



Los Alamos Study Group

Nuclear Disarmament • Environmental Protection • Social Justice • Economic Sustainability

April 7, 2016

For the 2016 Open-ended Working Group (OEWG) taking forward multilateral nuclear disarmament negotiations

Progress in multilateral nuclear disarmament requires a treaty prohibiting the possession, threat, or use of nuclear weapons

Submitted by the Los Alamos Study Group

Introduction and summary

1. There has never been, at any time, much progress in multilateral nuclear disarmament negotiations. In the decades since the NPT was negotiated there has really been no such progress at all, though undoubtedly some dangerous plans and actions on the part of nuclear weapon states were deterred by fear of diplomatic reaction.¹
2. This failure is not accidental. Nuclear weapon states, often assisted by states in nuclear security alliances, have consistently and effectively opposed multilateral disarmament. They will continue to do so. It is therefore dangerously naïve to think that nuclear weapon states will participate, or even *can* participate, given their internal political formations, in good faith multilateral negotiations aimed at taking away or diminishing their nuclear arsenals.
3. There is no reason to think that the long-running failure of disarmament diplomacy to achieve its namesake goal will not continue until the perceived value and lawfulness of nuclear weapons by nuclear weapon states, by nuclear weapons factions within those states, and by the nuclear allies of these states, is finally removed.
4. Of course a loss of perceived value and legitimacy might happen by some catastrophic chain of events, but diplomatically it can only be done by means of new international law which lowers the perceived value of nuclear weapons and removes the *de facto* legitimacy these weapons have today – that is, by a treaty which prohibits the development, possession, sharing, or use of nuclear weapons, a “ban treaty.”
5. Such a treaty must be negotiated and tabled for signature by non-nuclear weapon states if it is to be realized at all.
6. Negotiation of such a treaty would be relatively straightforward and is already supported by the 127 states which have signed the Humanitarian Pledge. To such states a ban treaty would add no further commitments.
7. Once tabled by an initial group of signatories, further accessions would involve a process that would stimulate civil society engagement, with spillover benefits to societies.
8. A ban treaty is both a) necessary and b) foundational to subsequent diplomatic approaches to disarmament, whatever they may be. It would be compatible with all existing disarmament, nonproliferation, and arms control treaties.

¹ The Comprehensive Test Ban Treaty (CTBT) is a horizontal and vertical nonproliferation treaty, not a disarmament treaty, and therefore not an exception to this generalization.

9. A ban treaty would powerfully affect the actions and policies of current and latent nuclear weapon states, regardless of formal acceptance by those states. It would do so indirectly through the norms it establishes, with exquisite flexibility and adaptable, by that state, to each state's political and security situation. It would increase, to some extent immediately, so-called "self-deterrence," thus decreasing the risk of nuclear war.

10. Overall, a ban treaty would tip the political and moral scales toward disarmament in state decisions, domestic politics, and diplomacy.

Unless nuclear weapons are made illegitimate, by treaty, they will remain *de facto* legitimate and will be prized if not considered mandatory by those states which have them, just as they are today. In that case there will be no good faith negotiations toward any disarmament instrument or framework whatsoever.

11. Despite what some (including ourselves) see as the inherent incompatibility of nuclear weapons with humanitarian law and morality, nuclear weapon states have consistently acted according to the belief that their arsenals are fully lawful and appropriate. This legitimacy is supported by what these states see as the iron logic of nuclear deterrence, its associated morality requiring nuclear weapons, and their own legal and sovereign responsibilities for security and the prevention of war.

12. Within nuclear weapon states these doctrines and dogmas are articulated, supported, and enforced by powerful, even *dominating*, political, military, and economic formations that reach into every relevant sector of society and institution of government. These potent formations, institutions, and ideologies are beyond the reach of ordinary diplomatic processes. "Negotiations in good faith," as required by Article VI of the NPT, are not really possible for nuclear weapon states. At present, no disarmament negotiations involving nuclear weapon states can succeed.

13. In order to make disarmament negotiations possible on the part of nuclear weapon states someday, the relative power of their nuclear weapons establishments must first decline. There are many ways that might occur – through misadventure or economic collapse for example – but none is so simple, so easy, so immediate, and so supportive of civilizational values as the establishment of fresh, authoritative international norms that delegitimize nuclear weapons, by means of a simple treaty among like-minded states.

14. Such clear international norms, addressing as they must nuclear possession as well as use, are currently lacking. There is at least a twofold "legal gap," concerning nuclear possession and nuclear use. Closing that twofold gap would have an immediate effect on nuclear state policies in at least some nuclear weapon states, including but not limited to their foreign policies, nuclear weapons investments and military nuclear strategies, and disarmament diplomacy.

15. To repeat, the establishment of norms prohibiting nuclear weapons possession and use would dramatically diminish the relative political power of factions supporting nuclear weapons. It is from these factions that resistance to disarmament has always been organized and conducted. Delegitimation threatens these factions immediately and existentially. To a great or lesser extent the "security considerations" mentioned by nuclear weapon states refer, not to the state, but to these factions, which are aggrandizing in nature and in a given case may be confused with the state or country as a whole.

16. In addition to the justifications mentioned in paragraph 11, which apply to all nine nuclear weapon states, the five NPT nuclear weapon states believe that the absence of specific disarmament obligations in the NPT confers *complete*, and to all intents and purposes *permanent, de jure* legitimacy for their arsenals.

17. It hardly needs saying that these five states are also the permanent members of the Security Council. Their five economies comprise half the world's total booked economic activity, even without those beneath the

NATO and U.S. “nuclear umbrellas,” so called.² What these states consider legitimate must perforce be treated as such until proven otherwise. Diplomatically and practically, there is only one way to do that.

18. As noted in the first paragraph, there simply has been no progress in multilateral nuclear disarmament negotiations. What reductions have occurred historically in some states’ arsenals as a result of bilateral negotiations, for the sake of economy, or for reasons of military redundancy or safety, have been accompanied by qualitative improvements and increased overall weapon system capabilities.³

19. This modernization process is accelerating and now comprises a new and destabilizing arms race, accompanied by revived nuclear war-fighting doctrines. In the U.S., a trillion-dollar budget over 30 years is planned.⁴ And while some arsenals have shrunk in the years since the Cold War, others are growing and diversifying. All are increasing in capability.

20. The enduring *de facto* (and claimed *de jure*) legitimacy described above is further reinforced by the conspicuous absence of any new conventional law to the contrary. No group of states has stepped forward to make new law denying the legitimacy of nuclear possession and nuclear use. Thus, in a manner somewhat analogous to the doctrine of “adverse possession” in property law,⁵ this legitimacy remains, precisely because it is uncontested.

21. Given all this, why should nuclear weapon states, whether they are a party to the NPT or not, ever engage in ‘negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament,’ even if they had the internal freedom to do so? The simple truth, given the uncontested and therefore real legitimacy of nuclear weapons, is that they won’t. Nothing will be possible in multilateral nuclear disarmament diplomacy until the legitimacy of nuclear weapons is effectively contested and removed.

Realistically, only a treaty making nuclear weapons illegal can open the door to successful disarmament diplomacy.

22. How can this situation be effectively challenged? Diplomatic investments in nuclear disarmament in the quarter-century since the end of the Cold War amount to millions of person-hours. In addition there has been voluminous testimony, legal analysis, and informed activism on the part of civil society in domestic and international settings, involving millions of people. None of this has availed to either produce good faith negotiations on the part of the nuclear weapon states or to disturb what is now the apparent customary legitimacy of nuclear weapons.

23. Likewise the unanimous advisory opinion from the International Court of Justice, that there exists a binding 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”⁶ has not been heeded. Numerous non-binding U.N. disarmament resolutions have not produced any significant practical effect either.

² U.S. Central Intelligence Agency World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html>.

³ See *Assuring Destruction Forever: Nuclear Weapons Modernization*, Reaching Critical Will, Apr 2015, <http://www.reachingcriticalwill.org/resources/publications-and-research/publications/9724-assuring-destruction-forever-2015-edition>.

⁴ For details see the “United States” chapter in *Assuring Destruction Forever*.

⁵ Nuclear weapon free zone treaties are very valuable but they are not norm-setting treaties beyond the state parties and geographic areas involved. They are by definition not universal.

⁶ International Court of Justice, “Legality of the Threat or Use of Nuclear Weapons,” Advisory Opinion of July 8, 1996, at 105(2)F, <http://www.icj-cij.org/docket/files/95/7495.pdf>.

24. Action by states is necessary. Civil society can help, but only so much. New conventional law is necessary. By definition, there is no other way. Nuclear weapons will be legal – *de facto* legal, and *de jure* legal as well as morally necessary in the eyes of those who possess them – until they are made illegal. To address “the legal gap” that is blocking multilateral disarmament requires, precisely, a treaty banning nuclear weapons.

25. Like the long-standing failure of disarmament diplomacy, this legal gap did not arise by accident or oversight. It is rather the result of an ongoing but largely suppressed *dispute* between conflicting security paradigms and perceived interests. Some parties want nuclear disarmament and all that goes with it, and other parties want to keep their nuclear weapons forever. It is as simple as that. Until the nuclear weapon states change their minds, there can be no “win-win” resolution of this dispute. The work of delegitimation has to be done by non-nuclear weapon states alone. The nuclear weapon states obviously oppose prohibiting nuclear weapons and can play no constructive part in negotiations. These states have *never* played any constructive part in multilateral disarmament negotiations over the past 25 years. Their closest nuclear allies may also oppose practical disarmament measures, at least for the time being. Calls to make negotiations “universal” are misplaced.

26. Absent a ban treaty, well-intentioned statements by diplomats, civil society, religious leaders, Nobel Prize winners, and so on, however excellent they may be, fall short of what is needed to delegitimize nuclear weapons. They are really just opinions and testimony in a protracted contested case, which create no new law and leave the present legitimacy of nuclear weapons untouched.

27. What is needed is for non-nuclear states not party to nuclear security treaties to draw their own conclusions from decades of testimony and discussion, and to act. No other states need be consulted.

To make progress in the 2016 OEWG it is necessary to focus on well-defined, concrete approaches that are realistic and effective. Only a ban treaty meets these criteria.

28. Since there are only 15 working days allocated for the OEWG, it is particularly important to avoid distractions and delays. There will be efforts to broaden the discussion, say to “the risks and challenges ahead,” or to introduce irrelevant and premature technical concerns (for example, regarding elimination and verification protocols), or to otherwise rehash diplomatic terrain traversed repeatedly in past decades without results.

29. There may be speculation about a treaty to guide the details of a hypothetical multilateral disarmament process. Be assured that the nuclear weapon states will not sign such a treaty – not now, or for the foreseeable future. Legal norms must be changed first.

30. Especially given the short working time of the OEWG, we hope all involved will make every effort to help those states who wish to do so to negotiate, or lay the groundwork for negotiating, a relatively simple treaty prohibiting the development, production, possession, sharing, and use of nuclear weapons. Nuclear weapon states can play no constructive part in this.

31. Looking ahead, we suggest the 30th anniversary of the U.S.-Soviet Reykjavik summit (October 11-12, 1986) as a possible date to unveil a ban treaty.