The Nuclear Weapons Prohibition Treaty: Negotiations and Beyond

Arms Control Today

The Treaty on the Prohibition of Nuclear Weapons has been hailed by supporters as a historic achievement that they hope will be, in the words of the Hiroshima atomic bombing survivor Setsuko Thurlow, “the beginning of the end of nuclear weapons.”

The treaty is the first international agreement that prohibits the use, possession, deployment, and stationing of nuclear weapons for all states-parties and challenges the legitimacy of nuclear deterrence policies. It opens for signature at the UN General Assembly in New York on September 20 and enters into force 90 days after the deposit of the 50th instrument of ratification.

Dismissed by the nuclear-armed states and their allies, the impact of the treaty will become evident only over time. The treaty’s negotiators do not have illusions that the new instrument will produce immediate results in reducing nuclear risks or nuclear weapons. Instead, the aim is to delegitimize nuclear weapons and make it more difficult for states to continue to rely on nuclear weapons as part of their military and foreign policy strategies.

Borne of a movement focused on the humanitarian impact of nuclear weapons use, the treaty commits its states-parties to conduct environmental remediation and provide assistance to victims of nuclear weapons use or testing under their jurisdiction and establishes the responsibility of states that use or test nuclear weapons to provide assistance to other affected parties. Further, the treaty mandates the destruction of nuclear arsenals, with a view that the details of nuclear weapons elimination would be negotiated at a later date.

Negotiations of the prohibition treaty, mandated by UN General Assembly Resolution 71/258, took place at a difficult time and in peculiar circumstances. North Korea had accelerated its nuclear weapons program, conducting its fourth and fifth nuclear tests in January and September 2016 and demonstrating growing missile capabilities in recent months. Russian leadership in recent years had made cavalier pronouncements on the use of nuclear weapons. And statements by the new U.S. president, Donald Trump, raised concerns about increased possibility of nuclear weapons use as he demonstrated little knowledge of nuclear weapons issues combined with a proclivity for bombastic statements and threats.

For the proponents of the ban, these developments underscored the urgency of negotiating a treaty to prohibit the use and possession of nuclear weapons. For the opponents, these issues only added to the list of problems the prohibition treaty cannot solve.
Although the prohibition treaty was negotiated by mostly like-minded states, the deliberations did not escape some of the familiar problems and disagreements plaguing the debates at nuclear Nonproliferation Treaty (NPT) and International Atomic Energy Agency (IAEA) meetings, which affected some of the treaty’s provisions. A short negotiation time frame and the lack of a preparatory process, along with the absence of a number of states traditionally active in disarmament and nonproliferation forums, also influenced the process and substance of the talks.

This article provides an overview of how the negotiators arrived at the final text of the prohibition treaty and discusses some of the substantive issues that generated the most debate.

The Process

Given the apparently unbridgeable divide between the two sides of the debate on the desirability and timeliness of prohibiting nuclear weapons, the treaty was negotiated without the nuclear-weapon states and against their vocal opposition. Most European states were also absent, which was unusual for negotiations on a humanitarian treaty or indeed any UN-mandated process. On the other hand, civil society representatives from about 100 nongovernmental organizations actively participated and contributed to the process, which is unprecedented for nuclear weapons-related negotiations.

The negotiations were complicated by severe time constraints and the fact that the negotiators could not benefit from the work of preparatory committees or specially designated expert groups. The need for additional technical expertise, for example, was evident during the work on safeguards and nuclear weapons elimination provisions. Although some states, including Egypt, questioned whether it was necessary to conclude the treaty this year, the core group of Austria, Brazil, Ireland, Mexico, and South Africa pressed early for a “lean” treaty that could be adopted without the need to ask the UN General Assembly for a negotiating mandate extension into 2018.

With the uncertainty surrounding the Trump administration’s pending Nuclear Posture Review, the stalemate in U.S.-Russian arms control, growing tensions in East Asia, and continued nuclear-weapon-
state opposition to the prohibition treaty, the political window for the negotiations seemed to be closing faster than could have been expected in October 2016. The longer the negotiations continued, the greater disagreements could become, and the greater potential for the prohibition negotiations and the periodic NPT review process to affect each other negatively.

Negotiations, chaired by Ambassador Elayne Whyte Gómez of Costa Rica and titled “Conference to Negotiate a Legally Binding Instrument Prohibiting Nuclear Weapons, Leading Towards Their Total Elimination,” consisted of two parts: a one-week session in March and a three-week session in the summer. During the first session on March 27–31, participating states, as well as civil society representatives, presented their positions on what the future treaty provisions should contain, particularly the preamble, core prohibitions, and institutional arrangements. States and civil society also expressed views on such issues as victim assistance, verification, and provisions for the elimination of nuclear arsenals.6

The March session was remarkable for its positive, business-like atmosphere. By the end of the week, most states’ positions converged around negotiating a short treaty establishing a strong prohibition on the use and possession of nuclear weapons. Some states, particularly Cuba, Egypt, Iran, and Venezuela, tried to broaden the scope of the future instrument, arguing for the inclusion of a time-bound disarmament program along with comprehensive prohibitions, but their views did not gain much traction.

Most if not all delegations emphasized the importance of the NPT as the cornerstone of the international nonproliferation regime and argued that the new treaty should build on and strengthen the NPT rather than replace it. On the basis of the first week’s statements, as well as the states’ working papers and written products submitted directly to the president’s team, Whyte Gómez prepared the first draft of the treaty, which she distributed on May 22, a week after the 2017 NPT preparatory committee meeting concluded in Vienna. The timing was of some significance, as Whyte Gómez chose not to attend that meeting in an apparent attempt to keep the discussion of the draft treaty out of the preparatory committee as much as possible.

The main negotiations on the text of the ban took place during the second session of the conference from June 15 to July 7. The first seven working days of the second session were spent reviewing the draft treaty paragraph by paragraph in the plenary. At the end of that period, it became evident that small-group negotiations would be necessary to address specific issues and resolve disagreements, even though such methods were not Whyte Gómez’s original preference.
On June 29–30, four groups, led by Whyte Gómez and the facilitators she had appointed, convened in parallel and addressed the following: main prohibitions and obligations (Article 1), verification and accession of nuclear-armed states (Articles 2–4), victim assistance and environmental rehabilitation (Articles 5–7), and all other issues, including withdrawal provisions and institutional arrangements (Articles 8–20). The facilitators submitted their respective texts to Whyte Gómez as the products of their groups’ “best effort.” On July 3, at the beginning of the last week of the negotiations, Whyte Gómez released the draft final text based on the group submissions and additional consultations. States then had a little more than 24 hours until Wednesday, July 5, to review the draft final text and consult their respective capitals.

The expectation among many delegations was that they would be able to amend the draft text further on the basis of their review and instructions from the capitals. Whyte Gómez, however, indicated that the final draft would have to be submitted to the delegations at least 24 hours before its expected adoption, that is, the final text had to be ready by the morning of July 6. This left little if any time for negotiations on any additional substantive changes, which led to confusion and tension on July 5 when she resisted making any amendments to the draft. Several delegations questioned the reasoning behind having a plenary meeting to discuss the draft text if their comments were not going to be taken into account. At the same time, there was sufficient recognition in the room that reopening any part of the text for further negotiations could mean unraveling the whole draft. The prevailing desire among the states to adopt the treaty on July 7 was such that almost all the delegations, including those that had concerns with the text and with the process in the final days, ultimately supported the July 3 draft, with minor amendments.

Following the UN General Assembly’s rules of procedure meant that the conference needed only a two-thirds majority to adopt the text of the treaty, but it came closer to a consensus outcome than generally expected. On July 7, an impressive 122 states voted in favor, one against, and one state abstained.

The Netherlands, the only NATO member to participate in the negotiations, consistently stated that it would not be in a position to support a treaty if the provisions were inconsistent with the country’s alliance obligations. Unsurprisingly, the Netherlands asked for a vote on the text of the treaty and voted against it. Singapore abstained, citing the extremely limited time available for the negotiations.
and the failure to include in the final text Singapore’s proposal regarding transit. After Sweden and Switzerland expressed concerns about some of the provisions, such as the inclusion of testing in the prohibitions, relatively weak safeguards requirements, and the relationship between the prohibition treaty and the NPT, there were questions as to whether they would abstain on the final text. Both states, however, judged that the treaty overall was an important step forward and voted in favor.

Issues and Actors

The treaty prohibiting nuclear weapons is a highly controversial subject in the NPT context, with NPT states-parties sharply divided on its benefits, dangers, and expected long-term impact. The ban negotiations themselves, however, were not especially contentious in large part due to the absence of the nuclear-weapon states and most of their allies, and the collective drive to adopt a treaty by July 7 was at times almost palpable. After the first week in March, one could observe broad agreement among states on the treaty’s core prohibitions, such as the use, possession, production, stationing, and deployment of nuclear weapons, as well as assistance in prohibited activities. Still, a number of issues proved difficult for the delegations to conclude, including the prohibition on the threat of use of nuclear weapons and on testing and transit, verification, provisions for the accession of nuclear-armed states, withdrawal, and the relationship of the prohibition treaty with other instruments.

Threat of Use. From the beginning of the negotiating conference, many states included the threat of use in the list of prohibitions that the treaty should contain. This was to be expected, considering that the negotiation of a legally binding instrument on the assurances against the use and threat of use of nuclear weapons against non-nuclear-weapon states is a long-standing demand of the Non-Aligned Movement. Furthermore, protocols to the nuclear-weapon-free-zone treaties also commit the nuclear-weapon states not to use or threaten to use nuclear weapons against the nuclear-weapon-free-zone parties. Less expected was the objection from several states, including Mexico, Sweden, and Switzerland, that the threat of use was already covered by the general prohibition on the threat to use nuclear weapons under Article 1 of the UN Charter. Having a specific prohibition on the threat of use in the new treaty would then not only be unnecessary but also risk undermining the general prohibition in the UN Charter.

The key difference appears to be in the interpretation of the nature of the threat that ought to be prohibited. The UN Charter prohibition seems to apply to a more immediate threat to use nuclear weapons against a particular state or states under specific circumstances. Those that argued for the inclusion of the threat of use in the prohibition treaty, however, were targeting nuclear deterrence policies more broadly because a general threat to use nuclear weapons in retaliation is at the core of nuclear deterrence. The latter logic ultimately prevailed, and the negotiators agreed to include “threaten to use” in the activities prohibited under Article 1 of the treaty.

Testing. The disagreement over nuclear testing centered around the issue of whether its inclusion in the treaty’s prohibitions under Article 1 would be redundant because of the existence of the Comprehensive Test Ban Treaty (CTBT) and, more importantly, would undermine the efforts to bring the CTBT into force, which requires ratification by eight key states. Many states spoke in favor of including testing in the new prohibition treaty, arguing that this would strengthen rather than weaken the norm against nuclear tests, and a majority supported the reaffirmation of the CTBT’s importance in the preamble.

Mexico, the Netherlands, Sweden, and Switzerland expressed concerns about harming the CTBT. In an attempt to mitigate potential damage, Switzerland, supported by the Netherlands and Sweden, suggested adding “in accordance with the CTBT” to the text on testing, although this proposal was not taken up. At the other end of the spectrum, Algeria, Cuba, and Iran, among others, tried to broaden the scope of the testing prohibition, apparently to “fix” perceived loopholes in the CTBT. They argued for a specific reference to subcritical tests and computer simulations and objected to the use of the CTBT formulation prohibiting “any nuclear test explosion or any other nuclear explosion.” Furthermore, Egypt and Iran opposed any mention of the CTBT’s importance in the preamble of the prohibition treaty.
The uneasy compromise devised by Whyte Gómez was to include “test” among the core prohibitions under Article 1(a), so that states-parties to the prohibition treaty would undertake “never under any circumstances to. . . test. . . nuclear weapons or other nuclear explosive devices.” This broad formulation did not fully satisfy either side of the debate. States such as Cuba, Iran, and Nigeria announced that they would interpret the text as encompassing “all forms” of nuclear testing, including subcritical, although that does not constitute an agreed interpretation of the conference. The broader interpretation means little in practical terms because there is no verification in place for subcritical testing and computer simulations, and the nuclear-armed states are not joining the prohibition treaty in the foreseeable future. Yet, it could exacerbate the criticism that the new treaty reinterprets or otherwise undermines existing instruments.

Transit. Some of the most protracted debates at the conference involved transit. A number of countries, including Cuba, Ecuador, Guatemala, Indonesia, Kazakhstan, and Peru, called for an explicit prohibition on transit of nuclear weapons. Others, Austria and Mexico among them, argued against on the grounds that such a prohibition would be difficult to implement and verify. Transit constitutes one of the most sensitive points with regard to the relationship between the prohibition treaty and the nuclear-weapon-state policies. A direct prohibition on transit would have affected primarily the United States because its strategic nuclear submarines routinely patrol the Atlantic and Pacific oceans and would have benefitted the Russian position. Outside observers also saw the potential prohibition on transit as an indicator of a particularly anti-NATO, or anti-U.S., focus of the new treaty. Along with questions of implementation and verification, this consideration also must have weighed on the states urging caution with regard to banning transit.

The issue also split the nuclear-weapon-free-zone parties. None of the existing nuclear-weapon-free zones prohibit transit: the Latin American and the Caribbean treaty does not mention transit at all, while others leave it to the individual states-parties to decide whether to allow transit, overflight, and visitation by vessels and aircraft carrying nuclear weapons. The subject is currently particularly controversial in the context of the Bangkok Treaty, where Singapore refuses to accept Russia’s proposed reservation that it would not be bound by the protocol to the Southeast Asian nuclear-weapon-free zone if a state-party allows transit of nuclear weapons. At the prohibition negotiations, Singapore proposed the inclusion of language based on the traditional nuclear-weapon-free-zone transit formulation (Article 7 in the case of Bangkok Treaty) and subsequently cited the rejection of this proposal among the reasons for abstaining on the treaty as a whole.

Whyte Gómez ultimately decided that there was not sufficient agreement in the room to include transit in the treaty text. Speaking at the July 5 plenary, Cuba, Ecuador, and Peru indicated that they would interpret the prohibition on assistance under Article 1 as including transit. As is the case with testing, however, this should not be taken as an agreed interpretation of the negotiators as a whole.

Safeguards. One of the major concerns of the critics of the idea of a nuclear weapons ban has been that the treaty would undermine the NPT and nonproliferation efforts by creating an alternative instrument lacking the verification system associated with the NPT. States such as Iran, the argument goes, would then be able to “forum shop,” joining the prohibition treaty and leaving the NPT and its safeguards, claiming continued adherence to the commitment not to acquire nuclear weapons.

At the March session of the ban negotiations, several states raised the need for a verification regime and suggested that, for the verification of most prohibitions, the new treaty should rely on the existing IAEA safeguards system. Sweden and Switzerland, along with Chile, Liechtenstein, Netherlands, New Zealand, Thailand, and others, further argued that the treaty should adopt the highest available verification standard, which at present is the combination of comprehensive safeguards (INFCIRC/153) and the Model Additional Protocol (INFCIRC/540).

Negotiations of the safeguards provisions, along with the articles on the accession of nuclear-armed states, were the most complex due to their technical nature and the pronounced political disagreement on the role and necessity of an additional protocol. An additional protocol to a country’s safeguards agreement provides the IAEA with additional tools to verify the absence of undeclared nuclear material and activities in a state along with the nondisclosure of declared material. The measure was adopted as voluntary two decades ago, but more and more NPT states-
parties have come to view it as an integral part of the verification standard for the non-nuclear-weapon states. Yet, attempts to recognize an additional protocol as part of the safeguards requirement under the NPT have failed due to strong opposition led by Argentina, Brazil, Egypt, and Iran.

The prohibition treaty logically could have required states-parties to accept comprehensive safeguards and an additional protocol because the treaty’s prohibitions go beyond those in the NPT and the treaty was meant to strengthen the existing regime. At the same time, one could not realistically expect such an outcome, given the absence from the negotiations of many of the leading proponents of additional protocols and because this debate has not been settled in the NPT and IAEA contexts. States arguing for a higher verification standard in the prohibition treaty were cognizant of this reality and did not make the issue their redline for accepting the final draft.

During the negotiations, Argentina, Brazil, and Egypt in particular opposed any attempts to broaden the safeguards requirements for states that never had nuclear weapons beyond INFCIRC/153. To avoid lowering the standard for those who already have an additional protocol in force, it was agreed, based on Ireland’s proposal, to require that states-parties at a minimum maintain the IAEA safeguards obligations they had at the time of the prohibition treaty’s entry into force. Aspirational language regarding possible future adoption of a higher verification standard also did not survive the opposition and was replaced with a reference to “any additional relevant instruments” that a state-party may adopt in the future.

The prohibition treaty has already come under criticism for insufficiently robust safeguards provisions, and this will likely continue to be a point of contention when the treaty is discussed in other forums, such as the NPT review process. The problem is further exacerbated by the fact that (former) nuclear-armed states joining the prohibition treaty would be required, after eliminating their nuclear arsenals, to accept IAEA safeguards “sufficient to provide credible assurance” of the nondisplacement of declared nuclear material and the absence of undeclared materials and activities, which essentially means comprehensive safeguards together with an additional protocol. Thus, the treaty establishes different safeguards requirements for different kinds of states in perpetuity, and it is difficult to imagine that the current nuclear-weapon states would want to accept such an arrangement.15

**Nuclear-Armed States’ Accession and Elimination of Nuclear Weapons.** A key idea underlying the calls for negotiating a prohibition treaty had been that it would establish a strong normative prohibition against possession and use, leaving the details on verifiable elimination of nuclear weapons to be negotiated at a later date, with the participation of nuclear-armed states. At the same time, UN General Assembly Resolution 71/258 mandated the negotiators to indicate some kind of a path toward the complete elimination of nuclear weapons. Furthermore, at the March session, many states and civil society representatives spoke of the need to include provisions obligating the nuclear-armed states, should they join the treaty, to eliminate their nuclear arsenals. These provisions proved particularly difficult to negotiate and underwent the most changes from the first draft to the final text.
States decided to include in the treaty the “disarm and join” (the South African model) and “join then disarm” options for nuclear-armed states’ accession, but the latter approach in particular raised a range of serious issues. Those concerned verification, compatibility of Article 1 prohibitions with the accession of a state still in possession of nuclear weapons, and the timeline and procedure for agreeing to an elimination plan.

The negotiators tried to balance the fact that none of the disarmament timelines and verification details could be agreed in the absence of nuclear possessors with the need to ensure that a nuclear-armed state joining the treaty could not retain its arsenal indefinitely while claiming to be in compliance. A nuclear-armed state-party would have to submit its proposed disarmament plan within 60 days of joining the treaty, to be negotiated with an authority designated by the states-parties. The states-parties would also designate a competent authority to carry out disarmament verification. The two authorities do not have to be the same, and the treaty leaves open the choice of what kind of a body it may be (e.g., an existing international organization, a new specially created organization, or a subsidiary body of the Meeting of States-Parties).

The main reason behind pursuing the join-and-disarm option was allowing nuclear-weapon possessors to accede to the treaty and become bound by its prohibitions and other provisions before the lengthy disarmament process is completed. It appears unlikely, however, that any nuclear-armed state would use this option given that those countries would want to negotiate the terms of weapons elimination and verification first with each other. If they are to join the prohibition treaty together, it is more plausible that they would do so after concluding a disarmament agreement among themselves.

Withdrawal. Since North Korea declared it would no longer be part of the NPT in 2003, the debate has been ongoing about the need to tighten the withdrawal provisions and ensure that any state that decides to withdraw from the NPT in the future bears serious consequences. That debate has not led to any concrete results in the NPT context, but the North Korean experience and concerns about states leaving the future prohibition treaty informed the deliberations about withdrawal provisions during the ban negotiations. In addition to extending the withdrawal notice period to 12 months versus the NPT’s three months, Article 17 of the prohibition treaty stipulates that if the withdrawing party is engaged in an armed conflict at the end of that 12-month period, the state would continue to be bound by the terms of the treaty. This provision aims to discourage states from withdrawing from the treaty to pursue nuclear weapons development because of a conflict. Yet, the article envisions no enforcement measures, and the treaty provides no role for the UN Security Council in case of withdrawal.
Although it is unusual for treaties not to have withdrawal provisions altogether, a number of delegations argued that the very nature of the prohibition treaty is such that withdrawal should not be an option. It was also suggested that Article 17 should be deleted to allow the Vienna Convention on the Law of Treaties to apply in case of withdrawal. That convention stipulates that if a treaty does not have a specific withdrawal clause, leaving such treaty would be possible only if it was “established that the parties intended to admit the possibility of denunciation or withdrawal” or withdrawal is implied “by the nature of the treaty.” If one of those conditions is satisfied, a state would have to give at least a 12-month notice of withdrawal. The record that some of the negotiators expressed the view that withdrawal should not be allowed at all could have led to serious disagreements over the interpretation and application of the convention in case of future withdrawal.

At the July 5 plenary, the conference appeared to remain evenly split between those in favor and against deleting Article 17. Whyte Gómez ultimately judged that there was not sufficient will in the room to eliminate the withdrawal provisions.

Implications and Conclusions

It is remarkable that a treaty prohibiting nuclear weapons was concluded less than a year after the Open-Ended Working Group on Taking Forward Multilateral Disarmament Negotiations adopted a report recommending the commencement of negotiations. That 122 states voted in favor of the treaty’s final text sends a powerful message about the rejection of nuclear weapons as a legitimate instrument of national and international security. There is an extremely long way to go for the treaty to become customary international law, but if the number of states joining the ban grows steadily, so would the pressure on other countries to disavow nuclear weapons.

Practical implications of the treaty in the near term remain uncertain. The prohibition treaty will not change the policies of nuclear-armed states overnight, much less make them disarm. In the short term, the most visible impact of the ban might be exacerbated acrimony in the NPT and other forums. France, the United Kingdom, and the United States met the adoption of the ban treaty with condemnation and a promise to never join it, and the nuclear-weapon states have reportedly discussed “the dangerous flaws” in the treaty. There is a real danger that the rest of the 2020 NPT review cycle will be consumed by the bitter disagreement and mutual accusations.
It would be wrong to simply blame a controversial 2020 NPT review cycle on the Treaty on the Prohibition on Nuclear Weapons, given the crisis in U.S.-Russian nuclear arms control, North Korea’s demonstration of advanced nuclear and missile capabilities, anxiety about the developing new U.S. nuclear policy, arsenal modernization in all nuclear-weapon states, and no progress on the Middle Eastern zone free of nuclear and other weapons of mass destruction. Even without the ban, this would have been a difficult review cycle, but the treaty is likely to get most of the spotlight.

There is no denying the profound divide among NPT states-parties on the value and legitimacy of nuclear weapons, but both sides could try to reduce tensions by shifting the attention elsewhere. States would have to acknowledge their disagreement and somehow put it aside, focusing instead on other issues, such as implementation of the 2010 action plan.

Yet, it would require the nuclear-weapon states to put forth concrete proposals on disarmament measures they are planning to implement, and so far, there is little reason to believe this will happen in the near future. Both sides proclaim commitment to the NPT and bear the responsibility to try to continue working together, but the onus is on the nuclear-weapon states to put on the table a forward-looking agenda to back up their NPT nuclear disarmament commitments and obligations.

ENDNOTES


7. One substantive amendment to the July 3 draft that the president had to make was reintroducing the text into Article 7, previously agreed in the small group, on the responsibility of states using and
testing nuclear weapons to provide assistance to affected state-parties. It remains unclear why the text was missing from the July 3 draft.

8. UN Charter, art. 2(4).


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