the inclusion of references to reporting in the description of treaty issues allocated to the specific sessions on practical disarmament and regional issues. Salander got his agreement on the agenda for the second week by threatening to adjourn the PrepCom indefinitely. Salander's 7-page factual summary was acclaimed by participants as useful and balanced, but even then there were concerns that the teeth had been pulled from the PrepComs, turning them into flat shows that went through the motions without having the power to influence outcomes. This became even more obvious in the second PrepCom in 2003.

Having nearly scuppered the 2002 PrepCom, the issue of reporting had ceased to be a problem by 2003. Issues from the real world were more prominent, though they were generally not addressed. For example, the general statements began to reflect deeper schisms arising from the Bush administration's new focus in the post-9/11 security environment. There were also early indications of some of the consequences, most notably by North Korea and Iran, two states that had been described as part of an 'axis of evil', together with Iraq, which had just been invaded. Most significantly, North Korea had announced months earlier its withdrawal from the NPT, making use of Article X, with profound implications for the sustainability of the regime. For the sake of a procedural success, however, North Korea's withdrawal was not discussed, even though there were many who would have preferred real political debates to a smoothly conducted but essentially irrelevant meeting.

As before, the 2003 PrepCom finished on time, with adoption of a procedural report listing decisions, participants, working papers and other procedural data, to which was attached the Chair's summary. Once again, this was a carefully managed meeting that accomplished the adoption of its report, but it was also a missed opportunity to discuss and address resurgent proliferation and disarmament challenges. So the PrepCom was viewed as a diplomatic success – but this did not mean that it was a political success in terms of the NPT's objectives.

The 2004 PrepCom was supposed to produce recommendations and finalise arrangements for the 2005 Review Conference, such as the rules of procedure, documentation and agenda. Instead it closed late in confusion and disarray after managing to adopt only parts of its final report containing the most minimal agreements to enable the 2005 Review Conference to take place. At issue was whether the review and discussions in 2005 should be framed in terms of the outcome of the 2000 Review Conference as well as the 1995 Conference. The United States, supported by France, said no. The New Agenda Coalition and most of the NAM refused to allow the outcome of the 2000 Review Conference to be sidelined. Deadlock ensued. Because of this, the PrepCom could not agree an agenda or any background documentation for 2005. The rest, as they say, is history.

The 2005 Review Conference opened without an agenda and was able to do little work until adoption of a work programme, which wasn't effected until the third week. Though the US had modified its stand slightly, and was willing for all past review conferences to be listed, this was not good enough for Egypt, which continued to insist on specific references to 1995 and 2000, principally because they contained consensus agreements on nuclear disarmament and the need for a NWFZ in the Middle East.

The Conference then limped to its predicted end, when it adopted a so-called ‘final document’ that did little more than list participants and officials and how many meetings had been held. It did not fail simply because there was no agenda for the first half and then no time to negotiate a substantive final document. For many states, this was a preferred outcome to a document that would have cancelled out or weakened previous commitments and agreements. The 2005 Review Conference failed because no-one had a positive strategy for addressing the major issues and moving forward despite the political extremes. As identified by states parties before and during the conference, the non-proliferation challenges include:

- entry into force of the CTBT – even more of a priority in the wake of North Korea’s provocative nuclear test on October 9, 2006;
- nuclear disarmament and the revaluing of nuclear weapons currently underway as many of the NWS renew or modernise their arsenals;
- the nuclear fuel cycle and how to prevent Article IV being used as a route to acquire nuclear weapon capabilities;
- universalising a system of strengthened and more effective safeguards;
- clarifying and tightening the conditions under which states may legally withdraw from the treaty, especially if they have fuel cycle technologies acquired while they were NPT parties.

These continue to be of importance today.

Finally, since procedural and institutional mechanisms are also important for regime building, there is the question of the functioning of the NPT itself, whether the review process is adequate or appropriate, or whether the institutional powers of states parties need to be revised and strengthened in order to deal with nuclear dangers and proliferation more effectively.

### **Looking forward – Tasks for the Review Process**

The review process has two different but related objectives and tasks. The first – and to my mind, most fundamental – task is to create a context for revalidating the multilateral regime against nuclear proliferation, increasing its credibility and enabling states to reinvest in the Treaty’s purposes and implementation. The second is to establish, reinvigorate and, where necessary, construct appropriate diplomatic mechanisms for the 21<sup>st</sup> century that will enable states and their citizens to participate fully and accountably in implementing the Treaty. Traditionally the first may be designated ‘political’ and the second ‘procedural’, but in reality they need to be seen as mutually dependent and reinforcing. All too often, however, the domestic or national agendas of certain leaders or officials result in procedures and processes being invoked and employed to restrict or obstruct non-proliferation progress and implementation rather than to facilitate.

The treaty was a cold war compromise in the mid 1960s. Its core assumption that nuclear proliferation would jeopardise human security and survival are still sound, but the review process needs to take into account that some of the cold war letter needs to be politically reinterpreted to uphold and take forward the aims and the spirit. An important aim, which all participants in the PrepCom need to keep firmly in mind, is to build – in some cases, rebuild – confidence that the multilateral regime will meet their security needs better than unilaterally acquiring, retaining or renewing nuclear weapons. The meetings should not only be a forum for repeating standard government positions; the review process needs to get better at providing safety valves for a regime

under strain, with opportunities to raise and address concerns and the flexibility to adapt precedents and procedure is necessary in order to negotiate and agree ways and means to facilitate and implement the purposes, obligations and commitments of the non-proliferation regime as a whole.

### *Agenda*

Since the 2005 Review Conference failed to adopt its committee reports or agree a final document that contained anything relating to substance, the consensus outcome of the 2000 Review Conference still stands as the baseline and yardstick for what needs to be done.

With regard to the immediate challenge of the 2007 PrepCom, it would be helpful to realise that the issues that will need to be addressed and agreed in order for the 2007 PrepCom to take place constructively are rather similar to what confronted the Chair of the 2002 PrepCom: agenda and allocation of special time for specific issues.

Whatever the original intentions, the games that were played in 2004 and 2005 over the review conference agenda proved disastrously counterproductive for all concerned. It might be psychologically understandable for the 2007 PrepCom Chair to believe that the best thing is to steer clear of any mention of 2000, but such a defensive strategy would be neither necessary nor desirable, and may backfire.

The agenda adopted in 2002 contained a substantive paragraph describing the PrepCom's work thus (para 6) : "Preparatory work for the review of the operation of the Treaty in accordance with article VIII, paragraph 3, of the Treaty, in particular, consideration of principles, objectives and ways to promote the full implementation of the Treaty, as well as its universality, including specific matters of substance related to the implementation of the Treaty and Decisions 1 and 2, as well as the resolution on the Middle East adopted in 1995, and the outcome of the 2000 Review Conference, including developments affecting the operation and purpose of the Treaty."

Since this was agreed by all in 2002, it should be the starting point to obtain agreement on the agenda for 2007. Remember how the issue of reporting, which nearly derailed the 2002 PrepCom became a 'non-issue' for the 2003 PrepCom without the Chair having to have any recourse to the linguistic and procedural contortions that at one time appeared necessary. A practical agenda that reflects previous agreements and outcomes has to be adopted one way or another in order for relevant work to be carried out. Pretending that 2000 didn't matter, is not the way to build confidence in the regime or move forward to strengthen and implement the treaty.

The non-proliferation regime cannot afford another debacle like 2005. But nor can it afford to go through tough negotiations and reach important consensus agreements, as it did in 2000, only to have them ignored, dismissed or reinterpreted to suit the interests of a few states with illusions that their notions of national security are more important than the security of other nations and peoples.

So if the 2007-2010 review process is to be taken seriously, the Chairs need to show that the outcomes of review conferences are meaningful. Rather than retreating at the first sign of controversy, as has sometimes happened in the past, those charged with managing the review process need to hold firm to principles and persuade any recalcitrant delegations that it is not in

their interests to reproduce the debilitating and self-defeating problems that beset the 2005 Review Conference.

### ***Special time and/or subsidiary bodies***

What, then, are the issues that states will want to allocate special time for? The main contenders, I would venture to predict, are: practical disarmament, security assurances, regional issues (code-phrase for the Middle East), Article X and treaty withdrawal. Will there be champions calling for special time on other issues, and if so, what? Compliance and the safety and security of the nuclear fuel cycle are possible but less likely at this juncture. In theory there is no restriction on the number of special issues that could be allocated special time. But past practice has chosen a maximum of three, loosely correlating with the three cluster sessions, which are themselves based on the three main committees, which were started in 1985 in part for reasons of regional balance and to appease rival factions.

### ***Chair's factual summary***

Opinion was divided in the 2002-5 review process on whether it was preferable to avoid negotiations on the Chair's summary, thereby enabling meetings to focus on substantive information exchange, or better to facilitate some process of negotiations among some or all of the participating states with the aim of providing a basis for future recommendations (and on the premise that political debate and interaction only occur when there is something at stake or text to be negotiated).

Chairs inevitably have different styles, so I am inclined to the view that rather than legislate how a Chair's summary should be obtained (which the documents have not done), the choice should be dictated by circumstances and a Chair's own preferences and understanding of her available resources and skills. Nothing says that the Chair's factual summary has to be agreed or adopted, but some may legitimately believe that it is likely to be more useful if there has been some process of consultation and 'ownership' by the conference. It is variously characterised as a 'snapshot' of the major challenges identified at that particular meeting or an aide memoire for future meetings. It is generally agreed that it should describe the major issues and give a balanced account of states' expressed views on a range of substantive questions. However, if the past is anything to go by, the overt issues of contention at PrepComs will seldom be about what is going on in the real world, but rather about the internal workings of the review process. While understandable, this is one of the problems.

### **Conclusion**

The questions Jean assigned for this presentation were the following:

#### *Are changes possible in the next review cycle?*

Yes, of course. States Parties are custodians of the treaty and 'masters' of their own work under that treaty. Whatever is not explicitly proscribed in the treaty, decisions of a review conference or the rules of procedure, may be tried, adapted and innovated. Contrary to what many seem to assume, many changes can be initiated by a Chair and carried forward on her authority. There is no need to wait for a consensus decision of a future review conference unless the proposal contradicts or fundamentally alters a previous consensus decision. Far more structural, institutional and procedural options are available within existing articles and rules than most people realise, and

some of the best outcomes have been achieved when Chairs, Presidents and officials have had their backs against the wall and have therefore had to be creative and brave.

*If so of what type and how would/could they be implemented?*

It is necessary first to suggest or identify some problems that the current review process fails to address or objectives that it does not support or facilitate. Ideas on what to change and how to implement those changes will flow from the specific context.

*How can the full length of the cycle leading up to the 2010 conference best be used?*

Several options can be considered. Intersessional working groups or special coordinators could address specific concerns or provide an NPT link to real-world proliferation problems, for example by appointing an observer or participant to the Six Party Talks, NWFZ consultations, formal and informal consultations with states that may be giving rise to proliferation concerns or questions of compliance and so on. The PrepComs could be reinterpreted as meetings in their own right, with an enhanced capacity to make decisions, reflect concerns, send signals to states that are causing concern or even suggest steps that states should take to demonstrate compliance or make progress on implementing certain obligations.

I'm still thinking through ideas on this.

*Should the 2009 PrepCom session have a more direct focus than the 2004 session on resolving procedural issues?*

The 2004 session's problem was not that it didn't try to resolve procedural issues, but that two of the NWS for political reasons threw a massive dust-cloud (insistence on removing references to 2000), which meant that certain key procedural decisions could not be taken. Since this was politics masquerading as procedure, more focus would have just meant a longer period of either agony or pressure, with no guarantee of a more constructive outcome. A key question to consider is whether certain procedural issues, such as the agenda, background documents and so on, have to receive consensus. This is not required under the rules, and though some states would squeal loudly at the very suggestion, as if they were being stripped of all their rights and protections, it is worth considering. Consensus gives disproportional power to naysayers and obstructivists. Majority voting on certain decisions could save time and resources and represent a victory for common sense and pragmatism. So often, after days or weeks of frustrating negotiations, the end product is the same text as had been adopted at some previous meeting. While not a panacea in all cases, the judicial use of the majority option could actually facilitate consensus, speed up routine decision making and allow for more energy to be devoted to resolving and progressing the substantive issues.

But this is just a start.