Negotiating Nuclear Disarmament: Clarifying the Law

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Introduction

A number of important legal questions have been raised in the course of recent discussions regarding nuclear disarmament, including in the context of the Open-ended Working Group (OEWG) convened in Geneva during 2016. The purpose of this paper is to provide a legal response to some of the key questions that have arisen, namely:

1. Would the Nuclear Non Proliferation Treaty (NPT) be undermined by a new nuclear disarmament treaty?
2. Could such a treaty be put in place as an amendment to the NPT or through a Protocol to that Treaty?
3. What is "the legal gap" in the NPT and why does it matter?
4. What does "good faith" in Article VI of the NPT require?
5. Can a legally-binding prohibition on nuclear weapons make an effective contribution to nuclear disarmament?

1 Would the NPT be undermined by a new nuclear disarmament treaty?

1.1 The legal position is clear. When two treaties deal with overlapping subject matter but with differing States Parties, the Vienna Convention on the Law of Treaties 1969 (VCLT) provides that when the Parties to a later treaty do not include *all* the Parties to the earlier treaty, the later treaty does not affect or disrupt the existing treaty relationships for states not joining the new treaty.[1]

1.2 Thus, a new nuclear disarmament treaty, for instance a new treaty prohibiting nuclear weapons negotiated under the auspices of the General Assembly, cannot supplant the rights and obligations of those States Parties to the NPT which choose not to adhere to the new treaty. For NPT States Parties which do not join the new regime, the rights and obligations in the NPT would continue to exist without any change whatsoever. For NPT States Parties which do join the new regime, its obligations (such as the prohibitions on testing, possessing, using, transferring or stationing of nuclear weapons which it would establish) would complement, not undermine, the NPT.[2] Further, for all States Parties, it would be a partial but concrete realisation of Art VI of the NPT and entirely consistent with its object and purpose.

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[1] Arts 30 and 59 VCLT. A good example of how this works in practice is provided by Art XIII of the Chemical Weapons Convention 1993 which provides that nothing in that treaty shall be interpreted as in any way limiting or detracting from the obligations earlier assumed by any state under either the 1925 Geneva Protocol or the Biological Weapons Convention 1972.

[2] This point is elaborated in detail in Treasa Dunworth "Strengthening the NPT: International Law and Effective Measures for Nuclear Disarmament" (October 2015).

2 Could such a treaty be put in place as an amendment to the NPT or through a Protocol to that Treaty?

2.1 Art VIII.1 NPT provides for an amendment procedure which can be triggered by any State Party to the Treaty proposing an amendment which receives the support of at least one-third of the States Parties. In such case, an amendment conference must be convened to consider the proposed amendment.

2.2 Art VIII.2 sets out the requirements for adoption of an amendment to the NPT:

> Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to the Treaty, including the votes of all nuclear-weapon States Party to the Treaty and all other Parties which, on the date the amendment is circulated, are members of the Board of Governors of the International Atomic Energy Agency.

At the time of writing, this means that 33 states must agree for any amendment to be adopted.[3] In essence, each of those states have a "veto". Furthermore, Art VIII.2 goes on to stipulate that any amendment that might be agreed requires the ratification of all of those 33 states in order for the amendment to enter into force for *any* party.

2.3 Therefore, while it is legally possible to amend the NPT, at this point in time it is not a feasible political possibility.

2.4 There is no legal impediment to a Protocol being concluded by the States Parties. Indeed, in the past, several suggestions have been put forward for Protocols to the NPT, including at the negotiations in 1968,[4] and at the Review Conference in 1975.[5]

2.5 In response, several NPT parties resisted those Protocol proposals. They expressed concerns that the Protocol mechanism was, in essence, a backdoor amendment procedure, aimed at avoiding the constraints of Art VIII, including the privileged voting

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[3] At the time of writing, those states are: Argentina, Australia, Belarus, Brazil, Canada, Chile, China, Egypt, Finland, France, Germany, Ghana, Ireland, Japan, Republic of Korea, Latvia, Malaysia, Mexico, Namibia, New Zealand, Nigeria, Paraguay, Philippines, Russian Federation, Saudi Arabia, South Africa, Spain, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, United Kingdom, United States of America and Uruguay.

[4] Uganda, United Republic of Tanzania and Zambia: draft resolution, A/CONF.35/C.1/L.4 (17 September 1968).

[5] Ghana, Mexico, Morocco, Nigeria, Peru, Romania, Sudan, Yugoslavia and Zaire: Working Paper Containing Draft Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons Regarding Nuclear Weapon Tests, NPT/CONF/17*, 12 May 1975; Ghana, Mexico, Morocco, Nigeria, Peru, Romania, Sudan, Yugoslavia and Zaire: Working Paper Containing Draft Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons Regarding the Implementation of its Article VI, NPT/CONF/18*, 12 May 1975; Ecuador, Ghana, Mexico, Nigeria, Peru, Romania, Sudan and Zaire: Working Paper Containing a Draft Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons Regarding the Establishment of a System of Security Assurances within the Framework of the Treaty, NPT/CONF/22, 15 May 1975.

power it gave to certain states.[6] There is no reason to believe that a Protocol proposal today would be perceived any differently.

2.6 The process by which any Protocol would be negotiated also poses difficulties. One obvious way (and the one attempted previously) is to use the Review Conference mechanism as a negotiating forum. This has two challenges. The first is that, under existing rules of procedure, states that are not Parties to the NPT would not have full rights of participation in the Conference.[7] Given that four of those states possess nuclear weapons (Democratic Peoples' Republic of Korea, India, Israel and Pakistan), the process would need adjustment so as to accommodate them as equal negotiating partners should they wish to participate and it is not clear that such procedural adjustments could be agreed. The second challenge is that while, theoretically, it is possible to reach decisions at a Review Conference by voting, the well-established practice of Review Conferences favours consensus based decision-making. As is evident from many other fora, including the NPT Review Conferences themselves, this is not conducive to reaching results.

2.7 The second option for developing a Protocol would be to convene a meeting outside the Review Conference process. While this might avoid the difficulties posed by the consensus decision-making practices of the Review Conferences, it does not necessarily resolve the challenge of including non-States Parties as equal negotiating partners.

3 What is the "legal gap" in the NPT and why does it matter?

3.1 The expression "legal gap" has been used in a number of different ways. Some use it to refer to the fact that while all other categories of weapons of mass destruction are subject to universal and comprehensive legal prohibitions, this is not the case for nuclear weapons.[8] More frequently, the expression "legal gap" is used in the context of the unfulfilled promise of Art VI of the NPT, which provides that:

> 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.

3.2 In 2015, the General Assembly referred to the legal gap in this sense when it urged:[9]

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[6] Mohamed I. Shaker *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979* (1980), Vol III) at 1065 and Bruce Unger "The Nuclear Non-Proliferation Treaty Review Conference: An Unsuccessful Attempt to Stem the Tide" 139(2) *World Affairs* (Fall 1976) 87, at 96.

[7] See for example the Rules of Procedure for 2015: Rule 1.1 (States Parties to the Treaty to be represented) and Rule 28 (only States Parties have voting rights), NPT/CONF.2015/1.

[8] Gro Nystuen & Kjølv Egeland "A 'Legal Gap'? Nuclear Weapons Under International Law (March 2016) at www.armscontrol.org.

[9] *Humanitarian Pledge*, GA Res 70/48 (7 December 2015) at para [3].

> all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons to renew their commitment to the urgent and full implementation of their existing obligations under article VI, and calls upon all States to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons and to cooperate with all stakeholders to achieve this goal.

3.3 In light of the on-going failure to advance the negotiations required by Art VI, despite the unequivocal undertaking of the NWS in this regard at the 2000 Review Conference and subsequently, there are clearly obligations remaining under the NPT which are not being fulfilled.[10] Indeed, all states have acknowledged that there remains "unfinished business" in nuclear disarmament, in that there has been and remains, an obligation to achieve and maintain a world without nuclear weapons.[11]

3.4 Thus, whether this failure is described as a "legal gap" or as an unfulfilled legal obligation, the terminological debate should not distract attention from the important legal point that there is unfinished business in the NPT, namely the need to pursue effective measures to prohibit and eliminate nuclear weapons.

4 What does "good faith" in Article VI of the NPT require?

4.1 The expression "good faith" in Art VI is not further defined in the NPT. However, a cardinal rule of treaty interpretation is that "each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless."[12] Thus, both Art VI in general and the reference to "good faith" in particular must be given a meaning rather than glossed over or read out of the text entirely.[13]

4.2 Good faith is a basic principle of international law. It finds expression in a range of foundational international law texts including the Charter of the United Nations, [Art 2(2) (Member States shall fulfill in good faith the obligations assumed by them)] and several references in the VCLT [Art 26 (treaties must be performed in good faith) and Art 31 (treaties should be interpreted in good faith)].

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[10] 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, "Final Document, Volume I, Part I," NPT/CONF.2000/28 (Parts I and II) para 6, page 14. Reaffirmed in the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, "Final Outcome Document" NPT/CONF.2010 /50.

[11] For example: "[T]here is a clear collective obligation to achieve and maintain a world without nuclear weapons." (Netherlands, A/AC.286/WP.16, at para 10).

[12] *Eureko v Poland* (Partial Award), 19 August 2005, at para 248; See also *Territorial Dispute (Libya/Chad)* (Judgment) ICJ Rep (1994) 21, at 23, where the Court referred to this principle of effectiveness as one of the "fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence"; See also *Japan – Taxes on Alcoholic Beverages* AB-1996-2, WT/D38/AB/R, Report of the Appellate Body, 4 October 1996, at 11.

[13] David Koplow "Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?" (1993) Wis. L. R. 331 at 378.

4.3 The principle of good faith as a legal obligation has been affirmed by the International Court of Justice. For example, in the *Nuclear Tests Case*, the Court stated that:[14]

> one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.

4.4 In a number of cases, the Court has determined that good faith requires states to engage in genuine efforts to commence and engage in negotiations. For example, in the *North Sea Continental Shelf Case*, in the context of reaching agreement on the delimitation of adjacent continental shelves, the Court stated that:[15]

> the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation ….

Thus, to give effect to the exhortation in Art VI of the NPT "to pursue negotiations in good faith", states must commence negotiations for nuclear disarmament with a genuine commitment to arriving at an agreement.

4.5 In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court confirmed that Art VI establishes an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.[16]

4.6 Thus, for all States Parties to the NPT there is an undeniable legal obligation to actually enter into negotiations for nuclear disarmament with a genuine view to arriving at an agreement.

5. Can a legally-binding prohibition on nuclear weapons make an effective contribution to nuclear disarmament?

5.1 In the past it was often believed that legal rules and norms could not be effective without the support of the most powerful states. However, this view is being increasingly discredited in light of growing practice to the contrary in many different areas of international law. There are now numerous examples of formal multilateral treaties serving as effective instruments for advancing norms even in the absence of great power engagement.[17] Those treaties can be seen to shift international expectations and result in policy change over time, even within states that have chosen to remain outside the particular treaty regime.

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[14] *Nuclear Tests (New Zealand* v *France)*, (Judgment) ICJ Rep (1974) at para 46.
[15] *North Sea Continental Shelf Cases (Denmark/Germany/The Netherlands)* [1969] ICJ Rep 13, at para 85.
[16] (Advisory Opinion) [1996] ICJ Rep 3, at para F dispositif.
[17] Adam Bower "Norms without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines" *International Studies Review* (2015) 17, 347-373, at 349.

5.2 This point is very clearly illustrated by an example drawn from the evolution of the Exclusive Economic Zone concept in the law of the sea. While it is now universally accepted that a state may claim sovereign rights of exploration and exploitation over natural resources up to 200 nautical miles, this proposition was initially highly contested — for security and economic reasons — and thus remained controversial for many decades.[18] A number of states had made assertions of jurisdiction and sovereignty out to the 200 mile limit, but prior to the negotiation of the UN Convention on the Law of the Sea commencing in 1974, there was no international consensus on the legality of such claims.[19] However, by the time the negotiations concluded 8 years later, the majority opinion and practice among states (even those who had strongly opposed this just a few years before), was to recognise, indeed mirror, such claims.[20] It would seem that the evolution and acceptance of the concept was partly triggered by the negotiation and conclusion of the treaty, and partly by accelerated state practice.

5.3 Examples of this dynamic drawn from the disarmament/arms control sphere include the 1925 Geneva Protocol and the Anti-Personnel Mine Ban Treaty 1997.

(a) The 1925 Geneva Protocol

Following extensive use of chemical weapons during the First World War, the Protocol was negotiated as part of the broader Conference for the Supervision of International Trade in Arms and Ammunition and in Implements of War in 1925. Despite the absence of at least one major power (the US did not join until 1975), the Protocol was nevertheless very widely accepted as an important part of the development of the "chemical weapons taboo" and in fact it was cited by many as constituting a "constraining influence" which prevented widespread use of chemical weapons during the Second World War.[21]

Certainly, the Geneva Protocol 1925 laid the foundations for the Chemical Weapons Convention 1993 which instituted a comprehensive verifiable ban on the use, development or possession of chemical weapons. While the Protocol itself was conditional (due to reservations, it essentially became a no-first use treaty), non-verifiable and unable to command universal adherence, it was an indispensable step on the way to the comprehensive and verifiable ban which was subsequently achieved. In other words, the Protocol was part of the normative evolution of the chemical weapons ban.

(b) The Anti-Personnel Mine Ban Treaty (Ottawa Convention)

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[18] David Attard *The Exclusive Economic Zone in International Law* (Oxford University Press 1987), especially Chapter 1.

[19] *Fisheries Jurisdiction (UK v Iceland)* ICJ Reports (1974) 3; *Fisheries Jurisdiction (FRG v Iceland)* ICJ Reports (1974) 175, Joint Separate Opinion, at 45 and 213.

[20] In the *Tunisia/Libya Case* the ICJ referred to the EEZ as a concept "which may be regarded as part of modern international law" ICJ Reports (1982) at para. 100.

[21] Richard Price "A genealogy of the chemical weapons taboo" *International Organization* 49(1) December 1995, 73-103.

The negotiations for what was to become the Ottawa Convention came about because of widespread dissatisfaction with the grave humanitarian impact on civilians of anti-personnel land mines and the lack of progress in strengthening the multilateral regulation of those weapons. Instead of continuing to allow the most powerful countries who used or manufactured such weapons to continue to block effective regulation, a group of states took the decision to disengage from negotiations with those powerful countries and instead move forward on a separate process of negotiations for a stronger treaty. That treaty opened for signature in December 1997 after a short period of negotiations, and it entered into force on 1 March 1999. Today, there are 162 States Parties.

Since the conclusion of the treaty, there has been a dramatic decrease in the use of landmines. The Landmine Monitor reports that while there were still 10 deaths per day due to landmines in 2014, that was a reduction of 60% compared to 1999.[22] Further, over the past five years, 1.5 million anti-personnel mines have been cleared. Since 1999, 49 million stockpiled weapons have been destroyed.[23]

More importantly, there has been a dramatic reduction in landmine-producing states, from 50 in 1999 to 11 potential producers in 2014, although the Landmine Monitor suggests that only four states are now active producers.[24] Further, although several important states are not party to the treaty, some states have nevertheless enacted formal moratoria on exports, including China, India, Israel, Pakistan, Russia, South Korea and the United States.

Taking a specific example, while the United States remains firmly outside the treaty framework, its policy towards anti-personnel landmines has, and continues to, change. In 2004, President Bush announced that the United States would eliminate all forms of "persistent" mines. In January 2011, all persistent mines were withdrawn from active inventories.[25] Then, in June 2014, the United States announced that it would not produce or otherwise acquire any anti-personnel landmines in the future including to replace existing stockpiles.[26] At the same time, the United States stated that it was "diligently pursuing solutions that would be compliant with and that would ultimately allow the United States to accede to the Ottawa Convention."[27]

Similarly, China remains outside the treaty, but attends its Meetings of States Parties and frequently expresses its support for the humanitarian goals of the treaty and actively supports international demining activities.[28] China informed the Third Review

[22] International Campaign to Ban Landmines *Landmine Monitor 2014*, at 1.
[23] International Campaign to Ban Landmines *Landmine Monitor 2014*, at 3.
[24] International Campaign to Ban Landmines *Landmine Monitor 2014*, at 3.
[25] Bower, above n 17, at footnotes 21 and 22.
[26] Statement by Ambassador Griffiths, United States Embassy, Maputo, to the Third Review Conference to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 27 June 2014.
[27] Ibid.
[28] Statement by Madame Dong Zhihua, Counsellor, Department of Arms Control and Disarmament, Ministry of Foreign Affairs, China to the Third Review Conference to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 26 June 2014.

Conference that it had not made any new deployments of landmines over the past ten years.

5.4 In conclusion, while a multilateral treaty has a direct and immediate legal effect for those states that join it, a multilateral treaty can also play a part in influencing and shaping the policies and practices of states which, for whatever reasons, find themselves unable or unwilling to take part in neogitations for, or adhere to, the multilateral agreement. As the examples above illustrate, this dynamic is also evident in the context of international disarmament agreements.

5.5 Perceptions of security interests and the role of particular weaponry can and do evolve. It is difficult to demonstrate *absolutely* the influence of widely supported but not universal agreements. But the evidence does suggest that, even in the absence of engagement by the most powerful states at the outset, such agreements can impact very significantly over time on the evolution of international norms against weapons and lead progressively to their eventual elimination.

5.6 This is surely possible in the case of a weapon which has been the subject of international opprobrium since its creation and which states have repeatedly acknowledged their obligation to eliminate.[29]

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[29] Above, n 10.