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Challenging Nuclearism: The Nuclear Ban Treaty Assessed

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On 7 July 2017 122 countries at the UN voted to approve the text of a proposed international treaty entitled 'Draft Treaty on the Prohibition of Nuclear Weapons.' The treaty is formally open for signature in September, but it only becomes a binding legal instrument according to its own provisions 90 days after the 50th country deposits with the UN Secretary General its certification that the treaty has been ratified in accordance with its constitutional requirements.

In an important sense, it is incredible that it took 72 years after the attacks on Hiroshima and Nagasaki to reach the point of setting forth this unconditional prohibition of any use or threat of nuclear weapons. [Article 1(e) within the framework of a multilateral treaty negotiated under UN auspices.] The core obligation of states that choose to become parties to the treaty is very sweeping. It prohibits any connection whatsoever with the weaponry by way of possession, deployment, testing, transfer, storage, and production [Article 1(a)].

The Nuclear Ban Treaty (NBT) is significant beyond the prohibition. It can and should be interpreted as a frontal rejection of the geopolitical approach to nuclearism, and its contention that the retention and development of nuclear weapons is a proven necessity given the way international society is organized. It is a healthy development that the NBT shows an impatience toward and a distrust of the elaborate geopolitical rationalizations of the nuclear status quo that have ignored the profound objections to nuclearism of many governments and the anti-nuclear views that have long dominated world public opinion. The old reassurances about being committed to nuclear disarmament as soon as an opportune moment arrives increasingly lack credibility as the nuclear weapons states, led by the United States, make huge investments in the modernization and further development of their nuclear arsenals. Even more telling was the failure to seize the window of opportunity in the mid-1990s as the Cold War ended and the Soviet Union collapsed to pursue nuclear disarmament with due diligence.

Despite this sense of achievement surrounding the NBT process, it must be admitted that there is a near fatal weakness, or at best, a gaping hole, in this newly cast net of legal prohibition. True, the support of 122 governments lends weight to the claim that the international community, by a significant majority has signaled in an obligatory way a repudiation of nuclear weapons for any and all purposes, and formalized their prohibition of any action to the contrary. The enormous fly in this healing ointment arises from the refusal of all nine nuclear weapons states to join in the NBT process even to the legitimating extent of participating in the negotiating conference with the opportunity to express their objections and influence the outcome. As well, most of the chief allies of these states that

are part of the global security network of states relying directly and indirectly on nuclear weaponry also boycotted the entire process. It is also discouraging to appreciate that several countries in the past that had lobbied against nuclear weapons with great passion such as India, Japan, and China were notably absent, and also opposed the prohibition. This posture of undisguised opposition to this UN sponsored undertaking to delegitimize nuclearism, while reflecting the views of a minority of governments, must be taken extremely seriously. It includes all five permanent members of the Security Council and such important international actors as Germany and Japan.

The NATO triangle of France, United Kingdom, and the United States, three of the five veto powers in the Security Council, angered by its inability to prevent the whole NBT venture, went to the extreme of issuing a Joint Statement of denunciation, the tone of which was disclosed by a defiant assertion removing any doubt as to the abiding commitment to a nuclearized world order:

> "We do not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons."

The depth of disagreement is set forth very aggressively in the joint statement:

> "A purported ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary cannot result in the elimination of a single nuclear weapon and will not enhance any country's security, nor international peace and security. It will do the exact opposite by creating even more divisions at a time when the world needs to remain united in the face of growing threats, including those from the DPRK's ongoing proliferation efforts."

In effect, these leading NATO members, armed with nuclear weapons and enjoying Security Council veto power, are making two interrelated claims—that the NBT offers no practical solutions to such current challenges as those posed by North Korea's nuclear weapons and missile program and by dividing the world between those that have or depend on nuclear weapons and those who want to prohibit and eliminate them there is a loss of the kind of unity that is needed to force North Korea to back down.

It is correct that the NBT will not by itself lead to nuclear disarmament as it is not presently backed by a single one of the nine nuclear weapons states, but the civil society backers of the treaty and the 122 approving governments accept their responsibility to work toward implementation, which means changing the climate of opinion sufficiently so that the states with weapons will later adhere to the treaty.

On the more practical side of the joint statement's position, it should be obvious by now that coercive diplomacy (sanctions plus threats of military attack) have not achieved results. What seems far more promising is a combination of the norms embodied in the NBT together with what I would call 'restorative diplomacy,' that is, an effort to ensure North Korea's security by means other than nuclear deterrence, via guarantees, economic assistance, and the end of provocative military training exercises and weapons

deployments. Restorative diplomacy is not hampered in any way by the NBT, and is likely greatly aided by this comprehensive commitment to reject nuclear weapons and their purported security roles.

The body of the joint statement contends that global security depends upon maintaining the nuclear status quo, as bolstered by the Nonproliferation Treaty of 1968 and by the unprovable assertion that it was "the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years." It is relevant to take note of the geographic limits associated with the claimed peace-maintaining benefits of nuclear weaponry, which ignores the ugly reality that devastating warfare has raged throughout this period outside the feared mutual destruction of the heartlands of geopolitical rivals, a central shared forbearance by the two nuclear superpowers and other nuclear powers throughout the entire Cold War. During these decades of rivalry, and subsequently, the violent dimensions of geopolitical rivalry have been effectively outsourced to the non-Western regions of the world, causing massive suffering and widespread devastation for many vulnerable peoples throughout the Global South. Such a conclusion suggests that even if we were to accept the claim on behalf on nuclear weapons as deserving of credit for avoiding a major war, specifically a nuclear World War III, that 'achievement' was accomplished at the cost of millions, probably tens of millions, of civilian lives in non-Western societies. Beyond this, the achievement, such as it was, involved a colossally irresponsible gamble with the human future, and succeeded as much due to good luck as to the hyper-rationality attributed to deterrence theory and practice.

This reliance on the NPT to justify opposition to the NBT is at the root of these diametrically opposed views of collective security. The joint statement strongly asserts that the NPT/deterrence approach to collective security is the only way to end the impasse blocking moves toward nuclear disarmament, but extensive international experience suggests just the opposite conclusion. Namely, that NPT/deterrence is a management approach developed by the leading nuclear weapons states, and especially by the three governments issuing the joint statement. For these governments it is a greatly preferred alternative to the disarmament approach that motivates the NBT supporters. This comparison of approaches discloses a fundamental intellectual and political distinction that should be clearly articulated and understood.

NBT does not itself challenge the Westphalian framework of state-centrism by setting forth a framework of global legality that is issued under the authority of 'the international community' or the UN as the authoritative representative of the peoples of the world. Its provisions are carefully formulated as imposing obligations only with respect to 'State parties,' that is, governments that have deposited the prescribed ratification and thereby become formal adherents of the treaty. Even Article 4, which hypothetically details how nuclear weapons states should divest themselves of all connections with the weaponry limits its claims to State parties, and offers no guidance whatsoever in the event of suspected or alleged non-compliance. Reliance is (mis)placed in Article 5 on an essentially voluntary commitment to secure compliance by way of the procedures of 'national implementation,' that is, it specifies no binding constraints on State parties that violate the NBT.

The treaty does aspire to gain eventual universality through the adherence of all states over time, but in the interim the obligations imposed are of minimal substantive relevance beyond the agreement of the non-nuclear parties not to accept deployment or other

connections with the weaponry. The NBT proceeds on a basis in which the only truly binding obligations under international law that limit the freedom of sovereign states arise from the consent of their governments, and the clearest expression of consent is a negotiated and ratified international agreement in the form of an international treaty.

The issues are jurisprudentially complicated and conceptually controversial but there are other means than by treaty to exhibit consent, which means that from these other lawmaking perspectives even nuclear weapons states could have been deemed to have 'consented' to the prohibition on the use of nuclear weapons. The most general and well regarded of these alternative foundations of legal obligations is associated with what is called 'customary international law.' To establish a customary legal norm requires a long established pattern of consistent state practice of which the nuclear taboo might serve as evidence having existed for a period of more than seven decades together with 'a sense of obligation,' that is, acknowledging that habitual behavior is not enough by itself but that the taboo was respected because it was felt to be obligatory. In effect, a consistent pattern of practice must be reinforced by the sense that behavior was done with an accompanying sense of obligation. It could be argued, for example, that the nuclear taboo incorporates a strong widely shared sense that nuclear weapons should never be used. To offset such an argument, the U.S., France, and the UK could point to the Joint Declaration as contradicting any impression that a customary norm of prohibition had emerged, and this consideration may help explain why these governments were prepared to antagonize public opinion by claiming discretion to rely on threats and even uses of nuclear weapons on behalf of their version of national and global security.

An even more contested source of law is the related expression of an authoritative world consensus through the action of the UN General Assembly claiming a capacity to act in a quasi-legislative role. The adoption of a series of resolutions, most notably GA Resolution 1653, can be argued to establish a world community norm of prohibition. Such a lawmaking authority for the UN amounts to a rejection of prevailing positivist views that international obligations depend on some show of consent by the individually obligated states to become law.

Still further down the list of alternatives to adherence to a treaty of the sort represented by NBT is the contention that natural law prohibits recourse to such indiscriminate, potentially omnicidal weaponry. Such a view, deriving its authority from the earlier connections between international law and religious and moral beliefs, collides with modern ideas that all valid legal norms are based on the consent of states. There is a neo-natural law view that the objections to nuclear weapons and nuclearism reflect values reflecting universally shared beliefs of humanity. In an important respect, the objections of most people to nuclear weaponry is based more on their religious and ethical beliefs than on whether or not there exists a valid legal prohibition, illustrating the gap between societal consensus and the international legal order as dominated by sovereign states.

Taking an unnecessary further step to reaffirm statism, and specifically, 'national sovereignty' as the foundation of world order, Article 17 confers on the parties to the NBT a right of withdrawal. All state parties have to do is give notice, accompanied by a statement of 'extraordinary circumstances' that have 'jeopardized the supreme interests of its country.' The withdrawal will take effect twelve months after the notice and statement are submitted. There is no procedure in the treaty by which the contention of 'extraordinary circumstances' can be challenged as unreasonable or made in bad faith. It is an acknowledgement that even for these non-nuclear states, nothing in law or morality or

human wellbeing takes precedence over their exercise of sovereign rights. Article 17 is not likely to be invoked in the foreseeable future. This provision reminds us of the strong residual unwillingness of even anti-nuclear governments to supersede national interests by deference to global and human interests. The withdrawal option is also important because it confirms that national security continues to take precedence over international law, even with respect to genocidal weaponry of mass destruction with regional and global implications such as the danger of nuclear winter. As such the obligation undertaken by parties to the NBT are reversible in ways that are not present in multilateral conventions outlawing genocide, apartheid, and torture.

Given these shortcomings, is it nevertheless reasonable for nuclear abolitionists to claim a major victory by virtue of tabling such a treaty? Considering that the nuclear weapons states and their allies have all rejected the process of treaty making, and even those within the circle of the intended legal prohibition reserve a right of withdrawal, the NBT is likely to be brushed aside by cynics as mere wishful thinking and by dedicated anti-nuclearists as more of an occasion for hemlock than champagne. The cleavage between the nuclear weapons states and the rest of the world has never been starker, and there are no signs on either side of the divide of making the slightest effort to find common ground. Indeed, there may be common ground. As of now, it is a standoff between two forms of asymmetry. The nuclear states enjoy a preponderance of hard power, while the anti-nuclear states have the upper hand when it comes to soft power, including solid roots in ‘substantive democracy,’ ‘global law,’ and ‘natural law.’ At stake here is the tension between the managerial and transformational approaches to nuclear weapons and nuclearism.

The hard power solution to nuclearism has essentially been reflexive, that is, relying on nuclearism as shaped by the leading nuclear weapons states. What this has meant in practice is some degree of self-restraint on the battlefield and crisis situations (the nuclear taboo exists without doubt, although it has never been seriously tested), and, above all, a delegitimizing one-sided implementation of the Nonproliferation Treaty regime. This one-sidedness manifests itself in two ways: (1) discriminatory administration of the underlying non-proliferation norm, most unreservedly in the case of Israel; as well, the excessive enforcement of the nonproliferation norm beyond the limits of either the NPT itself or the UN Charter, as with Iraq (2003), and currently by way of threats of military attack against North Korea and Iran. Any such uses of military force would be non-defensive and unlawful unless authorized by a Security Council resolution supported by all five permanent members, and at least four other states, which fortunately remains unlikely. [UN Charter, Article 27(3)] More likely is recourse to unilateral coercion led by the countries that issued the infamous Joint Declaration denouncing the NBT as was the case for the U.S. and the UK with regard to thei recourse to the war against Iraq. The war was principally rationalized as a counter-proliferation undertaking, which itself turned out to be a rather crude pretext for mounting an aggressive war, showcasing ‘shock and awe’ tactics.

(2) The failure to respect the obligations imposed on the nuclear weapons states to negotiate in good faith an agreement to eliminate these weapons by verified and prudent means, and beyond this to seek agreement on general and complete disarmament. It should have been evident, almost 50 years after the NPT came into force in 1970, that nuclear weapons states have breached their material obligations under the treaty, which were validated by an Advisory Opinion of the International Court of Justice (ICJ) in 1996 that included a unanimous call for the implementation of these Article VI legal commitments. In effect, the ICJ held that nuclear weapons states were under a legal obligation to pursue

nuclear disarmament in good faith, leaving unsaid their implicit breach of duty by failing to do so in the more than 25 prior years that the NPT had imposed such an obligation on parties to the treaty.

Drawing the main conclusion from deeds as well as words, it is evident for all with eyes that want to see, that the nuclear weapons states as a group have opted for deterrence as a permanent security scheme and their version of the nonproliferation regime as its principal management mechanism. In this security system it is hardly surprising that the legal mandate issued by the ICJ to negotiate nuclear disarmament has been totally ignored.

One contribution of the NBT is to convey to the world the crucial awareness of these 122 countries as reinforced by global public opinion that the deterrence/NPT approach to global peace and security is neither prudent nor legitimate nor a credible pathway leading over time to the end of nuclearism.

In its place, the NBT offers its own two-step approach—first, an unconditional stigmatizing of the use or threat of nuclear weapons to be followed by a negotiated process seeking nuclear disarmament. Although the NBT is silent about demilitarizing geopolitics and conventional disarmament, it is widely assumed that later stages of denuclearization would never be implemented unless they included these broader assaults on the war system. The NBT is also silent about the relevance of nuclear power capabilities, which inevitably entail a weapons option given widely available current technological knowhow. The relevance of nuclear energy technology would also have to be addressed at some stage of nuclear disarmament to address concerns about possible diversion to military uses.

Having suggested these major shortcomings of treaty coverage and orientation, can we, should we, cast aside these limitations, and join in the celebrations and renewed hopes of civil society activists to rid the world of nuclear weapons? I think, with a realistic sense of what has been achieved and what remains to be done, that the NBT should be treated as a historic step forward. It gives authoritative legal backing to the profound populist stigmatization of nuclear weapons, and as such provides anti-nuclear civil society forces with a powerful instrument to alter the climate of opinion in the nuclear weapons states. The Joint Statement is helpful, as well, in a perverse sort of way, undermining the tendency for activists to relax after achieving a provisional goal, in this case the NBT. We should all remember that there have been many lost opportunities and unfulfilled hopeful pledges in the past to get rid of the nuclear shadows haunting the human future. The most recent such instance was **Barack Obama**'s speech of 2009 in Prague envisioning a world without nuclear weapons that was received with great acclaim and earned the new U.S. president a Nobel Peace Prize, but brought the world not one step closer to getting rid of the weaponry.

Nagasaki, 9 August 1945

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