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THE ROLE OF THE UNITED NATIONS SECURITY COUNCIL AS REGARDS DISARMAMENT AND NUCLEAR NON-PROLIFERATION

Abstract

This article aims to analyse the role played by the United Nations Security Council as regards nuclear disarmament and non-proliferation. It can be seen how the body responsible for maintaining peace within the universal organisation has gathered more power and authority in this area over time. Moreover, this paper discusses the attitude adopted by the Security Council to the different cases of nuclear proliferation. Its goal is twofold: to examine to what extent the positions of the different members of the Security Council are able to affect the Council's actions, as well as to analyse their influence on the nuclear non-proliferation and disarmament regime.

KeyWords

Security Council, nuclear disarmament and non-proliferation, international security, Charter of the United Nations.

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INTRODUCTION

Nuclear non-proliferation has evolved as a consequence of the interaction of many factors that vary from case to case. From 1998, the date that India and Pakistan undertook their first nuclear tests, we have seen a reversal of this trend, with the assertion of new nuclear powers and the appearance of new actors outside of the Nuclear Non-Proliferation Treaty (NPT), while the first states to have nuclear capacity have proceeded to modernise their nuclear capabilities, instead of definitively getting rid of them.¹

The nuclear landscape has thus evolved in a negative sense in recent times. From the five states that have traditionally possessed nuclear weapons, there are currently nine recognised nuclear powers,² to whose ranks we should add a country with a nuclear programme and suspected of harbouring military ambitions, Iran.

Given the current situation, it seems unlikely that this trend will change. On the contrary, trade and energy rivalries, together with the increase in latent conflicts in different regions of the world, are fuelling the nuclear ambitions of a number of countries. All of this means that neither the nuclear states recognised in the Nuclear Non-Proliferation Treaty, nor the new nuclear powers, would agree to surrender their arms capabilities.

This harsh reality makes it clear that nuclear disarmament is currently not a priority for these states.

1 The Treaty on the Non-Proliferation of Nuclear Weapons or the Nuclear Non-Proliferation Treaty (NPT) was signed in 1968 and entered into force in 1970 and currently has 191 States Parties. NPT Review Conferences take place periodically. See, for instance, GARRIDO REBOLLEDO, Vicente. 'La no proliferación y el desarme humanitario', in *Política Exterior*, vol.29, no. 166, 2015, pp.40-52; and AGUIRRE DE CÁRCER, Miguel, *Los nuevos compromisos de desarme y no proliferación nuclear*, Working Papers, no. 31, Madrid: Elcano Royal Institute of International and Strategic Studies, 2010. The traditional nuclear powers have pushed for regimes for the non-proliferation of nuclear weapons with the twofold aim of avoiding the competition of other states in this field and the diffusion of dual-use technologies, while at the same time attempting to maintain the strategic status quo that benefits them and safeguards their status as international powers.

2 It is well known that there were five states that managed to achieve nuclear weapons first of all, and they correspond to the permanent members of the UN Security Council -United States, Russia, United Kingdom, France and China-, to which four new nuclear powers have been added, Israel, India, Pakistan and North Korea.

In any event, the existence of nuclear weapons represents a clear and immediate danger to international security. The larger the number of countries with this type of weapon of mass destruction, the greater the risk of accident or confrontation.

Against this backdrop, the mission of the United Nations (UN) Security Council may be key and decisive, since it is the body that bears the primary responsibility for maintaining international peace and stability.³ However, the strategic value that this weapon offers to the permanent members of the Council, together with their rivalry and rifts regarding the policies to follow in this field, has stripped this body of the role it is supposed to play and has hampered the initiatives of other organisations and instruments aimed at achieving a world without nuclear weapons.

The structure of this article is divided into three sections: first of all it studies the 1996 advisory opinion of the International Court of Justice on the legality of nuclear weapons. The second section shall analyse the growing role played by the Security Council in terms of nuclear disarmament, by means, first of all, of study of the legal basis of its intervention, for which the Charter of the United Nations and the Treaty of Nuclear Non-Proliferation are referenced. The third section focuses on exploring the way in which the Security Council has acted faced with the different state nuclear programmes developed over the last two decades: firstly it shall explain the case of Iraq and then that of Iran. Finally, it describes and evaluates the conduct of this United Nations body vis-à-vis the four nuclear powers who are not parties to the TNP: Pakistan, India, Israel and North Korea (which withdrew from this treaty in 2003).

INTERNATIONAL LAW IN THE FACE OF NUCLEAR WEAPONS: THE RULING OF THE INTERNATIONAL COURT OF JUSTICE

One element that further complicates the situation is that nuclear armament is in a legal limbo that arises from the absence of an explicit outright ban under international law. In 1994, given the increasing dispute between the states that possessed nuclear weapons and those that did not, the latter succeeded by a majority in getting the United Nations General Assembly to put the following question to the International Court of Justice (ICJ) with the aim that the response be pronounced in the form of an advisory opinion. 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'⁴

3 Article 24.1 of the Charter of the United Nations.

4 On 15 December 1994, the General Assembly requested this 'urgent' advisory opinion of the Hague Tribunal in the form of its resolution 49/75K, by virtue of Article 96.1 of the Charter of the United Nations. The World Health Organisation (WHO) also requested an advisory opinion from the ICJ via their resolution WHA 46.40, of 14 May 1993, on the following question: 'In view of the health and environmental effects would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?' However, the

As it is, the advisory opinion of the Hague Tribunal of 8 July 1996 about the *legality of the threat or use of nuclear weapons* establishes that ‘There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons’ -paragraph 105.2.A-.⁵ Nonetheless, the Tribunal itself recognises in the following paragraph that there is no ‘comprehensive and universal prohibition of the threat or use of nuclear weapons as such’. Additionally, the Court deemed that their threat or use ‘would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’,⁶ yet immediately afterwards it considers that it ‘cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’.⁷

As a general rule, the Hague Tribunal considered in 1996 that the threat or use of nuclear weapons generally ran counter to the rules of international law applicable in armed conflict -in particular the principles and rules of humanitarian law-. However, in a calculated and highly-debated position of ambiguity –with 7 votes in favour and 7 against, with the casting vote lying with the President–, the Court was unable to reach a definitive conclusion as to whether the threat or the use of nuclear weapons is or is not legal in an extreme circumstance of legitimate defence in which a state’s own survival is at risk. One way or another, the Court did proclaim the existing obligation to pursue and conclude negotiations in good faith in order to achieve nuclear disarmament in all

ICJ rejected the WHO’s request in their advisory opinion on the subject of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, of 8 July 1996, as it deemed that the point sought did not fall within the remit of the requesting body, on this occasion the WHO.

5 ICJ Reports 1996, p.226. See also, in general, BOTHE, Michael. ‘Nuclear Weapons Advisory Opinions’, in WOLFRUM, Rüdiger (ed.). *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012-, online edition, www.mpepil.com.

6 Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, paragraph 105.2.E.

7 It is true that the General Assembly on 24 November 1961 had adopted the ‘Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons’ -res.1653 (XVI)-, and in this regard called for the consultation of the possibility of a conference for the prohibition of the use of nuclear weapons -res.1909 (XVIII), of 27 November 1963-. Yet no total ban of nuclear weapons exists in contemporary international law: what has come about is a race towards non-proliferation of these types of weapons that is horizontal -with no increase to the number of states in possession of nuclear weapons- and vertical -with no increase to existing volumes. More specifically, efforts towards horizontal non-proliferation have centred on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), of 1 July 1968 (U.N.T.S., vol.729, p.161); and in the seven nuclear-free zones that exist today: the Antarctic (treaty of 1 December 1959); outer space (treaty of 27 January 1967) -these first two, with a broader scope, are demilitarised zones-; seabeds (treaty of 12 February 1971); Latin America and the Caribbean (Treaty of Tlatelolco, 14 February 1967); the South Pacific (Treaty of Rarotonga, of 6 August 1985); Africa (Treaty of Pelindaba, of 1996), and Central Asia (Treaty of Semipalatinsk, of 2006). In turn, vertical non-proliferation of nuclear weapons has occurred first of all due to the cessation of the tests for this type of weapons with the treaty that prohibits such testing in the atmosphere, outer space and under water, of 5 August 1963 (U.N.T.S., vol.480, p.43), and the Comprehensive Nuclear-Test-Ban Treaty, of 24 September 1996; and secondly in successive agreements which, as the periodical fruit of successive negotiating rounds, the superpowers signed in order to limit and reduce nuclear weapons, whether they be strategic (SALT I and II, START I and II) or intermediate-range (INF Treaty).

its aspects under strict and effective international control. Ultimately, this ambiguity has raised doubts and has given rise to varying interpretations, sparking further controversy in this area.⁸ The disagreements between the judges reveal the difficulties that the Court came up against as it addressed a problem that is undeniably a legal one, yet also one of a political nature.⁹

Undoubtedly, the position of the International Court of Justice, had, and continues to have, direct consequences on international security: one of the matters that could be qualified as a real risk to international security is the application here of the right to legitimate defence, an area very closely linked to the sovereignty of states. As we have observed, this principle is not restricted in any way to one specific type of weapon.¹⁰

In this way, the practice adopted by nuclear states of reserving nuclear weapons as a means of preserving their integrity and independence does not stand in contradiction with the rules of international law. This reality opens the door for states to choose to develop nuclear weapons as part of their security and defence policies as defence against any 'potential' attack, whether it be with nuclear or conventional weapons.

Furthermore, the ambiguity of the concept of a situation where 'the very survival of a State would be at stake' gives rise to different interpretations, some of which may prove to be abusive. Nuclear states, above all those considering the nuclear path, are encouraged by one further motivating factor in addition the changes occurring within

8 In this vein, a significant doctrinal debate has been ongoing regarding whether an outright and specific prohibition of the use of nuclear arms does or does not exist. See SCHWARZENBERGER, Georg. *The Legality of Nuclear Weapons*, London: Stevens, 1958; FERNÁNDEZ SÁNCHEZ, Pablo A. (coord.). *La licitud del uso de las armas nucleares en los conflictos armados: IV Jornadas de Derecho Internacional Humanitario*, Seville: University of Huelva-University of Seville, 1997; HEARN, William R. 'The International Legal Regime Regulating Nuclear Deterrence and Warfare', *British Yearbook of International Law*, vol.61, 1990, p.221 and ff.; FALK, Richard, MEYROWITZ, Lee & SANDERSON, Jack. 'Nuclear Weapons and International Law', in *Indian Journal of International Law*, vol.20, 1980, pp.541-595; BROWNLIE, Ian. 'Some Legal Aspects of the Use of Nuclear Weapons', in *International and Comparative Law Quarterly*, vol.14, no. 2, 1965, p.440 and ff.; BAILEY, Sydney D., *Prohibitions and Restraints in War*, London: Oxford University Press, 1972, pp.140-154; MEYROWITZ, Elliot L. 'The Laws of War and Nuclear Weapons', in *Brooklyn Journal of International Law*, vol.9, no. 2, 1983, p.227 and ff.; MOORE, John N. 'Nuclear Weapons and the Law: Enhancing Strategic Stability', in *Brooklyn Journal of International Law*, vol.9, 1983, p.267 and ff.; as well as the following contributions in the book edited by POGANY, Istvan. *Nuclear Weapons and International Law*, Avebury: Aldershot, 1987: SHAW, Malcolm N. 'Nuclear Weapons and International Law', pp.1-21; GRIEF, Nicholas. 'The Legality of Nuclear Weapons', pp.22-52; JANIS, Mark W. 'Do 'Laws' Regulate Nuclear Weapons?', pp.53-62; and POGANY, Istvan. 'Nuclear Weapons and Self-Defence in International Law', pp.63-83. See also, in general, KADELBACH, Stefan. 'Nuclear Weapons and Warfare', in WOLFRUM, Rüdiger (ed.). *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012-, online edition, www.mpepil.com

9 MARRERO ROCHA, Inmaculada. *Armas nucleares y Estados Proliferadores*, Granada: University of Granada, 2004, p. 118.

10 CERVELL HORTAL, María José. 'Las armas nucleares y el Derecho Internacional', *Anales de Derecho* (University of Murcia), no. 15, 1997, p. 209.

the international or regional security situation. On the one hand, the new nuclear states wish to maintain and modernise their nuclear weapons, while the non-nuclear states try to obtain such weapons for reasons of security and prestige.¹¹

Faced with this situation, the efforts made to develop an international regime for nuclear disarmament and non-proliferation have not ceased to grow over recent decades. The international community is ever more aware that the existence of these weapons represents a major threat to security. For this reason, the UN encourages the conclusion of international and regional treaties, agreements and initiatives of various kinds -unilateral, bilateral and multilateral-, as well as the creation of special bodies with a view to reducing the number of existing weapons and putting an end to nuclear proliferation.

In fact, these mechanisms and instruments have managed to limit said proliferation and have achieved a reduction in these types of arms at global level. However, the fact that a limited number quantity of nuclear weapons linger on, as well as that some states continue to opt for such weapons as a core part of their security and defence policies, constitutes a real risk and threat to international security. This reality calls into question the effectiveness of the international regime for disarmament and non-proliferation, as well as casting doubt upon the role played by the United Nations in this area.

THE INCREASING ROLE OF THE SECURITY COUNCIL IN THE AREA OF NUCLEAR DISARMAMENT AND NON-PROLIFERATION: TOWARDS GREATER CONTROL AND MONOPOLY

The legal basis of Security Council intervention as regards nuclear disarmament and non-proliferation

The Charter of the United Nations

It is rather complicated to find a clear answer to the issue of the use or threat of nuclear weapons in the Charter of the United Nations since none of its articles refers to a specific type of weapon. This can be explained by the fact that the Charter was signed (on 26 June 1945) when the atomic bombs were dropped on Hiroshima and Nagasaki (6 and 9 August of the same year). The intervention of the Security Council in this area can thus be explained by a broad interpretation of the provisions of the Charter in order to maintain international peace and security (Art. 2.4 and Chapter VII). The interpretation that the Council may make as to whether the nuclear programme of a state constitutes a threat to international peace and security or not may prove

¹¹ See GARCÍA RICO, Elena del Mar. *El uso de las armas nucleares y el Derecho Internacional. Análisis sobre la legalidad de su empleo*, Madrid: Tecnos, 1999.

to be controversial. Therefore, in the absence of an international treaty that bans the possession of nuclear weapons completely, the intervention of the Security Council is always going to be the subject of discussion, especially if we take into account that the Nuclear Non-Proliferation Treaty discriminates as it reserves the right of the five states which are permanent members of the Security Council to possess nuclear weapons whilst denying this very right to other states.

This reality means that other nuclear powers emerge on the periphery of the NPT, and even that states parties act on the sidelines of the treaty, stirring up further controversy around the issue.

Yet it may generally be considered that the legal basis for intervention of the Security Council in terms of nuclear disarmament and non-proliferation is contained within the provisions of the Charter of the United Nations. In accordance with the latter, the Security Council is the body responsible for maintaining international peace and security, which is why it falls to this body to evaluate and judge whether the nuclear programme of a state, the proliferation of this weapon, and its threat and use constitute a threat to international peace and security.¹²

In this respect, Chapter VII of the Charter of the United Nations confers decision-making and coercive powers on the Security Council with the aim of countering threats and restoring international peace and security. These are mandatory for all the member states of the international organisation: Article 39 of the Charter thus states that ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.¹³

Faced with a threat to peace, the Council could proceed to enact provisional measures, such as enforcement measures without the use of force and enforcement measures with the use of force. According to Article 41, ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and

12 ANDRÉS SÁENZ DE SANTA MARÍA, P., ‘Derecho, moral y eficacia en la práctica de sanciones del Consejo de Seguridad’, in *Soberanía del Estado y Derecho Internacional: homenaje al profesor Juan Antonio Carrillo Salcedo*, vol. I, vol. I, University of Seville, Seville, 2005, pp.155-176. See also OETTE, L., ‘A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council’, *European Journal of International Law*, vol. 13, no. 1, 2002, pp.93-104; WECKEL, Philippe, ‘Santions du Conseil de sécurité: un champ d’étude interdisciplinaire par nature’, in *Société Française pour le Droit international, Droit international et relations internationales: Divergences et convergences*, Paris: Pedone, 2010, pp.55-75; and CORTRIGHT, D., LOPEZ, G.A., GERBER-STELLINGWERF, L. ‘The Sanctions Era: Themes and Trends in UN Security Council Sanctions Since 1990’, in VAUGHAN, L. et al (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford: Oxford University Press, 2010, pp.205-225.

13 Article 39 of the Charter.

the severance of diplomatic relations'.¹⁴

At the same time, Article 42 permits the Security Council to resort to military intervention if it deems that the aforementioned measures have not been adequate: the Charter provides that the Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. 'Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'.¹⁵

On the other hand, the Charter of the United Nations affords the Security Council the mandate of regulating questions relating to disarmament and the non-proliferation of weapons of mass destruction. With the objective of promoting international peace and security and the non-proliferation of such weapons, Article 26 of the Charter decrees that the Council 'shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments'.

Article 47 confirms this, incorporating disarmament as one of the missions of the Security Council, as it stipulates that 'There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament'.¹⁶

The Nuclear Non-Proliferation Treaty: a discriminatory legal basis

On the other hand, the competences of the peace-keeping body relating to nuclear disarmament and non-proliferation are not only based on the provisions of the Charter of the United Nations, since these are also underpinned by the rules of international law, both under conventional and customary international law. In this regard, the NPT –considered to be the most universal agreement in this field– makes reference in its preamble to the Charter of the United Nations, establishing the following:

'Recalling that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources'.

¹⁴ Article 41 of the Charter.

¹⁵ Article 42 of the Charter.

¹⁶ Article 47.1 of the Charter of the United Nations.

By virtue of its provisions, the NPT confers on the universal organisation the two-fold function of verification (via the International Atomic Energy Agency) and sanction in the case of non-respect of the obligations incumbent on state parties.

However, the problem lies here in the fact that the scope of the NPT is not universal, and various nuclear powers are acting outside of the treaty. Moreover, the NPT establishes two 'categories' of states with different obligation regimes: on the one hand, the *de iure* nuclear states, Nuclear Weapons States, with the right to maintain their nuclear armaments, which are those that had carried out nuclear testing before 1 January 1967 (Article IX.3): The United States, the former Soviet Union -currently Russia-, the United Kingdom, France and China; and the remaining states, which do not have the right to develop nuclear weapons (Non-Nuclear Weapons States), among which those that have carried out nuclear testing after the designated date are considered to be '*de facto* nuclear proliferators'.¹⁷

Hence, from the outset, this treaty has been heavily criticised for enshrining a discriminatory system that permits five states –the same countries as those with a permanent seat on the UN Security Council, with veto rights- to possess the most powerful weapons in the world, and prohibits other countries from acquiring them. This situation has led to the hardening of positions among state groupings, sustaining constant tension as to the political-legal link between non-proliferation and disarmament. As a consequence, the countries that aspire to having their own nuclear arsenal view the declarations of those who legally possess nuclear weapons with suspicion, as the latter seek to impose limits on those who do not possess such weapons.¹⁸

As a matter of fact, the NPT establishes a system based on three fundamental pillars: non-proliferation, disarmament and the peaceful use of nuclear energy. However, the non-proliferation/disarmament relationship is another controversial topic, and it is the source of great tension. The states which possess nuclear weapons have thus driven the non-proliferation programme forward to a large degree and, as is only to be expected, they have focused on halting the spread of such weapons and nuclear capacity to other countries.

As a gesture of good will, a general clause was incorporated into the NPT -Article VI-, whereby those countries who possess nuclear weapons commit themselves to holding negotiations in good faith with a view to agreeing upon effective measures concerning putting a stop to the nuclear arms race and nuclear armament and to discuss a general and comprehensive disarmament treaty subject to strict and effective international control, yet without specifying what measures these would be nor setting a particular time

17 GARRIDO REBOLLEDO, Vicente. 'La Conferencia de Revisión del TNP: entre el desarme y la no-proliferación', *Análisis del Real Instituto Elcano*, no. 63, 2005, p.3.

18 GARRIDO REBOLLEDO, Vicente. *La no proliferación y el desarme en perspectiva histórica*, Colección de Estudios Internacionales no. 7, Bilbao: University of the Basque Country, 2010.

frame.¹⁹ The generic and ambiguous character of the clause reflects the real intention of the five nuclear powers of conserving their privileged status for an indeterminate period of time and their desire to monopolise the non-proliferation regime.²⁰

Finally, we should recall that the NPT does not lay down the measures to take against state parties who violate their obligations. Consequently, this lacuna affords the Security Council exclusive competence for decisions regarding all cases that pose a threat to international peace and security. This is precisely the source of major contention, since its five permanent members -with a right to veto- are the very same five *de iure* nuclear powers recognised by the NPT.

The evolution of Security Council practice: towards greater control of nuclear proliferation

Meanwhile, for a long period of time, the Council found itself paralysed due to confrontation among its members –above all due to rivalry between the United States and the Soviet Union during the prolonged Cold War-. Its actions in this regard did not reflect a particular interest on the part of its members to invoke the provisions of the Charter in order to tackle the threats to peace and security associated with the proliferation of armaments.

Amongst the modest initiatives launched by the Security Council at the time in this area, one which stands out is the creation of a commission for armaments –albeit for conventional ones not nuclear ones- in February 1947 at the request of the General Assembly.²¹ One of the very few resolutions that the United Nations body adopted in this field was its Resolution 135 (1960), of 27 May 1960, in support of continuing negotiations between members of the Council to refrain from the threat of use and the use of force, while at the same time calling for states to put an end to the arms race, to make efforts towards general disarmament and to proceed to the suspension of all nuclear tests.

In the same vein we encounter another relevant Security Council resolution, Resolution 255 (1968), of 19 June 1968:²² here, the Council recognises its responsibility

19 Ibidem, p.5 y ff.

20 FERNÁNDEZ COLÓN, Gustavo. ‘El Tratado de No Proliferación Nuclear ¿Es posible el desarme?’; in *Humana del Sur* (University of the Andes), no. 1, July-December 2006, pp. 47-64.

21 This commission was established by Resolution 18 (1947) of the Security Council, of 13 February 1947 (operative point 3), following the request of the General Assembly as set out in its Resolution 41 (I), of 14 December 1946. This commission was to be subsequently dissolved in 1952 –Resolution 97 (1952) of the Security Council, of 30 January 1952-.

22 Resolution 255 of the Security Council, adopted on 19 June 1968 with five abstentions, including those of France and Pakistan.

and that of the nuclear states regarding non-proliferation, as well as its commitment to intervene in the case of the use of these type of armaments by any state, while also recalling the use, in this regard, of the right to legitimate defence –of Article 51 of the Charter of the United Nations-.

On another occasion, the body tasked with maintaining peace decided, on the very basis of Chapter VII of the Charter, to enforce an embargo on arms and military material on South Africa, since it considered the acquisition of nuclear arms and material by this state to represent a threat to international peace, and required all states to refrain from any collaboration with this country for the manufacture and acquisition of nuclear weapons -Resolution 418 (1977), of 4 November 1977-.

Faced with this mediocre intervention and the inertia of the Security Council, the General Assembly took the initiative, by virtue of Article 11 de la Charter, of studying the general principles for cooperation and the maintenance of international peace and security, as well as the criteria which govern disarmament and the regulation of armaments. Nevertheless, its activity has been of very limited scope, and it cannot replace the role that the Security Council must play. The main reason for this is due to the fact that the Charter of the United Nations enshrines the competence of the General Assembly as subordinate to the Security Council in this field and it must limit itself to simply powers of recommendation.²³ This reality may lead to confusion among the bodies of the UN and end up paralysing the activities of the international organisation concerning disarmament and non-proliferation of weapons of mass destruction.

Nonetheless, the General Assembly has continued to take great pains to address this matter, such as convening high level meetings on nuclear disarmament, its staunch support for the negotiation and conclusion of a general convention on nuclear weapons that would establish their prohibition and destruction,²⁴ or the conclusion of effective international arrangements to afford guarantees to non-nuclear weapon States against the use or threat of use of nuclear weapons.²⁵

As the reader will be aware, from the end of the Cold War the Security Council began to be far more active. This stage began precisely with the Iraq-Kuwait crisis, which concluded with the adoption in the Security Council of Resolution 687 (1991). Since then, this body has adopted an increasing number of resolutions with different purposes and spheres of activity. Furthermore, it has equipped itself with extensive political responsibility and real authority since it bears the primary responsibility for the maintenance of international peace and security.

Therefore, given the ineffectiveness of the treaties and other international instruments, the Security Council has started to amass greater power. Its current role is not

23 Articles 11.2 and 12.1 of the Charter of the United Nations.

24 See, for instance, Resolution 69/58 of the General Assembly, of 2 December 2014.

25 See, for instance, Resolution 69/30 of the General Assembly, of 2 December 2014.

limited to intervening to maintain peace, but it has also become an international legislator and a guardian of international treaties to a certain degree. This development in practices affords the Council, in addition to the freedom to act, the power to decide how states should act, both those who are party to the treaties and those that are not.²⁶

In one sense, this growing prominence of the Security Council has provoked a great deal of uncertainty and suspicion among states. In accordance with international law, the international organisations may only generate new law by means of treaties or regulatory decisions, it thus remains unclear whether this body has the competence to legislate or control the compliance of international legal standards by states.

On the other hand, according to the NPT, the participation of the Security Council within the nuclear non-proliferation and disarmament framework is in line with the strategy of cooperation, meaning that this United Nations body may not create obligations that are not contained within the NPT. Its work does not consist in concluding a conventional regime, but instead it must confine itself to requiring states to act in a certain way when it deems their threatening to international security.

Following the Iraq-Kuwait case in 1990-1991, the Security Council formally proclaimed in a presidential statement on January 1992, for the first time, that the proliferation of weapons of mass destruction as such constituted a threat to international peace and security.²⁷

Years later, in its Resolution 984 (1995) this body reaffirmed that all states parties to the NPT must meet their obligations;²⁸ it thus urges all states 'to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control' -as is stipulated in Article VI of the Nuclear Non-Proliferation Treaty-. At the same time, the Security Council offered guarantees to the non-nuclear states (parties to the NPT), assuring them that it would intervene in the event that one of these states were subjected to or threatened with an attack involving nuclear weapons by other states.

From our point of view, we may consider that the Security Council acted in a discriminatory manner and one inconsistent with spirit and the text of the Charter of the United Nations, since Article 24 thereof clearly stipulates that the responsibility of Council is to

26 WECKEL, Philippe. 'Le Conseil de sécurité des Nations Unies et l'arme nucléaire', *Annuaire Français de Droit International*, vol.52, 2006, pp.178-185.

27 On 31 January 1992, the Security Council met at Heads of State and Government level and approved Presidential Declaration S/23500 on the matter of 'The responsibility of the Security Council in the maintenance of international peace and security'. The declaration states, among other things, that progress in the areas of disarmament, armaments control and non-proliferation are critical to the maintenance of international peace and security, and that the proliferation of all weapons of mass destruction poses a threat to international peace and security. It also underscores the need for all states to meet their obligations concerning the control of armaments and disarmament, as well as for them to avoid the proliferation of all weapons of mass destruction in all its aspects.

28 Resolution 984 (1995) adopted by the Security Council on 11 April 1995.

maintain international peace and security free of discrimination. That is to say, that this commitment applies to the members of the UN as a whole and not merely to the states parties of one treaty or another. The guarantees offered by the Security Council serve to urge the states parties of the NPT to continue to comply with the discriminatory regime of this treaty that preserves a state of affairs whereby it is exclusively the permanent members of the Security Council that possess of nuclear weapons, without calling on the latter to provide any guarantees towards total disarmament. Furthermore, in the event of the threat or use of nuclear weapons by one of these states, the Security Council will not be in a position to take the measures set out in this resolution, since the state in question will use its right to veto and paralyse activity within the Council.

In the same line of reasoning, the Council adopted Resolution 1540 (2004) in 2004.²⁹ Therein, the UN body affirms in its first paragraph that the ‘proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security’. It also recalls the responsibility and legitimacy of the Security Council regarding the adoption of enforcement measures in order to maintain international security. This resolution requires all states to exert control over weapons of mass destruction and the means to transport these (means of delivery), as well as preventing non-state actors from acquiring or using them. In this case, the primary body for the maintenance of peace widened its sphere of activity, including the fight against ‘international terrorism’ and ‘nuclear terrorism’ among its competences. These new ambiguous concepts will allow the Security Council to exercise greater control over states, as well as mandating new practices and conduct, without reaching an agreement concerning the circumstances that would constitute international terrorism or nuclear terrorism. In order to be in a position to do this, the Council, asserted its role of control and guardianship in this area by creating a subsidiary body called the ‘Non-proliferation Committee’, whose function was to examine the compliance of states with the aforementioned Resolution 1540.³⁰

The remit of this subsidiary body may be extended to include the supervision of the adherence of all obligations falling under the nuclear non-proliferation regime by means of control of the measures implemented by states as part of their national legislation in order to reinforce the regime. To begin with, this committee was created for a specific two-year term; however, Resolution 1673 (2006) of the Security Council prolonged its mandate until 2008,³¹ and subsequently continued to extend its mandate until its Resolution 1977 (2011) did this until 5 April 2025.³²

Despite the reticence of many of the members of the Security Council, in November

29 Resolution 1540 (2004) of the Security Council of United Nations, of 28 April 2004.

30 In operative paragraph 4 of Resolution 1540, the Security Council decided to create this committee, pursuant to rule 28 of its rules of procedure. See <http://www.un.org>.

31 Resolution 1673 (2006) of the Security Council, of 27 April 2006, paragraph 4.

32 Resolution 1977 (2011) of the Security Council, of 20 April 2011, paragraphs 2 and 3.

2008 the topic was successfully brought to the attention of this body once more and, under a general item of its agenda about the 'Maintenance of international peace and security', a new sub-topic was incorporated with the heading 'strengthening collective security through general regulation and reduction of armaments'. There then followed an open debate and a presidential declaration was approved.³³ On this occasion, the Security Council reiterated its belief that it was a 'necessity to strengthen international peace and security through, inter alia, disarmament, non-proliferation and arms control' as well the importance of 'the regulation and reduction of armaments and armed force' to promote international peace and security.³⁴

In a subsequent Security Council resolution on the matter, the body once again stresses the importance of the NPT, as well as its key role: indeed, its Resolution 1887 (2009) underlines the aspirations of the Council to achieve a world without nuclear weapons and reaffirms the importance of the NPT as it describes it as the cornerstone of the non-proliferation regime. All in all, it proclaimed its commitment to ridding the world of nuclear weapons and encouraged the creation of the conditions required for the objectives outlined in the NPT in order to promote international stability.³⁵

This Resolution 1887 (2009) was the first to really explore the issue of nuclear proliferation in depth. In the document, the Security Council aimed to renew its commitment in the area, as well as to set out its policies concerning all existing international instruments and to undertake an assessment of states' conduct. The aforementioned resolution welcomed initiatives to create nuclear weapons free zones and also gave its backing to the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities, the International Convention for the Suppression of Acts of Nuclear Terrorism and the Comprehensive Nuclear Test-Ban Treaty.

Additionally, this Security Council resolution expressed concern about the nuclear programmes of Iran and North Korea. Plus, finally, it required that all states reduce the use of highly enriched uranium as far as possible, alongside the strengthening of measures to control the export and financing of the proliferation of nuclear armaments.

In parallel to these measures, the permanent members of this body –presided by the United States– have sought to boost the political prominence of the Security Council by organising official summits on the matter. It is in these formal meetings where the nuclear powers establish strategies and guidelines to ensure that they retain exclusive legitimacy vis-à-vis the possession of nuclear weapons, as well as encouraging the adoption of resolutions in the Security Council aimed at gaining greater control over other states. In fact, on 24 September 2009, the United States, in their capacity as President of the Security Council, convened a presidential debate on nuclear non-pro-

33 Statement by the President S/PRST/2008/43, 19 November 2008.

34 In this regard, see STOIBER, Carlton. 'The United Nations Security Council and Nuclear Law' in OECD, *International Nuclear Law: History, Evolution and Outlook*, Paris, 2010, p. 113.

35 Resolution 1887 (2009) of the Security Council, of 24 September 2009, operative paragraph 5.

liferation and disarmament.

The convening of this debate showed once more that there has been a significant shift in the way the Security Council has shouldered its responsibilities in the field of disarmament in recent years.

For example, in April 2009, the President of the United States, Barack Obama, gave a speech in Prague in which he already committed himself to work towards an ultimate goal, that of a world without nuclear weapons. Obama considered the existence of thousands of nuclear weapons to be the most dangerous legacy of the Cold War and stated that, paradoxically, while the threat of a global nuclear war had diminished, the risk of a localised attack had increased.

This is how the nuclear powers with seats in the Security Council have managed to consolidate these powers through this UN body as the only states in the world with the legal and legitimate authority to examine, coordinate and give effect to the efforts they deem appropriate to nuclear non-proliferation, thus diminishing the importance of international treaties in this regard and ignoring the disarmament objective provided for in the NPT.

Its initiatives demonstrate the capacity and the potential of the Security Council and its members to increase control in this area, as they issue decisions that are binding for the entire international community –practically all countries of the world are members of the UN, and as such agree to comply with Security Council decisions-,³⁶ thus widening the scope of the obligations laid down in the treaties and multilateral agreements, including those states which are not parties thereto.³⁷

In this sense, the resolutions of the Security Council have primarily been adopted to bolster the privilege afforded to its permanent members by the NPT, since it recognises the legitimacy of their possession of nuclear weapons and at the same time banning the remaining states from acquiring them. In practice, these resolutions really guarantee the members of the Council the right to control and supervise the other countries.

The Security Council resolutions were criticised by various states, above all by the Non-Aligned, as they considered these matters to be general ones and that they should be dealt with within the United Nations General Assembly or in the Conference on Disarmament, and not within the Security Council. Moreover, some countries have decried the fact that the initiative to adopt these resolutions came primarily from the United States and its allies, with the aim of having more room for manoeuvre and control in the area of non-proliferation.

Furthermore, some states have expressed their disagreement with the existence of pro-

36 Article 25 of the Charter of the United Nations.

37 STOIBER, Carlton. 'The United Nations Security Council and Nuclear Law' in OECD, *International Nuclear Law: History, Evolution and Outlook*, Paris, 2010, p. 112 and ff.

visions in the Charter that provide that the application of these resolutions is obligatory.³⁸

Such attitudes highlight the reticence of numerous states to accept this state of affairs, one of impasse, which may adversely affect international cooperation in the area; this thus indirectly fuels the nuclear ambitions of those states with advanced development and modernisation programmes, which would prefer to maintain them to offset the interventionism and supremacy of the so-called 'nuclear club'.

THE CONTROVERSIAL ACTIONS TAKEN BY THE SECURITY COUNCIL IN LIGHT OF THE VARIOUS NATIONAL NUCLEAR PROGRAMMES

If we follow the same line of analysis, the fact that the five countries which are permanent members of the Security Council are also the same states which may legitimately possess nuclear weapons, in accordance with the NPT, is a privilege that may function both as a regulating element and as a destabilising factor.

The reason behind this is that the members of the Security Council may let their own strategic interests prevail over their responsibility for maintaining international peace and security. In other words, the controversial right to veto within the Security Council affords its permanent members the possibility to obstruct, without further reasoning, any attempt by this UN body to respond to the violation of an international treaty or a situation that may pose a unequivocal threat to international security.³⁹

At the other end of the scale, the members of the Security Council may speed up the adoption of enforcement measures, by opting for exaggerated measures or even the use of force against a state without giving them sufficient time to seek alternative peaceful options.

It is worth underscoring that in this regard the Charter of the United Nations provides the Security Council with certain discretionary powers; that is to say, that members of the Council are fully within their rights to assess whether a situation constitutes a threat to international peace and security or not. This UN body thus has possesses undeniable decision-making competences concerning enforcement measures, which may go as far as to include the use of force, or even to overlook the particular case it is presented with, depending on the interests of its member states, in particular those of its permanent members.⁴⁰

38 Ibidem.

39 Article 27.3 of the Charter of the United Nations, whose wording states that 'decisions of the Security Council on all [substantive matters] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'.

40 Articles 39, 41 and 42 of the Charter of the United Nations.

This reality helps to explain the reason why the actions of the Security Council are generally characterised by their imprecision and controversial nature. The clash of political interests among its members has illustrated on many occasions –as will be outlined below- that it proves difficult for them to reach a consensus about a specific circumstance. This constraint increases the mistrust of the other states, at the same time as representing a source of mistrust and an element of fragility in the field of non-proliferation and nuclear disarmament in general.

Now, the efforts made by the Security Council could –and should– play a crucial role in this matter. However, the initiatives adopted do not match up with reality and the practices of its members. In fact, the diverging responses made by the UN body to the different cases of nuclear proliferation demonstrate the reflections above very well. The Security Council has varied its approach to the different cases that have represented a threat to international peace and security due to violations of the nuclear non-proliferation regime. Its intervention has been selective, unequal and adapted to each specific circumstance, as well as controversial on occasion. To illustrate this, we shall proceed to analyse different national nuclear proliferation programmes: on the one hand the cases of the state parties to the NPT, such as Iraq and Iran; on the other hand, the particular example of North Korea, which had been a party subject to the NPT and which withdrew in 2003; and last but not least we will examine those so-called nuclear powers who never ratified this treaty (Pakistan, India e Israel).⁴¹

Intervention of the Security Council against Iraq's alleged nuclear weapons programme

The case of Iraq is a case in point of major significance to the study of the practices of the Security Council and its members as regards nuclear disarmament and non-proliferation, since it reflects the controversy that might emerge within the Security Council and international law surrounding the issue of whether nuclear proliferation poses a threat to international peace and security *per se*.

To begin with, the resolutions issued by the Security Council concerning Iraq referred to its invasion of Kuwait. Here we will limit ourselves to the study of the most relevant resolutions relating to weapons of mass destruction.

As is generally known, after the first Gulf War (1991), the Security Council began to call for the Iraqi regime to eliminate all its weapons of mass destruction and its missiles with a range greater than 150 kilometres. The first key action in this regard was

41 See BONDÍA GARCÍA, David. 'Reflexiones teóricas sobre la progresividad en la imposición de sanciones por parte del Consejo de Seguridad', in BADÍA MARTÍ, A., PIGRAU SOLÉ, A., OLESTI RAYO, A., (coords.), *Derecho internacional y comunitario ante los retos de nuestro tiempo: homenaje a la Profesora Victoria Abellán Honrubia*, vol. 1, Madrid: Marcial Pons, 2009, pp.55-80.

its Resolution 687 (1991):⁴² on its basis, the Security Council became directly involved in verification and disarmament processes through the functions of a body subsidiary to it created with this mandate in mind, the United Nations Special Commission on Iraq (UNSCOM).⁴³

From this point onwards, Iraq subjected itself to a far stricter inspection and control regime than that of the International Atomic Energy Agency (IAEA). Moreover, the country became the target of a set of stringent comprehensive sanctions, with serious economic repercussions for its population. Even over the first years in which these were in place (1991-1995), UNSCOM inspectors were able to reveal a variety of information about the Iraq's alleged clandestine nuclear programme despite the difficulties, obstacles and lack of cooperation shown by the government in Baghdad. The latter complained about the 'unacceptable' violation of its sovereignty that it believed this international mission represented, which led it to prohibit the entry of inspectors to many areas over its national territory.

On 13 October 1998, the Iraqi government decided to suspend all activities of the aforementioned United Nations Special Commission on their territory, a decision that the Security Council considered to be a flagrant violation of its Resolution 687. As a consequence, the Council approved Resolution 1284 (1999) establishing a new subsidiary commission within the United Nations (United Nations Monitoring, Verification and Inspection Commission, or UNMOVIC), with the objective of further reinforcing the international supervision system.⁴⁴ With this purpose in mind, the Security Council established a broader inspection regime, by means of the return of the constituent members of the United Nations Special Commission. On this occasion, the Council demanded the free, immediate, unconditional and unrestricted entry of its agents to all Iraqi installations, an obligation that was not even laid down by the IAEA.

Iraq seemed to cooperate at the beginning, yet it later rejected this new control and verification regime.⁴⁵ Given its lack of cooperation and the suspension of inspections, the Security Council unanimously approved a more demanding resolution in No-

42 This Resolution 687 (1991), of 3 April 1991, was adopted with 12 votes in favour, one against (Cuba) and two abstentions (Yemen and Uruguay).

43 UNSCOM was established by virtue of paragraph 9.b of the aforementioned Resolution 687 (1991).

44 Resolution 1284 (1999) of the Security Council, of 17 December 1999, operative point 1.

45 Nevertheless, until this point the international teams of inspectors undertook 300 inspections and thousands of visits to installations over the course of a period of less than one hundred months of activity in the Iraqi state. These operations put an end to the Iraqi nuclear, chemical and biological programmes, as well as the banned missile programmes. The operations allowed 48 Scud missiles (and their derivatives), 6 launch vehicles, 40 000 chemical weapons munitions, 690 tonnes of chemical weapons agents and 3 000 tonnes of precursor chemicals to be destroyed. Additionally, they proceeded to destroy a laboratory for the production of biological weapons as well as installations and materials related to its nuclear programme. See EL KHATIB, Fouad. 'Inspections et vérifications, leçons apprises du cas irakien', in FONDATION POUR LE RECHERCHE STRATÉGIQUE, *Les défis de la prolifération au XXIème siècle*, Paris, 2007, p.83.

vember 2002, Resolution 1441 (2002).⁴⁶ This step marked the last opportunity given to the Iraqi government to comply with the disarmament requirements laid down by international treaties and Security Council resolutions.

Resolution 1441 was the last to be issued on the matter before the invasion of Iraq by the US-led coalition in the spring of 2003. The nature of this resolution gave rise to two conflicting state and doctrinal interpretations: some saw it as an implicit authorisation for military intervention in Iraq, while for others the text was a mere warning, meaning that military intervention would have required another express vote in the Security Council.

Its text runs through the previous resolutions that the Security Council had approved on Iraq since 1990. Resolution 1441 (2002) also recognises 'the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security'. In other words, we are talking about Chapter VII of the Charter here, and the Security Council is fulfilling its function of determining what poses (or where there is) a threat to peace and security.

The situation evolved dramatically, as in the absence of an *ad hoc* Security Council authorisation, the United States, the United Kingdom and other allied states launched military intervention against Iraq with the aim of bringing an end to Saddam Hussein's regime. The government in Washington considered that a new Security Council resolution was not required to legitimise this intervention, as others had already been approved in the past that permitted it –such as Resolutions 678 (1990), 687 (1991) and 1441 (2002)-, and these very resolutions warned that the Security Council would take the necessary measures if Iraq did not comply with the obligations laid down therein.

Now, if we analyse these resolutions, we find that none of them can serve as a legal basis to legitimise the intervention of the United States and its allies in Iraq. Firstly, Resolution 678 (1990) condemned the invasion of Kuwait by Iraq and not an alleged nuclear programme or one for weapons of mass destruction –what is more, it was not approved unanimously-. Moreover, its text appears diffuse when it states that Iraq must comply with 'all subsequent relevant resolutions [...] to restore international peace and security in the area', as it seems to be legitimising the use of force in all resolutions that may subsequently be issued. Does this mean that the subsequent Resolution 1441 may justify the use of force because this is indicated in 678? At any rate, for those who do believe this to form a legal basis, it is worth recalling that in 1991 this international military intervention was supposed to be limited to the liberation of Kuwait and the restoration of peace and security, and not specifically to the disarmament of Iraq.

Secondly, in regard to Resolution 687 (1991), the Security Council recalls in the text that it has exclusive competence for decisions relating to the use of force and that it does not delegate its powers to any state. Consequently, the subsequent military intervention of the US and its allies in 2003 could not be based on this resolution.

46 Resolution 1441 (2002) of the Security Council, of 8 November 2002.

Thirdly, if we take a look at Resolution 1441 (2002), it is worth noting two important aspects: on the one hand, it states that the Security Council decides ‘to afford Iraq [...] a final opportunity’ and it does not explicitly include the use of force. Furthermore, neither does Resolution 1441 (2002) delegate, under any circumstance, powers to make any form of decision concerning the Iraqi crisis to states, or coalitions, as it states that this matter remains the exclusive competence of the Security Council.

The international military intervention in Iraq in 2003 was thus not underpinned by a sound international legal basis, since the Security Council is the only body that may authorise the use of force and it does not have powers to delegate decision-making competences to a state regarding when military intervention should take place.

As the reader will be aware, this military action occurred in the form of the invasion Iraq and was criticised by the international community, carving deep division within the heart of the Security Council, above all later on when international inspections revealed there to be no conclusive proof of the existence of weapons of mass destruction.⁴⁷

The motivations for the invasion were more political than ones justified on the grounds of international security, since the military attack in 2003 due to the ‘suspected’ possession of weapons of mass destruction proved to be disproportionate compared with the simple verbal international condemnations that the ‘real’ use of chemical weapons by Iraq in the eighties as part of its war against Iran had merited –as a clear and blatant violation of the 1925 Geneva Protocol and customary international law–; at that point neither the Security Council nor the United States adopted firm measures, despite the fact that an event of such gravity had required this at the time.⁴⁸

The credibility of the United Nations Security Council was seriously damaged, and the differences of opinions between its members weakened its actions. Moreover, the lack of conclusive evidence about whether Iraq possessed weapons of mass destruction cast doubt on the intervention of the Security Council.

Iraq eventually signed an Additional Protocol to its 1972 Safeguards Agreement in 2008, through which the verification capabilities of the IAEA vis-à-vis Iraq were

47 See NOVOSSELOFF, Alexandra. *Le Conseil de sécurité des Nations Unies et la maîtrise de la force armée*, Paris: Bruylant, 2003, p. 333. For the 2003 invasion of Iraq and the role played by the United Nations see REMIRO BROTONS, Antonio. ‘¿Naciones Unidas o Naciones «a la orden»?’ in ROLDÁN PANADERO, Concha, MATE RUPÉREZ, Manuel Reyes, and AUSÍN DÍEZ, Txetxu (coords.), *Guerra y paz: en nombre de la política*, Calamar: Madrid, 2004, pp. 83-104; ANDRÉZ SÁENZ DE SANTA MARÍA, Paz. ‘El Consejo de Seguridad en la guerra contra Irak: ¿ONG privilegiada, convalidador complaciente u órgano primordial?’, *Revista Española de Derecho Internacional*, vol. 55, no. 1, 2003, pp.205-222; CASTILLO DAUDÍ, Mireya. ‘La ocupación militar de Irak ante el Derecho Internacional’, *Revista Española de Derecho Internacional*, vol. 55, no. 1, 2003, pp.223-245.

48 QUEVEDO RUIZ, José Ramón. ‘Naciones Unidas y la lucha contra la proliferación de las armas de destrucción masiva. Logros y expectativas’, in MINISTRY OF DEFENCE (ed.), *Naciones Unidas como principal elemento del multilateralismo del siglo XXI*, CESEDEN Monographs no. 109, Madrid: Ministry of Defence, 2009, pp.132-139.

substantially augmented (as in the case of the other states that had ratified it), since the investigation was able to be extended to potentially undeclared activities. The Additional Protocol provides for an intensification of verification measures, extending these to the entire nuclear production cycle (uranium mines, all types of nuclear materials, residues and installations related directly or indirectly to the process), and the gathering of more detailed information to allow the inspectors to access all infrastructure, including environmental sampling.⁴⁹

The role of the Security Council in the light of North Korea's nuclear programme

North Korea has demonstrated that it possesses nuclear capacity. Despite international pressure, the government in Pyongyang was certain that obtaining military nuclear capacity was just a matter of time. One may consider that the origin of the North Korean nuclear programme seems to follow a lawful process adjusted to international standards. However, IAEA inspections soon discovered contradictions between North Korean government reports and the data it obtained through its own sources. The international inspections undertaken until 2002 proved the accusations of other countries (such as the United States), and concluded that North Korea had not given up on its military nuclear plans.

From December 2002, the government in Pyongyang opposed any IAEA inspection, in clear violation of the NPT.

In January 2003, North Korea announced it was to withdraw from the Nuclear Non-Proliferation Treaty after declaring that it had sufficient capacity to produce nuclear bombs.⁵⁰ The government of the country once again advanced its argument of the prior notice presented to the Security Council in 1993, the perceived threat to its survival represented by United States pressure, and the military manoeuvres carried out by the superpower in the region together with South Korea.⁵¹

The growing demands from US that were provoked by the change in attitude of the North Korean regime only served to justify its perception of feeling threatened.

49 SALAZAR SERANTES, Gonzalo de. 'El nuevo desafío: la proliferación nuclear en el umbral del siglo XXI', *Documentos CIDOB. Seguridad y Política Mundial*, no. 4, 2004, p.15.

50 North Korea had acceded to the NPT on 12 December 1985. On 10 January 2003 it announced its withdrawal from this treaty in a public declaration. Yet the state parties to the NPT continue to express differing opinions about the real status of the Democratic People's Republic of Korea under the NPT. See the following link on the United Nations website

<http://disarmament.un.org/treaties/a/npt/democraticpeoplesrepublicofkorea/acc/moscow>

51 Letter from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations of 12 March 1993 addressed to the President of the Security Council (doc.S/2003/91, Annex I, p. 2).

The government of Pyongyang opted for the first time to utilise a nuclear weapon as an instrument for blackmail, by boasting that it possessed this weapon, voluntarily placing itself in an unlawful position with respect to its commitments to international organisations and demanding trade-offs in exchange for respecting international treaties in the area of armaments control.

In February 2005, North Korea announced that it possessed nuclear weapons, and in July of the same year it carried out tests with various missiles: in 2006 and 2009 respectively it undertook subterranean nuclear tests. North Korea therefore recognised that it was a state that possessed nuclear armaments and it thus became a *de facto* 'nuclear power'.⁵²

Yet, in spite of the clear threat posed by the North Korean nuclear programme to international peace and security, and despite it having breached the provisions of the NPT with the covert development of its military nuclear programme over the period in which it was a state party to this treaty (between 1985 and 2003) according to the IAEA reports, the Security Council has been, in our view, less active in this case than with Iraq. To put it another way, the Security Council has not been as diligent as it should have been, despite the repeated reports submitted by the IAEA Board of Governors to the Security Council from 1993 onwards, according to which the government in Pyongyang had violated its Safeguards Agreement.

It was in 2006 onwards that the Security Council adopted the first measures against North Korea via its Resolution 1695 (2006), on ballistic missile proliferation.⁵³ This resolution was not based on Article 41 of the Charter of the United Nations –relating to enforcement measures not involving the use of armed force–, but the Security Council instead restricted itself then to calling on member states to exercise maximum vigilance and to prevent the transfer of missiles and weapons of mass destruction technology to North Korea.

Later on, on 14 October of the same year, and following the nuclear test announced by North Korea on 9 October 2006, the Security Council adopted Resolution 1718 (2006) by virtue of Chapter VII of the Charter –and in particular in accordance with Article 41 thereof⁵⁴ in which it condemned this nuclear test –which it considered to be a clear threat to international peace and security–, and called on North Korea to refrain from undertaking further tests, to suspend its ballistic missile programme and

52 CANOVAS SÁNCHEZ, Bartolomé. *Pyongyang crisis permanente*, Madrid: Spanish Institute for Strategic Studies, Opinion Paper 24/2013, March 2013, pp. 5-13.

53 Resolution 1695 (2006) of the Security Council, of 15 July 2006. See the letter of 4 July 2006 addressed to the President of the Security Council from the Permanent Representative of Japan to the United Nations (document S/2006/481).

54 Resolution 1718 (2006) of the Security Council, of 14 October 2006, in which it sanctions North Korea after it undertook a nuclear test.

to return to the Non-Proliferation Treaty and the IAEA Safeguards.⁵⁵ In this regard, the aforementioned Resolution 1718 (2006) sets out a comprehensive set of embargo sanctions on arms and nuclear technology, as well as financial measures such as the freezing of funds, other financial assets and economic resources related to the North Korean nuclear programme located in any member state of the United Nations.⁵⁶

After a subsequent nuclear test that took place on 25 May 2009 in contravention of Resolution 1718 (2006), Japan, South Korea, France and the United Kingdom petitioned the Security Council to adopt new sanctions against North Korea; and on 12 June of the same year, the Council adopted Resolution 1874 (2009):⁵⁷ this included new embargo measures for armaments and nuclear and military technology in general, and at the same time it urged member states to inspect all commercial shipments destined for Pyongyang and suspicious vessels offshore, as well as preventing the provision of services to North Korean vessels that gave rise to reasonable grounds for suspicion, and to freeze any form of trading or financial exchange that may serve the nuclear ambitions of North Korea.⁵⁸

Finally, in response to the launch of a satellite by North Korea on 12 December 2012, the Security Council approved Resolution 2087 (2013) in January 2013, which condemns this and imposes new sanctions on the political regime in Pyongyang, with a view to hampering the continuation of its nuclear and missiles programmes.⁵⁹ In this regard, Resolution 2087 (2013) reinforces and widens the scope of the sanctions put in place by the previous resolutions 1718 and 1874, as it renders them more effective and wider-reaching, and imposes a more comprehensive, robust and rigorous sanctions regime on North Korea. Such sanctions include the freezing of assets in order to limit the country's ability to obtain financing, and various bans: travel bans to address the exchange of scientific information abroad, a ban on the transfer of dual-use products and one concerning the smuggling of other goods.

Despite the efforts of the Security Council, its resolutions have not been able to put a stop to, or even to slow down, this military nuclear programme; on the contrary, North Korea is determined to resist, whilst it continues to make progress with the modernisation and development of its capabilities. This reality calls the effectiveness of the Security Council into question: the body is seeking a diplomatic solution to the situation, constantly lending its support to the so-called Six-Party Talks, which until now have not reached an agreement on the issue due to the clash of interests that

55 Operative paragraphs 1-5 of the aforementioned Resolution 1718 (2006) of the Security Council.

56 Operative point 8 of the aforementioned Resolution 1718 (2006).

57 Resolution 1874 (2009) of the Security Council, of 12 June 2009.

58 Ibidem, operative points 9-20. See GARCÍA SÁNCHEZ, Ignacio José. 'Corea: El sueño de una península unificada y desnuclearizada' in SPANISH INSTITUTE FOR STRATEGIC STUDIES, Panorama Geopolítico de los Conflictos 2011, Madrid: Ministry of Defence, 2012, p. 295.

59 Resolution 2087 (2013) of the Security Council, of 22 January 2013.

exists.⁶⁰ At the same time, the UN body has limited itself to proposing the potential modification of the sanctions that have been imposed, as well as threatening to adopt significant measures in the event of new nuclear testing or related launches, yet without specifying what these measures would be.

The Security Council has thus not considered other intervention options against this country, despite the fact that North Korea's constant provocation constitutes a clear threat to regional and international security that may lead to dire consequences, such as full-blown war breaking out and the promotion of nuclear proliferation in the region.

It is true that the United Nations unanimously condemns this state of affairs, yet the geostrategic interests in this region of the five nuclear powers who are permanent members of the Security Council limit any form of coordinated international action. Moreover, the threat of veto among its permanent members –above all China– hampers any initiative that contemplates armed intervention or any sanction that would be more direct than those currently in force.

Furthermore, the North Korean withdrawal from the NPT sets a precedent that obliges the Security Council to adopt measures as a result. The Vienna Convention on the Law of the Treaties of 1969 safeguards states' right of denunciation of treaties; in this case with North Korea, either this is an unmotivated treaty denunciation or it invokes reasons extrinsic to the treaty as laid down in the aforementioned Vienna Convention in its Articles 60-62 and 64 (material breach of the treaty, impossibility of performing a treaty, fundamental change of circumstances or conflict of the treaty with a new peremptory norm of general international law). Nonetheless, this right to withdraw from a treaty is subject to a number of rules, such as that of notification of the withdrawal being made months in advance.

Moreover, the NPT itself affords its states parties the right to withdraw from the treaty (Art. 10.1):

'Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests'.

On 10 January 2003, North Korea announced that it was to withdraw from the treaty in a public declaration meaning that its withdrawal was to be effective three months later on 10 April of the same year. Nevertheless, this denunciation of a treaty does not comply with the requirements laid down for this purpose and, as a result, it provoked controversy. The arguments put forward by North Korea do not correspond

60 These negotiations include North Korea, the United States, South Korea, China, Russia and Japan.

to those provided for in neither the NPT or the Law of the Treaties: the government in Pyongyang evoked its right to legitimate defence faced with hostile US policy; however, such a right may only be invoked in response to a prior armed attack or, at least, an imminent one –a condition that was not met here-, and the withdrawal of a state from the NPT should be notified not only to all states parties, but also to the Security Council. The latter was supposed to meet automatically and immediately in this case to assess the argument of security put forward by North Korea, to examine the repercussions for international peace and security and the measures that should be adopted. If a withdrawal places international peace and security in danger, the Security Council bears responsibility for responding accordingly in accordance with the Charter of the United Nations. What's more, the treaty does not recognise the concept of prevention but instead only the concept of reaction.

On the other hand, we may also consider this withdrawal from the NPT to have occurred after the treaty had been materially breached; in which case, for instance, according to the Vienna Convention on the Law of the Treaties, North Korea could not claim subsequent impossibility of performance of the NPT nor that of a fundamental change in circumstances as reasons for withdrawing from the treaty, as such reasons cannot be claimed by a state party that has provoked these with the violation of an obligation stemming from that treaty.⁶¹

Another point of contention concerning this withdrawal is the notification thereof: the NPT clearly stipulates that states must provide notice of their withdrawal three months in advance, and yet the government in Pyongyang decided to withdraw immediately without the mandatory notification. The only notification of a potential withdrawal from the NPT that North Korea submitted to the President of the Security Council was sent in 1993.

This supposed prior notice, which in reality was a political warning, was not even valid because it should have submitted a new one that included 'a statement of the extraordinary events it regards as having jeopardized its supreme interests'.⁶²

What is more, in accordance with international legal principles about international responsibility, withdrawing from a treaty does not absolve the state from assuming its international responsibility that results from a breach of the obligations that derive from the treaty in question over the period in which the country was a state party thereto. It should also be made clear that the nuclear resources and capabilities acquired whilst this state was a state party to the NPT, with the commitment given that these would be used for peaceful purposes, continue to be subject to the obligation of peaceful use, despite the fact that the state has withdrawn from the treaty. North

61 Articles 61.2 and 62.2.b of the Vienna Convention on the Law of Treaties; and GARRIDO REBOLLEDO, Vicente. 'Introducción', in HIGHER CENTRE FOR NATIONAL DEFENCE STUDIES (CESEDEN), *Respuestas al reto de la proliferación*, Security and Defence Documents no. 27, Madrid: Ministry of Defence, 2009, pp.8-9.

62 Article 10.1 in fine of NPT.

Korea took advantage of cooperation with the IAEA on nuclear matters to divert this aid to its military nuclear programme.

Once it had acquired sufficient capacity, it announced its withdrawal from the NPT and continued to develop its own programme in clear defiance of the international community. This situation has led to an unprecedented state of affairs in the NPT that, without a shadow of a doubt, has implications for both international security and international law itself.⁶³

Iran's nuclear programme: a new test for the Security Council

The Iranian nuclear programme has been underway for several decades already and has been developed by various different governments as part of two different political regimes. This was especially true during the 1990s (following the Iraq war) and it then picked up speed this century when President M. Ahmadinejad came to power in 2005. In October 2003 the IAEA confirmed the existence of a secret Irani nuclear programme that was carrying out uranium enrichment.

There are a multitude of risks associated with the advancement of this nuclear programme. Nevertheless, the real threat lies in the fact that, since Iran is a state party to the NPT,⁶⁴ the development of a national military nuclear programme would deal a huge blow to the effectiveness of this treaty. Bearing in mind the failure of the international community faced with the situation in North Korea, the Iranian case had become a critical test for ascertaining whether international cooperation was capable of averting nuclear proliferation; if it was not able to, the world would turn into a far more dangerous and unpredictable place.

The Security Council was far more actively involved in this case, despite there being neither any conclusive evidence to this day as to whether or not Iran had been developing a military nuclear programme, nor a confession from regime of the ayatollahs that they had intended to manufacture atomic bombs. This thus begs the following questions: Does the Iranian nuclear programme constitute a threat to international peace and security that is greater than that posed by the North Korean, Pakistani, Israeli or Indian programmes? Is Iran reneging on its commitments made under the NPT?

All in all, the controversy provoked by the Iran's nuclear programme is mainly due to the opacity shown by the government in Tehran, a lack of transparency confirmed by

63 BALLESTEROS MARTÍN, Miguel Ángel. 'La proliferación nuclear en Asia', in SPANISH INSTITUTE FOR STRATEGIC STUDIES, *El auge de Asia: implicaciones estratégicas*, Strategy Paper no. 143, Madrid: Ministry of Defence, 2010, pp.165-201.

64 Iran signed the NPT in July 1968 and ratified it in 1970. See ZACCARA, Luciano. 'Irán y la cuestión nuclear', *Política Exterior*, no. 109, January/February 2006, pp.113-121.

insufficient information being supplied about its programme and a lack of willingness to cooperate, in the view of Israel and the United States, the major nuclear powers that are unsympathetic to Iran. The limited knowledge of Iran's various nuclear development activities and its refusal to suspend its uranium enrichment activities have raised suspicions about the potentially military nature of its programme and as a result international pressure has increased.

It is worth noting that, in principle, the NPT does not provide for any restriction whatsoever to the development of nuclear energy for civilian purposes, neither does it establish a threshold in this field. Exceeding the percentage of 20% of enriched uranium does not necessarily mean that one intends to develop a military nuclear programme, as some technologies employed for civilian use also require a high percentage of enrichment, which may even reach 80% -which is also the percentage required to produce atomic bombs-. That said, the development of such capacity by Iran does not necessarily imply that Iran intends to create nuclear weapons; therefore, in principle, it cannot be categorically confirmed that a state is seeking to acquire nuclear weapons based only on the fact that it is enriching uranium to a percentage above 20%.

On the other hand, the lack of cooperation shown by Iran not allowing IAEA inspectors to enter and supervise a number of its installations and plants does not necessarily mean that this country stood in violation of the NPT, although Iran is bound to comply with the Safeguard Agreement that it has signed with the IAEA.⁶⁵ *De facto* evidence to condemn Iran's nuclear programme thus does not exist. The probable aim of the Iranian regime was merely to demonstrate to the world that it possessed enough technological capacity to produce nuclear weapons if it felt that it was necessary. In this case, its nuclear programme aimed to reach strategic objectives, thereby achieving so-called 'virtual dissuasion' and acting within the bounds of the NPT.⁶⁶

All in all, the uncertainty has sounded alarm bells amongst the international community with respect to the development of this nuclear programme. The matter reached the United Nations Security Council, which, from mid-2006, had approved various resolutions demanding the Iranian government suspend its activities relating to the enrichment of uranium.

Right from the outset, the issue of this suspected military nuclear programme created a deep rift between positions both within the United Nations Security Council

65 The Safeguards Agreement between Iran and the IAEA has been in force since 15 May 1974 (<https://www.iaea.org/sites/default/files/publications/documents/infcircs/1974/infcirc214.pdf>). Moreover, Iran had signed Additional Protocol 18 of December 2003, but it has not entered into force, and it is therefore not obliged to comply with it. See LARA FERNÁNDEZ, Belén. 'El programa nuclear de Irán y la estabilidad estratégica en la zona', in Higher Centre for National Defence Studies (CESEDEN), Information Bulletin, no. 292, Madrid: Ministry of Defence, 2005, p.7.

66 IBAÑEZ, Fernando. 'El programa nuclear iraní: estado de la cuestión y posibles escenarios', in Relaciones Internacionales (GERI-UAM), no. 16, 2011, pp. 140-143, at www.relacionesinternacionales.info/ojs/article/view/271.html.

as well as the international community in general. While the United States, the United Kingdom and France believed that the matter of the Iranian nuclear programme should be put to the Security Council in order for the body to adopt appropriate measures, other states such as Russia, Pakistan, India and China –all nuclear powers– opposed the West’s initiative of referring the Iranian issue to the Security Council and instead backed a negotiated solution. The same position was adopted by the members of the Non-Aligned Movement, which discredited the proposal of the West as an attempt made by developed countries to control weaker countries, and they trumpeted the right of all countries to access to peaceful nuclear technology.⁶⁷

While these countries did recognise the severity of the Iranian nuclear crisis, they rejected the West’s conceptual approaches and did not wish the mistrust surrounding the Iranian nuclear programme to end up transforming ‘uranium enrichment’ into a violation of international law *per se*. In this regard, these countries expressed their will for the case of Iran to not become a precedent that would subsequently act against their own nuclear development plans.⁶⁸

Yet the growing suspicion aroused by this nuclear programme came to a head as the Board of Governors of the IAEA adopted a resolution in February 2006 that asked its Director to submit the case of Iran’s nuclear programme to the United Nations Security Council. Moreover, the aforementioned Board of Governors deemed it necessary for Iran to re-establish the suspension of all uranium enrichment related activities, as well as research and development in this field.⁶⁹ The Iranian government’s response was that it would not bow down to what it considered to be unfounded threats.

From then onwards, the Security Council proceeded to approve various resolutions on the matter –for instance, Resolutions 1737 (2006),⁷⁰ 1747 (2007),⁷¹ 1803 (2008),⁷² 1929 (2010)⁷³ and 2224 (2015).⁷⁴ These were adopted by virtue of Article 41 of the Charter of the United Nations -Chapter VII-, with a view to bringing greater pressure to bear on Iran so that it would suspend its uranium enrichment and ballistic missiles development programmes. The content of these resolutions includes sanction meas-

67 See PARADAS, Marion. ‘Les crises de prolifération (Iran, Corée du Nord)’, in *Fondation pour la Recherche Stratégique, Les défis de la prolifération au XXIème siècle*, Paris, 2007, p.12 and ff.

68 BALLESTEROS MARTÍN, Miguel Ángel. ‘La proliferación nuclear en Asia’, in SPANISH INSTITUTE FOR STRATEGIC STUDIES, *El auge de Asia: implicaciones estratégicas*, Strategy Papers no. 143, Madrid: Ministry of Defence, 2010, p. 19.

69 See UN News Centre, 6 February 2006, at www.un.org/apps/news/fr/storyFAR.asp?NewsID=11815&Cr=&Cr1=iran&Kw1=iran&Kw2=scell%E9&Kw3=.

70 Resolution 1737 (2006) of the Security Council, of 23 December 2006.

71 Resolution 1747 (2007) of the Security Council, of 24 March 2007.

72 Resolution 1803 (2008) of the Security Council, of 3 March 2008.

73 Resolution 1929 (2010) of the Security Council, of 9 June 2010.

74 Resolution 2224 (2015) of the Security Council, of 9 June 2015.

ures concerning those people and bodies related to the nuclear and ballistic missile programmes (notification and prohibition of travel, the freezing of assets, etc.); embargo measures for activity related to these programmes; bans on teaching or specialised training for related subjects; bans on the export of Iranian arms and restrictions to military and financial cooperation, as well as the carrying-out of inspections on Iranian vessels and aircraft.

On the other hand, the government in Tehran considered the measures adopted via the Security Council resolutions on the matter to be 'invalid' and 'unlawful' and claimed that these measures were hindering its nuclear programme, since it fell outside the framework of responsibilities established by the Charter of the United Nations insofar as it was of an exclusively civilian nature, without any military ambition whatsoever.

Nonetheless, it is worth noting that none of the resolutions issued by the Security Council call for recourse to the use of force, either explicitly or implicitly, and limit themselves to warning that, in the event that Iran does not comply with its obligations to the IAEA, the Security Council would proceed to adopt further sanctions as it sees fit.

To begin with, the United States was inclined to opt for armed intervention against Iran just as it had done with Iraq. However, in order to avoid making the same mistake twice, it corrected its initial position, as it recalled its disastrous experience in Iraq that had brought about major losses suffered in terms of finances, staff and reputation and legitimacy, and aligned itself with the position of the rest of the members of the Security Council in favour of a negotiated solution.⁷⁵

The enforcement measures adopted by the Security Council and implemented by the member states of the United Nations have ended up adversely affecting the Iranian economy, leading to major malaise within society. Perhaps it is this critical situation –if we disregard other strategic and political factors– that has been what has led the Tehran regime to involve itself further in the negotiations of the P5+1 Group,⁷⁶ which culminated in 2015 with various successive agreements with the aim of limiting and controlling their nuclear programme in order to guarantee its exclusively civil nature: first with a framework agreement in April,⁷⁷ and then a global agreement, from July 2015 –which

75 VELARDE PINACHO, Guillermo. 'Proliferación de armas nucleares. Irán y Corea del Norte', in SPANISH INSTITUTE FOR STRATEGIC STUDIES, *Proliferación de ADM y de Tecnología Avanzada*, Strategy Papers no. 153, Madrid: Ministry of Defence, 2011, pp.63-74.

76 See LARA FERNÁNDEZ, Belén. 'Negociaciones nucleares con Irán', in *Claves de Razón Práctica*, no. 240, 2015, pp.40-49. The initial talks were undertaken with France, the United Kingdom and Germany together with Iran, and from June 2006 the United States, Russia and China joined the negotiations. The interstate group that negotiated with Iran was thus made up of six countries, the five permanent members of the Security Council plus Germany (P5+1). The group was joined by the High Representative of the European Union for Foreign Affairs and Security Policy, which led to the group being renamed E3/EU+3.

77 On the 3 April 2015, a framework agreement was signed on the basis of the Joint Plan of Action agreed upon in Geneva on 24 November 2013.

adopted the Joint Comprehensive Plan of Action (JCPOA) over the long term- and was endorsed by the Security Council in its Resolution 2231 (2015), of 20 July.⁷⁸

The JCPOA sets out restrictions to and international supervision of the Iranian nuclear programme, in exchange for the gradual lifting of sanctions against the country. With its five annexes, this agreement represents the culmination of a negotiation process that lasted almost twelve years.

On the one hand, this agreement aims to guarantee that Iran's nuclear programme is for exclusively peaceful purposes, as this state reaffirms that it will never procure, develop or acquire nuclear weapons. Yet, at the same time, Iran hopes to be allowed to complete a peaceful, domestic nuclear programme, which complies with the JCPOA and with economic and scientific considerations, and which would serve to boost confidence and foster international cooperation. The intention is that all activities under the Iranian nuclear programme be amalgamated into one commercial programme with purely peaceful purposes, which is to be compatible with international non-proliferation standards.⁷⁹

The JCPOA provides for several gradual steps established by mutual accord, with specific limits for the Iranian nuclear programme, including its uranium enrichment activities and R&D. It also makes a variety of verification measures available in order to guarantee the transparency of the process, such as the creation of a Joint Commission comprised of the E3/EU+3 and Iran to oversee the implementation of the agreement,⁸⁰ or the planned verification to be carried out by the International Atomic Energy Agency (IAEA) of the application of voluntary measures relating to nuclear energy set out in the JCPOA.⁸¹ Moreover, it provides for the periodic convening (at least every two years) of ministerial meetings between the parties with a view to assessing the progress made and to adopt appropriate decisions by consensus.⁸²

Nonetheless, the agreement reached makes it clear that its provisions and measures are only intended to be applied among the parties to the JCPOA, meaning that they

78 First operative point of the aforementioned Resolution 2231 (2015). In fact, on 14 July 2015, the 'Joint Comprehensive Plan of Action' agreement (JCPOA) was signed between Iran and the states making up the E3/EU+3 Group -China, the United States, Russia, Germany, France and the United Kingdom, together with the High Representative of the European Union for Foreign Affairs and Security Policy- (doc.S/2015/544). Security Council Resolution 2231 (2015), of 20 July, sets out this agreement in its Annex A. On the same date, the countries making up the aforementioned group and the European Union also presented a declaration with a view to promoting transparency and creating a climate conducive to full application of the JCPOA (doc.S/2015/545).

79 See section iv) of the general provisions of the JCPOA. In this regard, both parties (the E3/EU+3 and Iran) expressly recognise the Non-Proliferation Treaty (NPT) as the cornerstone of the nuclear non-proliferation regime.

80 Point ix of the general provisions of the Joint Comprehensive Plan of Action (JCPOA).

81 Section 15 of the general provisions of the JCPOA.

82 Points x and xvi of the general provisions of the PAIC.

do not set a precedent either for any other state or for the fundamental principles of international law and the rights and obligations provided for under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT); this safeguard has also been proclaimed by the Security Council.⁸³

To counterbalance this, the implementation of the JCPOA will result in the complete lifting all sanctions imposed by the United Nations Security Council,⁸⁴ as well as other multilateral and national sanctions imposed as a consequence of Iran's nuclear programme –including measures affecting access to trade, technology, financing and energy-.⁸⁵ For this purpose, the Security Council requested that the IAEA verify the measures adopted by Iran, that the Director General of this organisation inform the Board of Governors and the Security Council of Iranian fulfilment of its commitments and that the IAEA ultimately reach a conclusion as to whether all the nuclear material present in Iran continues to be allocated to peaceful activities.⁸⁶ Yet, even if that is the case, if a state that participates in the JCPOA notifies a material breach of the commitments made under the agreement, the Security Council may approve a resolution to revert back to the application of the previous sanction measures⁸⁷.

All in all, it is worth once again asking if Iran really intended to possess nuclear weapons and if it has truly been international pressure, symbolised in the enforcement measures decided upon by the Council, which led to a negotiated solution being achieved for the Iranian case. Admittedly, there was no proof of the military nature of the country's nuclear programme, meaning that is not clear if international pressure surrounding Iran was the result of a suspected Iranian breach of the NPT, if its nuclear development activities had themselves posed a threat to international peace and security, or instead was aimed at safeguarding the geostrategic interests of the Western powers, including Israel.

The Security Council vis-à-vis the nuclear powers which are not parties to the NPT

It also falls to the Security Council to address the situation of those nuclear states which have not acceded to the NPT, since the nuclear programmes of these states also

83 Ibidem, point xi; and Resolution 2231 (2015) of the Security Council, operative point 27.

84 Resolution 2231 (2015), operative paragraphs 7 and 8.

85 See sections 19-27 of the general provisions and the detailed Annex II of the JCPOA, with respect to the measures that the European Union and its member states as well as the United States commit to taking to lift sanctions against Iran.

86 Ibidem, operative paragraphs 4-6.

87 Ibid., operative paragraphs 11 and 12.

constitute a threat to international peace and security. The particular state of affairs in each case is a delicate issue for the body responsible for the maintenance of peace since the Security Council is not able to deal with them on the basis of the provisions of the NPT.

Following the rival nuclear tests undertaken by India and Pakistan in May 1998, the Security Council confined itself to condemning the threat that these tests posed to international security via Resolution 1172 (1998),⁸⁸ without this having major repercussions for the nuclear programmes of either of the two countries. In this resolution, the Security Council once more recalled that the United Nations Charter confers it 'the primary responsibility for the maintenance of international peace and security', but it did not draw practical practical consequences from this statement.⁸⁹

With the same backdrop, the President of the Security Council drafted two declarations about the tests carried out by both states, regretting that they took place, 'urging' the two states to renounce their nuclear ambitions and to refrain from carrying out further tests in the future.⁹⁰ For this purpose, they asked them to demonstrate good will and take immediate measures to relieve the tensions that existed between them.

These presidential declarations by the Security Council reveal the threat that such tests represent to the nuclear non-proliferation regime, and encourage parties to seek a peaceful solution. However, its dubious legal nature is an international source of obligation neither for state parties to the NPT, nor for the states acting outside of the treaty.

The Security Council is mandated by virtue of Chapter VII of the Charter to address such cases and take measures in order to counter any violation of disarmament and non-proliferation obligations –even if neither of these two states are parties to the NPT–, if it considers that the attitude of India and/or Pakistan constitutes a clear threat to international security. Yet, what is certain is that these two countries are engaged in programmes to modernise their nuclear capabilities, without this leading to any effective reaction from the Security Council. Resolution 1172 (1998) does not refer to Chapter VII of the Charter, which means that the Council wanted to evade its responsibility, by omitting to avail itself of the option to express itself with a coercive voice in these cases. Here, the Security Council did not classify such a situation on the basis of the enforcement provisions of the Charter so that it was not forced to draw

88 Resolution 1172 (1998) of the Security Council, of 6 June 1998.

89 In its operative point 11, Resolution 1172 (1998) recalls that, 'in accordance with the Treaty on the Non-Proliferation of Nuclear Weapons India or Pakistan cannot have the status of a nuclear-weapon State', despite the fact that the two states are not parties to the NPT and that neither have they ratified the Comprehensive Test Ban Treaty of 1996.

90 Declarations of the President of the Security Council S/PRST/1998/12, of 14 May 1998, and S/PRST/1998/17, of 29 May 1998, addressing the nuclear testing undertaken by India and Pakistan respectively.

the appropriate conclusions.⁹¹

Last but not least, another controversial case is that of Israel. The probable existence of Israeli nuclear weapons poses a threat to its neighbours -above all Iran- and undermines stability and security by breeding mistrust and suspicion among the countries of the region. While Israel maintains its nuclear arms, there is reason to believe that the Iranian government will continue with the calculated ambiguity of its nuclear programme. Moreover, the Israeli strategy of a nuclear deterrent may have been used as an excuse by Bashar Al Assad's Syrian regime to continue to develop its chemical weapons. In the same vein, Egypt has refused to ratify the Comprehensive Test Ban Treaty and, in fact, has reiterated that its ratification of this treaty depends on Israel itself becoming a state party to the NPT. On the other hand, the existence of Israeli nuclear weaponry hampers the efforts of the international community to create a zone free of nuclear weapons in the Middle East.

Furthermore, Israel has acted unilaterally regarding the matter, without turning to the Security Council; let us recall, in fact, that in the past it carried out military intervention against Iraqi and Syrian facilities (such as, for instance, the destruction of the Iraqi Osirak nuclear reactor in June 1981).

Faced with these threats and the lack of commitment shown by states in the Middle East, the United Nations Security Council should take a position on this case: it should at least denounce the Israeli nuclear strategy and bring pressure to bear on the government of Tel Aviv, just as it did with Pakistan and India. However, the Security Council does not react in this way because Israel benefits from the US nuclear umbrella within this UN body. Furthermore, as is known, the United States traditional views itself as the guarantor of Israel's security, which has allowed the latter to feel legitimised to adopt any defence measure that it deems necessary, irrespective of whether it has received the endorsement of the Security Council.

CONCLUSIONS

The first consideration raised by the role played by the Security Council as a result of the different cases of nuclear proliferation is discouraging: it seems that its actions have been both controversial and useless at the same time. In our view, the major obstacle that the Security Council -and UN in general- faces in this area lies in the refusal of the nuclear powers to comply with the commitment made to make progress towards effective nuclear disarmament, as is laid out in the NPT. The lack of real will on the part of the permanent members of the Security Council has thwarted all initia-

⁹¹ On 1 August 2008, the IAEA Board of Governors adopted by consensus a safeguards agreement with India in order to enforce controls of the civilian nuclear facilities designated by this state. The agreement was signed on 2 February 2009.

tives. Whilst those states continue to possess enormous amounts of nuclear weaponry that is not subject to institutionalised international control, the Security Council will not have the sufficient power or legitimacy required to enable it to take a firmer and more forceful line in its decisions. In the light of this harsh reality, it is highly improbable that the other states -nuclear and non-nuclear powers- will lend themselves to satisfactory cooperation. Such evidence dashes any hopes entertained, at the same time as advancing nuclear proliferation.

On the other hand, the perception of the threat posed by each national nuclear programme is one that is not shared in the same manner by the different permanent members of the Security Council. These countries agree to tackle the trend of nuclear proliferation only so far as those efforts do not clash with their own national interests and, conversely, they scramble to promote measures and strategies against national programmes that they consider to be an obstacle to their strategic interests. The policies of the major powers against nuclear proliferation are thus discriminatory; that is to say, these states develop strategies and measures that are ambivalent and able to be adapted to their geopolitical and strategic interests, which leads them to encourage and support certain specific national nuclear programmes or, quite the contrary, to attack and bring pressure to bear to halt others.

The Security Council, principally as a result of the inertia and disagreements seen among its permanent members, tends to defer any collective response for too long, in such a way as to render nuclear disarmament and non-proliferation a mere illusion. This state of stagnation may degenerate with serious consequences, fuelling international insecurity and rivalries between states.

Unfortunately, and despite the conditions of its creation and commencement, the Security Council has remained a relatively passive body in this field, it functions with the aim of preserving the balance between predominant forces, and only operates in areas considered to be 'neutral', without breaking away from its traditional area of activity.

On the other hand, states that have been acquiring nuclear weapons or who harbour such ambitions do not cooperate with the international organisations in a satisfactory manner. In fact, they also try to take advantage of the inconsistencies of international politics, aligning themselves with one major power or another in order to further their nuclear programme, or simply to reap political and economic benefits: hence Pakistan did not hesitate to acquire its own nuclear weapons upon noting the lack of effective international sanctions brought against the militarisation of the Indian nuclear programme; in turn, seeing the lack of reaction from the Security Council in the cases of India and Pakistan, North Korea worked against the clock to acquire nuclear weapons, it withdrew from the NPT and revealed its status as a nuclear power once it was no longer party to this treaty. As a matter of fact, the absence of firm sanctions issued by the Security Council in these cases and the existing fragmentation within its midst could be factors that will incite other states to develop their own military nuclear programmes.

The clash of interests and distrust that exists between the permanent members of the Security Council is by no means conducive to consistent policy in the area. This leads to the logical conclusion that while the Security Council continues to stand fragmented, the architecture of our collective security will continue to lose credibility and effectiveness.

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