



A Nuclear Weapons Ban – Finding Common Ground

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Summary

The majority of non-nuclear weapon states have launched negotiations in the UN General Assembly for a treaty banning nuclear weapons. The nuclear weapon states, supported by allies such as Australia, are opposed and say they will not participate. This position is inconsistent with their undertaking in the Nuclear Non-Proliferation Treaty to pursue negotiations for nuclear disarmament. Elimination of nuclear weapons will require a series of agreements likely extending over many years. A ban treaty would be an important step, further stigmatizing nuclear weapons and reinforcing the goal of elimination. The nuclear weapon states should recognize they have many points in common with the non-nuclear weapon states, and participate constructively in the negotiations. For their part, the non-nuclear weapon states should be prepared to moderate their demands to achieve agreement: for example, in the first instance a ban on use would be more achievable than an outright ban.

1. On the need to eliminate nuclear weapons it is difficult to improve on the words of President Ronald Reagan:

A nuclear war cannot be won and must never be fought. The only value in (the US and Soviet Union) possessing nuclear weapons is to make sure they will never be used. But then would it not be better to do away with them entirely?¹

2. The 1985 Reagan–Gorbachev Reykjavik Summit showed it was within reach for the leaders of the superpowers to agree on a timetable for the elimination of nuclear weapons, and it paved the way for some of the most sweeping arms reductions in history.² It is striking that the imperative to eliminate nuclear weapons was so obvious to a Republican president over thirty years ago, but somehow this sense of purpose and urgency has been lost in the decades since.

3. During the Cold War, the prospect of MAD – mutually assured destruction, not only of the United States and the Soviet Union but of human civilization – prompted a global movement against nuclear weapons. Today the general public assumes the danger of nuclear war has passed, and gives little thought to the continuing existence of nuclear weapons. In addition to the U.S and Russia, today seven other countries have nuclear weapons:

- (a) the other nuclear weapon states (NWS) recognized by the Nuclear Non-Proliferation Treaty (NPT) – China, France and the United Kingdom; and
- (b) four countries outside the NPT – India, Israel (which does not acknowledge its nuclear arms), North Korea and Pakistan.

4. While the danger of a war of annihilation between the US and Russia has mostly (though not entirely) passed, and both countries have made substantial reductions in their nuclear weapon numbers, each still has over 1,500 “strategic” weapons deployed, mostly on high

¹ 1984 “State of the Union” address, <https://www.thereaganvision.org/quotes/>

² The 1987 Intermediate-Range Nuclear Forces (INF) treaty and the 1991 Strategic Arms Reduction Treaty (START).

alert, with thousands more in reserve or classed as 'tactical' (battlefield) weapons.

5. The risk of nuclear war between India and Pakistan is an ongoing concern, and developments in North Korea are becoming increasingly dangerous. In addition there is a continuing risk of proliferation, that is, additional countries acquiring nuclear weapons. North Korea has crossed the nuclear threshold. Three countries – Iraq, Libya and Syria – had nuclear weapon programs which were stopped through external intervention. Iran's nuclear ambitions have been curbed for the time being, but a long-term solution is needed. A number of countries have *nuclear latency*, that is, the capability to produce nuclear weapons if they so decide. In this regard there is concern that Japan and South Korea may seek nuclear weapons if the North Korean threat worsens.

6. Two things are certain: while some countries have nuclear weapons others will also want them, and while nuclear weapons exist there is a real danger – even an inevitability – that they will be used, whether intentionally, by accident, or by rogue or terrorist action.

7. The NPT sets out the objective of a nuclear-weapon-free world, by prohibiting nuclear weapons for the non-NWS and requiring *all parties*, obviously including the NWS, to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament” (Article VI).

8. There have been negotiations outside the NPT framework that have contributed to the objectives of Article VI, such as the bilateral US–Russia arms control agreements and the Comprehensive Nuclear-Test-Ban Treaty (CTBT). However, there have been no multilateral negotiations on nuclear arms reductions, and certainly none on nuclear disarmament. One complication is that the Article VI commitment does not apply to the four countries outside the NPT. The NPT NWS will not commit to major arms reductions, let alone disarmament, without the non-NPT states doing likewise. So there is a need for a negotiating process that complements but is wider than the NPT.

9. It is against this background that the non-NWS have now acted to initiate negotiations on a global treaty banning nuclear weapons. This initiative has proven to be highly contentious and it is not clear how it will proceed. If nothing else, the initiative is important in reminding the world of the continuing danger posed

by nuclear weapons and the need to address this.

The Proposal for Ban Negotiations

10. On 23 December 2016 the United Nations General Assembly adopted a resolution for negotiations to be convened in 2017 on a *legally binding instrument to prohibit nuclear weapons leading towards their total elimination*. The negotiation sessions for 2017 are scheduled for March and June–July in New York.

11. The vote was 113 in favour of negotiations, 35 against and 13 abstentions. The voting showed serious division, not just in the numbers but in the way the voting coalesced. Essentially there was a split between NWS, together with a number of their allies, and the great majority of non-NWS. The 35 opponents included four of the five NPT NWS, namely the US, Russia, France and the UK. The fifth, China, abstained. Of the four non-NPT nuclear states, Israel opposed and India and Pakistan abstained. North Korea was not present, but in the preceding UNGA First Committee meeting had voted for negotiations. (For many opponents, North Korea's support will confirm that the negotiations cannot be taken seriously.)

12. Australia has taken a prominent position in the opposition to these negotiations. Foreign Minister Julie Bishop has argued “We must engage, not enrage nuclear countries,” and has dismissed the proposal for a ban as an “emotionally appealing” approach that would only “divert attention from the sustained, practical steps needed for effective disarmament.”³

13. No one is proposing that the ban treaty will be the only treaty required to eliminate nuclear weapons. A series of steps and agreements will be required, probably along the lines outlined in the report of the International Commission on Nuclear Non-Proliferation and Disarmament:⁴

- (a) de-alerting (removing nuclear weapons from immediate launch readiness);
- (b) no first use/sole purpose declarations – nuclear-armed states affirm that the sole purpose of nuclear weapons is to deter nuclear attack;
- (c) entry into force of the CTBT;
- (d) a fissile material cut-off treaty (FMCT);

³ <http://www.smh.com.au/comment/we-must-engage-not-enrage-nuclear-countries-20140213-32n1s.html>

⁴ *Eliminating Nuclear Threats*, icnd.org/reference/reports/ent/pdf/icnd_report_eliminatingnuclearthreats.pdf

- (e) a series of arms reductions (some bilateral, some multilateral), with arrangements for verification and for irreversible transfer of fissile material from weapons use;
- (f) nuclear archaeology to account for historical fissile production;
- (g) a range of monitoring, transparency and confidence-building measures.

14. Negotiating these steps and agreements is likely to extend over many years. The ban negotiations could establish a framework for pursuing these negotiations under the mandate of the UN General Assembly.

Irreconcilable Differences?

15. The NWS opposing negotiations argue that a ban treaty is totally unrealistic when for the foreseeable future nuclear weapons will remain essential to their national security. Other arguments include:

- (a) the proposal will divert attention from the practical steps needed for disarmament;
- (b) a ban will be unenforceable and therefore would raise unrealistic expectations;
- (c) the treaty will be meaningless because the countries with nuclear weapons will not join and will not be bound by it;
- (d) any suggestion of a deadline or a time-bound process is unrealistic and totally unacceptable;
- (e) the ban proposal is divisive and will damage the NPT.

16. Against all this, there is increasing frustration on the part of most non-NWS that the commitment in the NPT to pursue negotiations on nuclear disarmament is not being honoured. Despite this commitment, the NWS are behaving as if nuclear weapons are here to stay. In particular, maintaining the option of *first use* of nuclear weapons, as distinct from deterring nuclear attack by a policy of nuclear retaliation, is seen as clearly inconsistent with a commitment to nuclear disarmament. Other actions seen as inconsistent with this commitment include: maintenance of nuclear weapons in a state of high alert; nuclear weapon modernization programs; increases in nuclear weapon numbers; and threatening the use of nuclear weapons.

17. The non-NWS maintain there is an urgent need to change the mindset around nuclear weapons. Delegitimizing nuclear weapons is an

essential step in persuading nuclear-armed states that these weapons must be eliminated. Ban proponents point to the histories of those treaties that have outlawed an entire class of weapon, such as the Chemical Weapons Convention (CWC) and the Mine Ban Treaty. Most countries were prepared to join these treaties, prohibiting use, production, stockpiling and retention of chemical weapons and landmines respectively, even though during negotiation and the time of entry into force many countries possessed such weapons and a number of countries have remained outside the treaties.

18. The nuclear-armed states respond that the parties to these treaties had concluded the weapons concerned were not essential to their national security, so they were prepared to commit to a timetable for elimination. This is far from the situation today for nuclear weapons.

Reviewing the Objections

Unrealistic and Distraction from Practical Steps for Disarmament

19. NPT Article VI recognizes that disarmament will require the negotiation of *effective measures* – this suggests a series of negotiations leading to further agreements on specific steps, as outlined above. Article VI also recognizes the link between nuclear and conventional forces, and the need to address conventional disarmament. Far from diverting attention from these various practical steps, a ban treaty would instil a sense of purpose and urgency, currently lacking, to pursue them.

Unenforceable

20. The ban treaty is not intended to be enforceable, just as NPT Article VI is not enforceable. The value of the treaty will be as a declaration of an international norm against the use of nuclear weapons and a commitment to negotiate further steps leading to their elimination.

21. Though the treaty would not be legally enforceable, there will be a powerful deterrent against violation – if a party uses nuclear weapons, other parties can be expected to retaliate, including with nuclear weapons. The situation would be similar to the 1925 Geneva Protocol against use of chemical weapons – compliance was strengthened by the likelihood that violation would result in retaliation in kind. While arguably nuclear retaliation is unlawful (see below), a transgressor could not

rely on the protection of a law that it has violated. So in reality no party's national security would be jeopardized by a ban treaty, and the security of every country would benefit if the treaty helps to progress nuclear disarmament.

Meaningless Without Nuclear-Armed States

22. This all depends on the provisions of the treaty. It is not possible to say now, when there is no text on the table, that the nuclear-armed states will not join. If these countries participate in the negotiations they may well achieve a text they could accept.

Deadline for Nuclear Disarmament is Unrealistic

23. Again, this all depends on what the treaty says. Specific deadlines would not be realistic at this stage, but an outline of steps and an indicative timeframe for some of these steps might be achievable. The point of engaging in negotiations is to see if common ground can be reached.

Divisive and Damaging to the NPT

24. The opposite is true. The NPT will be damaged if the NWS refuse to participate in negotiations as called for by Article VI. Far from damaging the NPT, the negotiations will help advance the objectives of the NPT.

Points in Common

25. Despite the strongly held sentiments outlined earlier, there are some common understandings which both sides should be able to acknowledge. We can hope that if the nuclear-armed states reflect on these understandings they will see there is a basis for engagement with the non-NWS.

Taboo against Using Nuclear Weapons

26. Notwithstanding a number of threats or perceived threats, a powerful "taboo" against the use of nuclear weapons has held since 1945. Some commentators argue that nuclear weapons have not been used because of their impracticality (lack of suitable targets, doubts they would result in a decisive outcome) or the risk of escalation, but there is no doubt political and moral considerations have been predominant. One factor has been recognition that any use would reduce the barriers against subsequent use, with unforeseeable consequences. Political leaders have been constrained by

world opinion and concerns about their place in history.

27. The taboo is important, but it is not absolute. While nuclear weapons are politically unusable in circumstances where calm reason prevails, this would not be the case in a situation of extreme pressure where decision-makers believe their country is under attack. During and even after the Cold War there were several instances of false alarms or errors that could have resulted in war. If the major powers have been vulnerable to such problems, there is even more reason for concern about the command and control systems of some of the smaller nuclear-armed states – and it must be questioned whether the taboo against nuclear use is shared by the current leadership of every country that possesses nuclear weapons.

Catastrophic Global Consequences of Use

28. This issue has several aspects: the destructive power of nuclear weapons; the impossibility of limiting the effects to the intended target; and uncertainty whether a "limited" nuclear exchange would be possible without uncontrollable escalation. The impact of nuclear war could not be limited to the protagonists.

29. The spread of radioactive fallout could not be controlled, and widespread climatic effects are likely due to dust and soot particles from nuclear explosions and fires – resulting in lower temperatures, a phenomenon described as nuclear winter. Although there is debate whether the dangers of nuclear winter have been overstated,⁵ studies suggest that even a "limited" regional war, say between India and Pakistan each using 50 nuclear weapons, would have global consequences.⁶ These could include lower agricultural production – so nuclear winter would lead to nuclear famine – and increased UV radiation resulting from damage to the Earth's ozone layer, with consequent DNA damage and increased cancer rates.

Use Almost Certainly Unlawful

30. Reinforcing the political and moral constraints against nuclear use is the legal position that *any* use of nuclear weapons would almost certainly violate international humanitarian law, as set out in the Geneva Conventions and Protocols and customary international law. The

⁵ <http://nukespp.blogspot.com.au/2016/05/nuclear-winter.html>

⁶ <https://www.icrc.org/eng/assets/files/2013/4132-2-nuclear-weapons-global-food-production-2013.pdf>, <https://www.wired.com/2008/04/regional-nuclear>

basic principles of international humanitarian law relating to conduct of war include:

- (a) distinction – the parties must distinguish between combatants and civilians;
- (b) military necessity – an action must be aimed at a military objective; and
- (c) proportionality – harm caused to civilians must be proportional and not excessive in relation to the anticipated military advantage.

31. Protocol I to the Geneva Conventions prohibits indiscriminate attacks on civilian populations, including use of technology whose scope of destruction cannot be limited.⁷ Therefore, a war that does not distinguish between civilian and military targets would be in violation of international humanitarian law. Protocol I also prohibits means of warfare that “cause widespread, long-term, and severe damage to the natural environment.”

32. It is difficult to see how the use of nuclear weapons could ever be consistent with these principles. Relevant considerations include:

- (a) the destructive power of even “small” nuclear weapons;
- (b) the deliberate targeting of cities and populations (so-called *countervalue* targets);
- (c) the inevitable spread of radioactive contamination; and
- (d) the prospect of nuclear winter and associated effects, discussed above.

33. These issues were considered by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.⁸ The General Assembly had sought an advisory opinion on the question, *Is the threat or use of nuclear weapons in any circumstances permitted under international law?*

34. While the Court found: “There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such,” it also affirmed that international humanitarian law applies in cases of use, or threat of use, of nuclear weapons. The ICJ concluded that the indiscriminatory nature, destructive force and environmental consequences of nuclear weapons were such that “the use of nuclear weapons would generally be contrary to the rules of in-

ternational law ... and in particular the principles and rules of humanitarian law.”

35. In a much misunderstood passage, the ICJ said 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.” This does not, as some have argued, amount to a conclusion that in some circumstances use of nuclear weapons would be legal. Rather, the ICJ considered it was unable to rule on the policies of deterrence and retaliation, and stressed that states must always comply with rules protecting civilians from the effects of warfare.

36. Interestingly in light of Australia’s opposition to the ban negotiations, in the ICJ proceedings Australia argued that the effects of nuclear explosions are inherently uncontrollable and indiscriminate and that the use of nuclear weapons is therefore unlawful in all circumstances.

Existing Prohibitions

37. The concept of banning nuclear weapons has already been agreed by NPT parties. In the case of non-NWS, the NPT bans nuclear weapons absolutely. In the case of the NPT NWS, a commitment to pursue a ban is implicit in the commitment by these states to negotiate for disarmament (Article VI). Nuclear weapon bans have also been agreed for those regions covered by nuclear-weapon-free zone treaties. Currently there are eight such treaties, prohibiting the parties from acquisition, possession, stationing, testing and use of nuclear weapons in the areas concerned:

- (a) 1959 Antarctic Treaty;
- (b) 1967 Outer Space Treaty;
- (c) 1967 Treaty of Tlatelolco (Latin America);
- (d) 1971 Seabed Arms Control Treaty;
- (e) 1985 Raratonga Treaty (South Pacific);
- (f) 1995 Bangkok Treaty (South East Asia);
- (g) 1996 Pelindaba Treaty (Africa); and
- (h) 2006 Semipalatinsk Treaty (Central Asia).

In addition, in 1992 Mongolia declared itself a single-state nuclear-weapon-free zone.

Reasonable Expectations

38. No good purpose will be served by the nuclear-armed states refusing to participate in ban negotiations. True, if the nuclear-armed

⁷ http://en.wikipedia.org/wiki/Protocol_I_-_cite_note-commentary-4#cite_note-commentary-4

⁸ <http://www.icj-cij.org/docket/files/95/7495.pdf>

states refuse to join, a ban treaty will not be effective, at least in the near term. Over the longer term, however, the treaty could be important for reinforcing the unlawful nature of nuclear weapons. It is in the interest of the nuclear-armed states to participate so they can influence the direction and substance of the negotiations. After all, if ultimately they are faced with a treaty text they consider objectionable, they cannot be compelled to accept it. But if they refuse to participate in negotiations, they would have no basis for complaint that the text does not reflect their position.

39. There are two broad areas to which a prohibition on nuclear weapons would apply: *possession*, including production, stockpiling and retention, and *use*. Regarding use, realistically agreement should be achievable on a prohibition on *first use* – not all the nuclear-armed states would agree immediately, but as they reflect on this they will see that a ban on first use (essentially a no first use commitment) would be consistent with the nuclear taboo and the ICJ Advisory Opinion. Today only two nuclear-armed countries, China and India, have an explicit no first use policy. In practice others are close to this, through a common sentiment, albeit not yet stated as policy, that the primary purpose, or even the sole purpose, of nuclear weapons is to deter nuclear attack. The principle of sole purpose is effectively a principle of no first use.

40. Could the nuclear-armed states go further, and agree to a prohibition on *any* use of nuclear weapons? India has been advocating such a treaty since 1982. The other nuclear-armed states might object that a prohibition on use is also a prohibition on nuclear retaliation, and that would negate nuclear deterrence. This is not a convincing argument because, as mentioned earlier, in the event of a failure of the object of the treaty (i.e. a violation of the ban on use), the other parties would consider themselves no longer bound and could decide to retaliate in kind – so as a matter of fact deterrence continues to apply. Parties could choose to lodge reservations stipulating that their commitment to the ban would end if they were attacked by nuclear weapons (as was done with the 1925 Geneva Protocol), but in any case a party contemplating violation would have to assume the likelihood of nuclear retaliation. So, effectively a prohibition on use would amount to a *no first use* commitment. Seen this way, acceptance by the nuclear-armed states should not be unthinkable.

41. A prohibition on possession is more complicated. Since by definition the nuclear-armed states currently possess nuclear weapons, they are unlikely to agree to a prohibition that flies in the face of facts. On the other hand, in the context of a framework of progressive arms reductions leading towards eventual elimination, it should be possible for them at least to agree to no further increases in nuclear weapons, together with a commitment to taking further steps towards elimination, that is, possession will be prohibited in the future. This would make possession a temporary situation, without being specific about the duration of “temporary.”

42. This discussion shows there is much to negotiate. The areas of difference can be narrowed as negotiations progress. This is a reason for the nuclear-armed states to engage constructively in the negotiations. The non-NWS, for their part, must be realistic about what is achievable now, and be prepared to engage on ideas that progress the disarmament agenda, such as those outlined here.

Conclusion

43. The NPT NWS must remember they are committed, in the terms of Article VI, to pursue negotiations in good faith on effective measures relating to disarmament. As the ICJ pointed out in its 1996 Advisory Opinion, this is an obligation not only to negotiate but to seek the outcome set out in Article VI. Considering that the NPT has been in force for over 46 years, it is not convincing to argue it is too soon to start multilateral disarmament negotiations. If not now, when?

44. Of course progressing towards nuclear disarmament is not without its dangers. It is well understood that as nuclear weapons are reduced to much lower numbers the risk of preemptive strike might increase. It is also well understood that in a world without nuclear weapons the temptation for nuclear proliferation could be much stronger. However, the current situation, with the retention of large numbers of nuclear weapons and strategies based on their use, is even more dangerous.

45. For all nuclear weapons to be eliminated, the world will have to be very different to today – it won't be today's world minus nuclear weapons, but a new world where states are committed to collective security and peaceful settlement of disputes. The difficulties of achieving this is not a reason to throw up our hands and say disarmament is an impossible

dream – if nothing changes we will end up with a nuclear catastrophe. Change must start somewhere. A treaty which reinforces the stigmatization of nuclear weapons and establishes a framework for further steps towards disarmament seems an excellent place to start.

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APLN and CNND

The **Centre for Nuclear Non-Proliferation and Disarmament (CNND)** contributes to worldwide efforts to minimize the risk of nuclear-weapons use, stop their spread and ultimately achieve their complete elimination. The director of the Centre is Professor Ramesh Thakur. See further <http://cnnd.anu.edu.au>.

The **Asia Pacific Leadership Network (APLN)** comprises around eighty former senior political, diplomatic, military and other opinion leaders from fifteen countries around the region, including nuclear-weapons possessing states China, India and Pakistan. The objective of the group, founded by former Australian Foreign Minister and President Emeritus of the International Crisis Group Gareth Evans, is to inform and energize public opinion, and especially high level policy-makers, to take seriously the very real threats posed by nuclear weapons, and do everything possible to achieve a world in which they are contained, diminished and ultimately eliminated. The co-Convenors are Professors Chung-in Moon and Ramesh Thakur. The Secretariat is located at the East Asia Foundation in Seoul, Republic of Korea. See further www.a-pln.org.

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