

## SECURITY ASSURANCES AGAINST THE USE OR THREAT OF USE OF NUCLEAR WEAPONS: IS PROGRESS POSSIBLE AT THE NPT PREPCOM?

By Jean du Preez

### *Historical perspective: the early days of the NPT*

The issue of security assurances against the use or threat of use on nuclear weapons against non-nuclear weapons states has been at the heart of the debate over the Nuclear Non-proliferation Treaty (NPT) ever since the Treaty's inception. Prior to the conclusion of the negotiation process in the mid-sixties, the non-nuclear weapons States (NNWS), in particular the non-aligned States, sought means to protect themselves against possible use or threat of use of nuclear weapons in return for their obligation not to develop nuclear weapons themselves. Although some NNWS sought such security within strategic alliances such as NATO and the Warsaw Pact, others looked towards international arrangements to ensure their security. To this end these States called for the elimination of nuclear weapons, and as long as that had not been achieved, for international security assurances against the use or threat of use of nuclear weapons against non-nuclear weapons states. Despite the strong drive by NNWS during the Treaty's negotiations that it should include a guarantee against the use or threat of use of nuclear weapons against NNWS, the three nuclear weapons possessor States at the time (Soviet Union, United Kingdom and the United States of America) took the position that the matter should be pursued "in the context of action relating to the United Nations, outside the Treaty itself but in close conjunction with it". The desire by the NNWS not to be threatened by nuclear weapons did, however lead to the inclusion of a disarmament component in the treaty (Article VI) in terms of which each Treaty party undertook "to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". Towards the end of the Treaty negotiations, the Security Council, acting on an initiative sponsored by the Soviet Union, United Kingdom and the United States adopted resolution 255 in 1968 recognizing that the Council "would have to act immediately to provide assistance, in accordance with their obligations under the United Nations Charter", to a State victim of an act of nuclear-weapons aggression or object of a threat of such aggression. This commitment, defined as a positive security assurance, was in principle welcomed by the NNWS, but many non-aligned states indicated that such commitment fell short of their expectations and continued to express the need for a "negative" assurance -- that is the need for a commitment by the nuclear weapons States (NWS) not to use nuclear weapons against countries not possessing such weapons in the form of a multilateral legally binding commitment.

### *Nuclear weapon State pledges:*

The five NWS recognized under the NPT have since made, and in some instances, updated unilateral pledges thereby establishing criteria for the granting of negative security assurances to NNWS. However, four out of the five NWS qualified their pledges not to use or threaten to use nuclear weapons against NNWS. Only China gave an unconditional assurance not to be "the first to use nuclear weapons at any time or under

any circumstances”. These pledges by the five NWS were formally acknowledged by the Security Council in its resolution 984 adopted just prior to the 1995 NPT Review and Extension Conference, marking the first real politically binding commitment on both “positive” and “negative” security assurances. This resolution, considered by many States as an effort by the NWS to secure support for the indefinite extension of the Treaty, went further in some aspects than resolution 255 adopted by the Council in 1968. Not only did it recognized for the first time the legitimate interest of NNWS parties to the NPT in receiving security assurances that the Council, and in particular the NWS on the Council, would act immediately in the event that NNWS became victim of an act of nuclear weapons aggression. The Council also noted the means available to it for assisting such a victim, including through investigation and adoption of appropriate measures to settle the dispute and restore international peace and security. In doing so it invited members of the United Nations to respond to a request by a victim of an act of aggression with nuclear weapons and to provide technical, medical, scientific or humanitarian assistance. In furtherance of the bargain embedded in the NPT, the Council also urged all States to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control, thereby linking the need for security assurances with the provisions of Article VI of the Treaty. However, with the exception of China, the NWS again qualified their security assurances recognized in the resolution. In light of these qualifications, the non-aligned NNWS, in particular, continued to call for a multilaterally negotiated legally binding international instrument.

***Advisory Opinion of the International Court of Justice:***

The International Court of Justice in its 1996 Advisory Opinion on the “Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict” also addressed the issue of security assurances when it concluded unanimously that

*“There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons” and “A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter, and that fails to meet all the requirements of Article 51, is unlawful”.*

***Security assurances and nuclear weapons free zone treaties:***

Nuclear weapons free zones (NWFZs) have made and continue to make, as their objective, an important contribution to the strengthening of the international nuclear nonproliferation regime, to the achievement of nuclear disarmament and to global efforts aimed at achieving the total elimination of nuclear weapons. As such NWFZs help to strengthen the security of the States that belong to such zones. In addition to the nuclear non-proliferation, disarmament and peaceful use of nuclear energy provisions, negative security assurances constitute one of the pillars of NWFZ treaties. By signing and ratifying the relevant protocols to these treaties, NWS undertake legally binding commitments to respect the status of these zones and not to use or threaten to use nuclear weapons against States parties to such treaties. Commitments given by NWS in the

context of NWFZs are, however, not sufficient in their application given that the primary undertakings by NNWS not to aspire to nuclear weapons have been made under the NPT. Negative security assurances have been granted by the NWS to all the States in the nuclear weapons free zones of Latin America and the Caribbean (Treaty of Tlateloco) and the South Pacific (Treaty of Rarotonga) in terms of the respective protocols to those Treaties. In this regard Additional Protocol II to the Tlatelolco Treaty calls on the nuclear weapon states (i) to respect the denuclearized status of the zone; (ii) not to contribute to acts involving violation of obligations of the parties; and (iii) not to use or threaten to use nuclear weapons against the contracting parties. All five NWS states have signed and ratified Additional Protocol II. Protocol II of the Treaty of Rarotonga calls on the NWS not to use or threaten to use nuclear explosive devices against any party to the Treaty or against each others' territories located within the zone. China signed this protocol in 1967, the Soviet Union in 1986, whereas the remaining three NWS signed it in 1996 (after France has ceased nuclear weapon testing in the zone). All five NWS have also ratified this Protocol. Protocols containing security assurances to be granted by NWS are also part of the Treaties on the South East Asia Nuclear Weapons Free Zone (Treaty of Bangkok) and the African Nuclear Weapons Free Zone (Pelindaba Treaty). Although all five of the NWS have signed the security assurance protocol (Protocol I) to the Pelindaba Treaty, only China, France and the United Kingdom have ratified it thereby committing themselves not to use or threaten to use a nuclear device against any party to the Treaty or any territory within the zone for which a state party is internationally responsible. Russia has not ratified given its concerns over the status of the Indian Ocean island archipelago of Diego Garcia (controlled by the United Kingdom and formerly used as a base for US nuclear weapons), while the United States argued that it maintains the right to use nuclear weapons in the case of the use of chemical weapons by an African state (referring specifically to Libya). The Protocol to the Bangkok Treaty also calls on the NWS not to use or threaten to use nuclear weapons against any party to the Treaty or to use nuclear weapons within the zone (which appears to include large areas of international waters)—no nuclear weapon state has yet signed the Protocol, mainly due their concern over the possible passage of nuclear armed naval vessels through international waters cover by the Zone. The draft Central Asian Nuclear Weapons Free Zone Treaty – which will hopefully soon be adopted-- also requires the NWS to commit themselves not to use or threat to use nuclear weapons against the five central Asian parties of the treaty.

***Negative security assurances at NPT Review Conferences:***

Although the issue of negative security assurances has been a prominent feature at recent NPT Review Conferences, no concrete progress has been made to address the concerns by NNWS over the use or threat of use of nuclear weapons against them. At the 1990 Review Conference several proposals, most notably by Egypt, resulted in language in the draft Final Document. Although the Final Document as a whole did not achieve agreement, it included consensus language in paragraph 7 under “Security Assurances” which recognized the need for effective international arrangements that could be included in an international legally binding instrument to assure NNWS parties to the treaty against the use or threat of use of nuclear weapons. It also recognized that such instrument would strengthen the security of NNWS and offer additional incentives to

other NNWS to adhere to the treaty. It is further interesting that the same paragraph recognized that the participation of all NWS, including those which are not parties to the treaty, in such instrument would contribute to ensuring its maximum effectiveness. This reference of course related to China and France who have since joined the Treaty and not to states such as India, Pakistan and Israel. Paragraph 7 under the heading "Security Assurances" reads as follows:

*"The Conference recognises the need for effective international arrangements, that could be included in an international legally binding instrument, to assure non-nuclear-weapon States parties to the Treaty against the use or threat of use of nuclear weapons. The conclusion of an international instrument providing for such arrangements would strengthen the security of non-nuclear-weapon States parties to the Treaty and offer additional incentives to other non-nuclear-weapon States to adhere to the Treaty. Participation of all nuclear-weapon States, including those which are not parties to the Treaty, in such an instrument would contribute to ensuring its maximum effectiveness."*

The issue of security assurances again featured prominently at the 1995 Review and Extension Conference, in particular given the Security Council acknowledgement earlier that year of the assurances given by the 5 NPT NWS. Egypt introduced a comprehensive proposal at the Conference that covered both positive and negative assurances. The Conference, as part of the package leading to the agreement on the indefinite extension of the Treaty, included language on negative security assurances in the *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, thereby recognizing the Security Council's acknowledgement of the assurances given by the five NWS. It also called for further steps to be considered to assure NPT NNWS against the use or threat of use of nuclear weapons and that these steps could take the form of an international legally binding instrument. It is ironic that the NWS, in particular the US, used the security assurance declarations recognized by the Council extensively to lobby the NNWS to support the unconditional extension of the Treaty while their assurances not to use or threaten to use nuclear weapons against these States were heavily qualified. Paragraph 8 of the 1995 Principles and Objectives for Nuclear Non-Proliferation and Disarmament states that:

*"Noting United Nations Security Council resolution 984(95), which was adopted unanimously on 11 April 1995, concerning both negative and positive security assurances, further steps should be considered to assure non-nuclear weapon States part to the Treaty against the use or threat of use of nuclear weapons. Theses steps could take the form of an internationally legally binding instrument."*

During the preparatory phase for the 2000 Review Conference, specific proposals were made by Myanmar, Nigeria and Sudan in the form of a draft protocol aimed at providing comprehensive and unconditional negative security assurances to NPT NNWS. South Africa also made a proposal and provided text for a draft protocol to the Treaty on the prohibition of the use or threat of use against NNWS parties of the treaty. The South African proposal emphasized that negotiations of legally binding

security assurances within the context of the Treaty as opposed to other forums, such as the CD, would provide incentives to states outside the Treaty to join, and to states inside the Treaty to fully comply with their non-proliferation obligations. The 2000 Review Conference consequently agreed that legally binding security assurances by the five NPT NWS to the NNWS to the Treaty would strengthen the regime. The Conference also called on the PrepCom to make recommendations to the 2005 RevCon to this effect. The Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons states that:

*“The Conference agrees that legally binding security assurances by the five nuclear-weapon States to the non-nuclear-weapon States to the Treaty on the Non-Proliferation of Nuclear weapons strengthen the nuclear non-proliferation regime. The Conference calls upon the Preparatory Committee to make recommendations to the 2005 Review Conference on this issue.”*

Despite this agreement no discussions have occurred on such recommendations. The issue did, however, generate some discussion from another angle. To paraphrase John Simpson and Tanya Ogilvie-White in their recent article in the Spring 2003 Edition of CNS's *Nonproliferation Review*, the alleged backtracking by the NWS on their existing unilateral nuclear security assurances given to NPT NNWS and to members of NWFZ treaties is of considerable concern. These concerns were triggered by statements by senior US and UK officials and in the case of the US, the leaking of its Nuclear Posture Review and the release of its new National Defense Strategy. These statements and doctrines appear, in the opinion of many, to conflict with existing national negative security assurance commitments. Despite the statement last year by former US CD Ambassador Eric Javits that “there is no change in US negative security assurances towards NPT non-nuclear weapons states” and a similar statement by British government officials, many NPT NNWS interpreted the apparent new US and UK policies on the use of nuclear weapons as implying that there are circumstances in which existing commitments not to use or threat to use nuclear weapons against NNWS might be inoperative. These concerns would in all likelihood lead to new initiatives at the 2<sup>nd</sup> PrepCom to address the issue of legally binding negative security assurance in the context of the NPT.

#### ***Why only give security assurances to NNWS parties to the NPT?***

Granting negative security assurances to NNWS parties of the NPT would fulfill the undertaking which should be given to States that have voluntarily given up the nuclear weapons option by becoming States parties to the Treaty. Negotiations of such assurances within the context of the NPT, as opposed to another forum would provide a significant benefit to NPT parties and would serve as an incentive to those who remain outside the Treaty, or those who may consider leaving the regime. Of course, security assurances should only be granted to those who have forgone the nuclear weapons option and not to those who are still keeping their options open.

#### ***What type of negative security assurances should be considered?***

There are basically two kinds of negative security assurances, absolute and qualified assurances. The first type always guarantees a NNWS against the use or threat of use of nuclear weapons by a NWS. This kind of security assurances was envisaged by many of the non-aligned states during the initial negotiations of the treaty. Given the qualifying statements by most NWS on their individual declarations, “qualified” negative security assurances are likely to be more acceptable and achievable. This type of assurances (as stated in the individual declarations by the US, UK, France and Russia would exclude cases of an invasion or any other attack on a nuclear weapons state’s territory, its armed forces or other troops, its allies or on a States towards which it has a security commitment, carried out or sustained by such a NNWS in association or alliance with a NWS (in terms of NATO for example). The reverse of the latter scenario applies in a case where a NNWS initiates an attack outside its security alliance with the support of a NWS. In such case, the security assurances granted to such a NNWS would no longer apply. Following the 1995 Security Council resolution, the US and the UK further qualified the application of these commitments by emphasizing that the assurances given were not regarded as applicable if any beneficiary is in material breach of its own NPT nonproliferation obligations.

***Conclusion:***

The issue at stake is the granting of legally binding security assurances to the NNWS parties of the NPT, thereby fulfilling the undertaking which should be given to the States which have voluntarily given up the nuclear-weapons option by becoming parties to the Treaty. The negotiation of legally binding security assurances within the NPT umbrella, as opposed to some other forum, would provide a significant benefit to the Treaty parties and would be seen as an incentive to those who remain outside the NPT. In this regard it would:

- Build confidence among NPT state parties, addressing concerns over possible scenarios in which some NWS may consider using nuclear weapons;
- Provide incentives to States outside the NPT. As Cuba recently joined the Treaty, the only States, with the exception of the newly recognized state of East Timor, that remain outside the Treaty are three states with nuclear weapons. Security assurances granted to NNWS inside the treaty will emphasize the basic principle that security is guaranteed by the nuclear nonproliferation regime and not by nuclear weapons. This would in turn promote the advantages of universal adherence to the Treaty.
- Negative security assurances should only be granted to those who have forgone the nuclear weapons option and not to those who are still keeping their options open. It would therefore not be applicable to NPT parties who are aspiring to acquire or develop nuclear weapons in contravention of the Treaty. This would strengthen the regime and confirm the validity of the NPT and its indefinite extension

Security assurances rightfully belong to those who have given up the nuclear weapon option as opposed to those who are still keeping their options open. They would strengthen the nuclear non-proliferation regime and confirm the role of the NPT and its indefinite extension. In considering any internationally legally binding instrument on security

assurances (as a separate agreement negotiated in the context of the NPT or as a protocol to the Treaty), the types and application of such assurances would need to be taken into account. While all NNWS to the NPT should be potential beneficiaries of negative security assurances, such assurances would only be applied to NPT states that are in full compliance with their Treaty obligations and could in certain circumstances be qualified.