The Nuclear Non-Proliferation Treaty: Delayed Review – Issues Old and New

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ABSTRACT
This paper addresses the current uncertain status of the NPT Review Conference, originally scheduled for 2020. When the Conference is eventually held, three principal issues likely to be examined are the continued failure to bring the CTBT into force; the lack of progress leading to an international conference on the importance of promptly negotiating a Weapons of Mass Destruction Free Zone for the Middle East, the cause of the failure of the 2015 Review Conference; and the effect on the Review Conference of the Treaty on the Prohibition of Nuclear Weapons, which entered into force in January 2021. The 2020 Review Conference is now scheduled for August 2021. Thus the prediction of which matters will be most important at the Conference is somewhat uncertain. Whenever the Conference is held, serious issues will confront it. The Treaty has been weakened over the years; it is significantly endangered by the increasing threat of climate change. It is highly important to strengthen the Nuclear Non-proliferation Treaty, the centerpiece of international security, to maximize its chances to remain viable against the threat of climate change. A strong, positive Review Conference will do much to achieve this.

The fear of proliferation is by no means a recent phenomenon. In response to a reporter’s question in March of 1963, President Kennedy said that his worry was that by 1970, there would be ten nuclear weapon states instead of four, with nuclear weapons integrated into their national arsenals and by 1975, the number could be fifteen to twenty. He regarded this as “the greatest possible danger and hazard” (Kennedy, n.d.).

Kennedy was not the only statesman appalled by both the thermonuclear confrontation and the threat of the widespread proliferation of nuclear weapons. In 1961, the United Nations General Assembly unanimously passed the “Irish Resolution” which called on all states to conclude an international agreement prohibiting the further acquisition or transferring of nuclear weapons. Nothing happened for four years, but then the United Nations passed a new resolution, introduced by Sweden and India, which not only called for a nuclear non-proliferation treaty but also set forth principles on which the treaty should be based. Among them was a principle that called for a balance of obligations between nuclear and non-nuclear states, that is, undertakings by the NPT nuclear weapon states in exchange for the commitment to non-proliferation by the NPT.
non-nuclear weapon states. This meant, in particular, steps toward eventual nuclear disarmament. This set the stage for negotiations to begin in 1966.

The negotiation took place in Geneva at the 18 Nation Committee on Disarmament known as the ENDC, later the Conference on Disarmament (CD), which is what this body is called today. In August of 1967, the two co-chairmen of the NPT negotiation, the United States and the Soviet Union, had agreed upon a joint treaty draft text. This draft text obligated the nuclear weapon states-parties not to transfer nuclear weapons to the non-nuclear weapon states-parties (Article I). Nuclear weapon states were defined in the Treaty as states that had tested a nuclear device prior to 1 January 1967, thereby establishing the five permanent members of the Security Council as the nuclear weapon states: China, France, the United Kingdom, the Soviet Union and the United States. The non-nuclear weapon states – all others – were obligated not to receive or otherwise acquire nuclear weapons (Article II) and provided for safeguards to verify these undertakings (Article III). However, the non-aligned members of the ENDC wanted the treaty to be consistent with the five principles of the Sweden-India resolution, in particular balanced obligations and taking steps toward nuclear disarmament. They argued that the Treaty also needed to include specific, tangible interim steps to halt the nuclear arms race and to limit nuclear weapons. Some member states of the ENDC, as well as the UN generally, also advocated that a provision was necessary that safeguarded the right of all states-parties to have access to peaceful nuclear technology.

There was a long debate within the ENDC over the concept of “interim steps” of arms control and disarmament on the way to the elimination of nuclear weapons, in the words of the Resolution “balanced obligations” on the route to nuclear disarmament. This discussion evolved into the general language of Article VI of the Treaty, even while a number of states continued to argue for more – either specific objectives in Article VI or standalone goals. One state urged a separate article containing a number of interim steps. The co-chairman encouraged the view among the non-nuclear weapon states that specific disarmament objectives such as the test ban or fissile material cutoff could be pursued in the Review Conference process established by the Treaty, but opposed their inclusion in the Treaty text itself. In the end they relented a bit and agreed to a preambular reference to the Test Ban (paragraph 10). So, Article VI was left as an exhortative provision. For the non-nuclear states, Article VI came to mean a call for an end to the nuclear arms race and the ultimate elimination of nuclear weapons. It was also understood to mean that, along the way, specific measures such as a comprehensive nuclear test ban treaty, deep reductions in nuclear weapons, a fissile material cutoff treaty and improved safeguards and verification would be achieved - that is, interim steps.

The test ban was all important. After all, if the nuclear weapon states were unlikely to be able to make much progress in reducing the number of nuclear weapons in the depths of the Cold War, at least the nuclear weapon states could stop testing the weapons. Thus, the comprehensive test ban treaty became the essential “glue” that held the NPT together. It was – and is – the single most important commitment for the medium-term future in the eyes of the non-nuclear weapon states and it is the quid for the quo of the non-nuclear weapon states giving up the most destructive weapons ever created.

In 1993 the United States established a nuclear weapon test moratorium which gradually spread throughout the world. It is a voluntary and informal policy
commitment, not a treaty-backed obligation. Nevertheless, it is all we have today and very important. There are today no nuclear weapon tests anywhere in the world.

The non-nuclear weapon states’ strong desire for the treaty to ensure their access to the peaceful use of nuclear energy was codified in Article IV of the Treaty. Article IV establishes the “inherent right” of all states in compliance with Articles I and II to utilize peaceful nuclear energy. A number of additional supportive provisions also were included in Article IV. Many of the states involved in the creation of the NPT regarded the peaceful use of nuclear energy as a sovereign right and essential to their economic development.

The NPT was signed in 1968, and entered into force in 1970. In 1995, the long-awaited treaty-mandated 25-year Review and Extension Conference took place. Other than the extension of the NPT itself, which was intensely controversial, the number one issue was the CTBT. As part of the price for permanent or indefinite NPT extension, it was agreed that a CTBT would be negotiated in one year. The CTBT was achieved on schedule and was signed at the United Nations in 1996. However, agreement to ratification of the CTBT in the U.S. was blocked by the Republican members of the United States Senate in 1999. Even though there are now more than some 168 nations that have ratified the CTBT, there has been no movement in the United States since that time. Review Conferences before and after 1995 accomplished little on this issue. The 2000 conference did reaffirm all of the 1995 commitments and established 13 positive steps for nuclear disarmament. However, few of these have been actually implemented. The 2005 conference failed as there was virtually no agreement on any issue and the commitments of 1995 and 2000 were repudiated by the U.S. The 2010 conference was successful and the U.S. commitments of 1995 and 2000 were restored.

A new issue arose at the 1995 conference that had been considered in 1968, but became a major issue for the NPT regime in 1995 – the subject of a nuclear weapon free zone for the Middle East or – as the Egyptians propose it now – a weapons of mass destruction free zone for the Middle East. A Resolution on this subject was adopted by the Conference as part of the package securing NPT indefinite extension. Expressed differently, the real problem for the Arab nations is the Israeli nuclear weapon arsenal. The 2010 conference made its top priority implementing the Middle East Resolution and NPT parties reached agreement temporarily, but the effort to carry out their agreement ultimately failed because of Israel’s unwillingness to participate. The 2015 conference failed over this same issue.

Over the course of the 15 years after the 1995 Review and Extension Conference, this issue had become an increasing problem for the NPT regime. Finally, after years of waiting for something to happen, Egypt had decided to bring it up at the 2010 Review Conference as mentioned above. There was consensus for the convening of a non-negotiating Conference on the subject and the U.S. and its allies agreeing to such a conference made a consensus agreement on a Final Document possible in 2010. However, while virtually all other Middle East states agreed to attend this new Conference, Israel did not and the Conference never happened. As a result, the approach of most of the NPT states parties was far more draconian in 2015. There would be a negotiating conference by a fixed date chaired by the Secretary General of the United Nations. The United States, Canada and the United Kingdom opposed this proposal and
an agreed Final Document was blocked. Thus, the Conference failed. The Middle East Resolution is a second important issue which the NPT regime has failed to resolve.

Both the Middle East issue and test ban issue are likely to remain contentious. With regard to the latter, Trump administration officials, claiming (without proof) that Russia and China have carried out low-yield nuclear weapon tests recently, made statements in 2020, indicating that the U.S. should conduct such tests as well.

There is a final point worth mentioning here. The NPT regime has been a great success – with only four nations obtaining nuclear weapons in addition to the original five, far from what President Kennedy feared. Viewed from another perspective, however, the NPT has not been a success. The Permanent Five of the United Nations Security Council still possess highly destructive nuclear weapon arsenals, although smaller with respect to the number of weapons than in the past. On the basis of these arsenals, the P-5 still regard themselves as the great powers charged with managing the world: codified by their permanent membership on the Security Council with the rank of veto.

Some supporters of the so-called Ban Treaty (officially the Treaty on the Prohibition of Nuclear Weapons or TPNW) negotiated at the United Nations in 2017, argue that the NPT should be replaced (Doyle 2017; Joyner 2016). They have argued that the NPT serves only to protect the great power status of the P-5 states and their control of the UN Security Council and many other international institutions and does little to lift the scourge of nuclear weapons still threatening the world community. Thus, some have asserted that the NPT should be enlarged in scope by the Ban Treaty, which should become the world’s dominant security instrument. The issue of this Treaty is likely to come up at the 2020 Review Conference as well and could become a major question.

Such a proposed course of action (replacing the NPT with the Ban Treaty) would be suicidal and would not result in the elimination of nuclear weapons but in nuclear weapons sweeping all over the world as JFK feared. The Ban Treaty lacks, among other things, the essential highly intrusive verification provisions required for nuclear weapons elimination. Provisions like these would take many years to negotiate and would require sea changes in the views of the nuclear weapon states and their allies. Only three weeks was spent on the current text of the Ban Treaty. Even years of negotiation might fail to realize the needed fundamental attitude change of states’ commitment to such a verification system – for example, from states such as China, Russia, India, Pakistan, North Korea, Israel and Iran. And without an essential highly intrusive verification system, France, the United Kingdom and the United States would certainly not be quick to agree to any treaty either. Important countries could easily cheat on the obligations of the Ban Treaty as currently constituted – and they would do so. However, the Ban Treaty does have many supporters, 122 states voted at the United Nations to begin the negotiations, 56 countries signed it in 2017, and more than 50 have now ratified it. It came into force on 22 January 2021, pursuant to the Treaty, 90 days after receipt by the United Nations of the 50th ratification (UN, n.d.).

None of the nine states that possess nuclear weapons attended the negotiations on the Ban Treaty. As it turned out none of the non-nuclear weapon states allied with one or more of the nuclear weapon states attended the negotiations either, except the Netherlands, which was required to do so by its Parliament. The Netherlands voted against the adoption of the Treaty at the negotiations – the only no vote.
Afterwards, as emphasized by Professors Valentino and Sagan (2017), senior professors at Stanford, writing in the Bulletin of the Atomic Scientist, three NPT nuclear weapon states, the United States, the United Kingdom and France, which the author sees as working most closely with the Humanitarian Movement from which the Ban Treaty negotiations came, issued the following statement: “We do not intend to sign, ratify or ever become a party to it [the Ban Treaty]. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would not accept any claim that the treaty reflects or in any way contributes to the development of customary international law.”

This means that the Treaty can indeed be no more than “an aspirational document” (Valendino and Sagan 2017). In no way can it make nuclear weapons illegal, nor can it establish the possession of nuclear weapons as contrary to international law. A treaty becomes part of customary international law, binding on all states whether or not they are parties, after many years of virtually all states recognizing its validity without more than a minor outlier or two.

For example, the Moratorium on nuclear weapon testing, mentioned above, may be approaching this status. It has been almost 23 years since the last nuclear weapon test by a major state; only outlier North Korea has carried out a test since the India and Pakistan tests of 1998, and it declared in 2018 it will do no more nuclear weapon tests.

For a minority of the world’s states to sign a piece of paper allegedly outlawing nuclear weapons and making immediately illegal the existence or the possession of nuclear weapons under international law in the face of a specific rejection of this claim by three of the five NPT established nuclear weapon states is to be disingenuous (to put it mildly). Indeed, the push for the Ban Treaty swept aside certain critical issues. The United Nations Humanitarian Impact Movement was organized to “address dangerous realities about nuclear weapons that are too often ignored: the human costs of clean-up of waste sites and production facilities and the potential for nuclear winter or other environmental effects [should nuclear weapons ever be tested again]. But these critical concerns were sidelined as the push for a nuclear ban gathered steam” (Valendino and Sagan 2017).

Concerns about the risks of occurrence of an accidental or unauthorized use of nuclear weapons also need to be addressed. In 1996, the world came within minutes of worldwide nuclear war because a Russian radar system mistook a rocket launch to observe the Aurora Borealis – about which there had been wide notification – for a U.S. first strike with nuclear weapons (Matthews 2019).

Valentino and Sagan (2017) assert that “Cooperative efforts to address these problems [safety technology, security procedures, and environmental protections] are something that all states, both with and without nuclear weapons, should have been able to agree upon. The decision to use the momentum generated by concern for these humanitarian impacts to push instead for a divisive and ultimately ineffective ban, therefore, was a missed opening to make meaningful progress to reducing these hidden risks posed by nuclear weapons.”

On the one hand, since no state that does not ratify the Ban Treaty is bound by the Treaty and all its parties have already given up nuclear weapons pursuant to the NPT, the Ban Treaty could be argued by some to have accomplished little. However, some have argued that the Ban Treaty stigmatizes nuclear weapons somewhat akin to the Chemical Weapons Convention and chemical weapons. Seen this way, “The treaty is not really
about providing a framework for disarmament but rather about providing a focal point for stigmatization politics” (Tannenwald 2020). Even so, its capability to stigmatize nuclear weapon possession is limited given the number of nuclear weapon relevant states that oppose it.

The Treaty was negotiated at the United Nations over three weeks, in two session. The text is little more than an outline with some detail. It isn’t anything remotely like what would be required for a real, worldwide nuclear disarmament Treaty. The TPNW is thirteen pages of small, single-spaced text. If this is to be a nuclear weapon disarmament treaty, it should emulate such agreements as the START Treaty or the Comprehensive Plan of Action (JCPOA) between the United Nations Security Council and Iran. These are treaties of enormous complexity. The START Treaty, for example, is 259 pages of small, single-spaced script. The verification provisions of a real nuclear weapon disarmament treaty are not possible to describe at this time, but suffice it to say that they would have to be several times stronger than START or the JCPOA. For example, treaty implementation could involve Iranian nuclear inspectors in Israel on no notice and the same for Indian inspectors in China, etc. A simple reference to the International Atomic Energy Agency (and nothing more) comes close to being non-serious.

Gaukhar Mukhatzhanova is director of the International Organizations and Non-Proliferation program at James Martin Center for Non-Proliferation. She served as an adviser to the delegation of Chile during the negotiations of the Ban Treaty, and, in September 2017, published an extensive analysis in Arms Control Today. She wrote, “The prohibition treaty has already come under criticism for insufficiently robust safeguards provisions, and this will likely continue to be a point of contention when the treaty is discussed in other forums, such as the NPT review process. The problem is further exacerbated by the fact that (former) nuclear armed states joining the prohibition treaty would be required, after [and while] eliminating their nuclear arsenals, to accept IAEA safeguards ‘sufficient to provide credible assurance’ of the nondisposition of declared nuclear material and the absence of undeclared materials and activities, which essentially means comprehensive safeguards together with an additional protocol. Thus, the Treaty establishes different safeguard requirements for different kinds of states in perpetuity, and it is difficult to imagine that the current nuclear weapon states would want to accept such an arrangement.”

And should the nuclear weapon states ever consider joining, despite their firm protestations to the contrary, they “... would want to negotiate the terms of weapon elimination and verification first with each other. If they are to join the prohibition treaty together, [leaving the TPNW parties no role in this] it is more plausible that they would do so after concluding a disarmament agreement among themselves” (Mukhatzhanova 2017).

The TPNW has not arrived without risk. Two should be mentioned here. The treaty “could provoke the nuclear-armed states” to more strongly assert and more zealously argue how much they continue to need nuclear weapons. Also, “the Ban Treaty does have the potential to be extremely polarizing ... and there is a real risk to the NPT. ... some non-nuclear states appear to have plans for heightened contestation at future NPT review conferences” (Tannenwald 2020, 124–25). There is a division of opinion on the role that the Ban Treaty will play in the 2020 NPT Review Conference. Mukhatzhanova (2017) believes that the review cycle would have been a difficult one anyway given many
contentious issues such as nuclear weapon arsenal modernization by the US, China and Russia and lack of progress toward a WMD free zone in the Middle East, “but the treaty is likely to get most of the spotlight.” Other experts agree that there is a good chance that many states plan to contest the value of the TPNW versus the NPT at the 2020 Review (Tannenwald 2020, 125).

Michal Onderco (2020), a well-known expert from the Netherlands, reports that dissatisfaction with the pace of nuclear disarmament by the NPT-recognized nuclear weapon states led to discussions after the conclusion of the Ban Treaty negotiations with some observers suggesting “that TPNW parties may (or should) withdraw en masse from the NPT to show their displeasure with the NPT review process.” This would, of course, ensure the triumph of the JFK nightmare. Several preparatory meetings later it was clear that virtually all TPNW parties understand that wrecking the NPT is not in their interest and, accordingly, the TPNW has received low-key treatment thus far in the NPT Review Process. Onderco (2020, 143) believes that the WMD-free-zone issue “is widely seen as the main sticking point for the 2020 NPT Review, after being the chief cause of discord at the 2015 NPT Review Conference, and having seen no progress in the process in the meantime.” The TPNW will be an important (but secondary) issue at the Conference like the Additional Protocol he believes.

The 2020 Review Conference of the NPT is a coming important event. It was postponed from its original dates in the spring of 2020, because of the Covid-19 pandemic. The preparatory committee meetings over the previous three years were not encouraging; there was little convergence on the issues. Originally the Review Conference was scheduled for April 27–22 May 2020. On the 27th of April, the Conference President-designate of the 2020 NPT Review Conference Ambassador Gustavo Zlauvinen of Argentina announced that the Review Conference was being postponed by the parties until a later date, as soon as the circumstances would allow it (that is, with respect to what the pandemic will permit), but no later than April 2021.

At a United Nations Security Council session convened by Germany in February of 2020, in New York, the UN High Representative for Disarmament Affairs, Ms. Izumi Nakamitsu, stated that “relationships between States – especially nuclear-weapon States – are fractured. The specter of unconstrained nuclear competition looms over us for the first time since the 1970s. We are witnessing what has been termed a qualitative nuclear arms race – one not based on numbers, but on faster, stealthier, and more accurate weapons. Regional conflicts with a nuclear dimension are worsening, and proliferation challenges are not receding” (UN 2020).

“I hope the Review Conference can serve as a springboard for thinking on how to address the nuclear weapons challenges of our time,” the Council was told (UN 2020). The Review Conference now has been postponed to no later than August.

In January of 2021, Dr. Rebecca Davis Gibbons, an expert from the University of Southern Maine and the Harvard Belfer Center, published “Nuclear diplomacy in the Biden Administration.” She noted in the beginning that a dangerous global landscape existed as a result of President Trump’s withdrawal from the INF and Open Skies Treaty and his repudiation of the JCPOA. In addition, he had failed to extend the New Start Treaty within the five years permitted by the Treaty. This last issue has now been successfully addressed; the New Start Treaty was extended for five years on February 5th, 2021 – the last day when this could have been done.
Gibbons (2021) notes that, in addition to the important losses that arms control has suffered, “the great powers are engaged in renewed global competition that includes nuclear modernization plans. On the other hand, a large number of states . . . are calling for all states to renounce nuclear weapons.” This is, of course, because of the advent of the TPNW. For the Review Conference, Gibbons (2021) predicted a difficulty and rocky path toward a consensus final document, which in the end may prove to be impossible. She urges that the negative rhetoric about the Ban Treaty be scaled back and that at least the goal of the Treaty be endorsed even if states possessing nuclear weapons cannot become parties in the foreseeable future. Also, there should be a search for some common ground between the NPT and the Ban Treaty. One possible area could be reinforcement of assistance to victims of nuclear weapon programs, such as uranium miners dedicated to the acquisition of uranium to be used in nuclear weapons programs who have been harmed by radiation exposure. Perhaps there could be discussions of possible solutions to U.S.-Iran differences to make U.S. return to the JCPOA more likely.

Also, an article by Sico van der Meer, Research Fellow at the Clingendael Institute entitled “Nuclear risk reduction as an interim success for the NPT Review Conference,” published by the European Leadership Network in July 2020 should be mentioned here. Van der Meer had a number of suggestions on nuclear risk reduction as well as a strong statement about the issue of a WMD Free Zone in the Middle East for the Review Conference. With respect to the latter issue he said, “So far progress on key issues such as nuclear disarmament or the Weapons of Mass Destruction Free Zone in the Middle East, which contributed to a lack of consensus during the Review Conference of 2015, is barely noticeable.” He noted that a second failed Review Conference following 2015, could erode the broad international support for the NPT. “To enhance the norms which the NPT represents, progress should be made visible during the Review Conference. Nuclear risk reduction might be a feasible area to do so.”

Serious discussions on nuclear risk reduction could include agreed statements on certain nuclear policy areas: communications and cooperation, for example, declarations on dealerting and detargeting; operational measures limiting the risk of the unintended use of nuclear weapons; declarations of nuclear policy, statements like the famous statement of Presidents Reagan and Gorbachev in Geneva in 1985, “A nuclear war cannot be won and should never be fought;” and limiting rules affecting types of weapons and numbers, for example, a consensus expressing that a nuclear weapon type, that because of size or other factors is easier or more likely to be used, will never be constructed (Sico 2020).

The status of the 2020 NPT Review Conference is largely in disarray as are so many other institutions today and, if held in the near future, would be dominated by discussions of a new nuclear arms race, would be severely tested (once more) by the Middle-East-Zone-free-of-weapons-of-mass-destruction issue as well as by proposals related to the Ban Treaty. The Middle East Zone and the Ban Treaty are both highly controversial and could lead to a failed Conference along the lines of 2015. Other areas for consideration could include the lack of progress on the test ban; discussions of cooperation on the peaceful application of nuclear technologies in the face of the looming climate crisis; and perhaps some challenging proposals directed toward the CTBT. Probably the draft Final Document will be unacceptable to some Western states just as in 2015, for likely similar reasons – the WMD free zone in the Middle East and possibly the Ban Treaty.
However, even as the world community begins to seriously confront climate change, its effects will continue to increase for many years. The effects of climate change will put greater pressure on the NPT. The disappearance of arable land and fresh water sources with the expansion of deserts is a major symptom of climate change. To protect what they have, some smaller states will be tempted to reach for nuclear weapons. It is highly important to make the Treaty as strong as possible now so that it will have the capability to resist this pressure. A successful and positive Review Conference would help achieve this objective.

**Disclosure Statement**

No potential conflict of interest was reported by the author.

**Notes on Contributor**

*Ambassador Thomas Graham, Jr.* is Chairman of the Board of Directors of Lightbridge Corporation, a company which develops new and improved types of nuclear power fuel. These fuels are designed to improve the economics of existing and new nuclear power plants while enhancing safety characteristics, proliferation resistance and waste reduction.

Ambassador Graham served for nearly three decades at the US Arms Control and Disarmament Agency. During those years he played a critical role in the US government with respect to nuclear arms control and nonproliferation. From 1970 to 1997, he served as a senior US diplomat involved in every major international arms control and non-proliferation negotiation in which the United States took part.

President Clinton appointed him special representative for arms control, non-proliferation and disarmament, with the rank of Ambassador. In the years 1993 to 1995, Ambassador Graham led the successful US government effort to indefinitely extend the Nuclear Non-Proliferation Treaty. He also served for a decade and a half as general counsel of the Arms Control and Disarmament Agency, and Chief Legal Advisor of US arms control negotiating delegations. He also served as Acting Director of the agency in 1993. In this capacity he led the US effort to establish a long-term moratorium on the conduct of nuclear weapons tests which has now spread throughout the world. Due to the Moratorium there has been no nuclear weapon test anywhere in the world for several years and, except for in North Korea, for over 20 years. From 1994 to 1996, he was a principal figure in the worldwide effort to successfully support the conclusion of the Comprehensive Nuclear Test Ban Treaty.

Since 2019 Ambassador Graham has been Co-Chair, with Admiral the Nuclear Energy and National Security Coalition. He served on the International Advisory Board of the United Arab Emirates Peaceful Nuclear Power Program from 2009–2017. He has taught at—among others—Stanford University, University of Virginia, Georgetown University, University of Washington and Oregon State University. He is the author of 12 books, including several books on nuclear arms control and nonproliferation, and international relations and upwards of 70 published articles.

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