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THE NUCLEAR WEAPON BAN TREATY AND THE NON-PROLIFERATION TREATY

SERGIO DUARTE

Ambassador, President of Pugwash and former
UN High Representative for Disarmament Affairs

I was asked to comment on the relationship between the Treaty on the Prohibition of Nuclear Weapons and the Treaty on the Non-proliferation of Nuclear Weapons. The history and development of the two instruments shows many points of contact between them. Indeed, in at least one sense, the Prohibition Treaty adopted last July can be considered an offspring of the 47-year old NPT. Far from a competitor, the Prohibition Treaty was in reality conceived as complementary to the NPT. It remains to be seen how the implementation of both instruments from now on will – or will not – help fulfill the promise of progress toward the achievement of a world free of nuclear weapons. The two texts must not be seen as antagonistic toward each other, but rather as indispensable tools in the effort to eliminate the threat to humanity as a whole posed by the existence of nuclear weapons. This is a common objective of all multilateral instruments concluded by the international community since such weapons began to proliferate in 1945.

The urgent calls by the international community to fulfill that objective reflect the growing global recognition that a ban on nuclear weapons is an integral part of the normative framework necessary to achieve and maintain a world free of such weapons. It is not a hasty or impromptu movement born out of frustration for the protracted lack of concrete progress on nuclear disarmament. The negotiating process that led to the complete outlawing of bacteriological weapons in the 1970's and of chemical weapons in the 1990's grew from humanitarian agreements concluded after the end of World War I. Likewise, the prohibition and elimination of nuclear weapons have been the subject of international debate at the United Nations since the first Session of the General Assembly in 1946. Costa Rica and Malaysia proposed a draft Nuclear Weapons Convention in 1997 and updated it in 2007. Former Secretary General of the United Nations Ban Ki-Moon brought this idea again to the fore in his 5-point nuclear disarmament plan in 2008. All States agree that on the need to eliminate all weapons of mass destruction, including nuclear weapons, an objective also recognized in the NPT.

The possessors of nuclear arsenals and most of their allies, however, have so far taken a negative attitude toward the negotiation of a prohibition treaty. Explaining their vote last October against the proposal to convene these negotiations, the two States possessing about 95% of all existing nuclear weapons offered very similar arguments. While the Russian Federation said the prohibition would be “harmful and counterproductive”, the United States warned against the “negative effects” of seeking a ban without, as they see it, taking into consideration the international security environment. France and the UK, for their part, said that in and of itself a ban would not improve international security. The nuclear weapon States argue that the Prohibition Treaty risks undermining the existing security framework. Mankind, however, does not seem willing to rely forever on a “security framework” based on the threat of mutual destruction of nuclear belligerents together with the rest of the world as we know it. This can better be described as an “insecurity framework”.

It is clear that the new Treaty does not seek a ban in isolation of other measures neither does it disregard the consideration of the global security environment in the action leading to the elimination of nuclear weapons. No

one disputes that the international community faces serious security challenges. Incidentally, many of such challenges result in fact from the very existence of nuclear arsenals. Early involvement and participation in the ban process would have enabled nuclear weapon States to raise and explain the security concerns that seem so overwhelmingly important to them. The assertion that the conditions that would make the negotiations realistic do not exist right now has served to justify the indefinite maintenance of the current status quo. Such conditions, by the way, have never been clearly formulated. An open discussion with the States holding that view would have been useful to clarify many points of mutual interest. Another allegation against the start of negotiations on a ban was that they would not be based on a consensus and would therefore risk increasing the schism between haves and have-nots. That schism is in fact an inherent feature of the NPT, which instituted a division of the world into two groups of States. Conversely, the implementation of the Prohibition Treaty, which is meant to apply *erga omnes*, would actually eliminate the gulf between the two groups of States. The credibility and effectiveness of the NPT is being undermined not by calls to implement Article VI but by the perceived lack of compliance by the armed States with their commitments to nuclear disarmament. The obligation contained in Article VI was clarified by the International Court of Justice in 1996. Its Advisory Opinion requires not only that the Parties engage in good faith negotiations for the achievement of nuclear disarmament, but also to bring them to a conclusion. Seventy years since nuclear weapons first appeared and forty-seven years after the entry into force of the NPT, the words and deeds of the nuclear weapon States have so far amounted to an indefinite postponement of the fulfillment of that obligation. This is what generates the impression that they are avoiding or ignoring it.

The Nuclear Weapon Prohibition Treaty provides a welcome opportunity for stepping up the actual implementation of Article VI of the NPT. This is what is meant by the expression “leading to their elimination” contained in the General Assembly mandate for the negotiation of the Treaty. As I said before, the NPT does not in any way curtail complementary efforts to help further its objectives or to implement its provisions and advance nuclear disarmament. The Preamble of the Prohibition Treaty reaffirms that the NPT is the cornerstone of the nuclear disarmament and non-proliferation regime, and that its full and effective implementation has a vital role to play in promoting international peace and security. Furthermore, Article 18 clearly states that the implementation of the instrument does not prejudice obligations undertaken by States Parties with regard to existing international agreements to which they are parties, where these obligations are consistent with the Treaty. It would be hard to find any NPT obligation that could be considered incompatible with the commitments contained in the Prohibition Treaty. The latter provides a clear path for the fulfillment of the commitment to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, as prescribed by the NPT. The Prohibition Treaty is open to accession by possessors of nuclear weapons, either individually or collectively whenever they believe they are ready to become Parties to it. It would be truly regrettable if this opportunity for real progress is missed.

Once it comes into force the Prohibition Treaty will become a part of the *corpus* of positive international law. It is interesting to note in passing the opinion of some international jurists according to which States cannot continue to ignore or belittle the many international texts on the obligation of nuclear disarmament, including United Nations resolutions that are valid for all Member States of the Organization. This school of thought holds that there is a conventional and customary obligation to disarmament that must be followed by all States. This is, however, an issue better suited for legal experts and I do not intend here to develop this argument further.

At this point it would be useful to step back in time and take a general look at the history of the efforts of the international community to achieve the multilateral control and the elimination of weapons of mass destruction, particularly nuclear weapons.

Concern with the effects of the use of such weapons began many years before the existence of the NPT. Robert Oppenheimer, who is considered the father of the atomic bomb, famously stated in an interview that as he watched the blast of the “Trinity” test he recalled a quote from the ancient Hindu scriptures that reads: “Now I am become Death, the destroyer of worlds”. Soon after, atomic bombs were used to obliterate the Japanese cities of Hiroshima and Nagasaki, where over 200 thousand civilians – men, women and children – were killed. The survivors, as well as many of their descendants, still suffer the consequences of the exposure to radiation.

In January 24 1946, still under the shock of the catastrophic destruction caused by the new weapon, the General Assembly of the United Nations adopted Resolution no. 1. It called for the establishment of a Commission charged with “making specific proposals for the control of atomic energy to the extent necessary to ensure its use only for peaceful ends, and for the elimination of atomic weapons from national armaments”, among other related measures. After three years of fruitless debates, those efforts were abandoned. The ideological dispute and military rivalry between the United States and the Soviet Union generated deep mistrust between them and resulted in an all-out arms race that continued off and on for the next decades. The current efforts at “modernization” of nuclear arsenals are the latest expression of the nuclear arms race.

Ireland was the first State to call attention to the dangers of proliferation of nuclear weapons. In 1965 the General Assembly adopted Resolution 2028, which contains the main principles on which a non-proliferation treaty should be based. The first three of those five principles read as such: a) The Treaty should be void of any loop-holes which might permit nuclear or non-nuclear powers to proliferate, directly or indirectly, nuclear weapons in any form; b) the treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear powers; and c) the Treaty should be a step toward the achievement of general and complete disarmament and, more particularly, nuclear disarmament. Resolution 2028 also requested the Eighteen-Nation Disarmament Committee (ENDC) to continue its work on this matter.

As a junior member of the Brazilian delegation I had the opportunity to follow the work of the ENDC at the time. The two co-Chairs of the organ, the representatives of the United States and the Soviet Union, had already submitted separate drafts of a non-proliferation treaty and eventually negotiated between them a joint text that was brought to the Conference in 1965. The two co-Chairs clearly intended to finalize a text as quickly as possible.

The eight States members of the ENDC that did not belong to either of the two rival military blocs, however, did not accept the joint draft as proposed and did their best to bring the text into line with the principles enunciated in Resolution 2028, particularly those quoted above. Among other shortcomings, they pointed out the imbalance between the obligations of nuclear and non-nuclear States, particularly the absence of a clear, legally binding commitment to adopt concrete, meaningful measures of nuclear disarmament by the possessors of nuclear weapons in exchange for the renunciation to the acquisition of such weapons by those that did not possess them. They also wanted to make sure that measures to prevent proliferation should not in any way hamper their own scientific progress in the field of the application of nuclear technology for peaceful purposes.

In the course of the discussions some of the suggestions made were included in new drafts prepared by the two proponents but deep differences remained within the ENDC. A fact seldom, if ever, mentioned by

commentators of the NPT is that there was no consensus on a final text at the Committee. When it became clear that there would be no agreement the two co-Chairs, based on their own authority as such, decided to send the text to the General Assembly, where it was further discussed and amended and finally put to a vote. The result was 95 in favor, 21 abstentions and four against. A number of non nuclear weapon States declined to sign the NPT.

Several important agreements, all of which aimed at preventing the spread of nuclear weapons were successfully negotiated over the past decades, such as the Outer Space and the Antarctic Treaties, the CTBT and the five regional instruments that created nuclear-weapon free zones, among others. Gradually, the attitude of the opponents of the NPT changed. For different reasons, several countries that hesitated to sign the Treaty slowly decided to become Parties to it. Membership in the NPT kept growing; from 91 members in 1975 it increased to 178 in 1995, when it was extended indefinitely. Today, as we know, only four States, all of which acquired nuclear weapons, are not Party to the NPT.

Most of the countries that had relatively advanced nuclear civilian programs and were considered to be candidates for developing nuclear military capabilities seem to have come to the conclusion that possession of these weapons would not enhance, but rather diminish, their security. Contrary to that trend, the current nuclear weapon States insist that such armament protects their own security and seem to believe that the maintenance of international peace and security actually requires nuclear weapons, as long as they remain in their exclusive possession. As their non-nuclear allies rely on a nuclear “umbrella” they are bound to support this doctrine.

Pressed mainly by budgetary and technical considerations, the two main possessors have negotiated between themselves several agreements to reduce the size of their arsenals. Other nuclear States have unilaterally placed limitations on the number of their weapons. Although there are no independent means of verification, it is estimated that the total number of existing nuclear weapons decreased from about 70 thousand at the height of the Cold War to some 15 thousand to-day. Nevertheless, all nuclear weapon States, including the largest possessors, continue to devote huge financial and scientific resources to the improvement of the accuracy and destructive power of their weapons and show no inclination to accept irreversible, legally binding multilateral commitments to eliminate of their atomic arsenals within specific timelines. None of the bilateral or unilateral commitments to reduce or limit arsenals that they entered into is organically linked to the goal of nuclear disarmament. Indeed, the word “disarmament” seems to have all but disappeared from their lexicon. Nuclear-weapon States advocate a “step by step” method but so far the measures proposed seem to represent ends in themselves and do not follow a clear, logical sequence resulting in the final elimination. Non-nuclear weapon States, for their part, have faithfully abided by their non proliferation commitments under the NPT and are submitted to verification procedures. No non-nuclear weapon State has acquired nuclear weapons while subject to the NPT.

Even as membership in the NPT grew, a movement to promote more effective measures to achieve nuclear disarmament started to gain ground among the members of the instrument, particularly since its indefinite extension in 1995. It is fair to acknowledge that two of the Treaty’s three main objectives have been at least partially met. Contrary to earlier dire predictions, only four new States acquired nuclear weapons beyond the five original proliferators. Some useful measures to promote the peaceful uses of nuclear energy have been adopted. But the credibility and stability of the NPT is seen to be threatened by its failure to achieve the third main objective: the cessation of the nuclear arms race and nuclear disarmament. Despite the stated commitment and

support of all NPT parties, serious doubts and differences remain, as shown by the fact that five out of nine Review Conferences ended without agreement on a Final Document.

Meanwhile, a growing awareness of the ruinous consequences of the possible use of nuclear weapons has taken root among concerned governments and civil society organizations. At the 2010 Review Conference of NPT all States parties to that instrument recorded for the first time ever their unanimous concern with the catastrophic humanitarian consequences of any use of nuclear weapons.

In 2013 and 2014 three international conferences on the humanitarian impact of nuclear weapons concluded that no state or international body could address adequately the immediate humanitarian emergency caused by a nuclear weapon detonation. It concluded further that the effects of a nuclear weapon detonation, irrespective of cause, will not be constrained by national borders, and will affect states and people in significant ways, regionally as well as globally. 125 States endorsed a declaration that “it is in the interest of the very survival of mankind that nuclear weapons are never used again” and stressed that “all efforts must be exerted to eliminate the threat of these weapons of mass destruction”.

The realization of the need to explore new avenues to break the current deadlock in the multilateral disarmament forums prompted the series of events that culminated in the adoption of the Treaty on the Prohibition of Nuclear Weapons last July 7 in New York. The report of the working group that recommended its negotiation recalled article VI of the NPT and noted that the text of the NPT did not specify the effective measures that should be pursued in fulfillment of that article. It did not fail to reaffirm the importance of the NPT and of the commitments made therein and further considered that the pursuit of any measures, provisions and norms to attain and maintain a world without nuclear weapons should complement and strengthen the nuclear disarmament and non-proliferation regime, including the three pillars of the NPT. The report was adopted by a non-recorded vote with 68 in favor, 22 against and 13 abstentions. The opponents were the States possessing nuclear weapons and their allies. Some of the latter who participated in the work of the Group stressed their previous argument about the need to address security concerns. The report of the Working Group took note of that position and recommended the convening of a Conference in 2017, open to all States, with the participation and contribution of international organizations and civil society, to negotiate a legally binding instrument to prohibit nuclear weapons, leading to their total elimination.

At the following Session of the General Assembly, the issue was discussed in the I Committee. A draft resolution based on the recommendation of the Working Group was elaborated by a group of six States (Austria, Brazil, Ireland, Nigeria, South Africa and Mexico) recalled that the NPT serves as the cornerstone of the nuclear non-proliferation and disarmament regime and reaffirmed the obligations of the Parties to that Treaty as reflected in the outcome documents of the 1995 Review and Extension Conference and the 2000 and 2010 Review Conferences. The decision to convene a Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading to their elimination, was adopted by 135 votes in favor, 35 against and 13 abstentions and became Resolution 71/258. Again, the negative votes came mainly from the States that are recognized as nuclear-weapon States under the NPT, most of their allies and members of the European Union.

It was interesting to note that non-NPT nuclear weapons possessors India and Pakistan, as well as nuclear armed China abstained in the vote, while the DPRK, which had voted in favor of the resolution in the I Committee, decided not to be present in the Assembly hall when the final tally was taken.

The Conference was attended by many non-nuclear weapon States, a number of international organizations such as OPANAL and the Red Cross and several civil society organizations that had been working for a long time on issues related to a legally binding ban of nuclear weapons, including of course Pugwash. Although the Conference was open to all States, none of nine existing possessors of nuclear weapons participated to present their opinions and concerns. Only one of their allies, the Netherlands, was present. There was general convergence of views among the vast majority of participants. The main differences to be resolved dealt with the relationship of the Treaty with other instruments of international law, including the Charter of the United Nations, the NPT, the CTBT and regional nuclear-weapon free zones, as well as existing safeguards obligations concluded with the IAEA. The humanitarian considerations that were at the root of the promotion of the negotiation also received detailed attention. Other important questions under discussion were the scope of the prohibitions to be included in the Treaty, the mechanism for accession by states that possessed, owned or controlled nuclear weapons, the responsibilities of the meetings of States parties and the procedures on amendments, universality, entry into force and withdrawal. Unlike the NPT, the Depositary is the Secretary General of the United Nations. As we know, the Prohibition Treaty was adopted by 122 votes. The Netherlands explained its lonely negative vote by stating that the text was not in line with its commitments under NATO. Singapore cast the only abstaining vote.

Following the adoption of Treaty by the negotiating Conference on July 7, the Permanent Representatives of France, the United Kingdom and the United States issued a press statement where they stated their intention not sign, ratify or ever become a party to that instrument. Among other reasons for their position, they said that “a ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary, cannot result in the elimination of a single nuclear weapon and will not enhance any country’s security, nor international peace and security”. They added that the treaty offers no solution to the grave threat posed by North Korea’s nuclear program. As some scholars recently pointed out, however, other approaches to deal with the DPRK as an emerging nuclear weapon State have not been successful either. As a matter of fact, the intent of the promoters of the Treaty has never been to find a solution to that problem. The rise of North Korea to status of nuclear power has served to justify reliance on deterrence. A high official of the United States asked whether anyone really believed that the DPRK would agree to relinquish its nuclear arms. The same question, of course, can be asked to each of the other eight possessors of atomic arsenals.

I cannot end my presentation without expressing concern with the extremely grave and volatile situation in East Asia, particularly in the Korean peninsula. There is no justification for the dangerous and in some cases reckless escalation of words and demonstrations of force by the parties involved. The major nuclear weapon States should ponder that the reluctance to accept clear, legally binding commitments to nuclear disarmament is one of the main incentives for others to look for means to deter perceived threats. This became obvious in the past couple of decades with regard to the nuclear ambitions by some States.

Despite the enthusiasm of its supporters and the disparagement of its opponents, it is too early to assess the impact of the Nuclear Weapons Prohibition Treaty on the current debate on the ultimate achievement nuclear disarmament. The language of the final version of the Treaty shows that its negotiators endeavored to take every precaution in order to avoid any incompatibility between this instrument and the NPT. In the weeks after the opening of the instrument to the signature of States at the United Nations just a couple of days ago it will be possible to gauge the extent of international support to the Treaty, both quantitatively and qualitatively. Upon ratification, individual countries will be able to consider the adoption of national legislation containing measures that can have an impact on policies and practices of nuclear weapon States.

Supporters of the Treaty know that it will not make nuclear disarmament happen in the short run but they are convinced that it will make the urgency of nuclear disarmament more visible and hasten effective multilateral action. It amounts to a categorical rejection of nuclear armament and of the doctrine of nuclear deterrence. States will need to find a workable convergence between the existing normative basis and the new prohibition embodied in the Prohibition Treaty in order to ensure increased security for all nations and not for just a few armed ones and their allies who support that doctrine.

May I conclude by recalling that the United Nations General Assembly decided to establish September 26 as the International Day for the Total Elimination of Nuclear Weapons and to convene a UN High Level Conference on Nuclear Disarmament no later than 2018 in order to evaluate progress and advance further the elimination of nuclear weapons. The current 72nd Session of the General Assembly is expected to decide on the holding of a preparatory meeting for the High Level Conference as well as on the convening of a Fourth Special Session on Disarmament. This coincides with the preparatory cycle for the 2020 NPT Review Conference. Recent UN High Level Conferences have been very successful, such as the ones on Climate Change, on Oceans and on Migration. States should avail themselves of these opportunities to participate in a process aimed at bringing new impetus to the non-proliferation and disarmament debate and at promoting concrete progress in this field, with the active support of civil society organizations. Rather than dismissing the newest instrument, the Treaty on the Prohibition of Nuclear Weapons, as unhelpful or counterproductive, States should ensure that it is used as a new and effective tool toward the common objective of ridding the world of nuclear weapons.