

## The Nuclear Ban Treaty: Recasting a Normative Framework for Disarmament

The state of nuclear arms control in 2017 has three distinct storylines. First, there are currently no negotiations or discussions at all on arms control being conducted among any of the nine nuclear weapons-possessing countries (China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom and the United States). Second, the Preparatory Committee (PrepCom) process for the 2020 Nuclear Nonproliferation Treaty (NPT) Review Conference, held every five years, began with the first meeting in Vienna on May 2–12, 2017. The 2020 Review Conference will mark the 50<sup>th</sup> anniversary of the NPT entering into force. Third, a United Nations-mandated conference (March 27–31, June 15–July 7) to negotiate a legal instrument to prohibit nuclear weapons adopted the Nuclear Weapons Prohibition Treaty (NWPT) on July 7, 2017 with 122 states voting in favor.<sup>1</sup> The treaty prohibits the acquisition, development, production, manufacture, possession, transfer, receipt, testing, hosting, use and threat of use of nuclear weapons.<sup>2</sup> Opened for signature in the UN General Assembly on September 20, 2017, and signed by fifty countries on that date, the treaty will come into force ninety days after fifty states have ratified it.

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The NWPT is the most significant multilateral development on nuclear arms control in decades. The sober reality of the first storyline has delegitimized the NPT as the dominant normative framework for nuclear disarmament, and the third is the result of this disillusionment. Consequently, the real significance of the NWPT lies in its potential to serve as an alternative normative framework for mobilizing states to the cause of nuclear disarmament. This article proceeds in four parts. I will first sketch the slow but steady erosion of NPT normative authority, then discuss the roots of the UN ban treaty in humanitarian principles, before assessing the normative impact of the NWPT. The final section points to some potential problem areas in the relationship between the old and new global nuclear regimes.

### **Exhaustion of NPT Normative Authority**

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For half a century, the NPT has functioned as the normative anchor of global nuclear orders, from peaceful uses to nuclear safety and security, nonproliferation and disarmament.<sup>3</sup> The NPT nonproliferation obligations have been universalized to all countries that do not possess nuclear weapons. There has been a global retreat from nuclear power since the accident in the Fukushima nuclear plant in Japan in 2011, albeit with China and India as two major exceptions. The lead on nuclear security was taken over by the four U.S.-initiated Nuclear Security Summits between 2010 and 2016. While they moved the issue up the priority list because of the leaders' concentrated attention over four summits, the focus was narrowly limited to securing sensitive nuclear materials against theft, sabotage and leakage to unauthorized groups and individuals, including terrorists. With disarmament efforts completely stalled as well in 2017, the NPT's normative potential was exhausted.

### **Erosion of the NPT**

The NPT has also built up an accumulating series of anomalies, shortcomings, flaws and gaps between promise and performance.<sup>4</sup> Three are especially pertinent. First, as the NPT regime is treaty-based, its normative reach does not extend to non-signatories so that paradoxically, the five nuclear weapons states (NWS) are legally obligated to eventual nuclear disarmament, but the three extra-NPT nuclear-armed states (India, Israel, Pakistan) are not. Second, the NPT's withdrawal clause reflects the world of the 1960s–70s such that although North Korea insists it withdrew from the treaty in 2003 and has acquired a weaponized intercontinental nuclear capability, the NPT review conferences have not been able to determine its exact legal status vis-à-vis the NPT, and the UN website still lists it as a State Party.<sup>5</sup> Third and for present purposes most critically, the

legal strength of the Article VI obligation of the NWS to eliminate their nuclear arsenals remains contentious, and arguably weak.

At the NPT Review and Extension Conference in 1995, the price of gaining unanimous support for the treaty's indefinite extension was a four-part package.<sup>6</sup> First, two further key multilateral agreements were called for: a Comprehensive Nuclear-Test-Ban Treaty (CTBT) and a treaty banning the production of fissile materials. The CTBT was of course negotiated in 1996, but is yet to enter into force owing to the stringent requirement that all 44 states with nuclear capabilities listed in Annex 2 must be parties for it to do so (eight states are yet to fulfill this condition including China, India, Israel, North Korea, Pakistan and the United States).<sup>7</sup> Negotiations on a fissile materials cut-off treaty (FMCT) are yet to commence. Second, the review process was strengthened. Instead of being limited to procedural matters, the PrepComs were asked to scrutinize the implementation record of NPT parties against the agreed action agenda of the previous Review Conference, and secondly to generate substantive recommendations for consideration by the following Review Conference. The process has not quite worked out as envisaged as, owing to timidity and significant political differences, the PrepComs have failed to provide fuller scrutiny of the past record or agree on substantive recommendations for future Review Conferences.<sup>8</sup> Third, efforts to convene a conference in 2012 on a Middle East WMD-Free Zone stalled in the face of growing regional instability, the absence of agreement on the conference aims, and the none-too-subtle efforts by some Arab states to instrumentalize the zone proposal into a tool to disarm Israel of nuclear weapons.

Thus, the only one of the four elements of the package to be realized is the treaty's indefinite extension itself. With the benefit of hindsight, some states have undoubtedly experienced buyer's remorse at having surrendered the only leverage they had over the nuclear policies of the NWS. In these circumstances, one political philosopher has argued, mass defection from the NPT by non-NWS is not only ethically permissible; it may even be the ethically responsible course of action.<sup>9</sup>

Had the nuclear weapons states demonstrated serious intent to negotiate nuclear arms control measures and outline a roadmap for disarmament, there would have been no need for an alternative normative framework under which to pursue stigmatization and prohibition as steps toward elimination of these most destructive weapons. According to George Perkovich, an NWPT skeptic, "the nuclear prohibition initiative became inevitable" because of the failure of the nuclear weapons states to take the NPT disarmament obligation seriously, insisting that "good faith" negotiations do not require any particular outcome.<sup>10</sup>

Hopes were high in 2009–10 that serious progress might be achieved in nuclear disarmament, with President Barack Obama's inspirational speech in Prague in March 2009,<sup>11</sup> U.S.–Russia negotiations on a new strategic arms reduction

treaty (New START), the inaugural Nuclear Security Summit and a modestly successful NPT Review Conference in 2010. But much of this optimism began to evaporate after 2010, and by 2016 had given way to outright pessimism. Other nuclear-armed states felt threatened by Obama's Prague agenda, from Russia and France to Israel, North Korea and Pakistan. The U.S. defense and nuclear establishments also mobilized to defeat the president's publicly announced agenda.<sup>12</sup> Instead, the Pentagon plans to spend \$1 trillion over thirty years on a new generation of nuclear bombs, bombers, missiles and submarines. In the 'legacy' months of the summer of 2016, in an effort to recoup some of the Prague agenda, the administration contemplated declaring it to be U.S. policy never to be the first to use nuclear weapons. But once again, central European and Pacific allies in particular resisted fiercely<sup>13</sup> and the push for a no-first-use policy was quietly dropped. The 13 "practical steps" from the 2000 review conference and the 22 "action items" from the 2010 version failed to produce greater results and transparency, and the 2015 NPT Review Conference could not agree on an outcome document.<sup>14</sup> Thus by the time Obama left the White House, the few glimmers of hope at the start of his presidency for serious progress

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on nuclear disarmament had faded into the sunset.

The NWS insist they have acted in good faith consistent with the NPT Article VI disarmament obligation through unilateral decisions and bilateral agreements to reduce the numbers of nuclear warheads globally by 75-80 percent from the Cold War peak. France and Russia also point to the Article VI linkage to general and complete disarmament, although it may be argued that the normative force of this linkage has been broken over successive Review Conferences.<sup>15</sup> Christopher Ford, head of the U.S. delegation to the NPT PrepComs in 2007 and 2008 and now serving as the senior director for weapons of mass destruction and counterproliferation on the Trump administration's National Security Council, goes further to argue that the vague and weak disarmament obligations of the NPT compared to the stringent, immediate, legally binding, and internationally verifiable and enforceable nonproliferation clauses confirm that the treaty's real purpose was the latter; disarmament was merely a political sop.<sup>16</sup>

### **Nuclear Anxieties and Declining Leadership**

The failure to demonstrate continuing tangible progress on nuclear reductions has coincided with heightened anxieties about rising nuclear threats. 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. Mikhail Gorbachev, who is partially responsible for the peaceful end of the Cold War, thinks “the world is preparing for war.”<sup>17</sup> The nuclear peace has held so far owing as much to good luck as sound stewardship.<sup>18</sup> For nuclear peace to hold, deterrence *and* fail-safe mechanisms must work *every single time*. For nuclear Armageddon, deterrence *or* fail-safe mechanisms need to break down *only once*. Deterrence stability depends on rational decision makers being always in office on all sides; and on there being no rogue launch, human error or system malfunction. This 100-percent guarantee is an impossibly high bar. If not abolished, nothing is more certain than the fact that nuclear weapons will proliferate and be used again: someday, somewhere, somehow. The perceived character and leadership flaws of leaders like Vladimir Putin, Kim Jong-un and Donald Trump increase global anxiety about world peace being held hostage by their fingers on the nuclear button. Their quality of nuclear decision making adds urgency to the search for a peace without, rather than through, nuclear weapons.

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While premeditated nuclear strikes seem unlikely pathways to a nuclear exchange, many regions today have the potential to escalate to nuclear conflict. 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. Even a limited regional nuclear war, in which India and Pakistan used 50 Hiroshima-size (15kt) bombs each, could lead to a famine that kills up to two billion people over a decade of lingering nuclear winter effects which would destroy crop production and disrupt global food distribution networks.<sup>19</sup> Northeast Asia is another dangerous cockpit for a war that could directly involve four nuclear-armed states plus South Korea, Japan and Taiwan. The pathways to a war that neither side wants include a fatal miscalculation in the instrumental recourse to brinksmanship by both sides. U.S. threats could spook Kim into launching a preemptive attack, or Kim Jong-un’s serial provocations could incite a South Korean or U.S. military response that creates an unstoppable escalation spiral.

The election of Trump, an inexperienced politician with only a shallow grasp of strategic affairs, has sharply concentrated minds around the world on nuclear risks. In December 2016, the U.S. Defense Science Board initially urged president-elect Trump to consider acquiring a greater number of lower-yield weapons that could provide a “tailored nuclear option for limited use.”<sup>20</sup> Senator Dianne Feinstein rightly responded that there is no such thing as a limited nuclear war,<sup>21</sup> and as

criticism grew, the Board backed away from the proposal. In a tweet on December 22, 2016, Trump promised to “greatly strengthen and expand [U.S.] nuclear capability.”<sup>22</sup> In February 2017, President Trump insisted that the United States would stay at the “top of the [nuclear] pack.”<sup>23</sup> And on August 2, 2017, Air Force General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, said the future of nuclear deterrence lies in smaller, low-yield usable nuclear weapons.<sup>24</sup> This reverses the long-established consensus that the only purpose of nuclear weapons is deterrence, and fuels fears in other NWS that the United States is engaged in efforts to shift from ‘mutual vulnerability’ (the basis of deterrence), to ‘nuclear primacy,’ which would enable actual use of nuclear weapons.

The world could survive on the brink of disaster with one of the nine leaders with their fingers on the nuclear button being volatile, but risks going over the brink with at least two such leaders. Kim Jong-un has dramatically increased the speed and scope of his nuclear and missile programs and provocations. Trump effectively discarded President Ronald Reagan’s crisp warning that a nuclear war cannot be won and must never be fought, and with his strategically-challenged serial nuclear tweets, he has stoked the sum of all nuclear fears. In a 37-country survey of 40,448 people, only 22 percent expressed confidence in Trump’s global leadership. Most dislike and distrust him as “arrogant [75 percent], intolerant [65 percent] and even dangerous [62 percent].”<sup>25</sup>

The Trump nuclear effect extends to risks of further proliferation. Japan, South Korea and Taiwan are examples of states with advanced latency: mastery of the sensitive nuclear fuel cycle technologies as well as availability of and access to sensitive nuclear materials. Rising nationalism in the region, territorial disputes in the East and South China Seas, continued North Korean nuclear defiance, and concerns about Trump’s tweeted perceptions of free-riding allies and his relaxed attitude to nuclear weaponization by said allies have been catalysts for pro-nuclear arguments in Japan and South Korea.<sup>26</sup> Growing Chinese belligerence and diminished faith in the U.S. security guarantee could also attract interest in Taiwan regarding the pursuit of an independent deterrent. However, there are also substantial political, economic and reputational constraints in all three,<sup>27</sup> reinforced by additional potential legal, bureaucratic, scientific and public opinion vetoes in Japan.<sup>28</sup> Meanwhile, there has also been talk across the Atlantic of an independent European nuclear deterrent.<sup>29</sup> A review commissioned by the German parliament concluded that Germany can legally finance British or French nuclear weapons programs in return for their protection.<sup>30</sup> Even in remote Australia, a former Deputy Secretary of Defence has raised the idea of investing in capabilities that would reduce the lead time to get the bomb in order to expand Canberra’s options because of growing strategic uncertainty. The two props to the argument are North Korea’s growing nuclear capability and falling confidence in the credibility of U.S. extended nuclear deterrence.<sup>31</sup>

All these developments are very concerning and imply a rejection of the NPT as the globally legitimate framework for regulating nuclear policy even as dangers have grown and become more acute in the second nuclear age characterized by multiple nuclear powers with crisscrossing ties of cooperation and conflict,<sup>32</sup> and fragile command and control systems. The Cold War nuclear dyads have morphed into interlinked nuclear chains, such as Pakistan-India-China-United States,<sup>33</sup> with a resulting greater complexity of deterrence relations among the nuclear powers. Consequently, changes in the nuclear posture of one can generate a cascading effect on several others. On top of all this, state-sponsored cross-border militancy and extremism involving nuclear-armed states is another contemporary reality, as is the fear of nuclear terrorism.

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Even though there are fewer nuclear weapons today than at the height of the Cold War, there is a higher likelihood of their use—by design, accident, rogue launch or system error. With 1,800 nuclear weapons held in a state of hair-trigger alert by Russia and the United States, we run the risk of nuclear war launched by blips on a radar screen. Little wonder that former Defense Secretary William Perry warns “the danger of a nuclear catastrophe today is greater than during the Cold War.”<sup>34</sup>

## Humanitarian Imperatives

Cognizant of the classical stern admonition from Athens to Melos that questions of right and justice apply only to relations among equals in power, while for others “the strong do what they can and the weak suffer what they must,”<sup>35</sup> the theory of “[r]ealism maintains that universal moral principles cannot be applied to the actions of states.”<sup>36</sup> Subsequent history has modified the thesis with a reduction in societal, national and international violence from the hunter-gatherer civilizations to modern times based on empathy, self-control, reason and moral sense as “the better angels” of human nature.<sup>37</sup> To paraphrase the familiar mantra of realism, international politics consists of the struggle for ascendancy of competing normative architectures conducted on two axes—one axis consists of military muscle, economic weight and geopolitical clout; the second of values, principles and norms.

Over the centuries, the pendulum of human behavior has swung, slowly and in a jagged rather than linear trajectory, from ‘pure’ power toward the normative end of the arc of history. Of course, in every era, great powers have a disproportionate



ability to influence the prevailing norms and laws. This is no different from domestic systems where, even if every citizen has the same one vote, the socioeconomic elite has much greater access to the political process for writing the rules to govern society. Over the last few centuries, Western ideas and values have found expression as ‘universal’ norms and have been embedded in the dominant institutions of global governance not necessarily because they are intrinsically superior, but because they are backed by economic power and battleships, missiles and tanks.

The NPT and the NWPT embed the geopolitical and normative balance of power, respectively, 49 years apart in time. The vague language of Article VI in comparison to the precise nonproliferation obligations of the NPT reflects the disproportionate influence of the two powerful states that drove the negotiations, namely the United States and the Soviet Union, around the middle of the twentieth century.<sup>38</sup> By contrast, the prohibition treaty reflects the preferences of the majority of states in a multipolar twenty-first century. Against the twin backdrop of the receding nuclear arms control and disarmament tide, and elevated nuclear threat levels, many countries concluded that fresh ‘out of the box’ efforts were needed. The normative basis for the new initiative was humanitarian principles that permit advocates to transcend national and international security arguments.

Delivering an advisory opinion on July 8, 1996, a majority of International Court of Justice judges concluded that the threat or use of nuclear weapons would generally be contrary to the rules of international law, and in particular humanitarian law.<sup>39</sup> The Court could not conclude definitively that the threat or use of nuclear weapons would be a lawful act of self-defense even in the extreme circumstance of the very survival of a state being at stake. The opinion also significantly altered the nature of disarmament obligations from a commit-

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ment to *pursue* negotiations, into an obligation “to pursue in good faith *and bring to a conclusion*” such negotiations (emphasis added). On this, the 14-judge Court was unanimous: judges from every NWS agreed with this fundamental obligation. Yet, 21 years later, there are still around 15,000 nuclear weapons in the arsenals of nine countries, all of which are modernizing, upgrading or expanding nuclear weapon delivery platforms and some—China,

India, North Korea, Pakistan—are increasing stockpiles.

Increasingly exasperated at the lack of nuclear disarmament anytime soon under the NPT, driven by fear of a catastrophic nuclear war with incalculable humanitarian consequences if nuclear weapons are not abolished, and inspired



by humanitarian principles, a growing number of non-NWS joined with civil society actors to explore an alternative avenue. On October 22, 2012, a 34-country statement emphasized that the catastrophic humanitarian consequences of nuclear weapons concerns the community of states as a whole. Nuclear weapons must never be used again, under any circumstances. The statement posits that “[t]he only way to guarantee this is the total, irreversible and verifiable elimination of nuclear weapons.”<sup>40</sup> This was repeated in 2013 and 2014, with supporting countries increasing to 155—an increase of almost five times in just two years. In addition, three conferences were held in Norway, Mexico and Vienna in 2013–14 on the humanitarian impacts of nuclear weapons. At the conclusion of the last conference in Vienna on December 9, 2014, Austria pledged to work with like-minded states to “fill the legal gap for the prohibition and elimination of nuclear weapons”<sup>41</sup> and 127 countries agreed “to stigmatize, prohibit and eliminate nuclear weapons.”<sup>42</sup>

In December 2015, the UN General Assembly adopted a resolution calling for work “to fill the legal gap for the prohibition and elimination of nuclear weapons.”<sup>43</sup> This was reinforced with a humanitarian pledge resolution adopted on the same day which established an open-ended working group<sup>44</sup> that decided to operate under General Assembly rules that permits decisions by vote, instead of the decision-blocking consensus rule of the Conference on Disarmament (CD). The working group’s August 2016 report asked the General Assembly to convene a conference in 2017, open to all states and with the participation of international organizations and civil society, “to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”<sup>45</sup> This was duly done on December 23, 2016.<sup>46</sup>

In an unclassified North Atlantic Treaty Organization document of October 17, 2016, Washington urged allies to vote against a call to hold the negotiations, and secondly, not to take part in any negotiations that were convened. Describing NATO as “a nuclear alliance,” it argued that “efforts to negotiate an immediate ban on nuclear weapons or to delegitimize nuclear deterrence are fundamentally at odds with NATO’s basic policies on deterrence and our shared security interests.” Yet, the document conceded that “[t]he effects of a nuclear weapons ban treaty could be wide-ranging.” Several of these were spelled out in the document, including how it would make nuclear planning more challenging.<sup>47</sup>

The nuclear weapons states and U.S. allies duly refused to attend the UN conference, describing it as impractical, ineffective and unrealistic. Japan walked out after delivering an opening statement sharply critical of the conference,<sup>48</sup> leaving Japan’s atomic bomb survivors, known as *hibakusha*, “heartbroken.”<sup>49</sup> Australia was among “the most outspoken of the non-nuclear states” in attacking the special UN conference instead of engaging with the countries that possess nuclear weapons.<sup>50</sup> India argued the CD is the only “right place for pursuing

nuclear disarmament” with “the mandate, the membership and the rules for embarking on the path to nuclear disarmament.”<sup>51</sup> Canada decried the UN ban

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negotiations as “premature and ineffective ... that ... could create divisions and complicate the path to nuclear disarmament.”<sup>52</sup>

The boycotting states denied themselves a voice in the proceedings and disrespected a duly-constituted multilateral process driven by a large majority of the NPT membership. *Prima facie*, non-participation also placed them in non-compliance with the Article VI obligation of *each* of the 190 NPT parties to

pursue and conclude disarmament negotiations. Disenchanted with the lack of progress under the NPT framework in the CD, 122 of 190 or close to two-thirds of NPT parties have proven that serious negotiations can produce an acceptable nuclear disarmament text in less than four weeks of multilateral negotiations.

## **A Normative Instrument**

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Jaswant Singh, at the time the Indian government’s senior defense adviser and subsequently foreign minister, used “nuclear apartheid” in the title of his essay to explain India’s implacable hostility to the NPT because it divided the world into a minority of five states as the nuclear haves, against all others as the nuclear have-nots.<sup>53</sup> The term is commonly attributed to the late K. Subrahmanyam, sometimes described as “India’s Kissinger.”<sup>54</sup> The charge of nuclear apartheid against the NPT by Indians was deeply flawed. Apartheid in South Africa was a policy of racial superiority and differential treatment based in law imposed by a tiny conquering minority on the majority indigenous population. The NPT was freely signed by the vast majority of non-NWS who accepted a temporary exemption for states that already possessed nuclear weapons. Indeed, in signing the Treaty of Tlatelolco in 1967—that established Latin America as a nuclear-weapon-free zone in which no possession, deployment, basing, testing or use of nuclear weapons was permitted—and its entry into force in April 1968, a whole continent embedded its non-nuclear-weapon status in a legally binding regional instrument *before* the NPT was adopted. Nonetheless, the apartheid label increasingly resonated as the NWS, through their identity as the five permanent members of the UN Security Council (P5), insisted on retaining their arsenals while enforcing nonproliferation compliance on anyone else wanting to join them in the exclusive nuclear club.

In contrast to the NPT classification of parties into NWS and non-NWS, the NWPT divides parties into three categories as of the date of adoption. The first are

the vast majority of unproblematic non-NWS. The nuclear-armed states are subdivided into two groups: the destroy-and-join states who will join the treaty only after they have first eliminated their nuclear weapons and programs; and those who will join and then destroy their warheads, programs and associated infrastructure “in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of that State Party’s nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities” (Article 4.2). The intention was to create some flexibility in pathways for states with nuclear weapons to become party to the NWPT.

Article 1 prohibits the possession of nuclear weapons for *all* signatories; bans the use and threat of use of nuclear weapons, thereby delegitimizing the doctrine and practice of nuclear deterrence; prohibits nuclear testing and is thus closely aligned to the CTBT; and bans hosting nuclear weapons. (This would affect NATO allies Belgium, Germany, Italy, Netherlands and Turkey, but not any of the three Pacific allies, although it would preclude the reintroduction of U.S. tactical weapons into South Korea.) States that currently host nuclear weapons controlled by possessor states can join on condition of verifiably removing them promptly (Article 4.4). The treaty requires assistance to the victims of, and for environmental remediation of areas contaminated by, the use or testing of nuclear weapons (Article 6). It offsets some of the NPT’s institutional deficits by scheduling biennial assemblies of States Parties. Extraordinary meetings can be convened as necessary (Article 8). Although the treaty is of indefinite duration and not subject to any reservations, a party may withdraw from it on 12 months’ notice if “extraordinary events ... have jeopardized [its] supreme interests” (Article 17).

To date, the only supporters of the NWPT are those without nuclear weapons. They have no power nor treasure to bully and bribe the nuclear-armed states to give up the bomb. Instead, as discussed in the next section, they are hoping to exploit their power of numbers to attach such a deep stigma to possessing the bomb that the nuclear powers will be shamed into stepping off the nuclear weapons path and instead sign the NWPT.

### **Stigmatize and Prohibit**

Almost 50 years from the NPT’s adoption, not a single nuclear warhead has been eliminated through a multilateral agreement, and no multilateral negotiation on nuclear weapons has ever been held under its rubric. The bilateral U.S.–Russian process, the chief driver of nuclear weapons reductions since the 1990s, has also completely stalled. Against this bleak global nuclear landscape, through the NWPT, the majority

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of non-NWS decided to switch roles from rule-takers to norm-setters, reclaimed nuclear agency, hijacked the process from the nuclear weapons states, and have proclaimed an unambiguous prohibition norm. The prohibition treaty will have a powerful normative impact on both the military utility and political value of nuclear weapons.

The nuclear disarmament policy goals are to delegitimize, prohibit, cap, reduce, and eliminate. Only those possessing nuclear weapons can undertake the last three tasks. But the non-NWS can pursue the first (delegitimization) and second (prohibition) on their own, both as an affirmation of global norms (standards as distinct from prevailing patterns of behavior), and as one of the very few means available to them of exerting pressure on the possessor states to pursue the other three goals. In this conceptualization, stigmatization and prohibition become the necessary—not sufficient, but necessary—precursors to elimination. From this point of view, the treaty will also draw on the long-recognized unique role of the United Nations as the sole custodian and “dispenser of politically significant approval and disapproval of the claims, policies, and actions of states.”<sup>55</sup>

The main impact of the UN nuclear ban treaty will be to reshape the global normative milieu: the prevailing cluster of laws (international, humanitarian, and human rights), norms, rules, practices and discourse that shape how we think about and act in relation to nuclear weapons. Criticism of the NWPT as ineffective in eliminating warheads, lacking credibility and being impractical is therefore fundamentally misconceived: it confuses the normative impact of a prohibition treaty with the would-be operational results of a full-fledged Nuclear Weapons Convention (NWC). A comprehensive NWC with a built-in credible verification and enforcement system is the indispensable international legal framework for getting to abolition. A model NWC was prepared in 1997 in response to the 1996 ICJ Advisory Opinion and updated in 2007.<sup>56</sup> In this model, a 15-year timetable for the elimination of nuclear weapons by NWS includes taking nuclear weapons off high-alert status, removing all weapons from operational deployment, dismantling them, and placing all fissile material under international control. Each step would be backed by strong international verification. The draft convention has been described as “a useful tool in the exploration, development, negotiation and achievement of such an instrument or instruments.”<sup>57</sup> There are many technical, legal and political hurdles to be overcome and details to be clarified before any NWC can be finalized. But some such convention will undoubtedly be necessary in the long run to embed the complete elimination of nuclear weapons in a universal treaty.

Short of abolition, stigmatization implies illegitimacy of a practice based on the collective moral revulsion of a community. The ban treaty aims to delegitimize and stigmatize the possession, use and deployment of nuclear weapons, plus the practice of nuclear deterrence, owing to the risks of possession and the humanitarian

consequences of any use. In other words, the *foreseeable effects* of any future use make the doctrine of deterrence and the possession of nuclear weapons *morally unacceptable* today to the community at large. The NWPT negotiating conference was mandated by the UN General Assembly in December 2016 explicitly to negotiate a prohibition treaty *leading to the eventual elimination* of nuclear weapons. Since the experience of the Chemical Weapons Convention demonstrated that it could take one to two decades, at least, to eliminate an entire category of weapons of mass destruction, the thought was that the safe, secure and verified decommissioning, dismantlement and destruction or conversion of all bombs following an NWC, if and when one is negotiated in the future, could take a similar, lengthy amount of time.

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The fraying normative consensus around the NPT as the embodiment of the global nuclear order as well as the framework for setting global nuclear policy directions has been effectively broken. The nine nuclear-armed states will undoubtedly ignore the NWPT to double down on their investment in nuclear weapons, delivery systems, doctrines and deployments. They and those of their allies who shelter under the nuclear umbrella of the NWS will also continue to affirm faith and confidence in the credibility of nuclear deterrence doctrine and practices. But the NPT's five nuclear weapons states will no longer be able to claim the mantle of international legality and legitimacy that the NPT had conferred on their possessor status. They may not like the result, but their constant refrain that the nuclear genie cannot be put back in the bottle can now be turned against them: neither can the ban treaty.

The NWPT is not a wand that, when waved, will make all nuclear weapons vanish magically. But the normative impact will lessen their attractiveness and change the incentive structures for states that possess them and others that rely on extended nuclear deterrence.<sup>58</sup> The NWPT can be compared to the 1997 Ottawa Convention prohibiting antipersonnel landmines, which some argue can be better understood as a humanitarian treaty than as an arms control treaty. Analogous to the NWPT, the big producers and users are not parties to the Ottawa Convention. Yet few analysts, or even officials of the non-party states, would dispute that it has indeed shaped the behavior of states, including possessor states. The Ottawa Convention has functioned as the normative umbrella under which a comprehensive program of action on stockpile destruction, contamination and clearance, and victim assistance has been carried out since the late 1990s.<sup>59</sup>

### Legal Obligations, Political Norms and Legal Effects

The second historic significance of the NWPT might well be that the non-Western and small states of international society have forced through an instrument of international humanitarian law against the will of most Western countries and all major powers.<sup>60</sup> Thus, the states that created the laws of war for the first time in history find themselves the objects of that law as ownership is taken over by the rest. In his still-influential book, Hedley Bull noted that “great powers are powers *recognised by others* to have, and conceived by their own leaders and peoples to have, certain special rights and duties.”<sup>61</sup> The NPT recognized the major powers’ right to possess nuclear weapons as part of their special managerial responsibilities for world order; the leaders and peoples of the NWS continue to assert that right; but in the NWPT, international society as such has derecognized that right. Says Brazil’s Foreign Minister Aloysio Nunes Ferreira: The treaty “reflects the historical aspiration from the large majority of the international community to ban the existence of such weapons.” It is “an important complement” to Article VI of the NPT “which established the obligation of nuclear disarmament.”<sup>62</sup>

Norms are understood differently by scholars of international law and international relations. Legal norms impose binding legal obligations. Political norms create moral obligations. But the latter can still be encased in a wider legal context and have legal effects. In regulating state conduct, both laws and norms serve enabling (license) and restraining (leash) functions. The history of human

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rights movements (suffrage, anti-slavery, anti-apartheid) shows that while social movements are motivated to enact moral norms into law, the moral authority of the norms by themselves exert a powerful “compliance pull.”<sup>63</sup> In general, legal norms are more effective in regulating state behavior. But in specific instances, a particular law may be breached while a political norm shapes a decision—on an act of commission or omission—through a calculation of reputational costs.

On mass atrocity crimes, for example, the 1948 Genocide Convention imposes legal obligations on states to act. By contrast, the 2005 Responsibility to Protect (R2P) is a global political norm that creates a moral responsibility but no legal duty on outside states to prevent and halt atrocities. However, even R2P has to be interpreted and applied in the broader context of binding obligations on states under national and international, humanitarian and human rights laws. For great powers in particular, R2P makes it more costly, on one hand, to resort to self-interested unilateral interventions, including so-called “humanitarian

interventions” as Russia discovered in South Ossetia in 2008; and on the other hand, it also makes it more costly to resist disinterested UN-authorized calls to collective action to save strangers from mass atrocities.<sup>64</sup> In 2011, for example, the power of the R2P norm overcame China’s and Russia’s instinctive opposition and they abstained rather than vetoed Security Council Resolution 1973 that authorized a human protection intervention in Libya. But the stealth transformation of the NATO-led operation from civilian protection to regime change provoked a backlash that has allowed the two powers to veto successive efforts to manage the humanitarian crisis in Syria since 2011.<sup>65</sup>

The NWPT is legally binding, but only for signatories. The Preamble notes it is based on the “principles and rules of international humanitarian law” including the distinction between civilians and combatants, proportionality, and the prevention of unnecessary suffering. It is not relevant to *jus ad bellum*—the law of going to war—but it aims to apply to *jus in bello*, how a war is conducted. It of course may not impose binding legal obligations on non-parties such as the nuclear-armed states and their allies, as per the Vienna Convention on the Law of Treaties (1969), but it does have legal *implications* for them.

International law comprises both treaty law and customary international law. Customary law in turn has two roots, state practice and *opinio juris* which at its simplest means that the practice of states is based in a sense of legal obligation.<sup>66</sup> To reach the threshold of law, the practice must be both widespread and consistent. This is the basis on which North Korea’s program of nuclear testing can be condemned and sanctioned, even though it is not a CTBT party. Given the explicit rejection of the ban treaty by a substantial number of states, however, and the identity of the rejectionist states—in particular the P5—the ban treaty cannot credibly be claimed to impose any legal obligation on non-signatories.

The nuclear discourse of the NWS “moves easily from” the position that the NPT permits them to possess and deploy nuclear weapons “to the language of entitlement, legal rights and enduring legitimacy.”<sup>67</sup> They are able to claim legitimacy through the NPT because it allegedly gave legal cover to their possession of nuclear weapons—and to no one else—until such time as they themselves negotiate the elimination of their stockpiles. But non-NWS are the majority shareholders in the NPT society of states and by acting together, they have taken back that legitimacy. By changing the prevailing normative structure, the NWPT shifts the balance of costs and benefits of possession, deterrence doctrines and deployment practices, and will create a deepening crisis of legitimacy. It removes the NPT-rooted fig leaf of international legitimacy that the NWS have used to cloak their nuclear weapons, while insisting that the pursuit of nuclear weapons by anyone else is both illegal (a violation of the international law of treaties) and illegitimate (a violation of the global norm).



The NWPT's legal effect will lie in strengthening the disarmament norm under Article VI of the NPT itself for NPT parties, and removing the NPT-sourced legal and legitimizing plank for continued possession, deployment and doctrines of use by the NWS. The NWPT will certainly be deployed by supporter states and civil society advocates as evidence of a new global political norm against possession.

**The normative impact will expand once the number of states parties crosses 100.**

With 50 ratifications to bring the treaty into force, the normative impact may be limited at first, but will begin to expand once the number of states parties crosses the psychological threshold of 100. It will gain further weight if some of the key NATO (Canada, Norway) and Pacific (Japan) allies defect from the rejectionist camp and join the ban treaty under civil society pressure whose advocacy explicitly references the NWPT.

The lead role in civil society will continue to be played by the International Campaign to Abolish Nuclear weapons (ICAN). On October 6, the 2017 Nobel Peace Prize was awarded to ICAN in recognition of its decade-long “ground-breaking efforts to achieve a treaty-based prohibition” of nuclear weapons by drawing “attention to the catastrophic consequences of any use” of these weapons.<sup>68</sup> ICAN is a coalition of over 450 organizations in more than 100 countries. It was launched in Melbourne on April 23 and in Vienna during the PrepCom session on April 30, 2007, consciously modeling itself on the International Campaign to Ban Landmines (ICBL), which also had earlier won the Nobel Peace Prize. Like the ICBL, ICAN—headquartered in Geneva—has forged an effective partnership with the Red Cross. ICAN served as the civil society coordinator for the three humanitarian consequences conferences in 2013–14, lobbied to establish a special UN open-ended working group on nuclear disarmament, campaigned for the UN General Assembly’s December 2016 resolution to launch negotiations on a prohibition treaty, and was an active presence at the NWPT negotiating conference in March and June–July 2017.<sup>69</sup> The Nobel Peace Prize will help to raise the global profile of ICAN, the ban treaty and the cause of nuclear disarmament. For example, ICAN decided that the prize would be received jointly by its executive director Beatrice Fihn and a Hiroshima survivor Setsuko Thurlow who has lived in Toronto since 1955 and been an active public campaigner for the cause. On October 27, Canada’s national newspaper carried a prominent story about her and her call on Prime Minister Justin Trudeau to sign the ban treaty.<sup>70</sup>

Meanwhile the non-use norm (or, in a weaker variant, the nuclear restraint norm) does satisfy the threshold of consistent and widespread state practice and is arguably a mandatory norm, *jus cogens*: a peremptory norm framed in the

language of prohibition from which no state can opt out unilaterally. One common explanation for the non-use of nuclear weapons since 1945 is that the NWS feared assured mutual destruction. An alternative explanation is that the normative taboo against the use of nuclear weapons is so strong that on several occasions the NWS accepted defeat in places like Vietnam and Afghanistan rather than use the bomb to destroy their enemies.<sup>71</sup> But lately, technological developments have begun to blur the dividing line between conventional precision munitions and nuclear weapons.

For example the growing accuracy, range and lethal firepower of U.S. conventional precision munitions means they can be used to target some enemy nuclear assets. Or else computer viruses and hacking can be deployed as effective tools of cyber warfare to disrupt and knock out enemy command-and-control systems. Could such actions be treated by the enemy as nuclear attacks, enabling it to respond in kind? One possible way to counter this pathway to nuclear war is to reaffirm the distinction in principle between nuclear and other weapons. The NWPT will harden the normative boundary between conventional and nuclear weapons. It also reaffirms the global nuclear norms of nonproliferation, disarmament, security, and non-use, and thereby devalues the currency of nuclear weapons.

Nuclear weapons obliterate the distinction between combatants and civilians that is central to every moral code in all cultures and civilizations. Most countries have chosen nuclear abstinence because people overwhelmingly abhor the bomb as deeply immoral. It is the most indiscriminately inhumane weapon ever invented. Its primary intended deterrent effect relies on the threat to kill millions of innocent civilians, accurately called the balance of terror. On July 3, 2017, the NWPT conference president ambassador Elayne Whyte Gomez of Costa Rica said: “Each one of us has assumed the historic responsibility to give humankind an instrument that reflects the moral imperative of prohibiting nuclear weapons and leading to a future free of nuclear weapons.”<sup>72</sup> The NWPT Preamble acknowledges “the ethical imperatives for nuclear disarmament” and describes a nuclear-weapon-free world as “a global public good of the highest order, serving both national and collective security interests.” It expresses deep concern “about the catastrophic humanitarian consequences that would result from any use of nuclear weapons” that pose “grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls.” It notes “the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (*hibakusha*), as well as of those affected by the testing of nuclear weapons,” and recognizes the “disproportionate impact of nuclear-weapon activities on indigenous peoples.” And it reaffirms “that any use of

nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience.”

Another critical legal gap that has been closed is the threat of use of nuclear weapons. Arguably, such a prohibition is already covered under the general prohibition on the use or threat of use of force in Article 2(4) of the UN Charter. The political reality, however, is that threats to use force are a regular staple of world affairs (“All options are on the table”) and given the existing state of nuclear politics, the inclusion of an explicit prohibition on the threat of use of nuclear weapons fills a legal gap. In this way too, the treaty has legal effects on non-signatory state actions.

## Potential Pitfalls

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With the NPT and the NWPT operating in parallel, the global nuclear order has been effectively bifurcated. Only time will tell if this stabilizes or disrupts the existing order. From one point of view, the UN conference was a vote of no confidence in the NPT process and poor outcomes that—potentially although not necessarily—poses an existential threat to the NPT and will therefore “require dedicated remedial action.”<sup>73</sup> Such dire predictions may be exaggerated, for almost all groups of states—even those outside the treaty—believe the NPT serves their interests.

After the NWPT vote on July 7, in a joint press statement, the ambassadors of the three Western NWS—the United States, the United Kingdom and France—said they had neither taken part in the negotiation of the treaty, nor did they “intend to sign, ratify or ever become party to it.”<sup>74</sup> In their judgment, the treaty “disregards the realities of the international security environment” and “is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years.”<sup>75</sup> This seems to be exactly the wrong response, and likely antagonized many non-NWS. If the argument of an adverse security environment can justify possession of nuclear weapons by the NWS, why cannot the same argument hold for North Korea with a far more threatening security environment than France and the United Kingdom?

The NPT regime is thus at a crossroads. Bringing the parallel NPT and NWPT streams into confluence will be among the most critical diplomatic challenges on nuclear policy over the next one to three years. If the NWS continue to disrespect the mandated multilateral process and negotiated treaty, the divide between the two camps could harden. It is hard to see that such a destabilizing outcome would be in anyone’s interest. It is vital to consider how to prevent the two processes damaging each other, and instead work to harness their combined energies

to shared nonproliferation and disarmament objectives. Potential areas that will need to be reconciled between the NPT and NWPT include safeguards standards, testing, stationing, the meaning and scope of assistance and encouragement to other states engaged in activities prohibited under the NWPT (for example support for nuclear deterrence postures), institutional arrangements for review and amendments, and linkage with the non-NPT nuclear-armed states.

There are potential downstream complications, even from the point of view of the altered normative architecture of the global nuclear order. By bringing all nuclear-weapon possessing states within one normative framework, the NWPT eliminates the distinction between the five NPT-licit NWS (China, France, Russia, the United Kingdom, and the United States), the three extra-NPT nuclear-armed states (India, Israel, Pakistan) and the sole NPT defector state (North Korea). For the NWPT, any country that possesses nuclear weapons after July 7 is a violator of the global prohibition norm, implying a moral equivalency between the five NPT-licit NWS and others. It is not clear that the NWPT proponents have thought through the practical and operational implications of this. For example, what happens to India's and Pakistan's requests to become members of the Nuclear Suppliers Group, which was set up in 1975—ironically, in response to India's nuclear test of May 1974—to control the export of sensitive materials, equipment and technology that can be used to make nuclear weapons?<sup>76</sup> Is their non-signature of the NPT, hitherto considered a deal-breaker by many, now rendered null and void in considering their applications?

Similarly, it is hard to see how the UN system can avoid a significantly wider gulf between legality and legitimacy in any enforcement decisions by the UN Security Council against nuclear challenges by others such as North Korea.<sup>77</sup> Will not Pyongyang be able to point the finger back at the P5 as being equally in defiance of global nuclear norms and the authority and will of the international community? This might prove particularly troubling because for the foreseeable future, for all its faults with regard to representational and democratic deficits, there is no substitute for the Security Council as the legal enforcement arm of the international community. Whether it be with regard to safeguards applied by the International Atomic Energy Agency or other competent international authorities performing some of the other specified tasks in NWPT Article 4, breaches of their obligations by NWPT parties will require enforcement if the treaty is not to lose credibility and authority. How can the P5 act as the primary enforcement agents of NWPT obligations when the main point of the treaty is to stigmatize their nuclear policy and they are its principal norm violators?

**It is vital to consider how to prevent the two processes damaging each other.**

## Conclusion

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The NWPT affirms the collective revulsion of the international community at morally unacceptable weapons of catastrophic destruction. It delegitimizes the very possibility of nuclear war as an unacceptable risk to human civilization. The NWS have institutionalized nuclear deterrence as a permanent national security doctrine and deploy their interpretation of the NPT as the main legitimizing normative framework and principal management tool. By contrast, the alternative NWPT normative framework begins with the unambiguous and unconditional stigmatization of the possession, use and threat of use of nuclear weapons, and outlines pathways to negotiated nuclear disarmament. Because it is a UN-approved treaty resulting from a mandated multilateral conference, it gives authoritative legal underpinning to the civil society-led stigmatization of nuclear weapons. In turn, this means that anti-nuclear advocates in all the possessor and umbrella countries can draw on the legitimacy of the NWPT to alter the prevailing domestic normative context in their countries. States opposing the NWPT have recognized this threat, and that is why they resisted and have tried to discredit the process and outcome.

The nuclear weapons states 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, the successful ban conference could shatter irretrievably the NPT and the CD as the sole normative framework and multilateral forum, respectively, for nuclear nonproliferation and disarmament. But it will do so by revitalizing the multilateral machinery for the task. Before the next NPT Review Conference in 2020, there will be at least two further sessions of the PrepCom in 2018 and 2019. The adoption of the ban treaty is an opportunity to be seized by the PrepCom process to take the pulse of the NPT membership at large and “to strengthen the implementation, authority and credibility of the NPT”<sup>78</sup> by engaging in a substantive discussion of the relationship between the NPT and the ban treaty including common elements among them, points of difference between them, and how the two might be brought together into greater convergence to mutual benefit.

George Perkovich argues that “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.”<sup>79</sup> In the post-NWPT world, incremental steps so infinitesimal as to be invisible will no longer be sufficient to satisfy the world’s nuclear moral majority. If the NWS wish to rescue the NPT as the preferred framework and process, it is for them to demonstrate practical outcomes, through deeds not words, by bringing the step-by-step approach to some productive conclusions. A practical agenda for the

nuclear-armed states would be to extend New START, commence negotiations on further warhead reductions, abandon modernization and upgrade plans, embrace no-first-use and de-alerting, remove tactical nuclear weapons from Europe, universalize the Intermediate Range Nuclear Forces Treaty (INF), ratify the CTBT, and negotiate an FMCT. Unless and until they do so, most countries and civil society will deem their continued possession of nuclear weapons, and reliance by them and their allies on the doctrine of nuclear deterrence, to be illegitimate. Instead, the international community will look to the NWPT as the embodiment of the world's abhorrence of nuclear weapons and as the only authentic representation of the global norm against nuclear weapons.

## Notes

1. The formal title is the Treaty on the Prohibition of Nuclear Weapons. The formal title of the old treaty is the Treaty on the Nonproliferation of Nuclear Weapons, commonly called the Nuclear Nonproliferation Treaty. This is always abbreviated to NPT and never to TNPNW. The biological and chemical weapons conventions are abbreviated similarly. Consistent with this practice, it seems to make more sense to call the ban treaty the Nuclear Weapons Prohibition Treaty in common usage, and to abbreviate it to the NWPT.
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