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**The NPT and
the Prohibition Negotiation:**

Scope for Bridge-building

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Introduction

In recent years, the debate on nuclear weapons has been dominated by differences over both the pace of disarmament and how to galvanize it. A humanitarian focus on the risks and consequences of a nuclear conflict or an accidental detonation has had the effect of drawing international attention to the necessity for taking nuclear disarmament forward. The means for doing so, however, are highly disputed especially among the parties to the NPT. This has accentuated the divide between states that do not possess nuclear armaments on the one hand and, on the other, those that do as well as those in alliances with nuclear-weapon states that rely on the perceived deterrent effect of nuclear weapons for their security.

These two papers were prepared for a panel event held during the first preparatory committee meeting of the Treaty on the Non-Proliferation of Nuclear Weapons (known as the Non-Proliferation Treaty, NPT) in Vienna on 2 May 2017. Organized by the Hiroshima Prefectural Government, the event aimed to elucidate a variety of perspectives on how to facilitate building bridges towards nuclear disarmament.

The Peace Promotion Project Team of the Hiroshima Prefectural Government has been active in canvassing ways to nurture a bridging of the longstanding divide between nuclear weapon-possessing states and non-nuclear-weapon states. This objective, which is shared by UNIDIR, requires encouraging a greater understanding of the various points of view on how best to achieve the common goal of the eventual elimination of nuclear armaments. UNIDIR welcomes the opportunity to work with the Hiroshima Prefecture in this bridge-building role.

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The Mirage of Nuclear Deterrence—Lessons for Allies

Paul Meyer

The almost 50-year-long rivalry between the superpowers (the Soviet Union/Russian Federation and the United States of America) that we refer to as the Cold War was the primary driver for the development of security policies and practices regarding nuclear weapons. It was these two powers, in possession of the bulk of nuclear arms, over 90% to this day, that determined the parameters of the nuclear competition and the doctrines that should apply to them. In both cases, the superpowers sought to provide a nuclear weapon dimension to the security guarantees offered to their allies, while maintaining tight control over these weapons. The entry into force of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1970 codified this non-proliferation obligation, although the United States successfully argued that its nuclear sharing arrangements within the North Atlantic Treaty Organization (NATO) alliance were “grandfathered” and did not represent a violation of Article I as American “control” of the weapons was maintained.

The Soviet Union’s early termination in 1949 of the United States’ monopoly on the atomic bomb introduced a new factor in the East-West security equation. Its full significance took some time to be appreciated. On the one hand, there was recognition that the destructiveness of nuclear weapons had transformed the usual military calculus and had rendered war “unthinkable” (in the words of General Leslie Groves, the head of the Manhattan Project). At the same time, the desire for military supremacy remained powerful and fuelled an ever-accelerating nuclear arms race. The same General Groves who early on had supported the elimination of atomic bombs under international control had also stated “if there are to be atomic bombs in the world we must have the best, the biggest and the most”.¹

Origins of deterrence

Notably, once the Soviet Union had broken the United States monopoly of the atomic bomb in 1949 the concept of “deterrence” emerged as the dominant approach to maintaining stability between the superpowers and managing the risk of nuclear conflict breaking out. The threat of employing nuclear weapons would, according to this doctrine, prevent their use at all. To sustain this stable situation would require both sides to maintain a state of mutual vulnerability in which both would be exposed to Mutual Assured Destruction (MAD) if nuclear weapons were used. This in turn led to the goal of “strategic stability” whereby neither side would have an incentive to strike first and both sides would retain the capacity for a massive retaliation by means of survivable second-strike nuclear forces if they were attacked. This MAD-based strategic policy was deemed to be the best means of preventing a full-scale thermonuclear war. Despite its counter-intuitive nature (that is, ensuring continued vulnerability of each country), MAD was considered the essential underpinning of deterrence. As Prime Minister of the United Kingdom

¹ E. Schlosser, *Command and Control*, The Penguin Press, New York, 2013, p. 75.

Winston Churchill described it in a 1955 speech to the British House of Commons: “Safety will be the sturdy child of terror, and survival the twin brother of annihilation”.²

Policy inertia

The policy of nuclear deterrence has proven both convenient and enduring for nuclear-weapon states and those non-nuclear-weapon states in alliance with them: convenient in that its proponents can claim that this posture will ensure that nuclear weapons are not used and that nuclear deterrence represents an effective war prevention strategy. This logic has been most developed over the years by NATO, which affirms: “The fundamental purpose of NATO’s nuclear capacity is to preserve peace, prevent coercion and deter aggression”.³ Although the circumstances in which NATO might employ nuclear weapons are described as “extremely remote”, its nuclear policy is intentionally ambiguous as to use. Significantly, even NATO’s nuclear leader, the United States, has been unwilling to narrow the scope for its nuclear forces, with the Obama administration’s Nuclear Posture Review stopping short of endorsing deterring nuclear attack as the “sole” purpose for American nuclear forces, while suggesting that this remained an eventual goal.⁴

The nuclear deterrence doctrine of NATO has also been enduring, with “an appropriate mix of nuclear, conventional and missile defence capabilities” presented over the decades as “core elements” of NATO’s strategy and the United States strategic forces depicted as “the supreme guarantee of the security of the Allies”.⁵ While NATO makes a bow towards arms control and disarmament by reaffirming its resolve “to create the conditions for a world without nuclear weapons”, it also asserts (tautologically): “As long as nuclear weapons exist, NATO will remain a nuclear alliance”.⁶ NATO policy continues to be premised on the unique quality of nuclear weapons “... to impose costs on an adversary that would be unacceptable and far outweigh the benefits that an adversary could hope to achieve”.⁷

Proliferation risks

Nowhere in this policy legacy is there a recognition that the manifold security benefits NATO ascribes to its nuclear forces would suggest that other states should acquire these capabilities as well. Support is expressed for the non-proliferation aims of the NPT, but given the centrality that NATO still accords to nuclear forces it would seem a case of “do what we say, not what we do” with respect to the rest of the world. A more realistic assessment would acknowledge that as long as some states possessed nuclear weapons there would be others wishing to acquire them.

² Cited in J. Schell, *The Fate of the Earth*, Knopf, New York, 1982, p. 197.

³ *NATO Summit Communiqué*, Warsaw, 8–9 July 2016, para. 54, www.nato.int.

⁴ United States Department of Defense, *Nuclear Posture Review Report*, 6 April 2010, www.defense.gov.

⁵ *NATO Summit Communiqué*, Warsaw, 8–9 July 2016, para. 53.

⁶ *Ibid.*, para 53.

⁷ *Ibid.*, para 54.

Nuclear weapons have been described as “the great equalizer” in contemporary security affairs.⁸ In this capacity, these arms can be seen as providing a defence against militarily superior adversaries by threatening a devastating blow that would (to restate the NATO creed cited above) “far outweigh the benefits that an adversary could hope to achieve”. Some observers have concluded that if Saddam Hussein really had possessed nuclear weapons or if Muammar Gaddafi had retained his weapons of mass destruction (WMD), then the military interventions of their countries would not have occurred.⁹ Clearly this appears to be the lesson learned by the leader of the Democratic People’s Republic of Korea (DPRK), Kim Jong-un, who has spearheaded a crash nuclear weapon and ballistic missile development programme in his country, explicitly justified as providing a deterrent to United States hostility and its nuclear arsenal.¹⁰

Events of recent years have shattered the hope that Pyongyang could be persuaded, with the right incentives, to terminate its nuclear weapons programme and revert to upholding the objective of a “denuclearized” Korean peninsula. The diplomatic process of the six-party talks represented this aspiration embodied in the joint statement of 2005 to work towards the denuclearization aim. The six-party talks have, however, been moribund for years and a long series of United Nations Security Council resolutions with ever more elaborate sanctions have failed to produce a change of course in the DPRK’s nuclear activities.

The proliferation risks inherent in the wake of the DPRK’s actions, including its unprecedented defection in 2003 from the NPT, are both clear and alarming. The nuclear proliferation represented by this country in north-eastern Asia could “entice neighbouring states, even allies of the United States, to seek nuclear weapons because of their fear of abandonment in a crisis”.¹¹ The persistence of historic animosities and territorial disputes and the comparatively close proximity of three nuclear-armed states (China, the Russian Federation and now the DPRK) have rendered this region susceptible to an international security crisis. Both Japan and the Republic of Korea have sufficient regional security concerns and relevant industrial capabilities to test their commitment to continued nuclear abstinence. Add to this uncertainty about American security commitments introduced by the contradictory utterances of its President Donald Trump regarding alliance relationships and nuclear weapons, and it is no wonder that dormant debates in Seoul and Tokyo concerning nuclear options have been revived.

Similar discussions in Europe have been prompted by deteriorating relations between Moscow and Washington with negative strategic impacts for Europe, alongside the same confused signals emanating from the White House. The United Kingdom of Great Britain and Northern Ireland’s imminent departure from Europe as a result of Brexit has also prompted debate over the desirability of a “Euro-deterrent”

⁸ See K. Kartchner, “The great equalizer”, *SAIS Review of International Affairs*, vol. 24:1, 2004 (review of: S. Sagan and K. Waltz, *The Spread of Nuclear Weapons: a Debate Renewed*).

⁹ See, for example, S. Gowans, “Why UN sanctions against North Korea are wrong”, *Global Research*, 8 March 2016.

¹⁰ T.V. Paul, “Disarmament revisited: Is nuclear abolition possible?”, *Journal of Strategic Studies*, vol. 35:1, February 2012, pp. 156–158.

¹¹ *Ibid.*, p. 158.

based on France's nuclear forces.¹² Whatever the feasibility of such arrangements, they point to an unsettled regional security environment that could exacerbate nuclear proliferation impulses.

The failure to realize any progress in fulfilling the Middle East resolution adopted as part of the 1995 NPT Review and Extension Conference casts a shadow over its goal of bringing about a WMD-free zone in the region. The inability to convene the conference on the Middle East WMD-free zone that was promised at the 2010 NPT Review Conference has further weakened the authority of this treaty—a key bulwark of non-proliferation. This is especially unsettling since the Middle East is a region that has given rise to the majority of alleged violations of the non-proliferation commitment by NPT states parties (e.g. Iran, Iraq, Libya and Syria).

Finally, the nuclear proliferation dynamic is tense and arguably prone to escalation in South Asia. Resolutely standing outside the NPT community, India and Pakistan are engaged in an ever-accelerating nuclear arms race. The ramping up of nuclear weapon arsenals and delivery systems, plus the introduction of destabilizing anti-ballistic missile defences and doctrinal asymmetries (e.g. Pakistan's early use posture versus India's no-first-use policy) heightens the potential for nuclear conflict with dire consequences for regional and global security.

This enumeration of nuclear proliferation pressures should alert us to the perilous nature of the current international security context. In order to avoid a reversion to a second Cold War, or a breakdown in the global non-proliferation regime embodied in the NPT (or both), will require some dedicated corrective action on the part of nuclear-weapon states and non-nuclear-weapon states alike. Such a restorative strategy would require a critical assessment of the efficacy of nuclear deterrence; a fuller consideration of providing extended deterrence without reliance on nuclear weapons and a determined politico-diplomatic strategy to reinvigorate the global machinery for nuclear non-proliferation and disarmament. This paper considers each of these elements in turn.

Limits to deterrence

The study of deterrence and the accompanying positions and policies adopted to maintain it have been essentially confined to the superpowers' experience and the Cold War confrontation between the two alliances they led. To the extent that other states have been examined, it has usually been confined to questions related to why they decided to acquire nuclear weapons (or not to). There has also been the tendency to equate deterrence with the simple acquisition of nuclear weapons and to assume it functions in a universal manner. This "acquisition" bias is a problematic assumption and like other aspects of the quasi-theological doctrine of deterrence does not hold up well under empirical scrutiny.

The assumption that the mere possession of nuclear weapons provides an effective deterrent effect for the possessing state is not borne out in reviewing the historical record. Since the advent of the atomic era there have been several examples of a

¹² M. Fisher, "Fearing U.S. withdrawal, Europe considers its own nuclear deterrent", *The New York Times*, 6 March, 2017.

non-nuclear-weapon state engaging in armed conflict with a nuclear-weapon state and not deterred by this fact in initiating conflict:¹³

1948	The Soviet Union & the United States – Berlin Blockade
1952–1953	DPRK/China & the United States – Korean War
1960	Algeria & France – Algerian War for Independence
1962–1975	North Viet Nam & United States – Viet Nam War
1967	Arab states & Israel – Six-Day War
1973	Egypt/Syria & Israel – Yom Kippur War
1979	Viet Nam & China – Border War
1982	Argentina & the United Kingdom – Falkland Islands (Malvinas) conflict
1991	Iraq & Israel – Scud attacks during First Gulf War

Deterrence would also seem to have failed in two instances of armed conflict between two states possessing nuclear weapons:

1969	China & Soviet Union – Uzzuri river clashes
1999	Pakistan & India – Kargil incursion

This review of the historical record of state-initiated conflict demonstrates that the simple possession of nuclear weapons is not a sufficient condition for ensuring deterrence. Nuclear deterrence has been even less effective with respect to challenges mounted by non-state actors against nuclear-armed states (e.g. Al Qaeda and ISIS). It would seem that the blind faith placed in the war prevention qualities of nuclear deterrence is not substantiated in the experience of the real world. Furthermore, there are dangers inherent in the various modes of nuclear postures and employment doctrines that characterize the nine nuclear-armed states.¹⁴ These run the spectrum from a focus on retaliatory capabilities coupled to doctrines of no-first-use to dispersed and decentralized nuclear systems and launch authority linked to doctrines of early and initial use.¹⁵

¹³ This listing and the notion of “acquisition bias” is derived from: V. Narang, *Nuclear Strategy in the Modern Era: Regional Powers and International Conflict*, Princeton University Press, 2014. Note that these designations do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations nor UNIDIR concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

¹⁴ The nuclear armed states are considered to be China, the Democratic People’s Republic of Korea, France, India, Israel, Pakistan, the Russian Federation, the United Kingdom and the United States of America. This is distinct from the smaller group of five nuclear-weapon states referred to in the NPT (China, France, the Russian Federation, the United Kingdom and the United States of America).

¹⁵ *Understanding Nuclear Weapon Risks*, UNIDIR, April 2017.

The risks represented by these conflicting nuclear postures can be compounded by differences in political culture and crisis reflexes. Drawing upon the Indo-Pakistan rivalry one analyst has observed that:

Other considerations at the domestic level, such as civil-military relations and resource constraints, regulate a state's choice of nuclear posture. For example, the asymmetric escalation posture is not only financially and organizationally demanding, but it forces a state's leadership to be prepared to devolve nuclear assets and authority to military end users in order to maintain the credibility of first-use options. This increases the risk of unauthorized and accidental use of nuclear weapons and can impose tremendous strain on a state's civil-military organs.¹⁶

Of course the risk of unintended or unauthorized use of nuclear weapons is not limited to South Asia. Several incidents in the trans-Atlantic security context both during and after the Cold War are sobering reminders of the risks of human and/or technical error in a nuclear deterrent relationship in which hundreds of intercontinental ballistic missiles are still retained on a high-alert status.¹⁷ Some have suggested that the fact that we have been able to avoid to date a nuclear weapon disaster, while maintaining a deterrence posture still predicated on immediate dispatch of massively destructive force, is a matter of "dumb luck" that sooner or later will run out.¹⁸

Alternatives to nuclear deterrence

Proponents of the abolition of nuclear weapons need to consider alternatives to nuclear deterrence in a world still marked by armed conflicts. Certainly the intention is not, as some charge, to make the world safe for conventional war. The specific military objectives traditionally assigned to nuclear forces are increasingly vulnerable to a new generation of conventional weaponry. As one analyst wrote:

With advancing technology, many of the tasks formerly assigned to nuclear forces can be performed by advanced, precision-guided conventional forces, including drones in some cases.¹⁹

Much of this weaponry can also be acquired and maintained at a fraction of the costs associated with the specialized infrastructure and procedures required by nuclear arms. The rise of these new conventional capabilities, especially those featuring rapid and highly accurate delivery, has prompted concerns by potential adversaries of the United States such as China and the Russian Federation. The Russian Federation, in particular, has cited the development of new conventionally armed American weapon systems such as Prompt Global Strike alongside ballistic missile defences and possible weaponization of outer space as constituting threats

¹⁶ Ibid.

¹⁷ H.M. Kristensen and R.S. Norris, "Status of world nuclear forces", *Federation of American Scientists*, 2017, FAS.org.

¹⁸ G. Evans, "Restoring reason to the nuclear debate", *Bulletin of the Atomic Scientists*, 16 November 2015.

¹⁹ E. Ifft, "A challenge to nuclear deterrence", *Arms Control Today*, vol. 47:2, March 2017, p. 12.

to its nuclear deterrent that must be addressed if further bilateral nuclear force reductions are to be resumed. Ironically, given the perceived advantages held by the United States in this new category of armament, the emergence of conventional alternatives to nuclear deterrence “is making the elimination of nuclear weapons more difficult”.²⁰

This current impediment to a resumption of bilateral strategic force reduction negotiations between the Russian Federation and the United States cannot be reduced to mere technological developments or changing threat perceptions. Deterioration in the overall East-West relationship, and especially between Moscow and Washington, has eroded trust levels and restricted contacts necessary for any resumption of strategic cooperation. This stalemate in relations between the leading nuclear-weapon states is a reminder that even if conventional capabilities for replacing nuclear weapons exist, asymmetries in their possession and potency would work against their being readily embraced as an alternative to nuclear deterrence. The problem in the end is of a political rather than a technological character.

A politico-diplomatic strategy to transcend nuclear deterrence

No one would dispute that the road to a world without nuclear weapons will be a long and winding one. It will also require the vision to identify a path forward despite a current strategic environment that seems anything but propitious for making progress on nuclear disarmament and supplanting nuclear deterrence.

While nuclear weapon-possessing states will eventually have to become engaged in processes to devalue nuclear weapons²¹ and move beyond a reliance on nuclear deterrence, there is a special role for non-nuclear-weapon states to play at this juncture. The non-nuclear-weapon states have long been quiescent consumers of a nuclear order defined by the weapon states. Recently, an upsurge in independent action has characterized the conduct of the non-nuclear-weapon states. Perhaps the most salient manifestation of this has been the growing strength of the “humanitarian imperative” movement over the last few years, culminating in the adoption by the United Nations General Assembly of the “Humanitarian Pledge” resolution in 2015 and the launch this spring of a multilateral negotiation on a treaty prohibiting nuclear weapons.

With two thirds of the 191 states parties to the NPT supporting a diplomatic process designed to stigmatize the possession of nuclear weapons, and by extension adherence to nuclear deterrence as immoral and illegal, a profound challenge to nuclear orthodoxy is being mounted. This development has major implications for that subset of non-nuclear-weapon states that are allied with nuclear-weapon states, notably the United States. To date, alliance states have aligned with the nuclear weapon possessors in boycotting these new diplomatic processes. Adhering to this crude tactic is not going to contribute to the forging of a joint strategy capable of restoring (at least for the states parties to the NPT) a degree of common purpose on

²⁰ Ibid.

²¹ See N. Ritchie, “Valuing and devaluing nuclear weapons”, *Contemporary Security Policy*, vol. 34:1, April 2013.

realizing the treaty's core objectives of nuclear non-proliferation and nuclear disarmament. In the near term, the restoration of this basic solidarity within the NPT community is a pre-condition for advancing the goal of transcending reliance on nuclear deterrence and progressing towards a world without nuclear weapons, as well as the non-proliferation imperative that the five nuclear-weapon states and their allies prioritize.

Nuclear Disarmament and a Nuclear Weapons Ban Treaty

Nick Ritchie

In March 2017, negotiation began on a treaty to prohibit nuclear weapons. The negotiation will continue in June and July and report to the United Nations General Assembly in October 2017. This negotiation is the culmination of the so-called humanitarian initiative on nuclear weapons that has shifted nuclear discourse away from weapons and deterrence and toward the effects of nuclear violence on people, communities and the environment. After three international conferences in Oslo in 2013 and in Nayarit and Vienna in 2014 and a United Nations General Assembly Open-Ended Working Group on multilateral nuclear disarmament in 2013 and 2016, the United Nations General Assembly passed an historic resolution in October 2016 authorizing the current negotiation of a ban treaty.

What effect will a ban treaty have?

Sceptics question the effect of a ban treaty on nuclear-armed states. Most, if not all, of them are opposed to a ban treaty, along with most of the United States' nuclear allies. Ultimately, nuclear disarmament can occur only when the nuclear armed have dismantled and disposed of their nuclear weapons in a voluntary process. Nevertheless, actions do not take place in a vacuum but, in particular, in political and historical contexts, and the chief purpose of the humanitarian initiative and a ban treaty is to change the global political context of nuclear weapons. Political context here refers to the prevailing set of norms, rules, practices and discourses that shape how we think about and act in relation to nuclear weapons.

The primary change sought by advocates of a ban treaty is twofold. First, the comprehensive delegitimization and stigmatization of nuclear weapons based on the risks of nuclear use and the unacceptable humanitarian effects of nuclear violence. Stigmatization is important here as it refers to the illegitimacy of a practice based on collective moral revulsion¹—in this case the practice of nuclear deterrence and the possession nuclear weapons and the moral unacceptability of the foreseeable effects of their use. Second, to shift the centre of power in nuclear disarmament diplomacy away from the agency of nuclear-armed states and their relationships with each other and towards the collective agency of the relatively disempowered. This is born out of frustration with the slow pace of nuclear disarmament by the nuclear armed.

The effect of this stigmatizing move by a majority of states will not be immediate and it is unlikely to be direct. A direct effect would require the participation of one or more nuclear-armed state in the negotiation process leading to a strategic decision to disarm and begin a process of dismantling nuclear weapons and production complexes. This looks highly unlikely at this stage. The effect of a ban treaty will, therefore, be indirect through a two-step process of change: first, to change the global context of nuclear weapons by establishing and legitimizing a new political reality through a new legal instrument supported by a super-majority of states, one in which nuclear weapons and nuclear deterrence are unconditionally condemned;² and second, for that change to affect the policies and practices of the nuclear armed by creating a “crisis of legitimacy”

¹ R. Adler-Nissen, “Stigma management in international relations: transgressive identities, norms, and order in international society”, *International Organization*, vol. 68:1, 2014, pp. 147–176.

² R. Price discussed stigma in these terms in a similar context in : “A genealogy of the chemical weapons taboo”, *International Organization*, vol. 49:1, 1995, p. 87.

around their continued possession of nuclear weapons and the practice of nuclear deterrence. The ambition is to interrupt established ways of thinking about nuclear weapons and security and destabilize the relationships and practices that sustain them. The intention is to increase the costs and challenges of trying to legitimize nuclear weapons in global politics in order to induce change in the policies and practices of the nuclear armed to “cascade” the prohibitory norm through the community of states that continue to value nuclear weapons.³ Two overlapping groups are central to this: the five nuclear-weapon states⁴ party to the NPT; and the “Western” nuclear-armed and nuclear protectorate states. This process of change is grounded in an understanding that legitimacy is something ascribed to nuclear weapons by international society. Non-nuclear-armed states are part of that society and they can change it by acting together.⁵ It builds on the notion of prohibition as a necessary precursor to elimination that has characterized other disarmament processes.⁶ The core, and as yet unknowable, issue is the extent to which the governments, legislatures and the public in nuclear-armed states will be susceptible to changes in the global politics of nuclear weapons envisaged by a ban treaty.

The two steps are connected in so far as a nuclear ban weapons treaty will establish a new category of “non-conformity” that discriminates between those states that engage in unacceptable “deviant” behaviour (i.e. placing a high value on nuclear weapons and practising nuclear deterrence) and those that do not.⁷ Advocates and signatories of a ban treaty can use this new categorization to shame, persuade, pressure and sanction non-conformers in so far as is possible. This will reflect what Finnemore and Sikkink described as an “active process of international socialization intended to induce norm breakers to become norm followers”.⁸ The successful negotiation of a ban treaty will expand the resources at the disposal of the humanitarian initiative. It will be an instrument for political leverage in domestic and international politics, and potentially a very powerful one. Beyond its legal and moral leverage, it could include material leverage depending upon actions required of treaty signatories, for example, through a prohibition on the financing of nuclear weapons activities.⁹

Some states will clearly be more susceptible than others. The DPRK, for example, seems most impervious of all to social stigmatization given the Kim Jong-un regime’s formal “Juche” governing ideology of isolation, national survival and self-reliance. Nevertheless, current indications suggest the nuclear-armed states are quite worried about the impact of a ban treaty. It is framed by opponents as a dangerous and destabilizing development, but history shows how states that initially resist a new global norm can be socialized into the new legal-normative order over time.

³ M. Finnemore and K. Sikkink, “International norm dynamics and political change”, *International Organization*, vol. 52:4, 1998, pp. 887–917.

⁴ China, France, the Russian Federation, United Kingdom and United States, coincidentally the five permanent members (P5) of the United Nations Security Council.

⁵ C. Reus-Smit, “International crises of legitimacy”, *International Politics*, vol. 44:1, 2007, p. 159.

⁶ For example, the discussion in: J. Borrie, T. Caughley, T. Graff Hugo, M. Lovøld, G. Nystuen and C. Waszink, *A Prohibition on Nuclear Weapons: a Guide to the Issues*, UNIDIR and ILPI, February 2016, chapter 3.

⁷ R. Price, “A genealogy of the chemical weapons taboo”, *International Organization*, vol. 49:1, 1995, p. 87.

⁸ M. Finnemore and K. Sikkink, “International norm dynamics and political change”, *International Organization*, vol. 52:4, 1998, p. 902.

⁹ C. Archer, J-M. Collin, N. Decoularé-Delafontaine, R. van Riet, A. Ware, *Move the Nuclear Weapons Money: a Handbook for Civil Society and Legislators*, International Peace Bureau, Parliamentarians for Nuclear Non-proliferation and Disarmament, and the World Future Council, October 2016.

What about the NPT?

Critics have disputed the need for a new disarmament instrument by arguing that the NPT is sufficient. This argument misses the core driver of the humanitarian initiative: nuclear disarmament commitments have not been fulfilled after nearly half a century since the NPT's negotiation and, moreover, there is little indication the treaty's nuclear-weapon states intend to do so. Absent evidence of serious intent, the ongoing risk of nuclear violence and the creeping permanence of nuclear weapons have been deemed unacceptable by an expanding majority of states.

Part of the problem is the NPT itself. The NPT formally recognizes five states as nuclear-weapon states and this has been interpreted by them as recognition in international law that they, and only they, are permitted to possess and deploy nuclear weapons. Their nuclear discourse moves easily from this position to the language of entitlement, legal rights and enduring legitimacy. The Russian delegation to the United Nations General Assembly explicitly stated in October 2016 that "under the NPT the nuclear weapons of the five nuclear powers are considered to be legitimate weapons".¹⁰ As a result, the NPT is unable to unequivocally delegitimize nuclear weapons and the practice of nuclear deterrence, given the discrimination between nuclear and non-nuclear states parties. It is such discrimination that provides the political space for the nuclear-weapon states and their supporters to ascribe legitimacy to their possession of nuclear weapons.¹¹ The near-universal membership of the treaty adds further legitimacy by providing tacit consent for the rules of a global nuclear order that allow for the continued existence of nuclear weapons. A ban treaty is, therefore, justified on the basis that the NPT does not and cannot categorically delegitimize nuclear weapons and the practice of nuclear deterrence. A ban treaty would, in contrast, constitute an unequivocal delegitimization through a legal instrument that categorically prohibits the possession of nuclear weapons based on humanitarian principles of unacceptable harm.

Will a ban treaty have legal implications for nuclear-armed states?

The question of legal leverage has been raised by civil society organizations and former government practitioners who argue that non-participation in ban treaty negotiation will call into question compliance with NPT commitments. For example, John Carlson, former Director General of Australia's Safeguards and Non-Proliferation Office, noted that Australia's decision to boycott the ban treaty negotiation is inconsistent with its legal obligation to pursue nuclear disarmament negotiations in good faith under the NPT.¹² This suggests that all states are required to participate in all nuclear disarmament initiatives that can be reasonably framed as an "effective measure" under the NPT's Article VI as a generalized legal obligation, an eventuality that seems unlikely. Formal legal argument notwithstanding, the question of participation in the process of negotiating a ban treaty will at least raise legal questions and thereby create new political problems for nuclear-armed states both within and without the NPT as well as treaty allies of nuclear-armed states that claim to operate within the legal structures of nuclear order.

¹⁰ Mikhail Ulyanov, Director of the Foreign Ministry Department for Non-Proliferation and Arms Control and Representative of the Russian Federation, United Nations General Assembly First Committee, General Debate, New York, 4 October 2016.

¹¹ See N. Ritchie, "Legitimising and delegitimising nuclear weapons", in J. Borrie and T. Caughley (eds.), *Viewing Nuclear Weapons Through a Humanitarian Lens*, UNIDIR, 2013.

¹² J. Carlson, "Getting past the awful logic of nuclear weapons", *The Lowy Interpreter*, 27 February 2017, <https://www.lowyinstitute.org/the-interpreter/getting-past-awful-logic-nuclear-weapons>.

The outcome of the ban treaty negotiation potentially could have a legal impact on non-participants. Nuclear law expert Dan Joyner, for example, has suggested that:

If a supermajority of states manifested state practice and *opinio juris* supporting this ban ... a rule of customary international law should and would be recognized to come into existence. This rule would then create obligations for all states, including the nuclear weapons possessing states.¹³

A ban treaty would certainly put nuclear weapons on a par with chemical and biological weapons as “weapons of mass destruction” whose possession and use have been unambiguously outlawed. However, any claim that a ban treaty had explicitly established or codified a customary international law against both the use and possession of nuclear weapons would be sharply contested.¹⁴ Critics would no doubt point to Article 34 of the Vienna Convention on the Law of Treaties that states: “A treaty does not create either obligations or rights for a third State without its consent” and argued that customary international law requires the prohibited practice in question to be “virtually uniform, extensive and representative”, and include states whose interests are specially affected, as the ICRC puts it.¹⁵ Nevertheless, ascribing customary status to a universal prohibition codified in new treaty law through a nuclear ban weapons treaty would certainly be used to marshal normative pressure on the nuclear armed. The imprimatur of the United Nations, which Claude called “the custodian of collective legitimacy”, will enhance the authority of such claims.¹⁶

Will a ban treaty constitute an “effective measure”?

For some, changing the international political context of nuclear weapons and creating opportunities for further resistance to the nuclear status quo as outlined above will constitute an “effective measure” under the NPT’s Article VI. For example, in 2015, the New Agenda Coalition (NAC) outlined “a framework of ‘effective measures’ that are envisaged and required by Article VI of the Treaty”.¹⁷ It drew on the unanimous conclusion of the International Court of Justice’s 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons:

There exists an obligation to pursue in good faith *and bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control [emphasis added].¹⁸

The NAC framework included, inter alia, a legal prohibition against the possession, stockpiling, development or transfer of nuclear weapons. A ban treaty is framed as an “effective measure” in this context as a logically necessary step to realize the NPT’s stated objectives. It is not a substitute for other necessary steps, including those set out in the final documents of the 1995, 2000 and

¹³ D. Joyner, “Time to outlaw nuclear weapons”, *Arms Control Law blog*, 18 April 2016, <https://armscontrollaw.com/2016/04/18/time-to-outlaw-nuclear-weapons/>.

¹⁴ J. Borrie, T. Caughley, T. Graff, M. Lovøld, G. Nystuen and C. Waszink, *A Prohibition on Nuclear Weapons: a Guide to the Issues*, UNIDIR and ILPI, February 2016, p. 58.

¹⁵ International Committee of the Red Cross, *Customary IHL*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#refFn_16_29.

¹⁶ I. Claude, “Collective legitimization as a political function of the United Nations,” *International Organization*, vol. 20:3, 1966, p. 379.

¹⁷ Working Paper on “Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons” submitted by the New Agenda Coalition to the Preparatory Conference for the 2015 NPT Review Conference, 2 April 2014, p. 8, NPT/CONF.2015/PC.III/WP.18.

¹⁸ International Court of Justice Advisory Opinion on “The Legality of the Threat or Use of Nuclear Weapons”, The Hague, 8 July 1996, p. 45.

2010 NPT Review Conferences, but part of a wider framework that includes them. Its negotiation would therefore—like the Comprehensive Test Ban Treaty—constitute one of several essential “effective measures”.¹⁹

Others argue that the second part of the two-step process of change outlined above cannot be guaranteed: a ban treaty will not by itself lead to the immediate dismantling of any nuclear weapons if nuclear-armed states do not participate. On that basis, a ban treaty will not constitute an “effective measure”. This argument, however, requires a direct causal relationship between a ban treaty and the dismantling of nuclear arsenals and defines an “effective measure” in these restrictive terms. Two points are important to observe here. First, the effect of any step towards nuclear disarmament that nuclear-armed states oppose will necessarily be indirect and its outcome in terms of the dismantling of nuclear weapons and production complexes will necessarily be indeterminate at the time. Second, to negate the value of indirect measures because they are indirect is to cede all agency for nuclear disarmament to the nuclear armed and deny the collective agency of the non-nuclear armed. It will come as no surprise that nuclear-armed states will not willingly engage in a process that challenges what they argue is their legitimate right to deploy nuclear weapons, but this does not in itself undermine the value and necessity of doing so.

A vital part of the ban treaty process has been claiming the power to speak authoritatively about the future of global nuclear politics by the majority of non-Western, non-nuclear-armed states; what former United Nations High Representative for Disarmament Affairs Sergio Duarte described as the democratization of disarmament.²⁰ Nuclear-armed states insist that disarmament must await the “right security conditions” that often seem to entail to revolutionary changes in global politics to a post-sovereign, post-war world. In 2008, a United States Congressional Commission stated that nuclear disarmament “would require a fundamental transformation of the world political order”.²¹ Critics assert that a ban treaty approach is not “realistic” because it ignores the enduring value of nuclear weapons for current possessors. In the meantime, nuclear weapons can be managed “responsibly” and nuclear weapons can be deployed legitimately to prevent war between the major powers.

The statement on nuclear disarmament by France at the United Nations General Assembly First Committee in 2016 is a case in point. The statement explicitly framed the nuclear status quo as normal, legitimate, stable and safe and its preferred “step-by-step” disarmament process as “effective, realistic and to the benefit of the security of all”. In contrast, it framed a ban treaty process as radical, illegitimate, dangerous, ineffective and destabilizing, not “adapted to the real world and disconnected from the security context”.²² This is a familiar framing deployed by critics to delegitimize the very idea of nuclear disarmament.²³

The ban treaty process is actively challenging this narrative by claiming a right for a majority of relatively disempowered non-nuclear-armed states to articulate a different understating of what counts as nuclear “reality”, what counts as security for all and security conditions for disarmament,

¹⁹ T. Caughley, *Analysing Effective Measures: Options for Multilateral Nuclear Disarmament and Implementation of NPT Article VI*, UNIDIR, 2015, p. 7.

²⁰ Sergio Duarte, *Statement to the First Committee of the UN General Assembly*, United Nations, New York, 3 October 2011.

²¹ *America's Strategic Posture: the Final Report of the Congressional Commission on the Strategic Posture of the United States*, Washington DC, U.S. Institute of Peace Press, 2009, p. xiv.

²² Remarks by Louis Riquet, Deputy Permanent Representative of France, *Nuclear Disarmament*, Conference on Disarmament, 71st Session of the United Nations General Assembly First Committee, New York, 14 October 2016.

²³ Sergio Duarte labelled the 12 most frequent arguments “the dirty dozen” in: R. Rydell, *Explaining Hammarskjöld's “Hardy Perennial”: the Role of the United Nations in Nuclear Disarmament*, UNA-UK background paper, 2013, p. 21.

what counts as responsible and legitimate state behaviour when it comes to nuclear weapons, what is dangerous and destabilizing, and what counts as an effective and positive step towards nuclear disarmament. Nuclear disarmament not nuclear deterrence constitutes the global public good, as United Nations Secretary-General Ban Ki-moon declared in 2008.²⁴

These understandings clash with those of the nuclear armed, particularly when the French statement declared that “nuclear weapons are an integral part of our collective security architecture system”²⁵ and that a discussion on nuclear disarmament that stigmatizes nuclear deterrence as a basis for security makes no sense. As Robert Wood, United States Ambassador to the Conference on Disarmament (CD), asked at the United Nations First Committee in October 2016, “How can a state that relies on nuclear weapons for its security possibly join a negotiation meant to stigmatize and eliminate them?”²⁶ Quite so, but this is precisely the point of the humanitarian initiative and a ban treaty: to delegitimize nuclear weapons as an acceptable instrument of statecraft and compel states to consider different ways of understanding and responding to security challenges that do not rest on systems designed to inflict massive and indiscriminate nuclear violence.

How does a ban treaty relate to existing treaties and institutions?

The case for shifting the international political context of nuclear weapons is supported by the ways in which nuclear weapon practices have been progressively delegitimized over the course of the nuclear age. This has taken the form of six discrete regimes that have evolved to restrain nuclear weapons programmes and shape the conditions of possibility for nuclear disarmament. These regimes are expressed through formal and informal institutions and their associated practices, narratives, norms and legal instruments. They are in varied states of development and working order, but they currently enjoy sustained support:

- 1) **An anti-proliferation regime** that has delegitimized the further spread of nuclear weapons on a global basis through the NPT, which precipitated a steady demilitarization of extant nuclear programmes. It is supported by a dense network of International Atomic Energy Agency nuclear safeguards, export control regimes, sanctions, interdiction and United Nations Security Council resolutions.
- 2) **An anti-testing regime** that has delegitimized any explosive (though not “subcritical”) nuclear testing through a long history of protests and negotiations against testing practices that led eventually to the Comprehensive Test Ban Treaty and the decommissioning of some nuclear test sites.
- 3) **A United States-Russian Federation strategic nuclear forces reduction regime** that has delegitimized the continued accumulation of massive nuclear arsenals through the nuclear freeze movement in the 1980s, the Intermediate-Range Nuclear Forces Treaty (INF) and the Strategic Arms Reduction Treaty (START) process up to and including the New START agreement in 2010. These practices have cemented a norm of negotiated, legally binding, verified and irreversible reductions in strategic nuclear delivery systems between the

²⁴ Ban Ki-moon, “Contagious” Doctrine of Nuclear Deterrence Has Made Non-proliferation More Difficult, 24 October 2008, SG/SM/11881-DC/3135.

²⁵ Remarks by Louis Riquet, Deputy Permanent Representative of France, *Nuclear Disarmament*, Conference on Disarmament, 71st Session of the United Nations General Assembly First Committee, New York, 14 October 2016.

²⁶ Statement by Ambassador Robert Wood, *Thematic Discussion of Nuclear Weapons*, 71st UNGA First Committee, 14 October 2016.

United States and the Russian Federation with corresponding limits on deployed warheads. The future of this regime, however, is now in question post-New START.

- 4) **A fissile material control regime** that is weaker than the other regimes, but finds expression in different forms, such as the Nuclear Security Summit process led by President Barak Obama, moratoria on the production of fissile material for use in nuclear weapons programmes, the shuttering of some fissile material production facilities, and attempts to limit the development of uranium enrichment and plutonium reprocessing plants in industrial nuclear fuel cycles. This regime has yet to coalesce in a long-sought Fissile Material (Cut-off) Treaty, although not for want of discussion.²⁷
- 5) **A no-first-use regime** that is more intangible still, but reflects an informal stigmatization of, or customary prohibition on, the use of nuclear weapons captured in the notion of a “nuclear taboo” or a “norm of non-use” that delegitimizes nuclear weapons as “normal” war-fighting weapons.²⁸ This is despite the fact that only India and China subscribe to a formal no-first-use policy and that other nuclear-armed states’ doctrines and arsenals are configured to enable rapid first use.

There is nothing inevitable about the permanence of these regimes or the network of constraints on nuclear practices and thinking that they represent. They all need to be reproduced over time through actions if they are to continue to have meaning and effect. The ban treaty process can be understood in this context in terms of the sixth regime:

- 6) **A universal prohibition regime** that builds on the nuclear-weapon-free zones that have delegitimized nuclear weapons programmes on a regional basis beginning in 1967 in Latin America, extending to the most recent zone in Central Asia, and now covering the Southern Hemisphere. This regime is attempting to bring the rule of law to nuclear disarmament, in particular, international humanitarian law, environmental law and human rights law.²⁹ It has its origins in the Baruch and Gromyko plans of 1946 and later in the McCloy-Zorin Accords of 1961, but more recently in the International Court of Justice’s landmark Advisory Opinion in 1996 and the drafting of a model Nuclear Weapons Convention consisting of comprehensive measures to both prohibit and eliminate nuclear weapons. This emerging regime draws on the successful prohibition of biological and chemical weapons, anti-personnel land mines and cluster munitions.³⁰ Its normative and legal purpose is similar to the other five regimes above, only this time it is seeking to delegitimize nuclear deterrence and the possession of nuclear weapons. For that reason, it is being developed against the current preferences of the nuclear-armed states, much like the anti-testing regime.

²⁷ P. Podvig, *Building Blocks of the Future Fissile Material (Cut-off) Treaty*, UNIDIR, 2016.

²⁸ N. Tannenwald, “The nuclear taboo: the United States and the normative basis of nuclear non-use”, *International Organization*, vol. 53:3, 1999, p. 463; Vancouver Declaration, *Law’s Imperative or the Urgent Achievement of a World Free of Nuclear Weapons*, 11 February 2011, <http://lcn.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>.

²⁹ T. Wright, “Do nuclear weapons violate the right to life under international law?”, *Australian Journal of Peace Studies*, vol. 3, 2008, pp. 99–119; R. Rydell, “The United Nations and a humanitarian approach to nuclear disarmament”, *Nuclear Abolition Forum*, No. 1, October 2011.

³⁰ J. Borrie and T. Caughley, “Viewing weapons through a humanitarian lens: from cluster munitions to nukes?”, *Irish Studies in International Affairs*, vol. 25, 2014, pp. 23–43.

Conclusion

A ban treaty will have an effect on the global politics of nuclear disarmament, but it is likely to be indirect in the short term. Over the medium-long term, it will play an essential role in widening and deepening a collective normative censure of nuclear weapons by codifying that censure in a legal form to maximize its authority and normative power in a manner that the NPT has been unable to achieve. Its impact will be felt as part of a broader set of “effective measures” to develop a universal prohibition regime that will need to include robust verification of demilitarized nuclear programmes.

Assessing the efficacy of a ban treaty will ultimately rest on a judgement about whether the international political context of nuclear weapons matters and the extent to which it directly or indirectly affects the actions of states and the understandings of statesmen and women and those that influence them. Evidence suggests that context matters enormously, that it gives meaning to actions and helps politics make sense, that shared ideas and understandings bring structure and order the social world. The power to shape the political context of nuclear weapons is profound. It is evident in the development of shared beliefs in the collective illegitimacy of nuclear weapons and the necessity of disarmament for sustainable long-term security. These shared understandings will continue to affect thinking about nuclear weapons and nuclear policies and practices and they find their most authoritative expression in the international rule of law.

Acronyms

CD	Conference on Disarmament
DPRK	Democratic People's Republic of Korea
MAD	Mutual Assured Destruction
NATO	North Atlantic Treaty Organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons

The NPT and the Prohibition Negotiation:

Scope for Bridge-building

In recent years, the debate on nuclear weapons has been dominated by differences over both the pace of disarmament and how to galvanize it. A humanitarian focus on the risks and consequences of a nuclear conflict or an accidental detonation has had the effect of drawing international attention to the necessity for taking nuclear disarmament forward. The means for doing so, however, are highly disputed especially among the parties to the NPT. This has accentuated the divide between states that do not possess nuclear armaments on the one hand and, on the other, those that do as well as those in alliances with nuclear-weapon states that rely on the perceived deterrent effect of nuclear weapons for their security.

These two papers were prepared for a panel event held during the first preparatory committee meeting of the Treaty on the Non-Proliferation of Nuclear Weapons (known as the Non-Proliferation Treaty, NPT) in Vienna on 2 May 2017. Organized by the Hiroshima Prefectural Government, the event aimed to elucidate a variety of perspectives on how to facilitate building bridges towards nuclear disarmament.