

The NPT and Prohibition Treaty as Alternative Normative Frameworks for Global Denuclearisation

Ramesh Thakur

We are at an inflection point in nuclear affairs with a world in disarray. Boundaries are eroding between nuclear and conventional munitions; regional, global, tactical and strategic warheads; and nuclear, cyber and space domains. Geopolitical tensions have risen in Europe, the Middle East, South Asia and East Asia. Little wonder that former US Defense Secretary William Perry warns that ‘the danger of a nuclear catastrophe today is greater than during the Cold War’.¹ Great power tensions make nuclear arms control more difficult but also more urgent, especially as the nuclear peace has held so far owing as much to good luck as sound stewardship.² Nuclear weapons may or may not have kept the peace among various groups of rival states; they could be catastrophic for the world if ever used by both sides in a war between nuclear-armed rivals; and the prospects for their use have grown.

The risks of nuclear war have grown with more countries with weaker command and control systems in more unstable regions possessing these deadly weapons, terrorists wanting them, and vulnerability to human error, system malfunction and cyber attack. Premeditated large-scale conventional attacks and preemptive nuclear strikes are unlikely pathways to a nuclear exchange. But the toxic cocktail of growing nuclear stockpiles, expanding nuclear platforms, irredentist territorial claims and out of control jihadist groups makes the Indian subcontinent a high risk region of concern. Northeast Asia is the world’s most dangerous cockpit for a possible nuclear war that could directly involve four nuclear-armed states, and South Korea, Japan and Taiwan. North Korea has dramatically accelerated both the pace and the scope of its nuclear and missile delivery programs in the search for a weaponised intercontinental nuclear capability.

A Ban Treaty

All nine nuclear-armed states (China, France, India, Israel, North Korea, Pakistan, Russia, UK, USA) pay lip-service to the ultimate elimination of nuclear weapons. But their actions with respect to weapons arsenals, fissile material stocks, force modernisation plans, declared doctrines and observable deployment practices demonstrate the intent to retain nuclear weapons indefinitely.³

Even though their combined stockpiles total only three per cent of global nuclear arsenals, warhead numbers are growing in all four Asian nuclear-armed states (and in none of the other five). Of the four, only China is legally bound by Article VI of the Nuclear Non-proliferation Treaty (NPT) to nuclear disarmament.

¹ Quoted in Doyle McManus, ‘The new nuclear arms race’, *Los Angeles Times*, 3 April 2016.

² Eric Schlosser, *Command and Control* (London: Allen Lane, 2013), 327; Patricia Lewis, Heather Williams, Benoit Pelopidas and Sasan Aghlani, *Too Close for Comfort* (London: Chatham House, 2013).

³ Gareth Evans, Tanya Ogilvie-White and Ramesh Thakur, *Nuclear Weapons: The State of Play 2015* (Canberra: Centre for Nuclear Non-Proliferation and Disarmament, 2015).

On 23 December 2016, the UN General Assembly called for negotiations on a 'legally binding instrument to prohibit nuclear weapons, leading towards their total elimination'⁴ by a solid 113-35 majority, that would help fulfil the 127-nation humanitarian pledge 'to stigmatise, prohibit and eliminate nuclear weapons'.⁵ In 1996 the World Court advised, unanimously, that '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'⁶ (emphasis added). The 2016 General Assembly resolution conforms to this obligation and attempts to give practical expression to it.

The conference held its first session 27–31 March with 132 NPT States Parties participating, and final session on 15 June–7 July. On 7 July, 122 states – almost two-thirds of NPT members – adopted the Nuclear Weapon Prohibition Treaty (NWPT) that will be opened for signature at the start of the annual UN General Assembly session in New York on 20 September.⁷ It prohibits the acquisition, development, production, manufacture, possession, transfer, receipt, testing, extra-territorial stationing, use and threat of use of nuclear weapons. It will come into force on the fiftieth ratification by a State Party. This is the most significant multilateral development on nuclear arms control since the indefinite extension of the NPT in 1995 and the adoption of the Comprehensive Test-Ban Treaty (CTBT) in 1996.

Former UN Under-Secretary-General for Disarmament Jayantha Dhanapala has pointed to the risk that the NPT and NWPT could have a mutually undermining influence to damage each other's prospects for success.⁸ From one point of view the UN-mandated conference is a vote of no confidence in the NPT process and poor outcomes that – potentially although not necessarily – poses an existential threat to the NPT. Paul Meyer, a former Canadian disarmament ambassador, believes that the NPT 'is in mortal peril' because an 'enormous fissure has opened regarding the right course of action to realise the treaty's disarmament objectives'. Meyer adds that this 'existential threat ... will require dedicated remedial action'.⁹

Such dire predictions may be exaggerated, for almost all groups of states – even those outside the treaty – believe that the NPT serves their interests. Still, the perceptions are potentially damaging and it is vital to consider how to prevent the emerging processes damaging each other and instead to work to harness their combined energies to the non-proliferation and disarmament objective. This is because most nuclear-armed states and those that shelter under the nuclear umbrella voted against convening the UN conference; and all nine nuclear-armed states and almost all NATO and Asia-Pacific US allies, with the exception of the Netherlands, boycotted the ban conference in New York in March and June–July.

⁴ Resolution 71/258, paragraph 8, <http://www.icanw.org/campaign-news/un-general-assembly-approves-historic-resolution/>

⁵ <http://www.icanw.org/pledge>

⁶ <http://www.icj-cij.org/docket/files/95/7497.pdf>

⁷ A/CONF.229/2017/L.3/Rev.1,

<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/documents/L3-Rev1.pdf>

⁸ Jayantha Dhanapala, 'NPT 2020 Review Underway: Is the NPT Still Relevant?' APLN/CNND Policy Brief no. 38 (Canberra/Seoul: April 2017), http://www.apln.org/briefings/briefings_view/Policy_Brief_38_-_NPT_2020_Review_Underway:_Is_the_NPT_Still_Relevant

⁹ Paul Meyer, 'The Nuclear Non-proliferation Treaty: *Fin de Régime?*', *Arms Control Today* (April 2017), p. 16.

The primary drivers of the ban negotiations were deepening concern at the intensifying and multiplying risks and threats posed by the existence and deployment of nuclear weapons and doctrines, and mounting frustrations at the failure to eliminate them under existing frameworks and processes. Over the years, despite being the most successful arms control agreement in history, the NPT has built up an accumulating series of anomalies, shortcomings, flaws and gaps between promise and performance. In addition, as the NPT regime is treaty based, its normative reach does not extend to non-signatories. This has the paradoxical result that the five nuclear weapon states (NWS) are legally obligated to nuclear disarmament but the four extra-NPT nuclear-armed states are not. The UN treaty will bring all nine states under one common normative framework.

On the one hand, the NPT has been and still is the normative sheet anchor of all nuclear orders. On the other hand, there are unmistakable indications that its normative potential has been exhausted. **As we head towards the 50th anniversary of the NPT's adoption next year, here is a startling fact: not a single nuclear warhead has been eliminated through a multilateral agreement – not one.** The bilateral US–Russian process has also stalled completely. There was a recommendation from a blue-ribbon Pentagon panel to expand US nuclear options by developing an arsenal capable of 'limited' nuclear wars which would further undermine the NPT.¹⁰ In addition, increasing attention is being paid to the possibility of nuclear weaponisation by Japan and South Korea in the Pacific, and to an independent European nuclear deterrent in the Atlantic.

Against this bleak nuclear landscape, the majority of non-NWS have decided to switch roles from rule takers to norm setters, hijacked the process from the NWS and proclaimed a more powerful and unambiguous prohibition norm. However, if the NPT faces a crisis of credibility and rapidly eroding legitimacy, the ban treaty faces a crisis of expectations. While NWS and allies allege that the ban treaty threatens the integrity of the NPT and the Geneva-based Conference on Disarmament (CD), it seems unarguable that their boycott of the UN conference was an open act of defiance and disrespect of a multilaterally mandated disarmament process involving two-thirds of the NPT membership. Prima facie, non-participation also placed them in non-compliance with the Article VI obligation of *all* 188 NPT States Parties, not just the NWS, to pursue and conclude disarmament negotiations.

Five Components of Nuclear Disarmament

The nuclear policy goals can be summarised as: delegitimise, prohibit, cap and contain, reduce, and eliminate. In this five-part agenda, only those possessing nuclear weapons can undertake the last three tasks. But the non-nuclear weapon countries, who constitute the overwhelming bulk of the international community, can pursue the first (delegitimation) and second (prohibition) goals on their own, both as an affirmation of global norms (standards as distinct from prevailing patterns of behaviour); and as one of the very few means available to them of exerting pressure on the possessor states to pursue the other three goals.

Cap, Reduce, Eliminate

All nuclear powers are modernising and upgrading their arsenals. The Asian nuclear powers are expanding their weapon stockpiles and diversifying their land, air and sea-

¹⁰ <http://www.rollcall.com/news/policy/pentagon-panel-urges-trump-team-expand-nuclear-options?>

based delivery platforms. Pyongyang is the only one still testing nuclear devices. Such developments could be frozen.

Russia and the US, with 93 percent of global nuclear stockpiles, could extend New START and negotiate substantial cuts to warhead numbers. Once these two have reduced their arsenals down from several thousand to a few hundred each, China could be drawn into the negotiations followed by the other nuclear-armed states.

The two nuclear superpowers could also reduce reliance on nuclear weapons in their national security policy by unilateral or mutually agreed changes to nuclear postures, doctrines and deployment practices like launch-on-warning and first use of nuclear weapons. NFU and de-alerting are strategic steps in downgrading the military role of nuclear weapons and transforming relations between nuclear adversaries from one of hostile confrontation to antagonistic collaboration. They would confirm nuclear weapons as weapons of last resort, reinforce the normative barrier against use, and permit the dismantlement of vulnerable land-based warheads. Moreover, indefinite reliance on first use and on short notice alert can legitimise the nuclear ambitions of others by validating their role in providing national security. There is thus a non-proliferation as well as a disarmament and crisis stability argument for de-alerting.

Stigmatise and Prohibit

In an unclassified NATO document of 17 October 2016 that urged allies to oppose ban negotiations, Washington conceded that ‘The effects of a nuclear weapons ban treaty could be wide-ranging’, including making nuclear war planning more difficult.¹¹ In other words, US opposition is built not on the lack of practical effects of a ban treaty, but on the opposite: its very considerable impact in the real world. The strength of US opposition is difficult to fathom but for this recognition of the practical import of a ban treaty.

The legally binding prohibition treaty will harden the normative boundaries between conventional and nuclear, regional and global, and tactical and strategic weapons that are being blurred by technological developments. The ban treaty will also reaffirm the global nuclear norms of non-proliferation, disarmament, safety, security, and non-use, and thereby devalue the currency of nuclear weapons.

The NWS have argued that the UN ban treaty is a potential threat to the credibility and authority of the NPT whereas participants in the ban negotiations have been at pains to underline the complementarities. At the same time, a successful ban conference could shatter irretrievably the NPT and the CD as the sole normative framework and multilateral forum, respectively, for nuclear non-proliferation and disarmament. But it will do so by revitalising the multilateral machinery for the task. The immediate policy challenge is how to ensure that the two separate streams of the ban treaty and NPT processes are brought together in a smooth confluence.

The UN High Level Conference on Nuclear Disarmament (2018)

One structured opportunity to reconcile the different streams of nuclear policy activities and dialogues will come at the UN High Level Conference on Nuclear Disarmament in 2018 as called for by the General Assembly (Resolution A/68/32, 5 December 2013). Like other high level UN conferences, this will elevate the issue of nuclear disarmament in national

¹¹ http://www.icanw.org/wp-content/uploads/2016/10/NATO_OCT2016.pdf

policy priorities and the global agenda, garner widespread media attention, and mobilise civil society. It could also adopt declarations on no first use and sole purpose and reiterate the call for the negotiation of a Middle East WMD-free zone.

Conclusion

The ban treaty is at present the only practical and credible effort to fulfil the dream of a world freed at last of the existence of nuclear weapons that constitute an existential threat to humanity. Asia-Pacific countries have been strong supporters. Almost the only opponents are the four nuclear-armed (China, India, North Korea, Pakistan) and the three umbrella (Australia, Japan, South Korea) states. Non-participation thus puts them on the wrong side of geography, history and humanity. The international community considers a ban treaty urgent, essential and in current circumstances the only practical way forward for achieving real disarmament. It should provide an impetus to efforts to a Nuclear Weapons Convention that is universal, non-discriminatory, verifiable and enforceable. Actual elimination could be spread over more than a decade to ensure that decommissioning, dismantlement and destruction of weapons and weapon-producing materials and infrastructure are carried out safely and securely.

A former United Nations Assistant Secretary-General, Prof. Dr. Ramesh Thakur is director of the Centre for Nuclear Non-Proliferation and Disarmament, Crawford School of Public Policy, The Australian National University; Co-Convenor of the Asia-Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament (www.a-pln.org); and United Nations Association of Australia Goodwill Ambassador for Nuclear Non-Proliferation and Disarmament. His most recent book is The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect, 2nd ed. (Cambridge University Press, 2017).