

Framework Forum Roundtable:

Issues and proposals for taking forward nuclear disarmament

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Legal Analysis of Proposed Measures

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I will make some observations with respect to several possible forms that agreements relating to nuclear disarmament could take: a nuclear weapons convention; a framework agreement; a political framework agreement; a framework of instruments; a ban treaty.

A nuclear weapons convention is often thought of as a single legal instrument addressing all aspects of elimination of nuclear weapons, like the Chemical Weapons Convention. However, unlike the CWC, given the already well-developed state of nuclear arms control and non-proliferation, in fact a nuclear weapons convention almost surely would incorporate or link to instruments including the NPT, the CTBT, possibly a fissile materials treaty, safeguards agreements and the Additional Protocol, Security Council resolution 1540, treaties on nuclear terrorism and nuclear safety, and more. A Model Nuclear Weapons Convention is set forth and discussed in the 2007 book *Securing our Survival* released by the International Association of Lawyers Against Nuclear Arms, the International Network of Engineers and Scientists Against Proliferation, and the International Physicians for the Prevention of Nuclear War.

A framework agreement on nuclear disarmament can be considered a variant of a nuclear weapons convention. It could set forth an obligation of non-use of nuclear weapons and a schedule for their elimination, and provide for further negotiations on matters that could not be settled at the outset, for example verification, enforcement, and control and disposition of fissile materials. The concept of a framework agreement is well established in international practice, for example the UN Framework Convention on Climate Change. Note that it would be a very consequential agreement if it had an obligation of non-use and set a binding schedule for elimination; a framework agreement does not have to be vague or aspirational or simply establish a process.

A framework agreement could have the great benefit of early treaty codification of the obligation of non-use. However, in the United States at least, the military is very reluctant to accept limits on use of military capabilities including nuclear ones; their attitude tends to be, as long we have the capability, as long as it is allowed, there should be freedom as to how to use it.

Further, states might be reluctant to enter into an agreement if crucial issues were left to further negotiations.

A political framework agreement: So far I have been talking about a legally binding framework agreement. It is also true that a political framework could be created for a process of elimination. Indeed states have tried very hard to establish such a framework within the NPT Review Process. We might try to think, à la the Paris Agreement, about an approach which is a cross or mixture of the political and the legal. It could for example:

- reference the disarmament obligation in NPT Article VI and general international law
- reference the incompatibility of use of nuclear weapons with IHL
- state the desirability of extending forever the practice of non-use
- set out, as in the Paris Agreement for levels of greenhouse gases, aims for achieving reductions and elimination of nuclear weapons; in the Paris Agreement, achievement of those aims is not legally required, nor are national measures to meet limits on national contributions to greenhouse gas emissions
- set out processes for achieving these aims, as in reporting, negotiations; these could be legally required, as in the Paris Agreement, or take the form of political commitments.

A framework of instruments is different than a framework agreement. A framework of instruments is referred to in the 2010 NPT Final Document, which notes “the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.” Such a framework would tie together agreements and institutions that now exist as well as ones yet to be created, probably including an overarching instrument on governance.

The tendency of this approach is to push finalization of the institutional and legal arrangements for elimination of nuclear weapons well into the future; it has a strong affinity with the step-by-step approach, or what some states have called the progressive approach. It does not necessarily imply reliance on a global multilateral agreement on prohibition and elimination of nuclear weapons, leaving open, for example, a protocol to the NPT with states possessing nuclear weapons as parties, or other plurilateral agreement among states possessing nuclear weapons. This indeed is referred to in a paper of the progressive group at the first session of the OEWG.

There is some logic to seeing an agreement among nuclear-armed states as a key ingredient in establishment of a NFWF. After all, all other states are already bound by a verifiable and enforceable obligation of non-acquisition under the NPT, as well as for most under regional NWFZs. However, if at some point in the future this path was taken, it would be crucial for global equity and democracy that there was a strong, meaningful role for all states, for example through the involvement of representatives of NPT states parties in negotiations.

Ban treaty: An agreement negotiated and concluded if necessary by non-nuclear weapon states alone – aka a ban treaty – could prohibit the possession and use of nuclear weapons. If the prohibition of possession essentially reproduced the existing obligation under the NPT and NWFZs, the contribution of a ban treaty would be to reinforce existing obligations of non-use of nuclear weapons under principles of IHL and other international law. It would be in large part a contribution to the global normative environment. Depending on how the prohibition of possession and related prohibitions were elaborated, possibly it could have some effects on the positions of states within nuclear alliances – if it even proved possible for them to be both parties to a ban treaty and members of nuclear alliances.

Note however a potential downside: it could be implied that states that there is not an existing obligation of non-use applying to states not joining a ban treaty. This is not hypothetical; a similar argument was deployed by nuclear-armed states in the proceedings for the 1996 Advisory Opinion, with respect e.g. to protocols to regional nuclear weapon free zones; in more general form,

the argument was made with respect to prohibitions on deployment of nuclear weapons in outer space or on the sea-bed, that partial prohibitions implied there was not a general prohibition. This could be especially glaring if a ban treaty did not involve a very large majority of states. This problem could be mitigated by presenting the obligation of non-use as a codification of an existing norm and practice and invoking IHL.

It would be possible for a ban treaty to include obligations relating to possession going beyond existing obligations. For example, if a ban treaty prohibited “development” of nuclear weapons, this would include steps short of acquisition/manufacture of nuclear weapons prohibited under the NPT, e.g. laboratory research arguably relating to nuclear explosives, or work on dual-use technologies. It would seem to follow that there would be some sort of mechanism for monitoring the absence of activities relating to development. This all sounds good. It would strengthen existing obligation of non-acquisition. However, of course non-nuclear weapon states are currently rather reluctant to assume additional obligations relating to non-proliferation; there has been, for example, some resistance to the Additional Protocol for monitoring beyond that of Safeguards Agreements. This same problem would seem to arise for a ban treaty concluded by NNWS alone if it has provisions on non-possession going beyond existing obligations.

Note also that a ban treaty could set forth basic obligations of non-use and non-possession while leaving to later negotiation within the treaty framework, or outside of it, issues relating to elimination of existing stockpiles – e.g. verification and enforcement of the obligation of non-acquisition in a world free of nuclear weapons. In theory this could leave room for nuclear-armed states to later join the agreement. However, states possessing nuclear weapons will be very reluctant to join a treaty whose terms they had not negotiated – even if those terms should be basically acceptable to them at the time they would be otherwise eligible to join. Perhaps this would be different say two or three decades from now; political and cultural contexts do change.

Political process: Current relations among nuclear-armed states, especially between the United States and Russia, are not conducive to progress on nuclear arms control and disarmament. The United States and UK have also been oriented to initiatives aimed at furthering disarmament, the verification initiatives and the P-5 meetings on transparency and other matters, which do not directly involve multilateral deliberation or negotiation relating to achievement of a NFWF. And a certain amount of distance has developed between the humanitarian initiative and the nuclear-armed states.

Nonetheless, it’s important to keep trying to engage the nuclear-armed states in a process. So the OEWG should strive to develop proposals that can be presented within the UNGA, at the 2018 UN High-Level Conference on Nuclear Disarmament, and at the 2020 NPT Review Conference, that have a reasonable chance of both engaging the nuclear-armed states and advancing disarmament. Those appear to me to be a framework agreement that would in essence be a variant of the nuclear weapons convention; or a political framework agreement combining political aims and legal elements.