

A BAN ON NUCLEAR WEAPONS AND THE NPT

Ambiguity, polarization and the fear of mass withdrawal

By Kjølvi Egeland, Torbjørn Graff Hugo, Magnus Løvold and Gro Nystuen

- States opposed to negotiations on a nuclear weapons ban treaty have expressed concern that such a treaty would undermine the Nuclear Non-Proliferation Treaty (NPT).
- Fears that the adoption of a nuclear weapons ban treaty could undermine the NPT's non-proliferation objective appear unfounded. Proposed challenges related to weakened or conflicting obligations and the universalisation of IAEA safeguards are relatively easy to overcome.
- The relationship between a nuclear weapons ban treaty and the disarmament obligations of the NPT is not straight-forward, as the language in Article VI is somewhat vague. It is clear, however, that a ban treaty would be both in line with the purpose of the NPT and compatible with the specific elements of Article VI.
- Growing support for a ban treaty has coincided with increased political tension between nuclear-armed and non-nuclear-armed states. However, history suggests that such polarization is unlikely to reduce the prospects for implementation of the NPT, including reaching agreement at review conferences.

1 Introduction

No treaty exists in a vacuum. The web of legal instruments that makes up the body of public international law consists of a vast array of interrelated legal rules. Sometimes these rules build upon and reinforce each other. Other times, legal rules undermine or contradict each other. International law governing the means and methods of warfare is no exception.

The Nuclear Non-Proliferation Treaty (NPT) was adopted in 1968. It entered into force two years later and has since gained near universal adherence. The Treaty, which was widely seen

as a step on the path to a world without nuclear weapons,¹ is often interpreted as a 'grand bargain' through which the non-nuclear-weapon states forsake the nuclear option in exchange

¹ See e.g. statement by the United Kingdom, Geneva, 14 September 1965 (ENDC/PV.232); statement by Italy, Geneva, 25 March 1969 (ENDC/PV.397); General Assembly Resolution 2028 (XX), 'Non-Proliferation of Nuclear Weapons', New York, 1965.

2 The NPT and its origins

In the early 1960s, a consensus began to develop in the international community about the need for serious action to be taken to prevent the humanitarian catastrophe that would result from nuclear war. Adopted in 1963, the (Partial) Nuclear Test-Ban Treaty banned nuclear tests in the atmosphere and underwater. It also urged its parties to work, in the ‘speediest’ way possible, for the ‘achievement of an agreement on general and complete disarmament’.⁴

The ongoing arms race between the Soviet Union and the United States—in particular the nuclear dimension of the arms race—made such an agreement imperative. Another major concern was the (horizontal) proliferation of nuclear weapons across more and more states.⁵ In June 1968, after three years of negotiations in the Eighteen-Nation Disarmament Committee in Geneva, and ten years after the Republic of Ireland introduced a first UN General Assembly resolution urging the conclusion of a treaty on the non-proliferation of nuclear weapons, the NPT was adopted by the UN General Assembly.⁶

Distinguishing between ‘nuclear’ and ‘non-nuclear-weapon states’, the NPT established a two-tiered community of states. The nuclear-weapon states were defined as those that had manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967. This definition encompassed the (now) five veto-powers of the Security Council: China,⁷ France, Russia (at the time the Soviet Union), the United Kingdom and the United States.

These states were given the right to possess nuclear weapons while the NPT parties pursued negotiations on ‘effective measures’ for disarmament (Article VI). The non-nuclear-weapon states, for their part, committed not to acquire nuclear weapons (Article II).

The relationship between the NPT’s non-proliferation and disarmament provisions was contentious from the outset. Despite a clear expectation from a majority of the world’s non-aligned states that the NPT should be a step towards disarmament as well as codifying the norm of non-proliferation,⁸ the Soviet Union and the United States were reluctant to introduce language on disarmament to the treaty drafts. The draft tabled by the superpowers as late as August 1967 contained language on disarmament only in the preamble.

The NPT would not have been adopted without the nuclear-weapon states pledging themselves to the goal of abolition.

Representatives of the three nuclear-weapon states that participated in the negotiations,⁹ as well as some of their allies, held that disagreement on disarmament, both in the context of the immediate NPT negotiations and the Treaty’s subsequent implementation, might hamper agreement on non-proliferation.¹⁰ Many non-nuclear-weapon states, however, were adamant that the NPT should contain an ‘acceptable balance of mutual responsibilities and

4 Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water (‘Partial Nuclear Test Ban Treaty’), adopted 8 August 1963, in force 10 October 1963, 480 UNTS 43, preamble.

5 The United States exploded its first nuclear weapon in 1945. The Soviet Union followed in 1949, Britain in 1954, France in 1960 and China in 1965.

6 E.L.M. Burns, ‘The Non-Proliferation Treaty: Its Negotiation and Prospects’, *International Organization* 23 (4), 1969, 788–807.

7 The Chinese seat at the UN was, at the time, occupied by the Republic of China (Taiwan). The People’s Republic of China took over Taiwan’s UN membership (including its permanent seat on the Security Council) in 1971.

8 General Assembly Resolution 2028 (XX), ‘Non-Proliferation of Nuclear Weapons’, New York, 1965.

9 The United States, the Soviet Union and the United Kingdom participated and voted for the Treaty’s adoption at the UN. China was not a member of the ENDC or the UN. France boycotted the ENDC and abstained from voting on the resolution that adopted the NPT. China and France both acceded to the NPT in the 1990s.

10 Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979*, vol. II, London: Oceana, 1980, p. 567.

THE 'PILLARS' OF THE NPT

The NPT is often said to rest on three 'pillars'. Employing a metaphor that highlights the constituent element's mutual dependence, the Treaty has also been described as a 'three-legged stool'.¹⁴ The three elements are (1) non-proliferation, (2) the right to peaceful use of nuclear technology and (3) disarmament.

The non-proliferation pillar comprises the obligation of the NPT nuclear-weapon states not to transfer nuclear weapons to 'any recipient whatsoever'¹⁵ and of the non-nuclear-weapon states not to receive or otherwise manufacture or acquire nuclear weapons.¹⁶ Together, these two provisions aim at creating a watertight system for non-proliferation. Many questions, however, have arisen with regard to the interpretation of these two articles, including the definition of a 'nuclear weapon' as well as the definitions of 'transfer' and 'manufacture'.¹⁷

The pillar on peaceful use consists of the right of all state parties to benefit from and take part in peaceful production and use of nuclear energy.¹⁸ The provisions on civilian use require the application of IAEA safeguards for the NPT non-nuclear-weapon states.

The disarmament pillar is the most disputed pillar of the three. Article VI of the NPT requires all state parties to pursue negotiations on effective measures relating to nuclear disarmament. The interpretation of this provision has been subject to discussions and disagreement over the years.

obligations'.¹¹ The non-aligned states, in particular, viewed disarmament as a precondition and an integral part of any bargain between the nuclear- and non-nuclear-weapon states. The NPT would not have been adopted without the nuclear-weapon states pledging themselves to the goal of abolition.¹² The compromise—Article VI—had sufficiently vague language to be acceptable for most.

Since the entry into force of the treaty in 1970, states parties have met every five years to 'review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised'.¹³ At the 1995 NPT Review and Extension Conference, states parties decided to extend the Treaty's initial lifetime of 25 years indefinitely.

The political dynamics at NPT review conferences reflects the two-tier division between nuclear 'haves' and 'have-nots'. While the nuclear-weapon states have used the review conferences to emphasise the importance of the treaty's non-

proliferation provisions, the non-nuclear-weapon states have called for stronger commitments on disarmament and greater access to nuclear technology for civilian purposes.

At least since the adoption of the 'extension package' that secured the indefinite extension of the NPT in 1995, the ability of review conferences to adopt consensus final documents has been cited as a major marker of the conferences' success or failure. At the review conferences in 2000 and 2010, negotiated final documents were adopted by consensus. In 2005 and 2015, state parties failed to achieve consensus on a final document.

11 General Assembly Resolution 2028 (XX), 'Non-Proliferation of Nuclear Weapons', New York, 1965.

12 See Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979*, vol. II, London: Oceana, 1980, p. 564; Caroline Fehl, 'Understanding the Puzzle of Unequal Recognition' in Christopher Daase et al. (eds), *Recognition in International Relations*, Basingstoke, Palgrave Macmillan, 2015.

13 NPT, Article VIII.

14 Jack I. Garvey, *Nuclear Weapons Counterproliferation: A New Grand Bargain*, Oxford, Oxford University Press, 2013, p. 5.

15 NPT, Article I.

16 NPT, Article II.

17 See Gro Nystuen and Torbørn Graff Hugo, 'The Nuclear Non-Proliferation Treaty' in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons under International Law*, Cambridge, Cambridge University Press, 2014, pp. 386–90.

18 The NPT originally also included a right to conduct 'peaceful nuclear explosions', but this idea has since been abandoned. See NPT, Article III–V.

3 Enter the ban treaty

The 2016 mandate for negotiations on a legally binding instrument to prohibit nuclear weapons—scheduled to take place at the UN headquarters in New York during the first half of 2017—was the outcome of a long process. The mandate for the negotiations was eventually adopted by the UN General Assembly, but the political momentum towards a ban was generated across various diplomatic arenas, including the meetings of the NPT review cycle.

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The push for negotiations on a prohibition treaty was made on the back of the so-called Humanitarian Initiative.¹⁹ A diplomatic offensive aimed at ‘reframing the debate’ on nuclear disarmament, the Humanitarian Initiative involved the organization of three ad-hoc conferences on ‘the humanitarian impact of nuclear weapons’ over the course of 2013 and 2014.

The Initiative was also promoted through a series of joint statements highlighting the ‘humanitarian dimension’ of nuclear disarmament. These statements were delivered by an ever-growing group of supporters to the meetings of the NPT review process and the UN General Assembly First Committee. The organizers of the conferences and joint statements frequently referred to the 2010 NPT Review Conference Final Document, which acknowledges the ‘catastrophic humanitarian consequences’ of any use of nuclear weapons.²⁰

19 Alexander Kmentt, ‘The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and Its Effect on the Nuclear Weapons Debate’, *International Review of the Red Cross* 97 (899), 2015, pp. 681–709.

20 Final Document, 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2010/50, vol. I, pp. 12, 19, available at [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)).

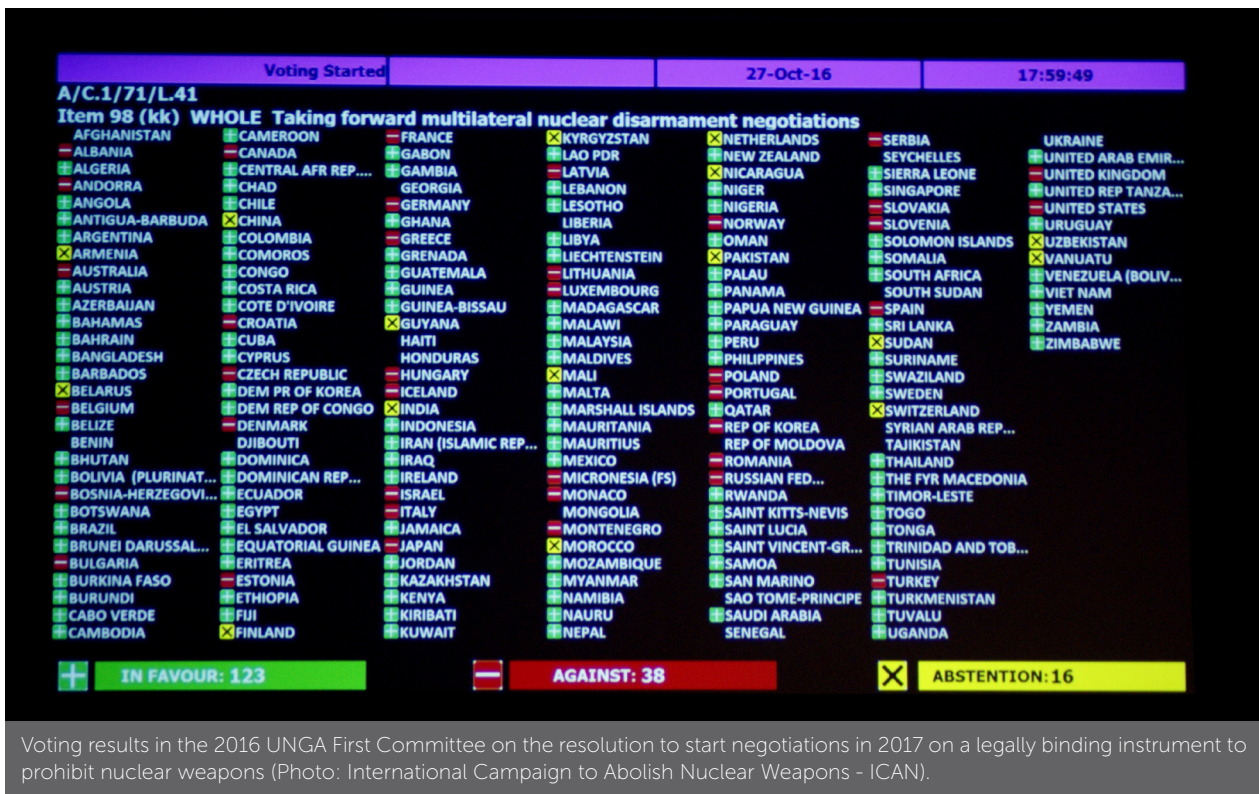
The Humanitarian Initiative was not originally cast as an attempt at building support for a ban. Its aim was to trigger a shift in the international debate on nuclear weapons, pushing the humanitarian perspective (back) to the top of the nuclear weapons agenda internationally. This project attracted growing support over the course of the NPT review cycle beginning in 2012. By the time of the 2015 NPT Review Conference, expectations were high that the NPT state parties would take the humanitarian agenda further than they had five years before.

However, any chance of achieving consensus on a final document in 2015 was undercut by sharp disagreements on the issue of a WMD-free zone in the Middle East. The resulting stalemate was a source of great disappointment for many states and civil society actors, fuelling the frustration of those that for decades had been working to strengthen the NPT’s disarmament pillar. The nuclear-weapon states’ apparent unwillingness to make progress on disarmament seemed to many to reveal—yet again—the shortcomings of the NPT as a vehicle for disarmament.²¹

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By 2015, the Humanitarian Initiative had become a movement of states and civil society actors calling for political action to prevent nuclear weapons from ever being used again. Through their endorsement of the Austrian-initiated ‘Humanitarian Pledge’, more than 100 states had declared their desire to ‘stigmatise,

21 See e.g. Cesar Jaramillo, ‘NPT Review Conference: No outcome document better than a weak one’, *Bulletin of the Atomic Scientists*, 3 June 2015, available at <http://thebulletin.org/npt-review-conference-no-outcome-document-better-weak-one8366>.



prohibit and eliminate nuclear weapons'.²² With the NPT unable to deliver on these expectations, attention turned to the United Nations.

In its 2016 report to the General Assembly, the OEWG recommended, 'with widespread support', to convene a conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons.

In late 2015, the General Assembly decided to establish an Open-Ended Working Group (OEWG) to 'address concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons'.²³

22 Humanitarian Pledge, 2014, available at http://www.icanw.org/wp-content/uploads/2015/03/HINW14vienna_Pledge_Document.pdf.

23 Report of the Open-ended working group taking forward multilateral nuclear disarmament negotiations, Geneva, 2016, available at <http://www.>

In its 2016 report to the General Assembly, the OEWG recommended, 'with widespread support', to convene a conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons.²⁴ The supporters of this initiative have consistently argued that the prohibition treaty will strengthen the NPT. In their view, a ban treaty will provide much-needed support for the NPT's disarmament pillar. Many have argued that the pursuit of such an instrument is in fact a legal obligation for all NPT state parties.²⁵

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[unog.ch/80256EE600585943/\(httpPages\)/31F1B64B14E116B2C1257F63003F5453?OpenDocument](http://unog.ch/80256EE600585943/(httpPages)/31F1B64B14E116B2C1257F63003F5453?OpenDocument).

24 Ibid.

25 See e.g. Treasa Dunworth, 'Pursuing "effective measures" relating to nuclear disarmament: Ways of making a legal obligation a reality', *International Review of the Red Cross* 97 (899), 2015, pp. 601-19.

4 Will a ban treaty undermine the NPT?

When the resolution mandating negotiations on a ban treaty was adopted by the First Committee of the UN General Assembly in October 2016, France, the United Kingdom, the United States and Russia had repeatedly asserted that a ban treaty would ‘jeopardize’,²⁶ ‘undermine’,²⁷ ‘weaken’²⁸ or ‘damage’²⁹ the NPT. A number of nuclear-aligned states, i.e. states without nuclear weapons but under the supposed protection of the nuclear weapons of another state,³⁰ used similar terms to articulate their opposition to a ban treaty.³¹ In a more curious fashion, the Chinese delegation to the UN General Assembly claimed that ‘[t]he approach to set up “new kitchens” will only weaken the foundation of international security mechanisms’.³²

Several potential conflicts between the NPT and a new ban treaty have been outlined. Some states argue that a ban treaty risks undermining the overall objectives of the NPT. Others point to the possibility that a ban treaty might create legal ambiguity and contribute to a sense of uncertainty about the legal rules in the field of nuclear non-proliferation and disarmament. Finally, some commentators have argued that the adoption of a ban treaty will lead to a sense of distrust and polarization between states, which, in turn, might hamper efforts to further universalize the NPT, reduce the likelihood of agreement at future NPT meetings or otherwise negatively impact the overall perception of the NPT.

In the following, we analyse the validity of these arguments. The first section assesses whether the new prohibition treaty could undermine the non-proliferation pillar of the NPT. The second section looks at the relationship between the Treaty and the NPT’s disarmament pillar. The third section evaluates the potential political implications of a prohibition treaty on the NPT and the wider international security architecture.

4.1 THE BAN TREATY AND NON-PROLIFERATION

At the 2016 meeting of the First Committee of the UN General Assembly, the French delegation stated that it would ‘vigorously oppose any attempt to weaken the non-proliferation regime through the promotion of a treaty prohibiting nuclear weapons’.³³ Specifically, France expressed concern that a ban treaty could ‘be used as an alternative to the necessary accession of all States concerned to the IAEA Additional Protocol’, a voluntary non-proliferation measure seen by many as crucial for progress towards a world without nuclear weapons.³⁴

In the same First Committee session, Japan voiced a similar anxiety: ‘given the frustration

26 See e.g. UNOG, ‘States respond to Russian proposals on a draft convention for the suppression of chemical and biological terrorism and on a programme of work’, 16 August 2016, available from: [http://unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/29A8C553DF0103E3C12580110038F4C1?OpenDocument](http://unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/29A8C553DF0103E3C12580110038F4C1?OpenDocument).

27 See e.g. statement by the United States in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/statements/14Oct_USA.pdf.

28 See e.g. statement by France in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/statements/5Oct_France.pdf.

29 See e.g. statement by the United Kingdom in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/15May_UK.pdf.

30 ILPI, ‘Nuclear umbrellas and umbrella states’, available at <http://nwp.ilpi.org/?p=1221>.

31 See e.g. joint statement delivered by Poland in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/eov/L41_Poland-et-al.pdf.

32 Statement by China in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/statements/10Oct_China.pdf.

33 Statement by France in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/statements/5Oct_France.pdf.

34 Ibid.

prevailing among some members of the NPT, we cannot exclude the possibility that [a ban treaty] may be formulated as posing less restrictive non-proliferation obligations compared to those under the NPT'.³⁵

Robert Einhorn has emphasized the importance of avoiding 'a situation where a country can withdraw from the NPT, join a ban treaty without IAEA verification obligations, and take advantage of the absence of scrutiny to pursue nuclear weapons.'

The concern expressed by some states that a ban treaty might hamper non-proliferation efforts under the NPT has also been pointed out by several arms control experts. Robert Einhorn has emphasized the importance of avoiding 'a situation where a country can withdraw from the NPT, join a ban treaty without IAEA verification obligations, and take advantage of the absence of scrutiny to pursue nuclear weapons'.³⁶ In a similar vein, Adam Mount and Richard Nephew have warned against the possibility that the development of a ban treaty 'could lead to "forum-shopping", in which a state might hope to dilute international condemnation over its noncompliance with the strict verification requirements of the existing [NPT] by participating in new nuclear weapons ban treaty'.³⁷

35 Statement by Japan in the Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/24Feb_Japan.pdf.

36 Robert Einhorn, 'Non-Proliferation Challenges Facing the Trump Administration', *Arms Control and Non-Proliferation Series* 15, Brookings, March 2017, available at https://www.brookings.edu/wp-content/uploads/2017/03/acnpi_201703_nonproliferation_challenges_v2.pdf.

37 Adam Mount and Richard Nephew, 'A nuclear weapons ban should first of all do no harm to the NPT', *Bulletin of Atomic Scientists*, 7 March 2017,

Leaving the alleged ulterior motives of proponents of a ban treaty aside, it seems reasonable to ask how the pursuit or adoption of a nuclear weapons ban treaty might undermine the non-proliferation pillar of the NPT. While the legal content of a ban treaty is yet to be negotiated, it is reasonable to assume that the treaty will contain a prohibition on the production and/or development of nuclear weapons.

At first glance, therefore, it appears unlikely that a treaty that prohibits nuclear weapons might create or contribute to a situation in which more states acquire nuclear weapons. On the contrary, prohibiting nuclear weapons would seem to reinforce, rather than undermine, the obligations non-nuclear-weapon states have already accepted under the NPT. To the extent that the purpose of a ban treaty is to delegitimize nuclear weapons, its adoption would presumably strengthen, not weaken, the norm of non-proliferation.

The challenge of parallel obligations

From a treaty law point of view, legal uncertainty can arise from the existence of two treaties covering the same substance but with different wording. The NPT prohibits 'transfer'³⁸ of nuclear weapons by the nuclear-weapons states. It moreover prohibits the 'reception', 'manufacturing' and 'acquisition'³⁹ of nuclear weapons by non-nuclear-weapon states. Although much can be said about the precision of and scope of these rules, their main gist is clear: both nuclear-weapon states and non-nuclear-weapon states must not allow anyone to acquire nuclear weapons.

One might assume that the ban treaty would contain non-proliferation obligations of a similar kind to those found in the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC). If so, it would include prohibitions on the development, production, stockpiling, acquisition and retention of nuclear weapons.⁴⁰ The NPT uses the terms 'receive',

available at <http://thebulletin.org/nuclear-weapons-ban-should-first-do-no-harm-npt10599>.

38 NPT, Article I.

39 NPT, Article II.

40 The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, adopted 10 April 1972, in force

‘manufacture’ and ‘otherwise acquire’ of nuclear weapons. The NPT also prohibits to ‘seek or receive any assistance’ in the manufacture of nuclear weapons. It may be argued that to the extent that ‘manufacture’ could have a different meaning than ‘development’ or ‘production’, this could create legal uncertainty.

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It is important that the new treaty is drafted in such a way that it does not create any legal uncertainties.⁴¹ The negotiators of the new treaty might want to consider a provision stating that nothing in the new treaty shall be construed as setting aside or weaken state parties’ existing obligations under international law.

Safeguards

To provide evidence that their nuclear installations are only used for peaceful purposes, most states have concluded so-called safeguards agreements with the IAEA. Concluding a safeguards agreement is a legal requirement for all parties of the treaties establishing nuclear-weapon-free zones as well as for the non-nucle-

ar-weapon state parties to the NPT.⁴² Providing the basis for the Agency’s inspections, monitoring and reporting, safeguards agreements are generally regarded as a vital element of the international security architecture. While the NPT nuclear-weapon states are not legally required to conclude safeguards agreements, they have, over time, nevertheless all accepted ‘voluntary offer agreements’ through which some or all of their civilian nuclear activities have been subjected to safeguards.

There are several arguments for why a nuclear weapons ban treaty might in theory undermine the application of IAEA safeguards. First, if the ban treaty is perceived as a mutually exclusive alternative to the NPT and nuclear-weapon-free zone treaties, and the ban treaty does not require its parties to have a safeguards agreement in place, the adoption of the ban treaty could seriously damage the IAEA’s ability to verify that states’ nuclear activities do not have a military dimension.

A ban treaty will not excuse its parties from their existing obligations under other treaties.

Second, as noted by France, the adoption of a ban treaty that does not require safeguards or additional non-proliferation measures might lead some states to believe that non-proliferation measures such as the IAEA Additional Protocol—a voluntary instrument that expands the IAEA’s power—have become less important or irrelevant. Another aspect worth noting is that a ban treaty, if it does not require its parties to have a safeguards agreement in place, could allow NPT nuclear-weapon states and states not party to the NPT—India, Israel, North Korea, Pakistan and South Sudan—to accede to the ban treaty without safeguards on their nuclear activities.⁴³

26 March 1975, available at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/media/C4048678A93B6934C1257188004848Do/file/BWC-text-English.pdf>; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted 13 January 1993, in force 29 April 1997, available at <https://www.opcw.org/chemical-weapons-convention/articles/article-i-general-obligations/>.

41 At least three approaches are available: (1) one can omit any reference to transfer, acquisition, manufacturing etc. in the new treaty; (2) one can, in dealing with this topic, use the same terms as the NPT thus ensuring that there are no discrepancies between the two instruments, or (3) one can include a ‘disclaimer’ in the new treaty, saying that nothing in this treaty shall in any way weaken the parties’ obligations under other treaties or international law in general.

42 NPT, Article II; Bangkok Treaty (Southeast Asia), Article 5; Pelindaba Treaty (Africa), Article 9; Rarotonga Treaty (South Pacific), Article 8; Semipalatinsk Treaty (Central Asia), Article 8; Tlatelolco Treaty (Latin America and the Caribbean), Article 13.

43 Note that the aim and practice of applying safeguards (ensuring that peaceful nuclear

The arguments referred to above are, however, relatively easy to counter. First, as long as the ban treaty does not include a provision that explicitly undercuts the safeguards provision specified by the NPT and the five nuclear-weapon-free zone treaties—and there is no reason to expect that it will—it is difficult to see how any of the parties to those treaties could possibly come to the conclusion that their existing obligations were no longer in force. Any such conclusion would certainly not have legal validity; a ban treaty will not excuse its parties from their existing obligations under other treaties. To remove any potential for confusion, however, the drafters of a ban treaty could include a general disclaimer, stating that nothing in the treaty should be construed as setting aside or weakening state parties' obligations under existing international law.

Like all the nuclear-weapon-free zone treaties as well as the NPT, the ban treaty could include language requiring its parties to conclude, if they have not already done so, a safeguards agreement with the IAEA.

Secondly, like all the nuclear-weapon-free zone treaties as well as the NPT, the ban treaty could include language requiring its parties to conclude, if they have not already done so, a safeguards agreement with the IAEA. Such a provision would not imply additional obligations on any of the states that are likely to negotiate and adopt the ban at first. In fact, a safeguards-provision would only have added legal significance for the NPT nuclear-weapon states and states not party to the NPT or a zone.

There is no evidence that the states pursuing a ban treaty intend to weaken the non-proliferation obligations under the NPT. On the contrary, the states that have been most vocal in support of a ban treaty also seem to attach great impor-

activities really are peaceful) is different from the aim and practice of disarmament verification (building confidence that disarmament is truly taking/has taken place).

tance to their existing non-proliferation obligations and to the NPT in general.

4.2 THE BAN TREATY AND DISARMAMENT

In addition to expressing concern that the ban treaty might undermine the NPT's non-proliferation pillar, some states have postulated that the ban treaty might impact negatively on nuclear disarmament efforts. In an explanation of vote at the 2016 First Committee of the UN General Assembly, the Japanese delegation expressed its worry that a ban treaty 'would undermine the progress of effective nuclear disarmament'.⁴⁴ Japan's concern mirrors that of the NPT nuclear-weapon states, which boycotted the 2013 Oslo Conference on the Humanitarian Impact of Nuclear Weapons because they considered it a 'distraction' from more promising avenues towards disarmament.⁴⁵

Invoking the importance of the NPT review cycle as an arena in which non-nuclear-weapon states can hold the nuclear-weapon states to the objective of disarmament, the German delegation argued at the 2016 OEWG on nuclear disarmament that 'the pressure on [the nuclear-weapon states] to implement Art. VI of the NPT might diminish if, in the future, many states would decide that a ban treaty would be the new key instrument to make progress with regard to nuclear disarmament'.⁴⁶ The Norwegian government has argued that a ban treaty would not only undermine the NPT, but that it would be inconsistent with Article VI specifically.⁴⁷

44 Explanation of vote by Japan at the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/eov/L41_Japan.pdf.

45 See John Borrie and Tim Caughley, 'After Oslo: Humanitarian Perspectives and the Changing Nuclear Weapons Discourse', Humanitarian Impact of Nuclear Weapons Project Paper 3, UNIDIR, 2013.

46 Statement by Germany at the 2016 Open-ended working group taking forward multilateral nuclear disarmament negotiation, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/25Feb_Germany.pdf.

47 Foreign Minister Børge Brende's reply to written question from parliament (Sveinung Rotevatn, Venstre/Liberal Party), available (in Norwegian)

ARTICLE VI OF THE NPT

'Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'

The NPT's disarmament obligation is contained in the Treaty's Article VI (see Box B). While different interpretations of the exact meaning of Article VI has been voiced over the years, it is generally assumed to require state parties to 'pursue negotiations in good faith' towards the reduction and eventual elimination of nuclear arsenals.

Article VI is generally assumed to require state parties to 'pursue negotiations in good faith' towards the reduction and eventual elimination of nuclear arsenals.

As mentioned above, it seems reasonable to assume that a nuclear weapons ban treaty will contain a prohibition on the production and/or development of nuclear weapons. In addition, the resolution mandating the negotiations stipulates that the treaty should 'lead towards' the 'total elimination' of nuclear weapons. This might but does not necessarily mean that the treaty will contain provisions to provide for destruction of nuclear-weapon stockpiles.

On the face of it, it seems unlikely that a treaty that explicitly prohibits nuclear weapons will impede the nuclear disarmament objective of the NPT. Historically, the disarmament (destruction/dismantlement) of particular types of weapons has usually been preceded by the weapons' prohibition. The Chemical Weapons Convention (CWC), the Anti-Personnel Mine Ban Convention (APMBC) and the Convention on Cluster Munitions (CCM) all included time-bound obligations to destroy stockpiles of the weapons in question.

Yet, a number of states have suggested that negotiations on a nuclear weapon prohibition treaty would not be in line with Article VI of the NPT. The following sections review some of these arguments with a view to assessing whether negotiations of a prohibition treaty in the context of the General Assembly would be inconsistent with Article VI.

The wording of Article VI specifies that it does not just apply to the NPT nuclear-weapon states, but to all parties to the Treaty. Article VI does not, however, require that all NPT states parties must collectively and at the same time pursue the same measures.

Article VI does not require that all NPT states parties must collectively and at the same time pursue the same measures.

The UN General Assembly Resolution mandating negotiations on a prohibition treaty underlines the functions and powers of the General Assembly established by Article 11 of the UN Charter to deal with matters of disarmament.⁴⁸ All UN member states have a responsibility to achieve disarmament.

Does the NPT's Article VI specify a forum for negotiations?

Article VI does not determine that the disarmament negotiations it foresees must be carried out within the framework of the NPT itself. On the contrary, when the NPT was negotiated, it was widely seen as a step towards disarmament, not as a framework for subsequent ne-

at <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=66945>.

48 UN General Assembly Resolution A/C.1/71/L.41, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N16/326/24/PDF/N1632624.pdf?OpenElement>.

THE CONSTITUENT ELEMENTS OF ARTICLE VI OF THE NPT

- All of the Parties to the NPT are obliged under Article VI.
- The NPT Parties are obliged to *pursue negotiations*.⁵⁰
- Such negotiations must be pursued in *good faith*.
- Article VI mentions three specific actions:
 - (1) Negotiations on effective measures for the *cessation of the nuclear arms race at an early date*.
 - (2) Such negotiations must also be on *effective measures relating to nuclear disarmament*,
 - (3) and on a *treaty on general and complete disarmament under strict and effective international control*.

gotiations.⁴⁹ The NPT review cycle is designed to review the implementation of the NPT, not to function as a forum for disarmament negotiations. Article VI does not specify the context in which negotiations must be pursued. Pursuing negotiations on a prohibition treaty in the context of the UN General Assembly, or in any other forum for that matter, cannot reasonably be seen as conflicting with the wording of Article VI.

Does the implementation of the NPT's Article VI require a specific result?

In a working paper to the 2016 OEWG on nuclear disarmament, the Netherlands argued that '[s]tates have consistently viewed the rule of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons as containing not only an obligation of conduct but also of *result*, as reflected in numerous consensus NPT Review Conference final documents and unilateral statements, and confirmed by the International Court of Justice (ICJ) in its Nuclear Weapons Opinion'.⁵¹

It is true that the ICJ stated in its Advisory Opinion of 1996 on the legality of the threat or use of nuclear weapons that Article VI enshrines an obligation 'to achieve a precise result—nu-

clear disarmament in all its aspects—by [...] the pursuit of negotiations on the matter in good faith.'⁵² On this basis, the argument could be made that unless a nuclear weapon prohibition treaty achieves 'nuclear disarmament in all its aspects', the treaty would be inconsistent with Article VI of the NPT. (It should be pointed out that the same argument would apply to other treaties as well, such as the CTBT, the Fissile Material Treaty, START and New START). The ICJ, however, did not offer any legal reasoning for how it arrived at its interpretation, and it appears to be inconsistent with the rules on treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT).⁵³

As all treaty provisions, Article VI must be taken at 'face value', which is the ordinary meaning to be given to the terms of the treaty, as provided in Article 32 of the VCLT.⁵⁴ This entails that Article VI does not constitute an obligation to *conclude* negotiations, only to *pursue* them (see element 2 in Box C). This interpretation is strongly supported by the negotiation history of the NPT. The nuclear-armed states explicitly resisted language that would obligate them legally to successfully conclude negotiations on nuclear disarmament.⁵⁵ As noted by one commentator: '[t]he Court's interpretation of Article VI almost certainly stretched its terms beyond

49 Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979*, vol. II, London: Oceana, 1980, pp. 555–72.

50 Together, elements 1 and 2 imply *multilateral* negotiations.

51 Statement by the Netherlands to the Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/WP16.pdf> (emphasis added)

52 ICJ, 1996 Advisory Opinion, Paragraph 99.

53 See also Daniel Joyner, *Article VI of the Non-Proliferation Treaty*, in *Nuclear Weapons under International Law*, Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (Eds.) Cambridge University Press 2014, page 405.

54 VCLT, Article 26.

55 Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979*, vol. II, London: Oceana, 1980, pp. 565–8.

their ordinary meaning.⁵⁶ That said, the understanding among most non-aligned states at the time of the NPT negotiations was that the nuclear-weapon states' right to possess nuclear weapons would be temporary.⁵⁷ This understanding is supported by the fact that the duration of the NPT was originally limited to 25 years, after which the Treaty would have to be extended for an additional period or periods (or simply expire).

The understanding among most non-aligned states at the time of the NPT negotiations was that the nuclear-weapon states' right to possess nuclear weapons would be temporary.

The contention that a nuclear weapons ban treaty will not in itself achieve 'nuclear disarmament in all its aspects' is also related to the requirement in Article VI that negotiations be pursued in a particular manner, that is, 'in good faith' (see element 3 in Box C). The VCLT specifies that treaty obligations must be undertaken in 'good faith'.⁵⁸ The ICJ has discussed the good faith requirement in several cases, among others in the North Sea Continental Shelf cases from 1969, in which the Court stated that the requirement of good faith means that the 'parties to a negotiation are under an obligation to enter into negotiations with a view to arriving at an agreement'.⁵⁹ In other words, the obligation to pursue negotiations in good faith means that there must be a genuine will by the negotiating parties to achieve a result.

56 See Daniel Joyner, 'Article VI of the Non-Proliferation Treaty' in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons under International Law*, Cambridge, Cambridge University Press 2014, p. 405.

57 See Caroline Fehl, 'Understanding the Puzzle of Unequal Recognition' in Christopher Daase et al. (eds), *Recognition in International Relations*, Basingstoke, Palgrave Macmillan, 2015.

58 VCLT, Article 26.

59 ICJ, North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Netherlands), 20 February 1969, Paragraph 2.

A prohibition treaty will not, at least in the short term, achieve the elimination of all nuclear weapons. Some might infer from this that the element of good faith is therefore missing. However, the same could be said of most if not all nuclear disarmament negotiations that have thus far taken place. Yet, few have argued that these previous negotiations have been inconsistent with Article VI. The General Assembly resolution mandating the ban treaty negotiations specifies that the new treaty is first and foremost a treaty *prohibiting* nuclear weapons. The purpose of such an instrument would primarily be normative. Proponents argue that such an instrument would stigmatize nuclear weapons, paving the way for their eventual elimination through subsequent (verifiable) stockpile reduction treaties or ban treaty protocols.⁶⁰

Is the ban treaty an 'effective measure'?

Article VI of the NPT stipulates that the pursuit of negotiations must be on effective measures related to the cessation of the nuclear arms race at an early date or effective measures related to nuclear disarmament (see elements 4 and 5 in text box C). Thus, the argument could be made that a prohibition treaty might not constitute an 'effective measure' related to nuclear disarmament.

'Effective measures' is not a precise legal term. It would be futile to attempt an exhaustive legal analysis of what it would entail in practice.

'Effective measures' is, however, not a precise legal term. It would be futile to attempt an exhaustive legal analysis of what it would entail in practice. From a legal perspective, therefore, it seems difficult to establish that a nuclear weapons ban treaty would *not* be an effective measure as envisaged by Article VI of the NPT.

60 UN General Assembly Resolution A/C.1/71/L.41, Operational Paragraph 8, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N16/326/24/PDF/N1632624.pdf?OpenElement>.

Does the NPT's Article VI suggest a particular chronology of implementation?

It has been argued that Article VI requires a specific sequencing of the steps towards the elimination of nuclear weapons. At the OEWG on nuclear disarmament in August 2016, the Netherlands qualified its support for a prohibition treaty by asserting that the development of such an instrument should be 'carried out "in the context of the chronological disarmament steps as they are foreseen in Article VI of the NPT". These are: an end to the nuclear arms race, nuclear disarmament and a treaty on general and complete disarmament under international control'.⁶¹

It has been argued that Article VI requires a specific sequencing of the steps towards the elimination of nuclear weapons.

This sequential view of the process of nuclear disarmament is often referred to as the 'step-by-step approach' by the nuclear-armed states and their allies.⁶² This entails that issues relating to disarmament should be tackled one at the time, and that a prohibition might come at a later, unspecified, stage. Bringing the CTBT into force and negotiating the FMCT are often seen as at or near the top of the list of items to be pursued in the step-by-step process (where they have been since the mid 1990s).

The practice from other disarmament treaties shows a different approach: the prohibition came first and meant that states with the relevant weapons would undertake not to use them

and to destroy them.⁶³ The question here is not which of these approaches are preferable, it is simply whether Article VI requires a specific order of events leading up to elimination of nuclear weapons. The wording does not appear to suggest that it does. If Article VI were meant to specify an order, the text would have had to make that clear.

If Article VI were meant to specify an order, the text would have had to make that clear.

4.3 THE CONSEQUENCES OF INCREASED 'POLARIZATION'

Numerous states have alluded to the possibility that a nuclear weapons prohibition treaty might lead to increased 'polarization'—that is, a state of political tension between nuclear and non-nuclear-armed states—and that this, in turn, could undermine the NPT. At the First Committee of the 2016 UN General Assembly, United States stated that a ban treaty risked 'creating an unbridgeable divide between states, polarizing the political environment on nuclear disarmament, and effectively limiting any future prospects for achieving consensus, whether in the NPT review process, the UN, or the CD'.⁶⁴ In a similar vein, at the 2016 OEWG on nuclear disarmament, a group of states in nuclear alliances argued that 'a Prohibition Treaty negotiation would [...] risk deepening the divide between NWS and NNWS'.⁶⁵ Later on during the same meeting, Canada specified that negotiations on a nuclear weapons ban treaty risked 'pushing states further apart and making the already dif-

61 Statement by the Netherlands in the Open-ended working group on taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/11May_Netherlands.pdf

62 Also called 'building block approach' or 'the full spectrum approach', see "A Prohibition on Nuclear Weapons – A Guide to the Issues", ILPI-UNIDIR, February 2016, p 23.

63 See for example CWC, APMB, CCM.

64 Statement by United States in the 2016 First Committee of the UN General Assembly, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/statements/14Oct_USA.pdf.

65 Statement by Germany in the 2016 Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/05August_Germany.pdf.

ficult goal of achieving consensus within [the NPT] framework even more challenging'.⁶⁶

The supposed danger of polarization has also been flagged by certain arms control experts. In an article in the *Bulletin of Atomic Scientists*, Heather Williams suggests that the NPT is marked by increasing polarization between the nuclear-armed states and the majority of non-nuclear-armed members of the NPT. 'For the NPT to work as intended', Williams asserts, 'these two groups will have to reconcile and cooperate. The onus is on both sides: For the nuclear-weapon states, that means reaching out to non-nuclear-weapon states to stop polarization, and for non-nuclear-weapon states, it means prioritizing the NPT over a ban'.⁶⁷

The process of implementing any international instrument requires states to cooperate, seek common ground, come up with solutions and overcome their differences

Impeding cooperation and compromise

If the opposite of polarization is understood as a willingness to engage in cooperative and constructive discussions about challenges related to nuclear non-proliferation and disarmament, it is difficult to disagree with the assumption that the NPT requires non-polarization in order to operate as intended. Indeed, the process of implementing any international instrument requires states to cooperate, seek common ground, come up with solutions and overcome their differences. In the context of the NPT review cycle, where decisions are conventionally made by consensus, diplomatic cooperation and compromise is a *sine qua non*. If a state or

a group of states should decide on non-cooperation as a diplomatic tactic in the meetings of the NPT, the prospects of achieving consensus would undoubtedly diminish.

It is worth remembering, however, that the NPT has always been a polarized legal framework.⁶⁸ By dividing its membership into two distinct groups of states—states with nuclear weapons, on the one hand, and states without nuclear weapons, on the other—it is not very surprising that states and groups of states have come to prioritize the three 'pillars' of the NPT in different, sometimes conflicting, ways. And there is little doubt that these differences have made it difficult—usually impossible—to achieve consensus amongst the NPT parties on negotiated final documents. In fact, the sixth NPT Review Conference, in 2000, was the first time the NPT state parties managed to conclude a fully negotiated final document by consensus.⁶⁹ That said, it bears mentioning before proceeding further in the discussion that the purpose of the multilateral nuclear disarmament regime is not to produce NPT review conference final documents, but to facilitate and effect nuclear disarmament.

The sixth NPT Review Conference, in 2000, was the first time the NPT state parties managed to conclude a fully negotiated final document by consensus.

Disarmament has been the most contentious of the NPT's pillars. Based on their diverging interests as expressed in the grand bargain made when the NPT was adopted in 1968, the states recognized as non-nuclear-weapon states have traditionally emphasized the disarmament objective. The nuclear-weapon states, for their part, have usually prioritized the NPT's non-pro-

66 Statement by Canada in the 2016 Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/5Aug_Canada.pdf.

67 Heather Williams, 'Does the fight over nuclear weapons ban threaten global stability', *Bulletin of Atomic Scientists*, 9 February 2017, available at <http://thebulletin.org/does-fight-over-nuclear-weapons-ban-threaten-global-stability10500>.

68 Magnus Løvold, 'The Splits: While painful for some, the disappearance of the middle ground in the international nuclear weapons debate is not necessarily a bad thing', ILPI, 2015, available at <http://nwp.ilpi.org/?p=4581>.

69 See Tariq Rauf, 'Ambassador Abdallah Baali on the 2000 NPT Review Conference', *The Nonproliferation Review* 7 (3), 2000, pp. 1–9.

liferation pillar. Historically, the question of the Comprehensive Nuclear Test-Ban Treaty (CTBT) was for many years a particularly divisive issue, contributing to the inability of the NPT review conferences in 1975, 1980, 1985 and 1990 to agree to fully negotiated final documents by consensus.⁷⁰

In theory, the achievement of consensus at NPT review conferences requires a ‘zone of possible agreement’ or ‘bargaining range’, that is, the existence of common ground. In order for such a zone to exist, there needs to be some degree of overlap between the negotiating parties’ ‘bottom lines’ or ‘walk-away positions’; the achievement of consensus requires that both parties offer a deal that is good enough for the other party not to ‘walk away’. At NPT review conferences, the size of the zone of possible agreement is largely determined by how much disarmament the nuclear-weapon states are prepared to offer in exchange for the non-nuclear-weapon states’ support for additional non-proliferation measures.⁷¹

There are several ways in which a nuclear weapons ban treaty might change the negotiation dynamic at future NPT meetings. The fact that a ban treaty would make nuclear weapons illegal could embolden the non-nuclear-weapon states to ‘raise’ their ‘walk away position’, demanding greater disarmament concessions from nuclear-weapon states. For example, non-nuclear-weapon states might demand the accession of the nuclear-armed states to the prohibition treaty in exchange for further concessions in other fields. The adoption of a ban treaty might also affect the bargaining positions of the nuclear-weapon states. Frustration with the non-nuclear-weapon states’ reduced willingness to accept the nuclear-weapon states’ own terms of reference might lead the former to disengage from disarmament debates altogether.

Both of these scenarios would arguably reduce the scope for possible agreement at future NPT

meetings, but neither seems particularly likely to occur. A majority of non-nuclear-weapon states have at previous NPT meetings demanded negotiations on a comprehensive nuclear weapon convention—a disarmament measure that in many ways would be more ambitious than a nuclear weapons ban treaty. Since 1961, when the UN General Assembly recognized that the use of nuclear weapons would be contrary to ‘the spirit, letter and aims of the United Nations’ and ‘to the rules of international law and to the laws of humanity’,⁷² a majority of states have demanded that the use (and threat of use) of nuclear weapons be codified as illegal. At previous NPT meetings, neither of these demands has made the achievement of consensus on a final document impossible.

While it does not seem likely that a nuclear weapons ban treaty will change the NPT review cycle’s basic negotiation dynamic, the adoption of a ban treaty might influence the nature of the specific demands made by some NPT non-nuclear-weapon states.

While it does not seem likely that a nuclear weapons ban treaty will change the review cycle’s basic negotiation dynamic, the adoption of a ban treaty might influence the nature of the specific demands made by some NPT non-nuclear-weapon states. Parties to a nuclear weapons ban treaty might for example choose to use the meetings of the NPT as an arena to encourage nuclear-weapon states and other states to join the ban treaty and/or to respect its provisions. Yet there is little reason to believe that the adoption of a ban treaty will fundamentally change the non-nuclear-weapon states’ willingness to compromise.

Neither the UN General Assembly Resolution requesting an ICJ Advisory Opinion, which was

70 See Rebecca Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, Geneva, UNIDIR, 2009.

71 See e.g. Andrew Grotto, ‘Why Do States that Oppose Nuclear Proliferation Resist New Non-proliferation Obligations?’, *Cardozo Journal of International and Comparative Law* 18 (1), 2010, pp. 1–44.

72 UN General Assembly, Resolution 1653 (XVI), ‘Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons’, New York, 24 November 1961.

met with strong opposition from the nuclear-weapon states when introduced at the First Committee in 1993 and 1994, nor the 1996 Advisory Opinion itself, made the achievement of a final document at the following NPT Review Conference impossible. In fact, observers of the NPT review process have argued that the Advisory Opinion facilitated the adoption of the '13 Practical Steps' for nuclear disarmament at the 2000 NPT Review Conference.⁷³

The collapse of the 2015 Review Conference without a final document, moreover, was not the result of states pushing for the negotiation of a ban treaty. Rather, the inability to achieve consensus was the outcome of a long-running disagreement between states about the issue of a WMD-free zone in the Middle East. The states calling for the Conference take on board the outcomes of the three humanitarian impacts conferences indicated that they were in fact prepared to accept the draft final document presented at the conclusion of the conference.

One cannot therefore conclude *a priori* that a nuclear weapons ban treaty will make the achievement of a consensus outcome at the 2020 NPT Review Conference either more or less difficult.

Increasing distrust

It might be argued polarization is not so much an indicator of the zone of possible agreement at future NPT meetings, but rather a more general description of the political dynamics between nuclear and non-nuclear armed states. Heather Williams conceptualizes polarization as a state of 'deep distrust' between nuclear- and non-nuclear-armed states, which, in turn, has resulted in an 'increased silo effect, whereby like-minded groups of states and experts, defined by a single issue, gravitate towards each other, self-segregating and failing to engage with other silos'.⁷⁴

Williams might be empirically correct that the increased support for a nuclear weapons ban treaty has correlated with an increased distrust on the part of the non-nuclear-weapon states of the nuclear-armed states' intentions to implement their disarmament obligation under the NPT. Despite promises by the former US President Barack Obama to 'take concrete steps towards a world without nuclear weapons' in 2009,⁷⁵ it quickly became clear that the nuclear-weapon states would only to a very limited degree fulfil the disarmament commitments they made at the 2010 NPT Review Conference.⁷⁶

One cannot conclude *a priori* that a nuclear weapons ban treaty will make the achievement of a consensus outcome at the 2020 NPT Review Conference either more or less difficult.

As noted by Gaukhar Mukhatzhanova, 'overall progress in implementing disarmament action items since 2010 has been very limited, though in the past years some positive developments took place with regard to transparency and reporting. Still, these measures are not likely to compensate for the lack of progress in other areas'.⁷⁷ Polarization, then, is arguably not so much an outcome of the ban-treaty movement as it is a response to the nuclear-weapon states' unwillingness to effect nuclear disarmament.

73 Rebecca Johnson, 'The NPT Review: Disaster Averted', *Bulletin of the Atomic Scientists* 56 (4), 2000, pp. 52-7; Kjølsv Egeland, 'Punctuated Equilibrium in Multilateral Nuclear Disarmament', *Peace Review* 28 (3), 2016, pp. 318-25.

74 Heather Williams, 'Does the fight over a nuclear weapons ban threaten global stability?', *Bulletin of Atomic Scientists*, 9 February 2017, available at <http://thebulletin.org/does-fight-over-nuclear-weapons-ban-threaten-global-stability10500>.

75 Speech by Barack Obama in Prague, 5 April 2009, full text available at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-prague-delivered>.

76 According to the NGO Reaching Critical Will, of the 22 'actions' on disarmament agreed on in the 2010 document, only 5 were implemented by the nuclear weapons states in 2015.

77 Gaukhar Mukhatzhanova, 'Implementation of the Conclusions and Recommendations for Follow-on Actions Adopted at the 2010 NPT Review Conference, Disarmament Actions 1-22: 2015 Monitoring Report', CNS James Martin Center for Nonproliferation Studies, April 2015, available at http://www.nonproliferation.org/wp-content/uploads/2015/04/150415_cns_monitoring_report.pdf.

Williams might also be correct in describing the pursuit of a nuclear weapons prohibition treaty as contributing to a certain ‘silo effect’.⁷⁸ With the exception of the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, which featured the participation of the United States and the United Kingdom, all the multilateral meetings that lead up to the adoption of the UN General Assembly resolution to start negotiations on a nuclear weapons prohibition treaty were boycotted by the nuclear-armed state parties to the NPT. This might have resulted in bringing the NPT’s non-nuclear-weapon states closer together, enabling them to (re)discover a sense of collective agency and ability to put pressure on the NPT’s nuclear-armed states to implement their disarmament commitments.⁷⁹

Many of the most significant political developments in multilateral nuclear disarmament were preceded by periods of acute polarization between nuclear and non-nuclear-armed states.

Again, however, it is unclear how increasing distrust and its corresponding ‘silo effect’ should translate into a reduced likelihood of achieving progress on disarmament. It seems equally possible that increased polarization could in fact have the opposite effect. As noted by Kjølvs Egeland, many of the most significant political developments in multilateral nuclear disarmament—including the adoption of the Outcome Document of the First UN Special Session on Disarmament, the adoption of the Comprehensive Test-Ban-Treaty (CTBT), the authorization of the 1996 ICJ Advisory Opinion and the adoption of the ‘13 Steps’ for nuclear disarmament at the 2000 NPT review conference—were pre-

ceded by periods of acute polarization between nuclear and non-nuclear-armed states. The historical record suggests that while polarization between the nuclear-weapon states has indeed been detrimental to the cause of disarmament, polarization between the nuclear and non-nuclear-weapon states has often been a harbinger of progress. To the extent that ‘polarization’ is a symptom of non-nuclear-weapon states grouping together as a single caucus with a clear demand, this is hardly surprising.⁸⁰

The fear of mass withdrawal

The claim that a nuclear weapons prohibition treaty, by contributing to a state of increased political tension between the nuclear and non-nuclear armed states, will diminish the likelihood of achieving a meaningful outcome at future NPT meetings, seems to hinge upon a third assumption, namely that the states pursuing a ban treaty are in fact aiming at substituting the NPT with the new treaty.

At the 2015 NPT Review Conference, the United Kingdom described the ban treaty as ‘a referendum on the NPT’.⁸¹ A similar concern was expressed by the Polish delegation at the 2016 OEWG: ‘either we have the NPT with its art. 6 provisions, which are causing frustration because they seem to legitimize nuclear weapons, or we have the immediate Single Ban Treaty, prohibiting and delegitimizing the nuclear weapons, but at the same time weakening, and as consequence, dismantling all NPT system. So, the question is quite clear what we are choosing’.⁸²

Certain arms-control experts have also viewed the nuclear weapons ban treaty as an alternative to the NPT. For example, Polina Sinovets

78 Heather Williams, ‘Does the fight over a nuclear weapons ban threaten global stability?’, *Bulletin of Atomic Scientists*, 9 February 2017, available at <http://thebulletin.org/does-fight-over-nuclear-weapons-ban-threaten-global-stability10500>.

79 See e.g. Elizabeth Minor, ‘Changing the Dis-course on Nuclear Weapons: The Humanitarian Initiative’, *International Review of the Red Cross* 97 (899), 2015, pp. 711–30.

80 Kjølvs Egeland, ‘How I learned Stop Worrying and Embrace Diplomatic “Polarization”’, forthcoming in *Peace Review*.

81 Statement by United Kingdom at the 2015 NPT Review Conference, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/15May_UK.pdf.

82 Statement by Poland at the 2016 Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/12May_Poland.pdf.

has entertained the idea that a ban treaty ‘might turn to have real power and strip the credentials from the NPT [...]. If the new treaty fails to abolish nuclear weapons and weakens the NPT without effectively replacing it, the dangers for the global nuclear order could be grave’.⁸³ Williams has expanded on this argument by claiming, though without providing evidence, that ‘some supporters of a ban are considering a mass withdrawal from the NPT’.⁸⁴

The suspicion that those advocating a nuclear weapons prohibition treaty seeks to replace the NPT seem to be driven by a view that the prohibition treaty will merely mirror the obligations already embodied in the NPT. At the 2016 OEWG, the Australian delegation noted that ‘if we assume that nuclear-weapon states and nuclear possessor states will not be part of any near term prohibition negotiation, and if we note that every other state is already prohibited from possessing, stockpiling and using nuclear weapons through our NPT membership obligations, it begs the question about what useful purpose would a Prohibition Treaty serve’.⁸⁵

If the states pursuing a nuclear weapons prohibition treaty were indeed intending to replace the NPT, or if this result were somehow to become an unintended consequence of the negotiation and adoption of a ban treaty, there would unquestionably be a serious reason for concern. However, there seems to be no evidence to the claim that states behind the ban treaty are indeed attempting to replace the NPT. On the contrary, states advocating for a prohibition have consistently situated their call for a new treaty within the framework of the NPT, that is, as a step towards the implementation of article VI.

The UN General Assembly resolution that provides the mandate for negotiations on a ban treaty explicitly recognizes that the NPT ‘serves as the cornerstone of the nuclear non-proliferation and disarmament regime’ and stresses ‘the importance of the full and effective implementation by the States parties to the Treaty of the various commitments made at the review conference’.⁸⁶ The states leading the ban-treaty movement have repeatedly made it clear that they do not see the ban as an alternative, but as a supplement, to the NPT. No state has advocated either that the negotiation of a ban treaty should be accompanied by withdrawal from the NPT or any of the obligations it stipulates, or that the NPT will not, or should no longer, be prioritized. The fear of a mass withdrawal from the NPT therefore seems unwarranted.

It is also unlikely that a nuclear weapons ban treaty would unintentionally come to replace the NPT. While there will probably be some degree of overlap between the legal obligations contained in the NPT and the provisions in the new ban treaty—just as there is an overlap between the NPT and various nuclear-weapon-free zone treaties—the overlapping provisions, if carefully drafted, are more likely to reinforce and strengthen the already existing provisions, just as the provisions in the BWC and the CWC have reinforced and strengthened the prohibitions on the use of biological and chemical agents under the Protocol of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the 1925 Geneva Protocol). Moreover, as discussed above, the ban treaty is not likely to mirror all provisions contained in the NPT. After the adoption of a nuclear weapons ban treaty, the NPT is likely to continue to serve as an important framework for verifying the non-proliferation of nuclear weapons and facilitating cooperation and peaceful use of nuclear technologies, as well as an arena for discussions between nuclear- and non-nuclear-armed states on effective measures for disarmament.

83 Polina Sinovets, ‘Assessing the ban treaty from Ukraine’, *Bulletin of Atomic Scientists*, 16 December 2016, available at <http://thebulletin.org/can-treaty-banning-nuclear-weapons-speed-their-abolition>.

84 Heather Williams, ‘Does the fight over a nuclear weapons ban threaten global stability?’, *Bulletin of Atomic Scientists*, 9 February 2017, available at <http://thebulletin.org/does-fight-over-nuclear-weapons-ban-threaten-global-stability10500>.

85 Statement by Australia in the 2016 Open-ended working group taking forward multilateral nuclear disarmament negotiations, available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/23Feb_Australia.pdf.

86 UN General Assembly Resolution A/C.1/71/L.41, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N16/326/24/PDF/N1632624.pdf?OpenElement>.

5 Conclusion

Despite differences of opinion regarding the Treaty's main purpose, the NPT continues to enjoy near universal adherence. This situation is likely to endure for as long as NPT parties continue to value the norm of non-proliferation or until the day when a world free of nuclear weapons has been realized and is properly secured by other instruments.

At the end of the day,
the success of the NPT
is dependent on active
implementation by all parties.

At the end of the day, the success of the NPT is dependent on active implementation by all parties. In the same way, as state parties have taken initiatives to augment the non-proliferation pillar when it has seemed under threat, so too will efforts be made to strengthen other pillars. A treaty's future ultimately depends on its ability to fulfil its functions. As the NPT's Preamble makes clear this includes 'to facilitate the cessation of the manufacture of nuclear weapons', 'the liquidation of all [...] existing stockpiles' and 'the elimination from national arsenals of nuclear weapons and the means of their delivery'.

The NPT does not prohibit the use of nuclear weapons. Some might argue that, since the Treaty does not explicitly mention use, the NPT sanctions the doctrine of nuclear deterrence. The nuclear ban treaty, for its part, will undoubtedly cover use. It might then be argued that the ban treaty would come into conflict with the NPT in the sense that it would not allow the practice of nuclear deterrence.⁸⁷ To this argument one might respond that the nuclear deterrence doctrine is at odds with the overall goal of the NPT, as expressed in its first preambular paragraph: 'Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take

measures to safeguard the security of peoples'. It would be more accurate to state that the ban treaty could undermine a specific reading of the NPT—one that legitimizes nuclear deterrence—rather than the NPT itself. A ban treaty would be a supplement to the NPT, fully consistent with its aims. It would, moreover, be in line with a long series of UN General Assembly resolutions tabled since 1961.

87 The question of whether a ban on testing would legally speaking undermine the CTBT remains an academic one since there is no signs of the CTBT entering into force.