

The Nuclear Weapon Non-Proliferation Treaty and Terrorism: The Consequences of 11 September 2001 on the Treaty Review Process

by Gilles Arbellot du Repaire*

Introduction

11 September 2001: by striking at the heart of the United States, the attacks by Al Qaeda announced the beginning of a new era, marked by what some are already calling “superterrorism”.

The haste with which the General Assembly¹ of the United Nations and the Security Council “unequivocally condemn[ed] in the strongest terms [these] horrifying terrorist attacks”,² as well as the immediate creation of a Committee against Terrorism,³ confirm, if confirmation were needed, the urgent need to contain this new “threat to international peace and security”.

Terrorists of the new generation, to whatever group they belong, share certain characteristics and differ from their predecessors as regards both the channels and means they use and the reasons that motivate them. They are not motivated by exclusively political or religious reasons: the two spheres are interlinked and merge in a vision of society in which no separation is made between temporal and spiritual powers. By taking as sole reference point the worldwide community of the faithful – such as the Muslim *Umma*, for fundamental Islamists – these factions operate at an international rather than infra-State level. For the most part composed of individuals ready to sacrifice themselves, some of these small groups are actively trying to gain access to weapons of mass destruction for the avowed purpose of maximising the number of victims. Faced with a Bin Laden who elevates the acquisition of nuclear weapons to a “religious duty”, and who would in certain circumstances not hesitate to use them,⁴ what had previously been simply an “unthinkable nightmare”⁵ has become a plausible scenario.

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1. A/RES/56/1, of 12 September 2001.
2. S/RES/1368 (2001), of 12 September 2001.
3. S/RES/1373 (2001), of 28 September 2001, paragraph 6. For its part, the General Assembly had, in 1996, created an ad hoc committee on terrorism, see A/RES/51/210, of 17 December 1996.
4. The proliferation of newspaper articles on nuclear terrorism is symptomatic of the scale of this concern. Thus, in August 2001, this topic was addressed 57 times. The following month, it was the subject of 1 106 articles. Cf. CURTIS (C. B.), “Reducing the Nuclear Threat in the 21st Century”, IAEA Symposium on International Safeguards: Verification and Nuclear Material Security, Vienna, 29 October 2001, p. 4.

It is against this sombre background that the first session of the Preparatory Committee (PrepCom) for the Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons⁶ (NPT), scheduled to take place in 2005,⁷ was held between 8 and 19 April 2002.

This Treaty, which applies in almost all countries,⁸ and which was extended indefinitely⁹ following the 1995 Review and Extension Conference,¹⁰ could well have problems trying to deal with the issue of nuclear terrorism.¹¹

For the record, the main objectives of the Treaty are to prevent the horizontal proliferation of nuclear weapons (Articles I and II) and facilitate the exchange of information, materials and technology for the peaceful uses of nuclear energy (Article IV), in exchange, for non-nuclear-weapon States (NNWSs), of the undertaking not to acquire nuclear weapons (Article II) and to apply International Atomic Energy Agency (IAEA) safeguards (Article III). As for nuclear-weapon States (NWSs), these undertake¹² to work towards nuclear disarmament, under strict and effective international control (Article VI).

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5. Cf. in particular, ALBRIGHT (D.), O'NEILL (K.), HINDERSTEIN (C.), "Nuclear Terrorism: The Unthinkable Nightmare", 13 September 2001, ISIS Issue Brief, Institute for Science and International Security; abundant documentation on the subject of nuclear terrorism is available on the Nuclear Control Institute website: <http://www.nci.org/nci-nt.htm>.
 6. The NPT, opened for signature on 1 July 1968, entered into force on 5 March 1970. Cf. Multilateral Treaties, United Nations, Vol. 729, No. 10485, or IAEA, INFCIRC/140.
 7. NPT, Article VIII, § 3: "(...) At intervals of five years (...), a majority of the Parties to the Treaty may obtain, by submitting a proposal to this effect to the Depositary Governments, the convening of further conferences with the same objective of reviewing the operation of the Treaty." Following the 1995 NPT Review and Extension Conference, and in the context of Decision 1, strengthening the Treaty's review process, it was decided that prior to the Review Conference meeting, the Preparatory Committee should organise a session in each of the three preceding years; Cf. NPT/CONF.1995/DEC.1.
 8. Following the 2000 Review Conference, there were 187 States Parties to the NPT. Today, three countries – India, Pakistan and Israel – are still not signatories. Cuba was admitted to the first session of the Preparatory Committee as an observer, and finally acceded to the NPT on 4 November 2002. Note that North Korea's withdrawal from the Treaty became effective on 11 April 2003.
 9. Article X.2 of the NPT provides that: "Twenty-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 shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."
 10. Cf. NPT/CONF.1995/DEC.3. See also, ROCKWOOD (L.), "The Nuclear Non-Proliferation Treaty: A Permanent Commitment to Disarmament and Non-Proliferation", *Nuclear Law Bulletin*, No. 56, December 1995; LABBE (M.-H.) (dir.), Prolifération et non-prolifération nucléaire. Les enjeux de la conférence de 1995 sur l'extension du TNP, Paris, éditions Fondation pour les études de la défense, 1995, 336 p.
 11. The term nuclear terrorism is used in the sense of the definitions given in Articles 1 and 2 of the Draft International Convention for the suppression of acts of nuclear terrorism, annexed to the report on the Sixth Session of the General Assembly of the United Nations: A/C.6/53/L.4. For the text of these articles, see *infra*, Part 2 of this study, Note 90.
 12. Since the signature of the NPT, certain NNWSs have always considered the commitments undertaken by the NWSs by virtue of Article VI as the counterpart of their own undertakings not to attempt to acquire nuclear weapons.

However, the potential accession to nuclear weapons by small groups constitutes a new risk not dealt with by the Treaty which addresses proliferation at the State level only. Can the NPT be used effectively to prevent the acquisition of nuclear weapons not just by certain States but also by infra-national groups?

For their part, States, which are only just emerging from a “bloc mentality”, must now face this new threat. Governments will therefore have to review their security arrangements so as to prevent nuclear weapons or materials falling into the hands of terrorists. But the adverse effect of such a repositioning is to destabilise international security, and more particularly the systems for controlling weapons and non-proliferation: whereas the existing legal structures are supposed to strengthen security worldwide by keeping nuclear materials and weapons out of harm’s way, the paradox is that they risk being dangerously weakened by these numerous readjustments. As the cornerstone of this process, the Treaty on the Non-Proliferation of Nuclear Weapons would be the principal victim.

Indeed, discussions about the terrorist threat at the first session of the Preparatory Committee clearly revealed differing points of view among the States Parties, with the risk of the progress and credibility of the Treaty being compromised (Part One).

However, these differences also brought to light certain avenues to explore in the fight against nuclear terrorism, both within the NPT and outside its legal framework (Part Two).

I. Discussion of the terrorist threat at the first meeting of the Preparatory Committee

A. *How the terrorist threat should be addressed at multilateral level: opposing views*

The first session of the Preparatory Committee ended on 19 April 2002, in New York, with the adoption of procedural decisions¹³ laying down the arrangements for organising the following two sessions and the next Review Conference.

1. The Preparatory Committee meeting

139 of the 187 States Parties took part in the session, as did representatives from specialised agencies and international organisations such as the Agency for the Prohibition of Nuclear Weapons in Latin America (OPANAL), the European Commission, the International Committee of the Red Cross, the League of Arab States, the Organization of African Unity, the Pacific Forum and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, not forgetting the International Atomic Energy Agency. 62 non-governmental organisations also sent observers.

Annexed to the report containing the procedural decisions is a factual summary by the Chairman¹⁴ of the Preparatory Committee, Henrik Salander from Sweden, representing the group of

13. Cf. NPT/CONF.2005/PC.I/21: Report of the Preparatory Committee on its first session. Among the procedural decisions taken at this meeting of the Preparatory Committee, the dates of the next sessions were decided as follows: from 28 April to 9 May 2003, Geneva; and from 26 April to 7 May 2004, New York. Moreover, a provisional decision was taken to hold the Review Conference in New York from 2 to 27 May 2005. See also, DC/2826, UN Press Release, of 3 April 2002, and DC/2830, of 19 April 2002. Due to editing and publication deadlines, this analysis has not taken into account the results of the second session of the Preparatory Committee (28 April - 9 May).

Western countries. This short document, for which the Chairman assumed sole responsibility and which, consequently, was the subject of neither negotiations nor amendments, highlights the main topics addressed during the Committee's session. Most delegations agreed, however, that it presented a balanced picture of the various opinions expressed.¹⁵

2. *The context of the negotiations*

However, although giving every appearance of a diplomatic success, thanks to the skill of Chairman Salander, the commentators agree that the general atmosphere of the first session was characterised by "frustration",¹⁶ "nostalgia and fear", influencing most delegations not to explore new avenues, but "to stick close to routines and rituals".¹⁷

Frustration, first of all, because the outcome of the first session seemed to dash the hopes born of the 2000 Review Conference. Whereas, on that occasion, the Parties had in the Final Document adopted a *thirteen-step* plan¹⁸ for the practical and systematic implementation of Article VI,¹⁹ five years later, the Western nuclear-weapon States showed a tendency to retract.²⁰ Thus, for example, the United States openly contested some of the steps, notably the one concerning the preparation of progress reports on the implementation of the disarmament commitments undertaken in pursuance of Article VI (step XII), the binding nature of which gave rise to serious arguments throughout the discussions in the Preparatory Committee. This aspect of the negotiations, widely discussed elsewhere, will not be addressed in the present study.²¹

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14. Chairman's Factual Summary, NPT/CONF.2005/PC.I/21, Annex II. This Summary was an innovation agreed at the 2000 Review Conference: *Cf.* NPT/CONF.2000/28 (Parts I and II), p. 20, item 7.
 15. *Cf.* JOHNSON (R.), "Low Key NPT Meeting masks deep disagreements over Treaty implementation", April 19 2002, Non-Proliferation Treaty, The Acronym Institute, www.acronym.org.uk/npt/2002rej2.htm.
 16. *Cf.* ROCHE (Sen. D.), "The NPT: Crisis and Challenge (Part I), Report and Assessment of the Nuclear Non-Proliferation Treaty Preparatory Committee Meeting", News Archives, The Global Security Institute. www.gs institute.org/archives/000095.shtml.
 17. JOHNSON (R.), "The 2002 PrepCom: Papering over the Cracks?", NPT Report, Disarmament Diplomacy, No. 64, May – June 2002, The Acronym Institute, p. 1 et seq.: www.acronym.org.uk/dd/dd64/64npt.htm.
 18. The 13 steps are as follows: i) Signature of the Comprehensive Nuclear-Test-Ban Treaty (CTBT); ii) a moratorium on tests; iii) negotiations on banning the production of fissile material; iv) establishing a subsidiary body of the Conference on Disarmament, to deal with nuclear disarmament; v) irreversibility of disarmament measures; vi) an unequivocal undertaking by the NWSs to eliminate totally their nuclear arsenals; vii) entry into force of the START Treaties; viii) implementation of the trilateral initiative (USA/Russian Federation/IAEA); ix) various steps leading to nuclear disarmament; x) banning of plutonium production; xi) general and complete disarmament; xii) regular reports on implementation of Article VI in the context of the NPT; xiii) development of verification capabilities.
 19. NPT, Article VI: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to 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."
 20. *Cf.* KUCIA (C.), "PrepCom 2002: Avoiding More Missed Steps", BASIC Notes, March 7, 2002, British American Security Information Council, p. 2-4.
 21. On this topic, see ROCHE, *op. cit.*; see also JOHNSON (R.), "Papering over the Cracks", *op. cit.*

There was also fear in the air: while some delegations welcomed the absence of conflict during the negotiations, “the corridor complaints and discussions told a different story, brimming with post-9/11 anger, unease and anxiety”.²² In fact, alongside the general and repeated condemnation of the World Trade Center attacks, there were also signs of deep concern because of the attitude of the current US Administration with regard to certain multilateral commitments and the implications of the new US Nuclear Posture Review (NPR).²³

3. *Factors of divergence*

A few days previously, Mr. Jayantha Dhanapala, Under-Secretary-General of the United Nations for Disarmament Affairs, had opened the meeting by emphasising the urgent need for effective measures to eliminate the risk of weapons of mass destruction falling into the hands of terrorists, quoting the Secretary-General, Mr. Kofi Annan:

“(…) We must now strengthen the global norm against the use or proliferation of weapons of mass destruction. This means, among other actions, redoubling the efforts to ensure universality, verification and full implementation of key treaties related to weapons of mass destruction…”²⁴

However, the United States Delegation, led by Ambassador Norman Wulf, referring to a declaration by Ambassador Eric M. Javits and in accordance with the NPR, noted certain aspects of the consensual undertakings, in particular the thirteen-step plan, with which the United States was no longer in agreement. From now on, the United States “no longer supports some of the Article VI conclusions in the Final Document from the 2000 NPT Review Conference”²⁵, such as those concerning the 1972 Ballistic Missiles Treaty (ABM)²⁶ or the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT).²⁷

It should be remembered that while the NWSs consider the transfers to NNWSs of nuclear information, materials, and technology as their compensation for undertaking not to acquire nuclear

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22. Cf. JOHNSON, op. cit. This still applies. Thus, at the presentation of the report by the First Committee of the General Assembly of the United Nations (30/09-29/10/2002), Fiona Simpson notes that more than a year after the events of 11 September, terrorism was listed among the considerations of nearly all of the 91 declarations; Cf. SIMPSON (F.), “First Committee Report”, Disarmament Diplomacy, Issue No. 68, December 02-January 03, The Acronym Institute.
 23. US Nuclear Posture Review, 8 January 2002. Although this is a classified document, extracts are accessible on the following site: www.globalsecurity.org/wmd/library/policy/dod/npr.htm.
 24. Cf. ROCHE, op. cit., p. 2.
 25. Statement by Ambassador Eric M. Javits, Permanent Representative of the United States of America at the Disarmament Conference, Geneva, communicated to the NPT Preparatory Committee, Article VI, dated 11 April 2002.
 26. This point was included at the request of certain NWSs, themselves: item 7: “The Conference agrees (…) The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the Treaty on the Limitation of the Anti-Ballistic Missile Systems as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.”
 27. Item 1 of the thirteen-step plan: “The Conference agrees (…) the importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty.”

weapons, the NNWSs, on the other hand, feel that the real benefit to them of this undertaking is the commitment by the nuclear powers, under Article VI, to work towards nuclear disarmament.

As a result, in retrospect, numerous NNWSs consider the attitude of certain nuclear powers, at best to be a delaying tactic to put off implementation of the plan and of Article VI, and at worst, a repudiation of the undertakings entered into in the 1995 and 2000 Final Documents. In any event, they fear a weakening of the effectiveness and credibility of the NPT,²⁸ and question the good faith of the NWSs as to their intention to pursue implementation of Article VI²⁹.

But in the end, the same concerns are at the origin of these diametrically opposed attitudes. Thus, two topics have been discussed on both sides in official declarations: terrorism, and the quest for a comprehensive application of the IAEA safeguards agreements. However, opinions differ as to the way in which these are linked to the NPT undertakings in respect of non-proliferation and disarmament.

On the one hand, emphasis is put on the need to keep nuclear weapons and materials out of reach of terrorists, while insisting on the need to apply the safeguards agreements in full, in the case for example of Iraq and North Korea.³⁰

In contrast to this, other representatives,³¹ while expressing their concerns about the increase in terrorism, insisted on the primordial role of the multilateral treaties and of disarmament in the fight against terrorism. They consider that the full application of the NPT and other relevant international legal instruments, including the commitments undertaken pursuant to Article VI, the Declaration of Principles and Objectives of the 1995 Review and Extension Conference³² and the 2000 Final Document,³³ remain essential.

These divergent viewpoints reflect, each in its own way, the same desire to put an end to the risk of civil populations being taken hostage by means of nuclear blackmail, whether by a “Rogue State” or by a terrorist group.

28. Cf. NPT/CONF.2005/PC.1/21, Annex II, Chairman’s Factual Summary, §7: “The view was expressed that the Treaty should be taken in its larger context of coherent commitments and credible progress towards nuclear disarmament. Without the fulfilment of Article VI over time, the Treaty, in which non-proliferation and disarmament were mutually interdependent and reinforcing, would lose its true value.”

29. This is combined with the undertaking by virtue of §4-c of the 1995 Declaration on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament (NPT/CONF.1995/DEC.2): “(...) – the determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons (...)”.

30. Cf. JOHNSON, (R.), *Papering over the Cracks*, op. cit., p. 6.

31. Foremost among whom, the New Agenda Coalition (NAC), represented by Egypt, the Non-Aligned Movement, represented by Indonesia, and the European Union, represented by Spain.

32. Declaration on the Principles and Objectives for Nuclear Non-Proliferation and Disarmament (NPT/CONF.1995/DEC.2): With a view to optimising implementation of the NPT, the principles and objectives adopted cover, respectively, the universality of the Treaty, non-proliferation and nuclear disarmament, nuclear-weapon-free zones, security assurances, safeguards and peaceful uses of nuclear energy: <http://disarmament.un.org/wmd/npt/1995dec2.htm>

33. Cf. JOHNSON, (R.), *Papering over the Cracks*, op. cit.

It is, however, reasonable to wonder if it is possible to reconcile such approaches. And there is always the possibility, lurking in the background, of a crisis at the Review Conference planned for 2005, which could, if not resolved, shake the whole non-proliferation regime to its foundations.

4. *The Preparatory Committee – a forum for repeated confrontations*

The problem facing the first session of the Preparatory Committee seems to echo the recent arguments in the United Nations Security Council concerning the return to Iraq of the inspectors of the new Disarmament Commission (UNMOVIC)³⁴ and of the IAEA action group – since renamed the Iraq Nuclear Verification Office, and the international crisis which followed.

Transferred to the Preparatory Committee, although these disagreements took place in a different context, they were basically identical in nature. In both cases, the unilateral approach is confronted with multilateral co-operation, and freedom of individual action contrasts with the legitimacy of collective measures.

The factual summary of Chairman Salander clearly underlines both the fundamental and general agreement of all delegations as to the importance of combating nuclear terrorism, and the disagreements as to the form such action should take and, consequently, the role of multilateral agreements in this field.

Thus, in paragraph 5 of the summary, he says: “It was *generally* felt that the terrorist attacks of 11 September 2001 had given an even greater sense of urgency to the common efforts of all States in the field of disarmament and non-proliferation. The view was held that further strengthening and reinforcing the non-proliferation regime was imperative to prevent the use of nuclear materials and technologies for criminal/terrorist purposes. The enhancement of the non-proliferation regimes covering all weapons of mass destruction, including efforts by the International Atomic Energy Agency, was considered to be the most important integral part of combating terrorism.”³⁵

However, divorce was pronounced when he continued, in paragraph 6: “There was emphasis on multilateralism as a core principle in the area of disarmament and non-proliferation with a view to maintaining and strengthening universal norms and enlarging their scope. Strong support was expressed for the enforcement of existing multilateral treaties. The need to seek treaties and other international agreements that meet today’s threats to peace and stability was underlined.”³⁶

This remark, together with paragraph 7,³⁷ is a call of the clearest kind for a readjustment of the position of all the nuclear powers. Chairman Salander is here supporting the arguments put forward by Secretary-General Kofi Annan, when he invited States to “redouble efforts to ensure the universality, verification and full implementation of key treaties relating to weapons of mass destruction (...)”.

34. United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), replacing UNSCOM, and constituted in the framework of Resolution 1284 (1999) of the Security Council, of 17 December 1999.

35. NPT/CONF.2005/PC.1/21, Annex II, Chairman’s Factual Summary, paragraph 5, p. 12.

36. Ibid, paragraph 6, p. 12.

37. See *supra*, note 28.

B. Differences regarding how the NPT should address terrorism: a step backwards in the non-proliferation process?

Of the 66 declarations made during the general discussion, the most virulent was certainly that formulated by the representative of the New Agenda Coalition³⁸ (NAC), the Egyptian Ambassador Mahmoud Moubarak. Expressing his disappointment at the absence of any significant progress in implementing the thirteen steps, he drew attention to the behaviour of the nuclear powers in recent years.

1. Questions raised by the New Agenda Coalition

First of all, Ambassador Moubarak said that the NWSs had given no firm commitment in the process leading to the total elimination of nuclear weapons, noting on the contrary that “there are worrying signs of the development of new generations of nuclear weapons”.³⁹

After briefly emphasising the importance of establishing reports on the achievement of disarmament undertakings in pursuance of Article VI, he reaffirmed that “any presumption of the indefinite possession of nuclear weapons by the NWSs is incompatible with the integrity and sustainability of the nuclear non-proliferation regime and with the broader goal of the maintenance of international peace and security”.⁴⁰

He also expressed his deep concern about emerging approaches to the future role of nuclear weapons as a part of new security strategies⁴¹, with a prospect of the possible development of new weapons, clearly referring to the Nuclear Posture Review.

Lastly, submitting to the Preparatory Committee a document entitled “The Way Ahead”,⁴² Ambassador Moubarak highlighted certain aspects of the thirteen-step plan (in paragraph 9) which the NAC States consider essential, namely:

- pursuance of the full and effective implementation of the substantial agreements reached at the 2000 Review Conference;
- the need for NWSs to give NNWSs negative and positive security assurances in the form of multilaterally negotiated legally binding instruments in accordance with the commitments undertaken in 1995;⁴³
- the desire to see the nuclear powers increase transparency in the management of their nuclear weapons arsenals and their implementation of disarmament measures, suggesting

38. Also called the New Agenda Coalition. The NAC comprises the following States: Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa and Sweden.

39. Cf. NPT/CONF.2005/PC.I/9, 5 April 2002, New Agenda Coalition paper submitted by Egypt on behalf of the New Agenda Countries.

40. Ibid., paragraph 5.

41. Cf. ROCHE, *op. cit.*

42. Original title: The Way Ahead; Cf. NPT/CONF.2005/PC.I/9.

43. Cf. NPT/CONF.1995/DEC.2, “Principles and Objectives (...)”, paragraph 8; see also the Resolution of the Security Council 984 (1995), dated 11 April 1995; and *supra*, note 10.

further reductions as a result of unilateral initiatives, as well as the destruction, as opposed to the storage, of dismantled nuclear warheads in the context of strategic weapons reduction agreements. The Head of the Egyptian Delegation took this opportunity to point out the crucial importance of the principle of irreversibility as regards implementation of the commitments undertaken in the context of the NPT;

- the priority to be given to reducing non-strategic nuclear weapons. (The Coalition States intend, for a future agenda, to submit a draft Resolution to this end, to the General Assembly of the United Nations).⁴⁴

Although most of these points apply to all the nuclear powers, in fact this principally brought current US policy into question, reflecting the hope that it would return to a greater commitment to the multilateral process. Those in favour of such a multilateral approach, echoing the conclusions of the report of the Policy Working Group on the United Nations and Terrorism,⁴⁵ argue that the fight against terrorism, and more especially nuclear terrorism, cannot succeed unless all States work closer together in a climate of enhanced international co-operation.

In response to these multiple objections and interrogations, the US delegation, through the repeated interventions of Ambassadors Wulf and Javits, defended its positions on two fronts. First, it explained its viewpoint concerning the measures taken by its government in compliance with Article VI, and more generally with the commitments accepted when signing the TNP. Secondly, it sought to justify the rethinking of US strategic vision in the face of new threats, a vision which the 11 September attacks had confirmed, if not changed.

2. *Measures adopted pursuant to Article VI of the TNP*

First of all, the United States Delegation wished to reassure the members of the Preparatory Committee, referring to an information document relating to Article VI.⁴⁶ Dealing first with the reduction in nuclear weapons agreed by Washington, the document then addressed the additional measures taken by way of a contribution to non-proliferation.

As part of the process of reducing its nuclear arsenal, following the end of the Cold War and since 1988, more than 13 000 weapons were dismantled. As a result, the target fixed by the START Treaty of 1991, i.e. fewer than 6 000 warheads deployed on each of the territories of the two Signatories, had been reached in December 2001.

Announcing the Strategic Offensive Weapons Reduction Treaty with the Russian Federation,⁴⁷ signed on 24 May 2002 shortly after the end of the first session of the Preparatory Committee, the information document, referring to President Bush's intention to reach agreement with his Russian

44. As can be seen from document A/57/425 of 25 September 2002, in fine.

45. Cf. Report of the Policy Working Group annexed to the joint United Nations General Assembly and Security Council document A/57/273-S/2002/875, in particular p. 3 of the Summary, Chapter IV, p. 10 et seq., as well as Recommendations 25 to 29.

46. Information Paper submitted by the United States, concerning Article VI of the NPT, 11 April 2002, of which a non-official version is available on www.basicint.org/nuclear/NPT/2002prepcom/C1-USA-ArtVI.htm.

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counterpart to reduce, within a decade, the total of strategic nuclear warheads deployed to a level of between 1 700 and 2 200, confirmed this trend towards reduction.

In response to the concerns expressed by the Coalition States, the United States representatives pointed out that over the past decade, non-strategic nuclear weapons had been reduced by 85%, that all such weapons destined for use by land and sea forces had been withdrawn and that stocks of gravity bombs⁴⁸ had been cut in half.

Concerning the additional measures, Ambassador Wulf mentioned the process of co-operation engaged with the Russian Federation and the States of the former Soviet Union with a view to guarding against the dangers related to weapons of mass destruction. Thanks to these programmes, which had been funded to the tune of USD 6.5 billion⁴⁹ since 1992,⁵⁰ Ukraine, Belarus and Kazakhstan had got rid of their nuclear warheads and also their strategic delivery systems, and the security and safety of nuclear weapons and materials had been enhanced.⁵¹ He further stated that the United States was refraining from developing new weapons, and had not manufactured nuclear warheads for some ten years. Although it does not plan to ratify the Comprehensive Nuclear-Test-Ban Treaty, his country was nonetheless complying with the moratorium on experimental explosions.⁵² It was, moreover, continuing to participate in the setting up of the International Monitoring System (IMS) provided for under the September 1996 Treaty.

The most welcome aspect of United States policy is no doubt the assistance programmes undertaken in co-operation with the former States of the Soviet Union. The international community is of course aware of the worrying state of the military and civil nuclear installations of the Russian Federation and the former Soviet Republics, as regards both security and safety. The nuclear materials they contain might well attract the attention of criminals, terrorists or dealers working for a State hoping to gain access to nuclear weapons.⁵³

That is why the United States Government has proposed its assistance, notably in the fields of material protection, control and accounting (MPC&A).⁵⁴ The purpose of these programmes is to bring the sites for storing nuclear materials destined for weapons into line with acceptable security standards. With sites secured in this way, the materials held in them will be less likely to be the subject

48. Low nominal-power nuclear weapons (equal to or less than 300 kT), with reinforced casing and head. Designed to penetrate the earth and explode at the depth of underground bunkers, weapons of the B 61-B type seem in fact to be relatively ineffective.

49. Cf. ROCHE, *op. cit.*, p. 4, § 4.1.

50. One billion USD will be allocated to this programme for the tax year 2003 (FY 03).

51. Since all the strategic weapons of Ukraine, Belarus and Kazakhstan were eliminated or returned to the territory of the Russian Federation, under the 1992 Lisbon Protocol.

52. Cf. ROCHE, *op. cit.*, and Information Paper concerning Article VI.

53. On this aspect of the management problem, see in particular BUKHARIN (O.), BUNN (M.) and LUONGO (K., N.). *Renewing the Partnership: Recommendations for Accelerated Action to Secure Nuclear Material in the Former Soviet Union* (Washington, DC: Russian-American Nuclear Security Advisory Council, August 2000), available on: <http://ksgnotes1.harvard.edu/BCSIA/Library.nsf/pubs/ransacreport>.

54. Under the aegis of the Department of Energy, the MPC&A Programme (Material Protection, Control and Accounting) is administered by the National Nuclear Security Administration (NNSA) and is the responsibility of the Bureau of Non-Proliferation and National Security (NN-50). See MPC&A Program – Strategic Plan, July 2001, DoE/NNSA: www.nn.doe.gov/mpca/index.html.

of unlawful trafficking and will therefore have less chance of ending up between the hands of terrorists or a State intent on pursuing a clandestine nuclear programme.

Furthermore, the processing of such materials is dealt with in several bilateral Russian-American agreements,⁵⁵ aimed at putting an end to the production of military-quality plutonium or converting it into fuel for use in civil reactors. Highly enriched uranium is blended, making it unusable for proliferation purposes, although it could still be used for criminal purposes.

The conclusions of the information document, emphasising that “The facts set forth above demonstrate unequivocally that the United States is honouring its obligations under Article VI of the NPT”,⁵⁶ only partly responded to the concerns of the Coalition States. Indeed, for a number of participants, the main obstacle to strengthening the NPT remained the United States’ attitude at strategic level, and the repositioning contained in its Nuclear Posture Review. The rejection of the two “steps” relating to supporting the ABM Treaty and the Comprehensive Nuclear-Test-Ban Treaty,⁵⁷ was a perfect example of this.

3. *Strategic changes to combat terrorism and new threats*

The tone was set by the United States representative who, although confirming Washington’s agreement in principle with the “conclusions” of the 2000 Review Conference, nevertheless insisted that “engaging in technical or legal interpretation of the *steps* individually or collectively would not, in our judgement, be a useful exercise.” As to the question whether the priority, for a NWS, was to pursue the overall goals [of non-proliferation and disarmament] rather than implementing a one-off and particular measure, “For the United States, the answer is an emphatic *yes*.”⁵⁸

This declaration, along with that relating to the ABM Treaty and the Nuclear-Test-Ban Treaty⁵⁹, is only the visible part of the wider repositioning contained in the Nuclear Posture Review⁶⁰ of January 2002. The comments by Ambassador Javits showed the thrust of the NPR, reaffirming the preponderance of nuclear weapons: “The new US approach will consist of nuclear and non-nuclear offensive systems, active and passive defences, and their revitalised defence infrastructure. These elements are interrelated, but have one thread in common – a reduced reliance on nuclear weapons.”⁶¹

Increasing the deterrent effect could justify the threatened or actual use of such weapons systems against enemy targets of primary strategic importance (clandestine military-industrial facilities for the manufacture of weapons of mass destruction, underground command bunkers, etc.) or as a response to the unexpected discovery of manufacturing capacity in relation to nuclear, biological

55. *Cf.*, *inter alia*, 1993 Agreement; 1997 US-Russian Plutonium Production Reactor Agreement; 2000 Russian Plutonium Management and Disposition Agreement.

56. Information Paper (...), in fine.

57. Points i) and vii) of the thirteen-step action plan.

58. *Cf.* ROCHE, *op. cit.*, p. 5, paragraph 4.2.

59. *Cf.* *supra*, and Information Paper, *op. cit.*, “(...) We continue to maintain a moratorium on nuclear testing. And last month, several senior Administration officials made clear that the US is committed to this moratorium. (...) The United States has no plan for a resumption of nuclear testing.”

60. The NPR does not have the status of an official plan until adopted by a Presidential Decision Directive (PDD), and incorporated into the Strategic Integrated Operational Plan (SIOP).

61. *Cf.* ROCHE, *op. cit.*, p. 5, paragraph 4.5.

or chemical weapons. On the basis of the extracts of the NPR⁶² and the discussions relating to the future role of such weapons, a number of delegations concluded that there was a risk that the US administration, in spite of the denials of its representatives, might ultimately abandon the negative security assurances.⁶³

As for the other aspects of the New Nuclear Posture, and without going into detail,⁶⁴ an overview gives an understanding of the United States' conception of the fight against terrorism and makes it possible to predict the consequences for the NPT.

The NPR gives a role to conventional weapons in the new Triad (nuclear and non-nuclear offensive systems, active and passive defences, and a revitalised defence infrastructure). The result is indeed a reduced reliance on nuclear weapons. However, such weapons are no longer considered solely as a deterrent, in contradiction with the conclusions and operative provisions of the advisory opinion of the International Court of Justice of 8 July 1996.⁶⁵ The possible combination of conventional and nuclear offensive weapons necessarily involves the risk that a nuclear holocaust could be triggered more easily. Conventional weapons would imperceptibly give way to nuclear weapons in the context of a gradual escalation in military firepower used in a conflict.

In this context, the NNSA⁶⁶ has been asked to identify areas for more intense study on such weapons, including an assessment of the need to proceed with nuclear tests in order to develop such new-generation weapons⁶⁷. Consequently, the prospects of seeing the Nuclear-Test-Ban Treaty ever entering into effect are becoming slimmer by the day.

Lastly, Iran, Iraq, Libya, Syria and North Korea – officially⁶⁸ non-nuclear-weapon States – have all been designated as potential targets for US nuclear weapons.⁶⁹ This being so, it is difficult to know what to think of the attempt by the United States to reassure the members of the Preparatory Committee as to its compliance with negative security assurances.

62. Cf. NPR, p.9-13; See *supra*. note 23.

63. Cf. S/RES/984 (1995), of 11 April 1995. Negative assurances consist of an undertaking by the NWSs not to use nuclear weapons against NNWSs, signatories of the NPT, except in the case of an attack made in collaboration with a nuclear State.

64. For a comprehensive review of the NPR of January 2002, see YOUNG (S.) and GRONLUND (L.), "A Review of the 2002 US Nuclear Posture Review", 14 May 2002, UCS Working Paper, Union of Concerned Scientists, www.uscusa.org/index.html, under the heading Global Security.

65. I.C.J., Advisory Opinion, 8 July 1996, on the licitness of the threat or use of nuclear weapons, annexed to General Assembly document A/51/218, of 19 July 1996.

66. National Nuclear Security Administration, Department of Energy.

67. NPR, p. 35.

68. While North Korea in theory remains a non-nuclear-weapon State within the meaning of the NPT, it is known to have very recently become a member of the group of de facto nuclear-weapon States, together with India and Pakistan. Cf. "Shock from North Korea – Nation admits to secret nuclear bomb project", International Herald Tribune, 18 October 2002, p. 1 and 5.

69. Cf. NPR, p. 16: "In setting requirements for nuclear strikes capabilities, distinctions can be made among the contingencies for which the United States must be prepared (...) categorised as immediate, potential or unexpected (...) North Korea, Iraq, Iran, Syria and Libya are among the countries that could be involved in immediate, potential, or unexpected contingencies."

In fact, some explanations can be found in the January 2002 review itself. The paragraph designating these States reads: “All (these States) have longstanding hostility towards the United States and its security partners; North Korea and Iraq in particular have been chronic military concerns. All sponsor or harbour terrorists, and all have active WMD and missile programmes.”⁷⁰

The standstill on the Nuclear-Test-Ban Treaty, the withdrawal from the ABM Treaty, the uncertain position as to negative security assurances, with the risk of the arms race starting up again which would mean the definitive failure of the non-proliferation process: these are manifestly not attributable to the 11 September attacks alone.

They are rather the delayed effects of the collapse of the Soviet Bloc, with the consequent emergence of threats “round every corner”, and of the lessons learned from the 1991 Gulf War. On this occasion, States were obliged to adapt their capacity to respond to new strategic configurations. Trying essentially to deter all types of aggression, and first of all from Rogue States, they are adopting the offensive approach of broadening their range of weapons systems in order to ensure a flexible and planned response in external theatres of operation, the defensive counterpart being the quest to make their national territory safe even if this means developing an anti-missile defence system such as the planned National Missile Defence.⁷¹

Nonetheless, the events of 11 September no doubt acted as an accelerator and catalyst in many defence sectors, and the resulting effervescence is perceptible, not only in the Pentagon but also in the allies and partners of Washington. The consequences of the attacks are less visible in changes to military programme orientations than in their confirmation through the increase in the budgets allocated and the shortening of the timeframes for development and deployment⁷². The National Missile Defence is a good example of this. As the vulnerability of US territory was manifestly demonstrated, and in order to guarantee its safety in the future, the NMD option was strengthened. The political foundation is therefore sufficiently strong that its development may be considered to be inevitable. In part because of the terrorist threat, Western States with nuclear weapons seem less disposed than ever to reduce their arsenals. Although it may be argued that nuclear weapons are not at all suited to the fight against terrorism, since the small groups in question are composed of only a few handfuls of individuals who are difficult to locate, in reaction to the events of 2001, attention was focused on States considered to be “hostile” to the NPR. In this way, the Nuclear Posture Review is part of the US Government’s response to the attacks of 11 September.

70. Ibid.

71. Although the NMD is a favourite topic for heated discussion in defence and weapons control circles, this anti-missile defence project is not the only one of its kind. Thus, Israel is developing the less ambitious, but similar Arrows programme. For its part, France seems to be thinking along the same lines, as suggested by the Senate report on the military programming Act for the period 2003-2008. As for the other nuclear powers, they have for the moment kept their options open, and their final decision will no doubt depend on the attitude of Washington.

72. In this respect, see the draft Law on the defence budget 2003-2008 (France) and the parliamentary reports devoted to it: for the draft Law, see the Web site of the Defence Ministry (www.defense.gouv.fr/actualités/dossier/d140); for the parliamentary reports, see the Web site of the National Assembly (www.assemblee-nat.fr/12/dossiers/programmation-militaire.asp).

4. *A step backward for the non-proliferation regime?*

Following these developments, we are obliged to conclude that the discussions about the application of the non-proliferation regime are far from resulting in a fully satisfactory solution for the States Parties to the NPT as a whole.

As for solving the problem of nuclear disarmament, already a thorny issue before 11 September, this seems to have been postponed. The context of insecurity, together with an awareness of the new risks of nuclear terrorism, means that NWSs, and in particular the United States, are not in the mood to pursue this process, as is shown clearly by the basic orientation of the NPR.

That is why Under-Secretary-General Dhanapala declared in this respect: “[The NPR] flies in the face of the Nuclear Non-Proliferation Treaty undertakings. Under Article VI, one is expected to reduce nuclear weapons and ultimately eliminate them. So this is to me a very serious contradiction of [these undertakings], and will be a very major stumbling block as we begin the process of preparing for the 2005 NPT Review Conference...”⁷³

When all is said and done, and as the US Senator Douglas Roche summarised in brilliant fashion: “The terrorist attacks of September 11, 2001 did bring more change than was realised at the time. The resulting ‘war against terrorism’ has catalysed military machinery everywhere. Political momentum is escalating preparation for, and involvement in, wars.”

Just after 11 September, Secretary-General Kofi Annan said that we should “now strengthen the global norm against the use or proliferation of weapons of mass destruction”⁷⁴, and that this means “redoubling the efforts to ensure universality, verification and full implementation of key treaties related to weapons of mass destruction”.⁷⁵ But in the case of the NPT, “it is not multiplication of effort we are witnessing, but subtraction.”⁷⁶

In spite of everything, the different viewpoints also made it possible to identify certain approaches which could be used to fight against nuclear terrorism, both within the NPT as well as outside its legal framework.

II. Evaluation of the terrorist threat and measures against nuclear terrorism recommended at the first meeting of the Preparatory Committee

A. *Evaluation of the terrorist threat in the Preparatory Committee*

Throughout the meeting of the Preparatory Committee, the importance of maintaining and strengthening the non-proliferation and nuclear disarmament regime was emphasised. Several of the delegations which took the floor at this first meeting made similar declarations of principle.

73. Cf. “US Plans Concern Top UN Official”, UN Wire, March 13, 2002. See also BROMLEY (M.), “Is the United States Living Up to Its Disarmament Commitments?”, BASIC Notes, April 2, 2002, BASIC, <http://www.basicint.org/pubs/Notes/2002USCommittments.htm>.

74. See supra, note 22.

75. Ibid.

76. Cf. ROCHE, op. cit., (Part IV), p. 9.

1. *The importance of maintaining and strengthening the non-proliferation regime*

The Delegation of the Russian Federation, although agreeing with the United States that terrorism and proliferation were serious risks, declared: “That is why enhancement of the regime of non-proliferation of nuclear and other weapons of mass destruction is the most important integral part of combating terrorism.”⁷⁷ Taking the Russian position further, the representative of the French Delegation, Ambassador Hubert de la Fortelle, emphasised the need to prevent weapons of mass destruction from falling into terrorist hands, but noted that “more international co-operation is imperative”, and that “multilateral non-proliferation and disarmament regimes are indispensable”, providing “confidence and predictability”.⁷⁸ These statements show that the position of these two nuclear powers is very different from that of the United States. Russia and Japan went even further by stating that “new measures to counteract new challenges and threats should not compete with traditional disarmament and non-proliferation aspects of security”,⁷⁹ but that on the contrary “these efforts are complementary (...). Maintaining and strengthening the NPT regime should be consistent with these global efforts [to combat terrorism]”.⁸⁰

This last remark clearly shows that the fight against nuclear terrorism and management of the nuclear non-proliferation and disarmament regime are not one and the same thing. In order to assess their shared characteristics, as well as their differences, it is now necessary to identify the nature of the threat. The first question in this respect concerns the usefulness of weapons of mass destruction to terrorist operations. To answer this objectively, we need to consider a series of parameters.

2. *Putting the terrorist risk into perspective*

First of all, the means of action of terrorists have evolved. A new generation of terrorists is emerging on the international stage, one which is better prepared and financed by powerful networks. Action on a grand scale is favoured, as shown by the 11 September attacks or the taking of hostages by the Chechen fundamentalists in the *Nord-Ost* theatre in Moscow in October 2002. This trend stems from their membership of ideologies based on political-religious convictions (Al Qaeda, Jamaah Islamiya or Aum Shinrikyo), without failing to mention right-wing extremists and apocalyptic sects).⁸¹ The particular feature of Islamic fundamentalists, the group to which the authors of the 11 September attacks belong, lies notably in their concept of law.⁸² We recall that, since the 1950s, the foundations and legitimacy of positive international law have constantly been called into question on the grounds that it imposes on all countries principles and customs most of which originate in Western culture. This theme is still a current one for these groups which contest the “secularity”, the values, and more generally the legitimacy of the international law in force. It is therefore difficult to find a common ground for discussion.

77. Cf. JOHNSON (R.), “Papering over the Cracks”, op. cit., p. 7.

78. Ibid., p. 8.

79. Russian Federation, Ibid., p. 7.

80. NPT/CONF.2005/PC.I/WP.7, 12 April 2002, Working Paper submitted by Japan.

81. Cf. BREMER-MAERLI (M.), “The threat of Nuclear Terrorism: Nuclear Weapons or Other Nuclear Explosives Devices”, a paper delivered at the IAEA Symposium on International Safeguards: Verification and Nuclear Material Security, Vienna, Austria, 29 October-2 November 2001, IAEA, p. 3.

82. To avoid any unfortunate confusion, it is necessary to specify that the following remarks do not of course apply to all Muslims, but only to Islamic fanatics.

It should also be remembered that terrorists choose whatever technology is best suited to exploit a given society's weak points. Modern societies, in which the urban lifestyle predominates, are particularly vulnerable to weapons capable of causing a large number of casualties at one time. Moreover, "as governments implement more sophisticated security measures against terrorist attacks, terrorists may find weapons of mass destruction appealing, as a way to overcome such counter measures."⁸³

It has also often been said that "with the break-up of the Soviet Union, black markets may now offer unprecedented access to weapons, components and know-how."⁸⁴ These allegations are debatable, given the absence of tangible proof of the trafficking of nuclear materials in sufficient quantities and of sufficient quality to make a weapon.⁸⁵ Nevertheless, they combine with the tendency of small terrorist groups to take advantage of previous ideas and attempts. Succeeding in manufacturing a rudimentary weapon or, short of this, in stealing a significant volume of highly radioactive materials, represents a challenge in their eyes, given that no-one has succeeded in doing this before.⁸⁶

Lastly, it should be said that technological progress and the publication of sensitive information in the public domain have facilitated the manufacture of weapons of mass destruction by ill-intentioned groups. And although manufacturing nuclear weapons still remains out of the reach of most candidates for proliferation, theft is a plausible hypothesis. But this would be to confuse the motivation of States and that of terrorists, who are not looking for prestige in acquiring a nuclear weapon and for whom deterrence has no meaning. The only thing that counts is the devastating effect of such weapons. Thus, a nuclear warhead has only a "symbolic" importance since it can be replaced with advantage by a conventional explosive device loaded with radioactive materials or waste, i.e. a radiological weapon.⁸⁷

Using a nuclear or radiological weapon or a nuclear explosive device could force governments to take their perpetrators seriously in the knowledge that the trauma caused would be extreme. A recent study has shown that irrespective of the power of a nuclear explosion or the area contaminated by a radiological bomb, the psychological impact would affect a geographical area and attain a level far exceeding that of injury and death.⁸⁸ This study confirms that, faced with phenomena of such a scale, the public is even more terrified given that the impact is catastrophic and remains poorly understood. In short, the threat of nuclear terrorism can take three basic forms:

- the credible threat of the use of a stolen nuclear weapon;
- the theft of nuclear and/or radioactive materials, resulting in:

83. BREMER-MAERLI (M.), op. cit., p. 4.

84. Ibid.

85. Of all the cases recorded, only a very few related to the trafficking of enriched uranium or plutonium 239, and even these concerned small quantities. Fraud, on the other hand, is very common in the illicit trafficking of radioactive materials.

86. For example, since the 1995 attack in the Tokyo underground involving Sarin gas (GB) by the Aum sect, there has been a constant increase in incidents involving chemical and biological weapons (Cf. BREMER-MAERLI, op. cit.).

87. Also called a "dirty bomb" on the other side of the Atlantic.

88. Cf. STERN (J.), *The Ultimate Terrorist*, Cambridge, 1999, Harvard University Press, quoted in BREMER-MAERLI, op. cit., p. 7.

- (a) the threat of one or more radiological weapons (radioactive materials), or
- (b) the threat of a home-made nuclear explosive device (nuclear materials);
- an attack on, or sabotage of, nuclear installations or transport operations involving nuclear or radioactive materials.⁸⁹

Having regard to these various factors, the members of the Ad Hoc Committee of the General Assembly of the United Nations on Terrorism, responsible for preparing a draft international Convention to suppress acts of nuclear terrorism, provisionally decided to define nuclear terrorism in the terms set out in Article 2 of the Draft.⁹⁰

4. *The shortfalls of the non-proliferation regime faced with nuclear terrorism*

The non-proliferation regime as a whole⁹¹ can therefore only, as it stands, cover some of these risks, more specifically those relating to the illicit obtaining of a nuclear weapon, misappropriation of civil nuclear materials for military use, and transfers of technology and equipment relating thereto. But its relative effectiveness would be considerably enhanced if States reached an agreement on proceeding with certain processes which are currently blocked, such as the entry into force of the Comprehensive Nuclear-Test-Ban Treaty, or the completion of a treaty on the prohibition of manufacturing fissile materials for military use (FMCT). It is, obviously, more difficult to steal materials which, because they are no longer being manufactured, are becoming increasingly rare and should in time disappear.

89. Cf. SCHNEIDER (M.), "The threat of Nuclear Terrorism: from analysis to precautionary measures", contribution to Democracies Faced with Mass Terrorism Meeting, Paris, Assemblée Nationale, 10 December 2001, WISE (World Information Service on Energy), p. 2.

90. Draft Convention prepared by the Ad Hoc Committee of the General Assembly of the United Nations on terrorism, and annexed to the report of the sixth session of the General Assembly: A/C.6/53/L.4. Article 2 provides: "1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally: (a) Possesses radioactive material or makes or possesses a device: (i) With the intent to cause death or serious bodily injury; or (ii) With the intent to cause substantial damage to property or the environment; (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material: (i) With the intent to cause death or serious bodily injury; or (ii) With the intent to cause substantial damage to property or the environment; or (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act. 2. Any person also commits an offence if that person: (a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in subparagraph 1 (b) of the present article; or (b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force. 3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article. 4. Any person also commits an offence if that person: (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or (b) Organises or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or (c) In any way contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned."

91. i.e. essentially, in addition to the NPT, the IAEA safeguards, nuclear-weapon-free zones and the export control mechanism implemented by the Zangger Committee and the Nuclear Suppliers Group (NSG).

Similarly, the introduction of new nuclear-weapon-free zones (NWFZ), essentially in the Middle East, together with a system of effective controls, would help to pacify regions which, all too often, have been breeding-grounds for terrorism because of the living conditions and the political, social and religious climate which prevail there. But for the moment, this is unlikely to happen since in denuclearised zones to which treaties currently apply,⁹² it has invariably been the case that a peaceful climate is a necessary precondition for concluding and effectively applying an agreement introducing such a legal structure, and not the reverse.

Taking this approach further, strict and internationally verifiable universal nuclear disarmament, accompanied by the destruction, as opposed to the storage, of all military-quality fissile materials would make it virtually impossible for there ever to be any blackmail and/or terrorist operation based on the use of nuclear weapons or highly-enriched materials.

This being so, the positions defended by most of the States represented on the Preparatory Committee are understandable. However, this implies taking two factors into account at all times:

- “[Weapons] that have been invented cannot be disinvented.” This frequently used expression implies that the destruction of procedures, devices and systems of nuclear weapons and materials is only a stopgap measure as long as sensitive information which could be used to recreate them remains available.
- Fissile materials for military use only represent a fraction of nuclear or radioactive materials in general. Even without them, primary supply sources remain, such as civil nuclear installations and radioactive material transport operations. Subject to lower-level security, these are easier to access, and more vulnerable to theft and sabotage. As for unlawful trafficking, nearly 600 incidents have been recorded since 1993, of which some 400 were notified by the authorities of States who made arrests on their territory. 75% of cases were of a criminal nature.⁹³ Regarding the sabotage of nuclear installations, the United States Nuclear Regulatory Commission (US NRC) has funded a study on the risks of sabotage run by nuclear power plants⁹⁴ and similar research is being carried out in other nuclear countries.

In short, irrespective of the type and number of measures taken in this respect, the non-proliferation and nuclear disarmament regime cannot, on its own, guarantee that there will never be any terrorist action based on blackmail or the threat or use of nuclear or radioactive devices. That is why, alongside the declarations of principle made in the Preparatory Committee, some delegations,

92. Treaty of Tlatelolco, opened for signature on 14 February 1967; Treaty of Rarotonga, entered into force on 11 December 1986; Treaty of Bangkok, entered into force on 27 March 1997; Treaty of Pelindaba, opened for signature on 11 April 1986. An Agreement was concluded on 30 September 2002; establishing a nuclear-weapon-free zone in Central Asia.

93. Cf. NILSSON (A.), “The Threat of Nuclear Terrorism: Assessment and Preventive Action”, Symposium on Terrorism and Disarmament, 25 October 2001, New York, Department of Disarmament Affairs, United Nations, p. 3.

94. Cf. Supplement to Draft Environmental Statement Related to the Operation of San Onofre Nuclear Generating Station, Units 2 & 3, NUREG-0490, January 1981, NRC, and in particular figure 7.1.4-4, “Probability Distribution of Acute Fatalities”, which estimates the number of deaths at 130 000; referred to in BUNN (M.), BUNN (G.), “Reducing the Threat of Nuclear Theft and Sabotage”, IAEA-SM-367/4/08, October 30, 2001, IAEA 29 October – 2 November 2001 Symposium on International Safeguards: Verification and Nuclear Material Security, p. 4.

anxious to cover the whole range of possible terrorist threats, considered it necessary to propose plans of action going beyond the strict confines of the NPT.

4. *Delegations' proposals: a call for multilateralism in combating terrorism*

Proposed by the representatives of Japan⁹⁵ and Germany,⁹⁶ and by the Spanish Delegation in the name of the European Union,⁹⁷ these plans, in spite of their differences in approach, are all based on the same fundamental concepts, including the need for States to co-operate at all levels. Thus, the Head of the Spanish Delegation stated that: "The attacks of 11 September 2001 have proved to the world, if need be, that international security is indivisible. No State on its own can keep its territory or people safe from the scourge of terrorists, terrorist groups or the menace of their access to weapons of mass destruction."⁹⁸

As noted by Matthew Bunn:⁹⁹ "If the United States is not prepared to re-engage on multilateral arms control, including measures that impose some constraints and inconveniences on its own forces and facilities, it is unlikely to be possible to build the needed support for an effective international regime to protect nuclear material and facilities from terrorists. In short, if we are to achieve the security we need, September 11 must bring an end to the period of US unilateralism."¹⁰⁰ As George Bush Sr. remarked on 13 September, the terrorist attacks should "erase the concept that America can somehow go it alone in the fight against terrorism, or in anything else for that matter".

This call for enhanced co-operation was echoed in paragraph 22 of the working document submitted by Japan,¹⁰¹ and in the reference it makes to Resolution 56/24 T of the General Assembly,¹⁰² entitled "Multilateral Co-operation in the Area of Disarmament and Non-Proliferation and Global Efforts against Terrorism".

95. NPT/CONF.2005/PC.I/WP.7., Working paper submitted by Japan.

96. NPT/CONF.2005/PC.I/WP.12., Protection against nuclear terrorism and security of nuclear materials and nuclear installations.

97. NPT/CONF.2005/PC.I/17, Statement made by Spain on 15 April 2002 on behalf of the European Union.

98. Ibid., paragraph 2.

99. Mr. Bunn, currently Deputy Director for Programme at the Belfer Center for Science and International Affairs of the University of Harvard, held the post of Adviser to the White House Office of Science and Technology Policy under the Clinton Presidency, in particular for questions in relation to nuclear security and management of nuclear materials of military standards.

100. BUNN (M.), BUNN (G.), op. cit., p. 2.

101. NPT/CONF.2005/PC.I/WP.7: "(...) In order to anticipate and prevent nuclear terrorism, national, regional and international co-operation must be strengthened"; to be compared in particular with A/RES/57/83, 9 January 2003, Measures to prevent terrorists from acquiring weapons of mass destruction, § 3.

102. A/RES/56/24 – T. 29 November 2001: "1. Reaffirms multilateralism as a core principle in negotiations in the area of disarmament and non-proliferation with a view to maintaining and strengthening universal norms and enlarging their scope, (...) 3. Calls upon all Member States to renew and fulfil their individual and collective commitments to multilateral co-operation as an important mean of pursuing and achieving their common objectives in the area of disarmament and non-proliferation".

B. *The plans of action to combat terrorism proposed at the 2002 session of the Preparatory Committee*

Built on the cornerstone of international co-operation, the plans proposed by Japan, Germany and the European Union propose the adoption of a series of concrete, essentially similar measures, all three covering all the aspects of the fight against nuclear terrorism within the regime of non-proliferation and nuclear disarmament as well as outside its scope of application, with a view to integration.

1. Plans of action: general points and similarities

The European Union annexed to its declaration a list of concrete measures contained in the conclusions of the Council and adopted as part of its non-proliferation, disarmament and arms control policy. Without going into the detail of this policy adopted at regional level, it should be emphasised that it concerns the fight against terrorism as a whole, not just the nuclear variety. Thus, the conclusions of the Extraordinary European Council meeting in Brussels on 21 September 2001 deal essentially with police and judicial co-operation, combating the funding of terrorism, and co-ordinating the European Union's global action, while reasserting its policy of co-operation and multilateral negotiation "with a view to building (...) a world of peace, the rule of law and tolerance".¹⁰³

However, in a Council Common Position on combating terrorism, adopted on 27 December 2001,¹⁰⁴ the following issues are addressed: border controls (Article 10), "the exchange of operational information, especially regarding (...) traffic in (...) sensitive materials, (...) and the threat posed by the possession of weapons of mass destruction by terrorist groups" (Article 11), enhanced co-operation, including with third States (Article 13), and accession to and full implementation of "international conventions and protocols relating to terrorism and United Nations Security Council Resolutions 1269 (1999)¹⁰⁵ and 1368 (2001)"¹⁰⁶ (Articles 14 and 15). The 1980 Convention on the Physical Protection of Nuclear Materials (which is currently being revised; see *infra*) is one of these texts. This Common Position broadly reflects the spirit and the proposals contained in the documents submitted to the Preparatory Committee by the Japanese, German and Spanish Delegations, which also refer to the exchange of information and enhancement of the regime to control exports as an extension of the fundamental principle of co-operation.

Thus, the paper submitted by the Head of the Japanese Delegation states: "Needless to say, the international exchange of information and surveillance is important", specifying: "But it is also essential to establish strict border control systems to prevent the illegal trafficking of nuclear materials and impose accurate register controls."¹⁰⁷ In other words, the international exchange of information cannot be fully effective without appropriate means to collect the information, and in particular,

103. Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, Brussels. EU, Council, No. 140/01.

104. 2001/930/PESC, dated 28 December 2001, reproduced in the Official Journal of the European Communities (OJEC), L. 344/90.

105. S/RES/1269 (1999), of 19 October 1999, International terrorism.

106. S/RES/1368 (2001), of 12 September 2001, Terrorist attacks of 11 September 2001.

107. NPT/CONF.2005/PC.I/WP.7, p. 5.

updated control registers made credible by the strengthening of border controls so as to ensure a more realistic evaluation of the flows of products and materials at State level.

However, the documents of the three delegations recommend two series of recurring measures: the implementation and strengthening of the IAEA safeguards system¹⁰⁸, and an appeal for universal accession to the Convention for the Physical Protection of Nuclear Material and for the strengthening of its regime.¹⁰⁹

2. *Plans of action: the strengthening of the IAEA safeguards regime*

From the entry into force of the NPT on 5 March 1970, NNWSs undertook to submit their nuclear materials to IAEA control by virtue of safeguards agreements based on the model INFCIRC/153(Corr.). But in the early 1990s, the IAEA was severely criticised for not having been able to detect Iraq's clandestine programme for manufacturing weapons of mass destruction, which was discovered only after the Gulf War. This failure led the Agency to strengthen its safeguards system by means of the "93+2 Programme", the second part of which, approved in 1997, introduced a Model Protocol additional¹¹⁰ to the safeguards agreements entered into by virtue of the NPT.¹¹¹

To its credit, the Additional Protocol gives the IAEA important new capabilities, including improved access to information relating to the activities of States in the field of nuclear materials and greater access to nuclear sites for inspectors, with shorter time periods between notification of the inspection and the inspection procedure itself. It also makes it possible to use more sophisticated surveillance techniques and to take samples at and around sites.

The negative side relates to the slow rate at which States are ratifying and acceding to the Additional Protocol. This is usually attributed to inertia, to hesitations linked to the possible challenge to national sovereignty, and to the intrusive nature of the procedures laid down in the Protocol, with

108. Cf. Germany: NPT/CONF.2005/PC.I/WP.12, § 9; Japan: NPT/CONF.2005/PC.1/WP.7, §§ 17 to 21, 23, European Union: NPT/CONF.2005/PC.I/17, § 5.

109. Cf. Germany: NPT/CONF.2005/PC.I/WP.12, § 8; Japan: NPT/CONF.2005/PC.1/WP.7, § 22, European Union: NPT/CONF.2005/PC.I/17, § 5.

110. INFCIRC/540 (Corr.).

111. For detailed studies, see the IAEA Internet site: www.iaea.org/worldatom/Programmes/Safeguards/; for a short summary of the Additional Protocol, see WAGNER, (A.), "The IAEA 1997 Additional Safeguards Protocol", September 1999, ACA Fact Sheets, Arms Control Association, available on their site: www.armscontrol.org/factsheets/93_2fact.asp.

the result that at 24 April 2003, 32 States out of the 72 Signatories had ratified it.¹¹² “Only two¹¹³ of these are States with significant nuclear activity.”¹¹⁴

The hopes expressed by the representatives of Japan, Germany and the European Union are legitimate, in encouraging all the States Parties to the NPT to ratify or accede to the Additional Protocol as soon as possible with the idea that setting up integrated safeguards worldwide will make it easier to keep track of nuclear activities and prevent materials being diverted for proliferation or terrorist purposes.

To this end, exports of nuclear materials and equipment must also be made secure. The Zangger Committee and the Nuclear Suppliers Group (NSG) have adopted measures to accomplish this. Whatever the differences between the two bodies,¹¹⁵ measures were taken¹¹⁶ during the 1990s to make the export of equipment and materials conditional upon the prior conclusion of safeguards agreements (general in the case of the NSG) by the would-be importer with the Vienna Agency. For the moment, there are particularities within each of the two institutions, and their approaches still have to be harmonised. Nevertheless, at its annual meeting, held in Prague on 16 and 17 May 2002, the NSG, in plenary session, recognised the challenge posed by nuclear terrorism and called for firm support for anti-terrorist measures, inviting all States “to conclude comprehensive safeguards agreements and Additional Protocols with the IAEA” and stressed the “need to follow the NSG Guidelines”.¹¹⁷ However, although achieving worldwide cover of nuclear activities through the widespread implementation of comprehensive safeguards agreements is a necessary condition, it is not sufficient.

First of all, account must be taken of the continuing refusal of India, Israel and Pakistan, all three *de facto* nuclear States, to sign the Non-Proliferation Treaty, and thus to submit all of their nuclear activities to the Vienna Agency. The nature of their activities, the quantities of materials concerned and the safety and security of installations can only be guessed at. In other words, the NPT remains dependent on the accession of these three countries: the fact that the Treaty is only quasi-universal, instead of genuinely and absolutely universal, deprives it of its full effect. It should also be

112. Source, IAEA Internet site. www.iaea.org/worldatom/Programmes/Safeguards/sg_protocol.shtml.

113. The People's Republic of China and Japan. The 15 Members of the European Union have signed one of the three Additional Protocols with Euratom and the IAEA: one for the United Kingdom, one for France, and one for the NNWSs Members of the Union. These protocols will enter into force as soon as the Vienna Agency has received the written notification of the Member States and of Euratom, stipulating that the necessary procedures have been accomplished. In France, the Bill authorising ratification of the Additional Safeguards Protocol has been under discussion since September 2002. Cf. Senate Report No. 398: www.senat.fr/dossierleg/pi101-199.html; adopted by the Senate, it was registered with the National Assembly President's Office on 10 October 2002 (Bill adopted by the Senate, No. 272).

114. SCHEINMANN (L.), “Transcending Sovereignty in the Management and Control of Nuclear Material”, Address to the International Symposium on Safeguards: Verification and Nuclear Material Security, 29 October-2 November 2001, IAEA, p. 2.

115. The main differences between the two bodies are as follows: unlike the NSG, all the members of the Zangger Committee are Parties to the NPT; the Committee's memoranda only apply to transfers to NNWS non-Parties to the NPT, whereas the NSG guidelines apply to all NNWSs; they both have trigger lists (basic lists), those of the Committee only concerning items falling under Article III.2 of the NPT; unlike the Committee, the NSG requires the importer to subscribe to a comprehensive safeguards agreement as a precondition to exportation; lastly, the fundamental special characteristic of the NSG is that it also deals with the export of dual-purpose equipment and technology.

116. INFCIRC/209/Rev.2, 9 March 2000 (Zangger Committee), and INFCIRC/405, May 1992 (NSG).

117. Statement by the Czech Republic, Nuclear Suppliers Group Plenary Meeting, 17 May 2002.

remembered that even if universality is achieved, assiduous efforts must be made to keep it so. The attitude adopted by North Korea¹¹⁸ since the autumn of 2002 shows clearly the structural fragility of the agreements to control weapons and non-proliferation due to the existence of treaty withdrawal clauses.¹¹⁹

Another outstanding question relates to the financing of the activities undertaken in the context of safeguard agreements. “Since the mid-1980s, the IAEA regular budget, which is the primary source of safeguards financing, has operated on the basis of zero-real-growth. (...)At the same time the number of States under safeguards has more than doubled, (...) the amount of nuclear material to be safeguarded has been increased (...) The fall in resources available under the regular budget has largely been compensated for by voluntary contributions...”.¹²⁰ But financial support based on continuous voluntary contributions has three major drawbacks: first, and as its name implies, these are only *voluntary* contributions, not binding in any way. The lack of any commitment for the future leads to uncertainty which makes it difficult to establish a budgetary strategy; then, the fact that the Agency is dependent on a limited number of sponsors raises the question of the independence needed to carry out its mission in terms of the objectivity of its judgement and action; lastly, by preventing misappropriation, safeguards are in the common interest of all States, whether they have nuclear weapons or not. Logically, therefore, all countries should share equitably the financial burden of carrying out this mission properly.¹²¹ However, the budget issue is in the course of being settled in the preparatory bodies of the Board of Governors. The draft budget for 2004-2006 contains proposals for the Director-General, Mr. Mohamed El Baradei, to increase significantly the resources made available for the implementation of safeguard agreements.

3. *Plans of action: the strengthening of the physical protection regime governing nuclear materials*

Furthermore, the IAEA safeguards system does not deal with the physical protection of nuclear or other radioactive materials, which are also coveted by terrorists. That is why, in parallel with the safeguards system and outside the scope of the Non-Proliferation Treaty, the Japanese, German and Spanish Delegations called for a strengthening of the Convention on the Physical Protection of Nuclear Material¹²² (CPPNM) and for all States to adhere to it,¹²³ bearing in mind that it only covers international movement of nuclear materials. So far, this legal instrument says nothing about the transport, storage or use of such material within national borders, leaving it to the State concerned to determine the level of security required.¹²⁴

118. “North Korea announces withdrawal from NPT, January 10: Statement and Reaction”, Disarmament Documentation, The Acronym Institute: www.acronym.org.uk/docs/0301/doc02.htm.

119. In the case of the NPT, the withdrawal clause is contained in Article X.1.

120. SCHEINMANN (L.), *op. cit.*, p. 5.

121. For a more detailed discussion of this problem, see SCHEINMANN (L.), *op. cit.*

122. INFCIRC/274/Rev.1, open for signature on 3 March 1980.

123. In particular, see NPT/CONF.2005/PC.I/WP.12, (Germany), paragraph 8.

124. *Cf.* CURTIS (C., B.), “Reducing the Nuclear Threat in the 21st Century”, *op. cit.* (*supra*, note 4), p. 5.

So as to guarantee a minimum level of security within countries, the representative of Japan said that physical protection at national level should be taken into account as soon as possible.¹²⁵

Should the CPPNM contain certain minimum standards for protecting nuclear installations and materials, in the knowledge that this is outside the scope of application of safeguards agreements concluded under the NPT? It should not be forgotten that the NPT does not deal at all with physical protection or, therefore, the threat of theft or sabotage. IAEA safeguards only address the risk of fissile materials being misappropriated for non-peaceful purposes. They are designed to detect thefts. “But a danger of detection is not likely to deter outside criminals or terrorists, who expect to be detected and to escape capture if they are stealing material or to die in the explosion if they are truck bombers.”¹²⁶

Nevertheless, the shortcomings in the physical protection regime could be rectified shortly. In May 2001, the Final Report of the Expert Meeting on the revision of the Convention concluded that there is “a clear need to strengthen the international physical protection regime”, and that a spectrum of measures should be employed.¹²⁷ The report specifies the topics which should be included in the revised version of the Convention, provides for the addition of definitions, and emphasises the importance of national responsibility in this sphere, while at the same time confirming the need to protect confidential information.

The principal change is to extend the Convention’s scope of application to cover not only the international transport of nuclear materials but also materials which are being used, stored or transported at national level. This widening of the scope should also include the protection of nuclear materials and installations against sabotage. The report, however, contains no guidelines as to what standards should be used as a basis for an amendment providing for such an extension.¹²⁸ Any direct reference to the recommendations set out in the numerous revisions of circular INFCIRC/225¹²⁹ was excluded. Whatever the positions of the experts before 11 September, the feeling since is that the amended Physical Protection Convention must absolutely include an obligation to ensure high levels of security, such as those which are the subject of IAEA recommendations,¹³⁰ with States being obliged to provide regular reports on the procedures, legislation and standards adopted in order to account for their nuclear materials and make them secure.¹³¹

The conclusions of the Final Report are opposed to any international supervision of physical protection at national level, reject the idea of adding a peer review mechanism, and reaffirm that nuclear materials and installations for military use should remain outside the scope of the Convention.

125. NPT.CONF.2005/PC.I/WP.7, (Japan), paragraph 22.

126. BUNN (G.), ZAITSEVA (L.), “Guarding Nuclear Reactors from Terrorists and Thieves”, November 2, 2001, IAEA 29 October – 2 November 2001 Symposium on International Safeguards: Verification and Nuclear Material Security, p. 8 et seq.

127. IAEA, GOV/2001/41, 15 August 2001, “Nuclear verification and security of material – Physical protection objectives and fundamental principles”, paragraph 4 et seq.

128. BUNN (G.), ZAITSEVA (L.), *op. cit.*, p. 1.

129. INFCIRC/225/Rev. 3 and 4 (Corr.): “The Physical Protection of Nuclear Material and Nuclear Facilities.”

130. See INFCIRC/225/Rev.4.

131. CURTIS (C., B.), *op. cit.*, p. 6; for a more detailed discussion, *Cf.* in particular BUNN (G.), ZAITSEVA (L.), *op. cit.*; BUNN (M.), BUNN (G.), *op. cit.*, as well as the very detailed documentation page of the Nuclear Control Institute: www.nci.org/nci-nt.htm.

However, the document defines some twelve “Objectives and Fundamental Principles”,¹³² which the IAEA General Conference adopted unanimously following the attacks of 11 September,¹³³ and which will serve as a reference for future steps to strengthen the physical protection regime.

Finally, the work on the revision of the Convention, which has been somewhat delayed, could in fact shortly lead to the adoption of a draft for submission to a Convention Review Conference. Although less than perfect, and apart from the problems relating to ratification, the revised version of the Convention on the Physical Protection of Nuclear Material would have the advantage of bringing legal solutions to the gaps in this instrument. Extending its application to the national level, together with the diligent application of its provisions by States, will help prevent terrorists or criminals from acquiring materials or sabotaging nuclear installations thus protected.

Complementing each other, the reinforced regimes of non-proliferation and of physical protection, given practical application by the increased use of the safeguards agreements system and by the extension of the operational scope of the CPPNM, are, as pointed out by the three delegations, essential weapons against the threat of nuclear terrorism.

4. *The IAEA Action Plan and additional measures*

Alongside the plans mentioned above, the Vienna Agency also said, in a statement to the Preparatory Committee, that an Action Plan¹³⁴ had been adopted to combat nuclear terrorism.

Chairman Salander said in this respect in his factual summary, that: “Many States Parties noted both the importance of combating nuclear terrorism and the many instruments available for doing this, including the physical protection of nuclear material and export controls. The IAEA Action Plan on the prevention of nuclear terrorism was widely noted and supported. The Agency’s work in support of States’ efforts to prevent the illicit trafficking of nuclear and other radioactive material was also commended.”¹³⁵

The IAEA gave an eight-point description of its Action Plan to improve protection against terrorist acts involving nuclear materials or other radioactive materials. These eight points are as follows:

- 1) Physical protection of nuclear material and nuclear facilities; 2) detection of malicious activities (such as illicit trafficking) involving nuclear and other radioactive materials; 3)

132. These fundamental principles include: on-site inspections by an independent regulatory body; the assumption of responsibility for physical protection by licence holders; licence holders, in collaboration with the regulatory body, should develop a “security culture” to ensure the continued implementation of security obligations; protection should be based on a realistic and up-to-date evaluation of the threat; security requirements should be defined in relation to the potential threat, the relative attractiveness of the materials or installations for potential attackers, the nature of the materials in question and the potential consequences in the event of theft or sabotage; the obligations of a State should reflect several layers and methods of protection, and the administration should establish a quality assurance programme as regards physical protection, verified as required by the national inspectors of the regulatory body.

133. BUNN (M.), BUNN (G.), *op. cit.*, p. 6.

134. IAEA action plan against nuclear terrorism, adopted at the meeting of the Board of Governors, 18-22 March 2002.

135. NPT/CONF.2005/PC.I/21, Annex II, Chairman’s Factual Summary, paragraph 32.

strengthening of State systems for nuclear material accountancy and control (SSAC); 4) security of radioactive sources; 5) assessment of safety and security related vulnerabilities at nuclear facilities; 6) response to malicious acts or threats thereof; 7) adherence to international agreements and guidelines; and 8) enhancement of programme co-ordination and information management for nuclear security related matters.¹³⁶

The various elements contained in the Agency's Action Plan seem to show wide support for the measures proposed by Japan, Germany and the European Union. For its part, the IAEA is now working on implementing this plan and on arrangements to back it up and extend it. Thus, in January 2002, its Director-General set up the Advisory Group on Nuclear Security,¹³⁷ to advise him "on the Agency's activities related to preventing, detecting and responding to terrorist or other malicious acts involving nuclear and other radioactive materials and nuclear facilities".¹³⁸ From the budget standpoint, a Nuclear Security Fund (NSF) was set up to receive contributions to finance the measures provided for in the action plan, and more generally, as its name implies, activities relating to nuclear security.¹³⁹

Prospective work already involves the possible prolongation of the action of the Agency. The strengthening of its programmes to combat terrorism should be based on the following elements: "review all programmes thoroughly with a view to strengthening the activities to prevent nuclear terrorism; review the implications of the enhanced threat; promote a comprehensive approach to security; strengthen the legal instruments for physical protection and extend the scope of States' undertakings; promote high security culture in States; promote security in all nuclear applications; enhance direct assistance to States for improved security".¹⁴⁰

Conclusion

It is still too soon to evaluate the impact of the declarations by the three delegations on the process of reviewing the Non-Proliferation Treaty at the Conference planned for 2005. Will there be a follow-up or will these documents remain a dead letter along with the measures they propose?

It is likely that this will depend essentially on two things. First, developments in Western, European and US policy on defence and security. Whether the US administration maintains its current policies or, on the contrary, re-engages in multilateral negotiations, the outcome will be extremely important not only for the follow-up given to these proposed measures, but also for the entire non-proliferation regime. Indeed, the international community is fully aware of the risks engendered by the Iraqi crisis for the whole UN structure.

136. Cf. IAEA, GOV/INF/2002/11-GC(46)/14, 12 August 2002, Attachment 1, "Progress on Agency Measures to Protect against Nuclear Terrorism"; see Combating Nuclear Terrorism, IAEA website; see also Nuclear terrorism action plan enters implementation phase, American Nuclear Society/Nuclear News, May 2002, available on the IAEA Internet site: www.iaea.org/worldatom/Press/Focus/RadSources/Nuclear_TerActPlan.html.

137. AdSec.

138. Cf. in particular, IAEA, GOV/INF/2002/11-GC(46)/14, of 12 August 2002, "Nuclear Security – Progress on Measures to Protect against Nuclear Terrorism", paragraph 4.

139. Ibid, paragraph 6, et seq.

140. NILSSON (A.), op. cit. p. 5; see *supra*, note 93.

The other aspect to be taken into consideration is how terrorism evolves. Depending on the frequency of acts of “super-terrorism” in coming years, and on their degree of violence and the resulting pressure from public opinion, governments may well be obliged to co-operate at an unprecedented level, and to put all their efforts into combating this scourge.

Future developments with regard to these two aspects will be discussed at forthcoming meetings of the Preparatory Committee, and will no doubt lead to further fluctuations in the positions taken by delegations until the situation has crystallised at the 2005 Review Conference.

More than ever, the future is uncertain. In such a context, the objective of universality of the NPT and the construction of a comprehensive regime for protecting nuclear materials, technologies, sites, weapon and information may be postponed indefinitely or, on the contrary, become achievable. Should the latter be the case, this would be an unprecedented contribution to consolidating the international security system. Events could overtake political procrastination. But the price to pay risks being a high one.