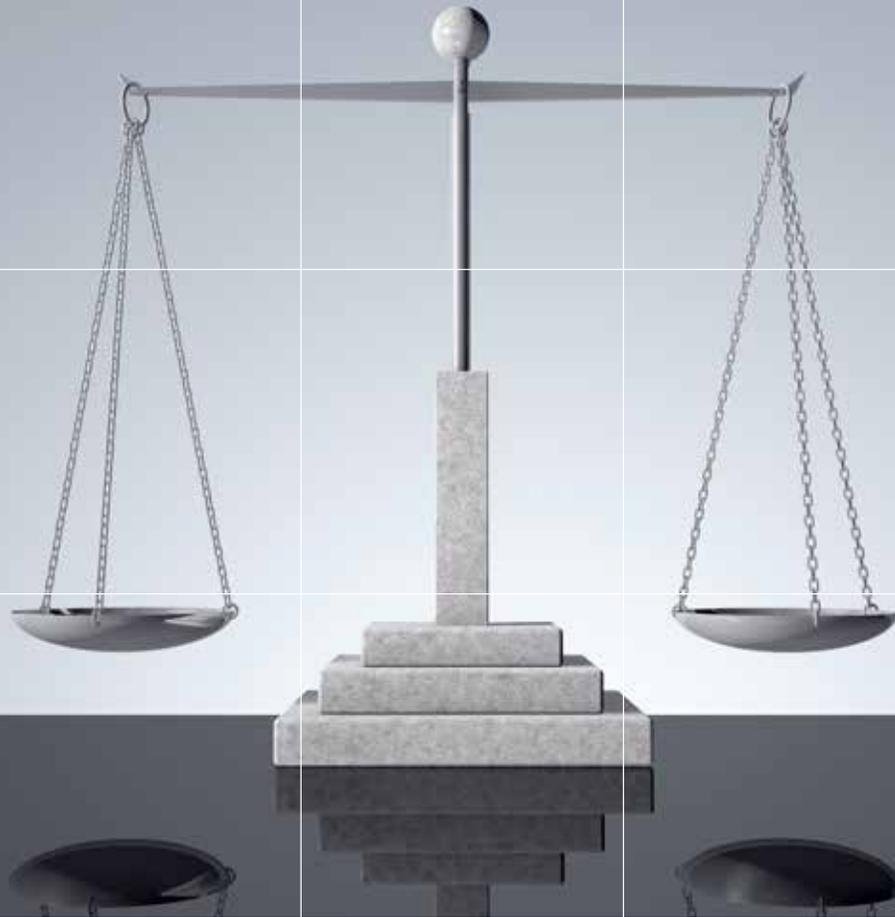




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THE NUCLEAR BAN TREATY

What Would Follow?

George Perkovich



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About the Author

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Summary

In May 2017, negotiators at the United Nations introduced a draft convention to prohibit the possession of nuclear weapons, as a way to hasten progress toward eventual nuclear disarmament, as called for in the Nuclear Non-Proliferation Treaty (NPT). All the nuclear-armed states except North Korea have boycotted the negotiations, along with many U.S. allies. Unfortunately, the good motives behind the treaty do not mean it will enhance international security, prevent nuclear proliferation, or facilitate actual nuclear disarmament. It may even have unintended consequences that make these goals harder to achieve. Yet there are steps that nuclear-armed states could take, perhaps nudged along by their allies, to help heal rifts that the proposed ban treaty has highlighted.

Rationale and Potential Pitfalls

- International support for a nuclear prohibition treaty became nearly inevitable, largely due to nuclear-armed states' failure to demonstrate "good faith" in pursuing nuclear disarmament under the NPT.
- Non-nuclear-weapon states are in the majority; most of them do not accept this lack of progress toward disarmament and are reluctant to be held hostage to the potentially nuclear war-triggering decisionmaking of leaders such as Kim Jong-un, Vladimir Putin, and Donald Trump.
- Despite the legitimate concerns that prompted it, the ban treaty's simplicity and corresponding lack of rigorous verification and enforcement provisions are cause for concern. By driving wedges between democratic allies, a nuclear ban treaty may inadvertently weaken deterrence of nondemocratic governments that would be less constrained by public opinion and the norms reflected in the treaty. This, in turn, would make actual nuclear disarmament less likely.

Bridging the Ban Treaty Divide

- Nuclear-armed states could individually or with other actors take nuclear disarmament obligations more seriously by specifying—theoretically, for now—how they would design a verifiable, enforceable nuclear disarmament regime.
- The process of designing a prototype disarmament regime would address vital questions that the ban treaty avoids: which activities, materials, and

facilities useful for developing and producing nuclear weapons must be prohibited, and how will dual-use activities be managed and monitored? What national and international transparency and verification protocols would disarming states require, and what organization(s) should and could enforce such a regime?

- An international debate is needed on the conditions, if any, under which the first use of nuclear weapons could be necessary and legitimate. States could stimulate such a debate by seeking to bring the use of nuclear weapons under the jurisdiction of the International Criminal Court.

Introduction

On March 27, 2017, negotiations began at the United Nations (UN) in New York to draft a treaty “to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”¹ Forty-eight countries in December 2016 registered their lack of support for this undertaking, either by voting no or abstaining. This included all of the world’s nuclear-armed states except North Korea. Most of the opposing and abstaining states rely to some degree on nuclear deterrence extended by their allies or security partners. However, 113 countries voted to make these negotiations happen.

Proponents of a prospective prohibition treaty argue that dramatic action is needed to speed up achievement of the ultimate goal of global nuclear disarmament. They argue that “there has been little perceptible progress on the multilateral nuclear disarmament pillar under the NPT,”² and that “outlawing nuclear weapons is a moral and humanitarian imperative.”³ Further, they posit a legal requirement for nuclear disarmament based on their reading of Article VI of the Nuclear Non-Proliferation Treaty (NPT) and the 1996 International Court of Justice advisory opinion on the “Legality of the Threat or Use of Nuclear Weapons.” Proponents believe that a prohibition treaty ultimately will engender international pressure that will compel nuclear-armed states and others that rely on nuclear deterrence to “conform to the new global norm.”⁴

Yet opponents and skeptics fear that the dynamics surrounding the prohibition treaty will distract attention and effort from the nonproliferation regime that has helped prevent nuclear war since 1945, and that has prevented—beyond early expectations—the proliferation of nuclear weapons to more states and to terrorist organizations. In boycotting the negotiations, the French, United Kingdom (UK), and U.S. governments noted that the “proposed ban fails to take into account the requisite security considerations and . . . will not eliminate nuclear weapons.”⁵ Japan worries that “efforts to make such a treaty without the involvement of nuclear-weapon states will only deepen the schism and division not only between nuclear-weapon states and non-nuclear-weapon states, but also among non-nuclear-weapon states.”⁶

From sharply divergent perspectives, then, states and attentive civil society organizations see a prohibition treaty as a significant challenge to the global nuclear order that was built by fits and starts from the ill-fated Baruch Plan of 1946, through the creation of the International Atomic Energy Agency (IAEA) in 1957, the completion of the NPT in 1968, and the beginning of the nuclear arms control process with the Strategic Arms Limitation Treaty (SALT I) in 1972. (Other important events, agreements, and export control arrangements also augmented this ordering process.)

This paper proceeds in three parts. First, it seeks to explain why the nuclear prohibition initiative became inevitable and should be treated seriously and respectfully. Second, it suggests why and how a prohibition treaty resembling the draft released on May 22, 2017, will be inadequate to achieve what its proponents wish, and could even undermine the prospects of actual nuclear disarmament. Finally, it suggests what could be done now and in the future to reconcile the aspirations of prohibitionists with those who fear unwelcome consequences.

Why the Nuclear Prohibition Treaty Became Inevitable

The foundation of the global nuclear order is the NPT. This foundation, though, contains a fissure—in text and politics. The treaty legally allows for the possession of nuclear weapons by the five states that had tested a nuclear

Article VI has long been a contentious issue—a fissure.

explosive before January 1, 1967, while obligating all other signatories not to acquire nuclear weapons. At the same time, Article VI of the treaty obligates each party “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”⁷ This reflected the political and moral need to link the vast majority of states’ eschewal of nuclear weapons to the small minority’s willingness to eventually eliminate their nuclear weapons. The proposed prohibition treaty makes this link more explicit than it ever has been.

Of course, Article VI has long been a contentious issue—a fissure. Some states and experts have argued that the NPT only obligates “good faith” pursuit of negotiations on nuclear disarmament, but cannot and does not require a particular outcome—that is, an agreement. Moreover, Article VI envisions such negotiations in the context of “a treaty on general and complete disarmament.”⁸ These perceived disarmament requirements are much less precise than the treaty’s clauses related to nonproliferation, which, the argument goes, affirms that the treaty’s central operative purpose is nonproliferation.⁹

Yet, while lawyers may endlessly debate the legal meaning and implications of Article VI, the matter was settled politically in 1995 when the treaty was due to expire unless the parties decided to extend it at a Review and Extension Conference. At the conference, the nuclear-weapon states persuaded the parties to extend the NPT indefinitely. The resolution extending the treaty also included an agreement entitled “Principles and Objectives for Nuclear Non-Proliferation and Disarmament.” In this document, “nuclear-weapon States reaffirm their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.”

The document also declared that fulfillment of Article VI required “the determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.”¹⁰

The political obligation to pursue nuclear disarmament was then affirmed and detailed in Review Conferences in 2000 and 2010. At the 2000 conference, thirteen steps related to nuclear disarmament were specifically called for. An action plan was agreed upon at the 2010 conference, enumerating twenty-two actions to be taken under the heading of disarmament.¹¹

The Resistance of Nuclear-Armed States

The effort to negotiate a prohibition treaty represents a political-legal reaction to the nuclear-weapon states’ failure to fulfill these political commitments to genuinely seek nuclear disarmament. If the vagueness of Article VI’s language reflects the preferences of the two disproportionately powerful states that drove the negotiation of the NPT—the United States and the Soviet Union—then the prohibition treaty reflects the preferences of a majority of states in the non-polar or multipolar twenty-first century. These states know they cannot force the nuclear-armed states to give up their nuclear arsenals. They can, though, create political and moral pressures to delegitimize these weapons. More materially, the majority can frustrate the nuclear-armed states’ desires and interests in strengthening the global nonproliferation regime. If the nuclear-weapon states persist in denying or obfuscating a legal obligation to pursue disarmament, the others can politically undermine the enhancement of legal obligations to make proliferation more difficult.

In a 2009 speech in Prague, then U.S. president Barack Obama recognized this challenge. He affirmed the soundness of the basic bargain that most people and states see at the heart of the nuclear order: “Countries with nuclear weapons will move towards disarmament, countries without nuclear weapons will not acquire them, and all countries can access peaceful nuclear energy.”¹² The enthusiastic reaction of most of the world affirmed this logic. Yet leaders of non-nuclear-weapon states whom Obama might have expected to join him in advancing the disarmament-nonproliferation agenda turned to other issues more important to them.

Meanwhile, the security establishments of other nuclear-armed states found Obama’s agenda threatening. Russian leaders thought Obama’s call was a plot that, if implemented, would reinforce the military advantage the United States would have in a world without nuclear weapons. French officialdom privately expressed alarm that such talk would invite unrealistic and, to them, unacceptable

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demands for hasty disarmament. Israeli leaders shared this view. Pakistan continued to augment its nuclear arsenal. North Korea did the same. Meanwhile, the defense and nuclear establishments of the United States mobilized to defend the nuclear-weapon enterprise from the misguided president, while the Republican Party generally denounced him for being dangerously naïve.

This multifaceted resistance has been effective. Since the 2010 New Strategic Arms Reduction Treaty (START)—itself a modest achievement in disarmament terms—no new agreements have been reached to reduce nuclear arms, curtail nuclear arsenal modernization, or end production of fissile materials for nuclear weapons. Various countries and organizations have produced scorecards

Nongovernmental organization leaders and a few states—led by Austria, Mexico, and Norway—sought to refocus attention to the humanitarian consequences of nuclear war.

to evaluate fulfillment of the disarmament-related measures called for in the 1995, 2000, and 2010 NPT Review Conferences. According to a well-researched assessment by the nongovernment organization Reaching Critical Will, as of 2015, clear “forward movement” has been made on only five of the twenty-two actions called for in 2010, while “limited progress” has been made on six others.¹³

Worse, arguably, Russia violated the Intermediate-Range Nuclear Forces Treaty of 1987, which remains the most far-reaching nuclear arms reduction treaty ever negotiated. Meanwhile, all of the nuclear-armed states have undertaken programs to modernize, and in some cases—China, India, North Korea, and Pakistan—expand, their nuclear arsenals.

In this environment, it was inevitable that states and civil society organizations dedicated to preventing nuclear war and eliminating nuclear weapons would seek new ways to reverse unwelcome trends and fulfill the aspirations and promises of nuclear disarmament. If nuclear-armed states and their allies argued that security interests preclude new disarmament-related steps, then others naturally would seek countervailing arguments.

Nongovernmental organizations and a few states—led by Austria, Mexico, and Norway—sought to refocus attention to the humanitarian consequences of nuclear war. The humanitarian argument highlights studies that suggest that even what might be termed a limited exchange of nuclear weapons, involving

one hundred fission devices, would or could alter climatic conditions sufficiently to cause a global famine affecting more than 1 billion people.¹⁴ Such use of nuclear weapons—let alone larger attacks involving more destructive devices—would harm people and the environment in ways that, depending on the circumstances, could violate the basic principles of international humanitarian law. These principles require discrimination of military from civilian targets, proportionality, and avoidance of unnecessary suffering.

Of course, it can be argued plausibly that not all uses of nuclear weapons would cause a humanitarian disaster. For example, a state in a conflict could for demonstration purposes detonate a nuclear weapon underground or at sea, or against a naval convoy or a desert air base far removed from civilians. It is not impossible that such use would succeed and de-escalate a conflict without a series of nuclear exchanges. Nevertheless, the focus on humanitarian consequences has put the burden on defenders of nuclear weapons to demonstrate whether and how any use of nuclear weapons would stay limited and would not escalate. The nuclear-armed states have not engaged in such discussions or debate.

Defenders of nuclear weapons also have failed to engage the humanitarian movement in serious arguments about the role of nuclear weapons in deterring or defeating grave threats to national and international security. Advocates of nuclear prohibition seek to keep the focus on humanitarian consequences of nuclear weapons as a way to transcend security arguments about such scenarios. They argue that the use of nuclear weapons would be a security disaster—which is fair enough—but they neglect to address situations in which non-nuclear means are unable to stop an aggression that threatens a nation's existence. Large conventional forces from China, India, Russia, or the United States, for example, could threaten significant incursions into less powerful states. A state could use illicitly acquired biological weapons to devastate an adversary population. Or, under a global nuclear disarmament regime, a state could clandestinely retain or acquire nuclear weapons and threaten to use them against disarmed adversaries.

The Argument for Prohibition

The failure of high-level leaders in states that rely on nuclear deterrence—directly or by extension—to open serious debates on such scenarios have made a “simple” prohibition treaty inevitable. When heads of state become involved in an issue, multiple agencies within their governments are mobilized to study issues and make recommendations. These include defense ministries, military services, and intelligence agencies. These agencies—accurately or inaccurately, wisely or misguidedly—inject security concerns into deliberations. Yet debates over the humanitarian movement have largely been ignored by top leaders and left to a few officials in foreign ministries to manage. These officials often are relatively ill-equipped to contest and complicate the moral and political arguments surrounding the humanitarian consequences of nuclear use. Of course, it is very difficult for anyone to convincingly say how nuclear use *would* (as distinct from *could*) be kept limited and would not lead to humanitarian disaster. Many diplomats are not well prepared to lead discussions of military scenarios in which non-nuclear forces might be inadequate to defeat conventional or biological attacks on—for instance—the Russian periphery, the Korean Peninsula, the Taiwan Strait, or the Indo-Pakistani border.

Apart from humanitarian grounds, concerns about fairness or equity also bolster arguments for prohibition. In terms of political and moral equity, the distinction between one nuclear weapon and zero is all that matters. States that have one are in a fundamentally different position—for good or ill—than those that have zero. It is fine and correct for the United States and Russia to say that they used to collectively deploy at least 10,000 strategic nuclear weapons, and now they only deploy approximately 3,200.¹⁵ But for most of the world’s states, this is not a winning argument. It is a bit like a slaveholder saying that he used to have one hundred slaves, but now only has thirty-two. If

slavery is bad, any number greater than zero is wrong. The same goes for nuclear weapons in the thinking of much of the world.

The perceived character of leaders such as North Korea’s Kim Jong-un, Russia’s Vladimir Putin, and the United States’ Donald Trump (among others) adds urgency to the campaign to prohibit and eliminate nuclear weapons.

Many citizens and states find it unacceptable that these men have their fingers on the nuclear button and hold the fate of the world in their minds and hands. Only nuclear weapons give a few leaders of a few countries the capacity to immediately destroy the lives of so many innocent people and states and cause lasting environmental damage. Because other states cannot determine the judgment of such individuals and cannot control the extent and effects of a nuclear war these men might conduct, the only way to escape being hostage to them is to ban and, hopefully, abolish nuclear weapons.

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Prohibition—and more broadly, elimination—of nuclear weapons also gains urgency from the basic sense that these weapons cannot be retained forever without being used someday. As the distinguished British strategist Lawrence Freedman wrote eight years ago, “The case for abolition . . . is that it is hard to believe that the past 60 years of self-restraint can continue for the next 60 years.”¹⁶ Deterrence optimists—and those who believe in the effectiveness of the nuclear taboo—could retort that, as the period of nonuse of nuclear weapons lengthens, the probability of nuclear war in the future declines. Yet most analysts agree that if and as the number of actors possessing nuclear weapons grows, and the combinations of states in confrontational relationships increase, the risk of deterrence failure does too. A strong nonproliferation regime, among other things, is necessary to contain this risk. Yet, non-nuclear-weapon states are now reluctant to further strengthen the nonproliferation regime unless their demands for nuclear disarmament are met.

In short, there are understandable, often excellent reasons to seek the elimination of nuclear weapons. The dismissive, disrespectful attitudes and behaviors of the nuclear-armed states toward proponents of nuclear disarmament add fuel and passion to the prohibition cause.

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Why the Prohibition Treaty Is Inadequate

Unfortunately, the good rationales and understandable motives that animate the prohibition movement do not necessarily add up to sound or effective action. However laudable the intentions behind the prohibition movement, the treaty it appears likely to produce will be inadequate to accomplish important objectives and may even undermine the prospects of nuclear disarmament. Proponents acknowledge that the prohibition treaty will not cause a single weapon to be dismantled. “A nuclear-weapons prohibition will not magically make nuclear-armed and nuclear-alliance states give up the bomb—but it will make it a less attractive weapon to maintain or pursue, and provide states with more incentives for elimination.”¹⁷

Proponents hope that the weight of more than 120 states’ demand for prohibition will morally and politically inhibit anyone from using nuclear weapons. North Korea was the only nuclear-armed state that voted in favor of negotiating a prohibition treaty. Yet, as most advocates of prohibition would acknowledge, it is extremely difficult to imagine that Kim Jong-un, faced with the loss of his regime and perhaps control over his country, would decide not to use nuclear weapons because there is a treaty prohibiting them.

So, too, if in response to Russian aggression in, say, Estonia, North Atlantic Treaty Organization (NATO) conventional forces were to bomb air force and army installations in Russia and drive Russian forces back, President Putin might or might not use tactical nuclear weapons to de-escalate the conflict, so to speak. Either way, it is difficult to imagine that a prohibition treaty that Russia

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and other nuclear-armed states did not sign would figure significantly in his decision. Similarly, if Indian armored forces moved into Pakistan following a major terrorist attack on an Indian city, and were inflicting severe damage and humiliation on the Pakistan Army, Rawalpindi's leadership has said it would use nuclear weapons to stop the Indian advance. This might or might not be what the Pakistan Army would actually do, but it is difficult to say how a prohibition treaty would really affect the decision.

At the same time, in any or all of the scenarios just mentioned, a prohibition treaty would do no harm—with one possible exception. If genuine democracies felt more obliged to uphold the treaty than nondemocratic governments, then the balance of resolve in crisis or conflict could tilt to the states less sensitive to norms. It is difficult now to assess this possibility across a range of potential regional or global confrontations. Still, the Western nuclear-weapon states and their allies in Europe and Asia worry that a prohibition treaty could cause or inflame political dissent within their states and between them. This weakening of solidarity among democratic allies, ironically and dangerously, could in turn embolden less affected adversaries such as China, North Korea, and Russia.

This concern can be seen from another angle: the prohibition movement has not engaged intensively with the nuclear-armed states that are most resistant to this agenda and that prohibit or tightly control public debate over nuclear issues. Much of the argumentation regarding humanitarian consequences of nuclear weapons and prohibition seems directed at the United States, the United Kingdom (UK), and their allies. In these countries civil society organizations are free and officials have been more or less willing to engage with them. Conversely, China, Israel, North Korea, Pakistan, Russia, and to some extent France have walled themselves off from these debates internationally and nationally. Yet these states are more determined to retain nuclear weapons and are more resistant to joining in nuclear-weapon reduction processes than the United States and the UK have been. (France has undertaken significant nuclear force reductions and eliminated its nuclear-weapon testing facilities, even as its resistance to complete nuclear disarmament is clear.)

Proponents of the prohibition treaty should not be expected to travel to these countries and challenge their officials, as they do in the UK, the United States, other NATO states, and Japan, for example. Still, the interests and positions of the most recalcitrant states must be addressed if the prohibition movement is to achieve more than limited, symbolic results. By not making nuclear

prohibition a significant issue in their bilateral relations with China, France, India, Israel, Pakistan, and Russia, prohibitionist states make it easier for U.S. and British officials to question their seriousness.¹⁸

Addressing Non-Nuclear Threats and Responses

Whether or not a prohibition treaty will weaken the defensive resolve of democracies, it will not remove the most ominous threats that trouble the nations currently relying on nuclear deterrence (including via alliances). Few knowledgeable people believe that nuclear-armed adversaries would launch nuclear weapons out of the blue. Rather, the primary concern is that some form of non-nuclear aggression could be initiated, particularly against a weaker state, and that for the defenders nuclear weapons could, in extreme circumstances, be the only way to defeat such aggression. The existence of a prohibition treaty could undermine the credibility of nuclear deterrence of such aggression. (Of course, the threat to use nuclear weapons in defense raises the risks of escalation to all-out nuclear war, which would leave everyone worse off and likely cause humanitarian disaster. This is the horrible paradox of nuclear deterrence.)

Proponents of a ban treaty tend to downplay threats of such conventional aggression. Instead, and understandably, they highlight the grave risks of escalatory nuclear war. But the nuclear prohibitionists ignore another threat that may become more serious in coming years: that of biological warfare. Proponents of a nuclear ban generally assume that the Biological Weapons Convention (BWC) of 1972 has removed the threat of biological warfare, and that the BWC provides a laudatory example of the benefits a nuclear prohibition could bring.

Yet, despite the BWC, several states have maintained robust programs that enable them to produce and perhaps use biological weapons. China, Iraq (before 1995), North Korea, and Russia are the most obvious examples—and those countries might say the same for the United States. Among other things, this points to the problem inherent in the BWC's lack of verification and the uncertainties that arise regarding technological capabilities that can be used for civilian and military, and defensive and offensive, purposes. The BWC reinforced long-standing norms against bioweapons and facilitated cooperation to prevent their proliferation and use. Still, as noted in a recent book-length study by David Malet, *Biotechnology and International Security*: “It remains a more restrictive, but perhaps no more effective, version of the Geneva Protocol [of 1925]. Despite the growth of military biotech programs, no compliance mechanisms or formal organizations exist for monitoring bioweapon research and stockpiles.”¹⁹

Meanwhile, like the BWC, the proposed nuclear prohibition treaty appears unlikely to entail verification. Leading technological countries (and companies)

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are in the early stages of a breathtaking revolution in biotechnology and genomic engineering. Empowered by information technology and robotics, the capacity to cheaply design and produce new organisms and to alter human biological processes will become increasing widespread. While new biotechnologies will likely provide enormous benefits for agriculture, medicine, and manufacturing, as well as mitigating effects of climate change, new techniques will also be used for military purposes that could be benign or malign—that is, defensive or offensive—respectively.

Indeed, the prospect of malign uses drives states such as China, Russia, the United States, and others to extensively fund defense organizations, commercial enterprises, and university research labs to stay at the forefront of this technology in order to defend against and blunt the effects of potential biological warfare. All of this occurs with the BWC in place. (The BWC focuses on pathogens and toxins, whereas twenty-first century biotechnologies could harm without relying on disease transmission.) In contemplating the potential prohibition of nuclear weapons, and even an eventual nuclear disarmament

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regime, states and civil society should think hard about how similar defensive contingency preparation to deal with revived nuclear threats would be managed. This is not being discussed at all in the negotiations on a nuclear prohibition treaty.

There is another reason for relating the biological weapons issue to the nuclear negotiations: the nuclear-armed states that subscribed to the BWC did so in part because they would retain nuclear weapons to deter and potentially

respond to major biological attacks. The retention of nuclear deterrence ameliorated concerns about the absence of verification for BWC adherence. However, if and when total nuclear disarmament becomes a serious undertaking, the potential threats emanating from the biotechnology revolution will assume even greater urgency. At that point, among other things, the inadequacies of the now-extolled BWC will weigh heavily on leading states.

Prohibiting the possession and use of nuclear weapons without redressing the circumstances that make states retain these weapons could be emblematic of two things. First, as proponents intend, it could symbolize rejection of the potentially murderous hostage relationship that the few nuclear-armed states impose on a large number of others. Second, it could affirm what some see as the realist view that treaties are not worth the paper they are written on if adequate power is not available and determined to verify and enforce them.

To put the second point a different way, states and experts who believe that nuclear weapons help deter major acts of aggression and inspire states not to escalate conflicts argue with some reason that prohibition puts the cart before the horse. If use of nuclear weapons is likely to *precede* such aggression involving

conventional forces or a biological attack, then it would make sense to focus first on nuclear prohibition. But if nuclear weapons would most likely be used after an act of major aggression is under way and there is no other viable means to stop it, then it makes more sense to focus first on finding alternative ways to deter or defeat such aggression.

States have a recognized right of self-defense. In this regard, it is appropriate to quote at length the International Court of Justice's 1996 advisory judgment:

95. . . . The principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. . . .

97. Accordingly, in view of the present state of international law viewed as a whole . . . and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.²⁰

If circumstances can be envisioned wherein a state or alliance cannot defeat an act of aggression by non-nuclear means, then do proponents of nuclear prohibition essentially require states in such circumstances to accept defeat, possibly tantamount to suicide? Is this legally and politically plausible (insofar as states that choose not to join such a treaty are not bound by it)? One could counter that the international community collectively ought to be willing and able to rally to a threatened state's defense and thereby defeat an instance of major aggression. Yet the current international system's dependence on the UN Security Council to authorize such action is highly problematic. Most of the states capable of mounting overwhelming conventional aggression retain the power to veto Security Council resolutions.

The Challenge of Eliminating Nuclear Weapons

Turning to the elimination of nuclear weapons, proponents of the prohibition treaty acknowledge that the envisioned successor disarmament treaty will be difficult to negotiate and implement. But this merely restates the obvious and does not advance the cause. Officials and experts in nuclear-armed states appreciate the enormous difficulties of defining what security-enhancing disarmament would entail, and whether and how it could be verified and enforced.

Yes, all nuclear weapons would have to be dismantled. But what would then be done with the fissile materials taken from them? Warhead disassembly

has never been verified (aside from the unique case of South Africa). Inherent uncertainties surround inventories of fissile materials. Given these uncertainties, by what means would the world be reassured that a state was not secretly retaining weapons-usable stockpiles? Would states be allowed to retain ballistic missiles? If so, under what conditions? What would be done with nuclear-weapon research and development facilities,

capabilities, and trained personnel? Would researchers and facilities adept at nuclear-weapon design and experimentation be monitored—including in universities—and if so, how? How would the management and safeguarding of civilian fuel-cycle facilities and activities need to be revised in order to bolster confidence that no one would cheat on a global disarmament regime?

Without offering guidance on these genuine challenges in designing and effecting nuclear disarmament, authors of a prohibition treaty may actually cloud the prospects of future disarmament. What would happen if and when nuclear-armed states seriously took up the challenge and developed what they judged to be a viable disarmament regime, but this regime required much more extensive and intrusive global monitoring of nuclear-related facilities and personnel than exists today? Would the hundred-plus supporters of the prohibition treaty subscribe to these requirements and share in the costs? What if viable disarmament required centralization of all civilian nuclear fuel-cycle activities under the control of a handful of formerly nuclear-armed states? Would today's non-nuclear-armed states with civilian nuclear aspirations accept this? Without some sense of how major disputes over the design of a world without nuclear weapons would be resolved, many states will be reluctant to pursue this agenda. Unfortunately, these kinds of issues have not been addressed in negotiations of the prohibition treaty.

Finally, the prohibition movement suggests or implies that it reflects the demands of a large majority of the world and therefore carries a democratic imperative. This is true on one level, yet may be problematic in two ways, one of which is not obvious. First, the states that favor a prohibition treaty do compose more than 60 percent of the world's countries. Yet, in terms of population, more than 60 percent of the world population lives in states that did

Without offering guidance on genuine challenges in designing and effecting nuclear disarmament, authors of a prohibition treaty may actually cloud the prospects of future disarmament.

not support this undertaking. This merely represents the long-standing tension between the international state system (in which each state has an equal vote) and international politics (wherein the population, political influence, and economic and military power of states vary enormously, and governments generally prioritize internal interests over global ones). In this sense, democracy within states (or merely state sovereignty) collides with democracy among states. More than majoritarian democracy, the issue seems better cast as one of respecting the rights of the large, innocent minority of the world's population who could be subjected to death and environmental peril by the actions of one or more nuclear-armed states that are allowed by other big states to retain and use these weapons without subscribing even to conditions laid out by the International Court of Justice in 1996.

Second, there is at least some possibility (risk) that if the prohibition treaty engenders significant debate in states that currently rely on nuclear weapons (directly, or indirectly via alliances), governments could mobilize security arguments against the treaty in ways they have not to date. If polls or other gauges of national opinion indicated that a large minority or a majority supported government positions, reliance on nuclear weapons could be affirmed in ways that were not apparent before the UN vote to negotiate a treaty. The prohibition issue has not been very publicly salient or debated in many of these countries. In countries that compose more than half of the world's population—China, France, India, Pakistan, Russia, South Korea, and the United States among them—it is probable that public opinion (however ascertained) would not favor the treaty. This could have the unintended and regrettable effect of confirming these governments' reliance on nuclear weapons and easing pressure on them to pursue disarmament measures.

What Should Be Done?

The catastrophic dangers posed by nuclear weapons, and the attitudes and behaviors of nuclear-armed states regarding disarmament, have made the prohibition movement inevitable. At the same time, the prohibition treaty now being negotiated fails to address a number of legitimate, vital concerns of states facing large-scale security threats. So what is to be done?

Clearly, nuclear-armed states and others who continue to rely on extended nuclear deterrence must devote more serious thought and action to nuclear disarmament. The 2000 and 2010 NPT Review Conferences specified well-known incremental steps that would manifest progress toward nuclear disarmament. States know how to take these steps, whether the number is thirteen or twenty-two; what they have lacked is political will.

Nuclear-armed states will not credibly meet their disarmament obligations unless and until they seriously define what a feasible, comprehensive, verifiable, and enforceable nuclear disarmament regime would entail.

But beyond the taking of well-marked incremental steps, nuclear-armed states will not credibly meet their disarmament obligations unless and until they seriously define what a feasible, comprehensive, verifiable, and enforceable nuclear disarmament regime would entail. Chris Ford, now a senior official in the Trump administration, has made the most trenchant conservative arguments that the legal requirement for disarmament is quite narrow. Yet he acknowledges that there is a requirement to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race . . . and to nuclear disarmament.”²¹ It is difficult to see how the nuclear-weapon states, individually or collectively, have met or could meet this requirement if they have not developed models of what nuclear disarmament should entail.

Designing a model nuclear disarmament regime does not require promises in advance to accede to and implement it. States commonly design futuristic weapons systems without deciding in advance to actually develop, procure, and deploy them. Why can't they do the same regarding nuclear disarmament? States could do this individually, bilaterally, and/or multilaterally. They

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could do it at classified levels and in the open, solely with officials or in collaboration with nongovernmental experts. (Indeed, the Carnegie Endowment has done this in a project to model a “firewall” that distinguishes purely peaceful nuclear programs from military ones, and provides insights on how to manage and monitor dual-use activities.²²) The core questions to be answered are: How should nuclear disarmament be defined? What capabilities, facilities, materials, and activities should it prohibit and allow? How could potentially dual-use capabilities, facilities, materials, and activities be verified and monitored? Finally, how would such a regime be enforced? It seems illegitimate for states to argue that they are even intending to pursue negotiations toward nuclear disarmament in good faith if they are not seriously addressing such questions.

To date, no nuclear-armed state has publicly undertaken such a project.²³ This betrays these states' lack of seriousness about nuclear disarmament. It is difficult to see how these states will gain credibility in the wider world if they refuse even to offer blueprints for a nuclear disarmament regime that others can then discuss and debate. These states cannot be forced to sign and implement a prohibition treaty, and they certainly cannot be forced to implement a hypothetical disarmament regime. But reluctance to even take up the design challenge can only be seen as evidence of bad faith.

Whether or not they design prototype disarmament regimes, states that say nuclear deterrence remains necessary for security reasons should more explicitly articulate whether and how their policies and actions to redress security challenges can open the way for progress toward nuclear disarmament. Many governments are trying to resolve or prevent conflicts on the European periphery, in the Middle East, on the Korean Peninsula, in Northeast Asia, and in

South Asia. Yet, with few exceptions, leaders do not articulate how the immediate actions they are taking can and should create conditions for reducing reliance on nuclear weapons and reducing their numbers toward zero. It is quite possible that the actions and outcomes one side seeks will not make adversaries feel they can reduce reliance on nuclear weapons. But clarifying this aspect of relations can still be useful in educating the rest of the world about the challenges of actually achieving the aspirations reflected in the ban treaty.

Special attention should be drawn to the problems of enforcing international norms and laws today and in the future. The proposed prohibition treaty will not have enforcement provisions. But the nuclear disarmament treaty that the prohibition treaty will call for must be enforceable or else nuclear-armed states will not agree to it.

The UN Security Council is the recognized international authority to address threats to peace and security. It also is the body with *de facto* international responsibility to redress violations of the NPT and, relatedly, challenges arising from violations of IAEA safeguards agreements.²⁴ If a nuclear disarmament convention as called for in the prohibition treaty mandate is to be enforced, would negotiators assign compliance and/or enforcement to the Security Council? Or would they seek an alternative that would gain the support of the states' whose performances are to be enforced? If neither option is attempted or proves possible, then how would a nuclear disarmament treaty have real effect?

If the UN Security Council's role on this matter is to be superseded, how would this process be managed, and what effect would this have on the broader international system? It is difficult to imagine the five NPT-recognized nuclear-weapon states agreeing to a disarmament regime whose enforcement would be managed by any entity other than the Security Council, wherein these states retain veto power. If the Security Council would play a role in enforcing a disarmament treaty or convention, then would any one of the nuclear-weapon states be able to veto responses to its own potential noncompliance with a treaty? If one of the veto-wielding powers committed aggression against another state—whether or not backed by nuclear threats—and the aggressed-upon state could not rebuff such aggression without use of nuclear weapons, how would such an eventuality be treated?

Further, a meaningful prohibition of nuclear weapons and a subsequent disarmament treaty must also apply to the other nuclear-armed states—India, Israel, North Korea, and Pakistan. How would these states be persuaded to adhere to such instruments if five of the nuclear-armed states did have authority to veto enforcement but the others did not?

Beyond issues related to the enforcement of nuclear disarmament, Zia Mian has suggested a constructive, creative way to focus attention on the legitimacy of using nuclear weapons. Mian has proposed that the UN General Assembly pursue a resolution that, among other things, could “call on states to

support adding the use of nuclear weapons to the mandate of the International Criminal Court, since the Court already has responsibility for investigating and punishing crimes against humanity, crimes of genocide, and war crimes.”²⁵

While nuclear-armed states likely would resist such a move, debate over such a proposal would raise the salience of vital issues concerning nuclear doctrines,

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operational plans, and force postures. And this would highlight the importance of preventing the use of nuclear weapons without prejudice to pursuing their elimination.

Many of the questions raised above may be unanswerable. But, if the enterprise intended by proponents of the prohibition treaty process is to have positive material results, these questions cannot simply be put aside for someone else to figure out at some later date. There is no reason why they cannot and should not begin to be addressed now. For

questions central to the enforcement of international norms and rules go to the heart of the security concerns that make dozens of countries in Asia, Europe, and the Middle East wary that major threats can be deterred or defeated without, in extremis, nuclear weapons. If ways can be found to reassure these and other nations that the international community will predictably and effectively defend them in time to prevent the illegal infliction of grave—even existential—damage, then the case for prohibiting and eliminating nuclear weapons will become much greater.

Notes

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3. Maaïke Beenes, “Institutional Arrangements” (statement, United Nations, New York, NY, March 31, 2017), <http://www.icanw.org/campaign-news/ican-statements-to-the-negotiating-conference/>.
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5. On behalf of France, the UK, and the United States, France delivered an explanation of their vote against UN Resolution L.41. Please see “France, United Kingdom & United States, Explanation of Vote” (statement, United Nations, New York, NY, October 27, 2016), <http://www.icanw.org/wp-content/uploads/2016/10/France-UK-and-US-EOV.pdf>.
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13. Ray Acheson, “It’s Time to Draw Conclusions,” in *The NPT Action Plan Monitoring Report March 2015*, ed. Ray Acheson (Geneva: Reaching Critical Will, 2015), http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPTAP_2015_Analysis.pdf. This report details the organization’s basis

- for evaluating fulfillment of each of the 2010 Review Conference's sixty-four recommended actions in the domains of disarmament, nonproliferation, and nuclear energy. See also, Elizabeth Philipp and Kelsey Davenport, "Assessing Progress on Nuclear Nonproliferation and Disarmament: Updated Report Card 2013–2016," Arms Control Association, July 2016, https://www.armscontrol.org/files/2016_ReportCard_reduced.pdf.
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 18. In private, U.S., British, and French officials have remarked more than once how former Egyptian president Hosni Mubarak and President Abdel Fattah el-Sisi did not and do not in bilateral meetings raise the issue of a Middle East weapons-of-mass-destruction-free zone, even as Egyptian diplomats rail about the issue in NPT Review Conferences. If leaders are not raising the nuclear prohibition issue directly with their counterparts, little material pressure will be generated.
 19. David Malet, *Biotechnology and International Security* (London: Rowman and Littlefield, 2016), 38.
 20. International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion," July 8, 1996, <http://www.icj-cij.org/docket/files/95/7495.pdf>.
 21. Ford, "Debating Disarmament."
 22. See Toby Dalton et al., "Toward a Nuclear Firewall: Bridging the NPT's Three Pillars," Carnegie Endowment for International Peace, March 20, 2017, <http://carnegieendowment.org/2017/03/20/toward-nuclear-firewall-bridging-npt-s-three-pillars-pub-68300>.
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 24. The IAEA Statute, Article XII.7.C, states: "The inspectors shall report any non-compliance to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which it finds to have occurred. The Board shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations." See "The Statute of the IAEA," International Atomic Energy Association, <https://www.iaea.org/about/statute#a1-12>.
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