United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination

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Proposal of a Framework Agreement on Nuclear Disarmament Containing a Protocol to Prohibit Nuclear Weapons[1]

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Introduction

1. It is an undeniable fact that the total elimination of nuclear weapons requires the involvement of all states, including nuclear-armed states and their allies. Therefore, one can and should work towards a legal instrument that would meet the concerned states' aspiration for an early prohibition of nuclear weapons, while enabling nuclear-armed states and states relying on extended nuclear deterrence to join the negotiations, become part of a larger framework for nuclear abolition, and take time, if necessary, to participate in "prohibition" at a later stage.

2. Based on this idea, the paper will first examine the desirable elements and structure that should be contained in the "legally binding instrument to prohibit nuclear weapons, leading towards their total elimination" (hereinafter "the Legal Instrument"). Drawing on the outcomes of the examination, it will then design an outline of a "Framework Agreement on Nuclear Disarmament".

Elements and characteristics that should be contained in the Legal Instrument

3. Considering the substance of UNGA Resolution 71/258 (hereinafter "Resolution"), as well as the discussions at the First Committee meeting of the UN General Assembly's 71st session, the 2016 Open-ended Working Group (OEWG) and the three international conferences on the humanitarian impact of nuclear weapons, the Legal Instrument should be equipped with the following elements and characteristics, all underpinned by concerns about the "catastrophic humanitarian consequences" of nuclear weapons.

(a) ***General prohibition of nuclear weapons.*** What is to be negotiated is a "legally binding instrument to prohibit nuclear weapons, leading towards their total elimination" (Resolution OP8). It naturally follows that the foremost element the Legal Instrument must include is the general prohibition of nuclear weapons.

(b) ***Setting legal obligations for the total elimination of nuclear weapons.*** OP8 of the Resolution requires that the prohibition of nuclear weapons "lead" to "their total elimination".

[1] This working paper is a shortened version of a document prepared by the working team of Peace Depot in February 2017. The full version is available at www.peacedepot.org/media/pcr/1702_FrameworkAgreementProposal_eng.pdf.

To meet the requirements under OP8 clearly enough, it would be desirable to codify in the form of legal obligations, the political commitments listed in PP9 of the Resolution, which are commitments made repeatedly in connection with the Nuclear Non-proliferation Treaty (NPT).

(c) ***Ensuring a complementary relationship with the NPT.*** In order to maintain as much as possible the cooperative relationship among nuclear-armed, non-nuclear and nuclear-reliant states in nuclear disarmament and non-proliferation efforts, it is important to ensure that the NPT review process and the prohibition treaty's negotiation process do not conflict but complement with each other. From that perspective, it would be desirable for the Legal Instrument to be so designed as to allow for acknowledgement in future consensus documents adopted at NPT conferences, in accordance with Resolution OP6.

(d) ***Enabling phased participation in "prohibition".*** The Resolution also encourages all UN "Member States to participate in the conference (to negotiate the legal instrument)" (OP9). However, the views of nuclear-armed and nuclear-reliant non-nuclear states expressed so far offers little hope for those states to join a prohibition treaty from the very beginning. Therefore it would be of great significance to pursue the formulation of a legal instrument which would promote flexibility in the position of nuclear-armed states and especially nuclear-reliant non-nuclear states, induce them to take part in the negotiations, and gain their support by allowing their later participation in "prohibition". This would constitute a concrete measure "leading towards the total elimination" of nuclear weapons.

(e) ***Pursuit of transparency and risk-reduction measures relating to existing nuclear weapons.*** Considering that the initiative to prohibit nuclear weapons originated from concerns about the "catastrophic humanitarian consequences" of the use or detonation of nuclear weapons, measures should be sought to reduce the risk of nuclear detonation, whether by accident or intent (see PP3 of the Resolution). As OP7 "recommends that States consider implementing" these measures "as appropriate", it is in line with the spirit of the Resolution to put those measures on the negotiation table, along with "prohibition".

(f) ***Setting obligations on states to provide assistance to nuclear victims, and to educate the public and raise awareness on nuclear damage.*** OP7 of the Resolution recommends that States "consider implementing (…) the various measures suggested in the report of the (Open-ended) Working Group". The OEWG Report (A/71/371) states that a legally binding instrument to prohibit nuclear weapons could include the "recognition of the rights of victims of the use and testing of nuclear weapons" and "a commitment to provide assistance to victims and to environmental remediation" (para.35). It also emphasizes the importance of education and awareness-raising on the reality of nuclear damage and the catastrophic humanitarian consequences of nuclear weapons use (para. 59 and 60). Therefore, it would be in line with the spirit of the Resolution to put on the negotiation table the positive obligations states parties should bear in relation to these matters.

(g) ***Elimination and verification not necessarily included.*** PP17 of the Resolution talks about "a legally binding instrument prohibiting nuclear weapons" while the next paragraph, PP18, talks about "additional measures (…) for the irreversible, verifiable and transparent destruction of nuclear weapons". The fact that the Resolution takes up "prohibition" and "destruction" separately seems to imply that this Legal Instrument does not necessarily need to contain provisions on "verification", "destruction" or "elimination". Nevertheless, since the final goal is "total elimination" and "the legally binding instrument" should be "leading towards" it (OP8), it would be desirable for the Legal Instrument to contain obligations on the total elimination of nuclear weapons.

Draft outline of a Framework Agreement on Nuclear Disarmament

4. Based on the consideration above, we propose a "framework agreement" model, which is a form of legal instrument ensuring the general prohibition of nuclear weapons, containing elements from legal obligations for total elimination to transparency and risk reduction measures, and allowing for the optional and phased participation of states.

5. The 2016 OEWG Report describes a "framework agreement" as a legal instrument "which would comprise either a set of mutually reinforcing instruments dealing progressively with various aspects of the nuclear disarmament process, or a chapeau agreement followed by subsidiary agreements or protocols that would lead gradually to a nuclear-weapon-free world" (para. 38). The framework agreement we propose here comes under the latter category in the OEWG Report's description.

6. Concerning nuclear disarmament, a general agreement does exist among states on the goal to "attain and maintain a world without nuclear weapons". However, as for the specific measures and timeframe to achieve the goal, a large gap lies in their views and positions, thus hindering progress toward the achievement of the goals. The "framework agreement" model seems to serve as an effective solution to this reality.

7. The following is a suggested draft outline of a Framework Agreement on Nuclear Disarmament, consisting of the Main Body which establishes the "chapeau agreement" and a number of Protocols.

The Main Body

8. The Main Body of the framework agreement constitutes a "chapeau agreement" codifying the scope, legal obligations for the total elimination of nuclear weapons, the relationship between the main body and protocols, and arrangements regarding the Conference of the Parties and other operational matters.

(a) The provision on the objectives might be as follows: "With a view to averting the catastrophic devastation that would be unleashed upon all humanity and the environment by nuclear war, as well as to avert the risk of such war occurring, the objective of this Framework Agreement would be to eliminate national armaments of atomic weapons and thus achieve a world without nuclear weapons". Here we drew upon the expressions in the Preamble of the NPT and the first UN Resolution (A/RES/ (1)), in the belief that stipulating goals on which there is already a universal agreement would lower the hurdle for states to accept the Main Body.

(b) States parties shall undertake the legal obligations stated below. These obligations reflect either a unanimous recommendation made by the International Court of Justice (ICJ), or the near-universal agreements made through nuclear disarmament and non-proliferation negotiations. Consequently, the Main Body must be acceptable to both the nuclear-armed states and their allied nuclear-reliant non-nuclear states:

i) To make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons[2];
ii) To pursue in good faith and bring to a conclusion negotiations leading to nuclear

[2] "Conclusions and recommendations for follow-on actions" B-iii in the Final Document of the 2010 NPT Review Conference (adopted May 28, 2010); NPT/CONF.2010/50 (Vol. I)

disarmament in all its aspects under strict and effective international control[3];

iii) To pursue policies that are fully compatible with the objective of achieving a world without nuclear weapons[4];

iv) An unequivocal undertaking by nuclear armed states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament[5]; and

v) To rapidly move towards an overall reduction in the global stockpile of all types of nuclear weapons, and to further diminish the role and significance of nuclear weapons in all military and security concepts, doctrines and policies[6].

(c) The Main Body shall also stipulate: the relationship between itself and the Protocols, technical matters relating to the Conference of the Parties and operating agencies, and conditions for entry-into-force. As for the entry-into-force conditions, it would be important to allow for flexibility, so as to enable phased participation in Protocols depending on the situation of each state party.

Protocols

9. The Conference of the Parties shall negotiate and conclude Protocols, which would give shape to the objectives and legal obligations mentioned above. The negotiation and conclusion of some of the Protocols, in particular the Protocol on the general prohibition of nuclear weapons, shall take place in parallel with those of the Main Body. States Parties to the Main Body are allowed to become parties, optionally and in a phased manner, if necessary, to the Protocols exemplified below. Each of the Protocols, as well as the Main Body itself, shall set up their own individual Conference of the Parties. Different Protocols can have different conditions for entry-into-force. The provisions of each Protocol can be reviewed and revised at the relevant Conference of the Parties as the need arises, as long as the amendment is consistent with the objectives and obligations in the Main Body.

(a) The ***Protocol on the general prohibition of nuclear weapons*** shall prohibit the possession, development, production, testing, acquisition, stockpiling, transfer, deployment, use and threat of use of nuclear weapons, as well as the assisting, financing, encouraging and inducing of these acts. As for the "use and threat of use", a significant distinction lies between those acts and the acts of "possession" or "stockpiling". They are acts that cause the catastrophic humanitarian consequences of nuclear detonation, while neither "possession" nor "stockpiling" causes such damages. It was because of this distinction that the 1996 ICJ Advisory Opinion focused primarily on the legality of "the threat and use of nuclear weapons". Subsequently, concluding a separate protocol prohibiting the "use and threat of use" may also be an option. Nuclear-armed and reliant states may become ready to sign a protocol prohibiting threat or use before they are ready to join a comprehensive prohibition that also bans possession.

(b) A ***Protocol on positive obligations*** shall set the obligations of states to assist the victims of nuclear weapon activities including use, development and maintenance, to remedy environmental damage, and to promote education and public awareness-raising on the reality of nuclear damage.

[3] Paragraph 105 (2) F in the Advisory Opinion of the International Court of Justice (ICJ) (adopted July 8, 1996), and Article VI of the NPT

[4] Action 1 in "Conclusions and recommendations for follow-on actions" of the 2010 NPT Review Conference Final Document (May 28, 2010); NPT/CONF.2010/50 (Vol. I)

[5] Page 14, Paragraph 15-6, "Article VI and eighth to twelfth preambular paragraphs", Part I in the 2000 NPT Review Conference Final Report (May 19, 2000; NPT/CONF.2000/28)

[6] Action 5 in "Conclusions and recommendations for follow-on actions" of the 2010 NPT Review Conference Final Document (May 28, 2010); NPT/CONF.2010/50 (Vol. I)

(c) A ***Protocol on transparency measures relating to nuclear weapo***ns aims to enhance transparency on nuclear weapons, which is vital for their total elimination. The protocol could, for example, oblige nuclear-armed states to disclose, by standardized format, information regarding their nuclear arsenals and delivery vehicles – the types, distinction between deployed and non-deployed, alert status, and so on. Also there could be provisions for the establishment of a committee to consider and develop schemes to monitor and improve transparency measures.

(d) States parties to a ***Protocol on measures to reduce the role and risk of nuclear weapons (including a protocol on no-first-use)*** shall undertake to further reduce the role and significance of nuclear weapons in all military and security concepts, doctrines and policies, with a view to decreasing the possibility of nuclear weapon detonation, including accidental or mistaken ones. Reduction measures shall include: unilateral measures such as de-alerting the launch on warning and high operational alert of strategic nuclear weapons, plurilateral measures among nuclear armed states, and agreements within extended nuclear deterrence regimes involving non-nuclear states relying on nuclear weapons. It would also be worth considering an independent no-first-use protocol, which some of the nuclear-armed states should be able to join. Moreover, a reduction committee could be established to monitor and explore further measures reducing the role and risk of nuclear weapons.

(e) It would be worth considering a ***Protocol on the preparation of a Comprehensive Nuclear Weapon Convention (CNWC)***, which aims at the total elimination of nuclear weapons backed by a verification system. Meanwhile, we would like to emphasize the necessity to put priority on the early conclusion of the Main Body, Protocol (a) on general prohibition, and Protocol (b) on risk reduction.

The significance of providing an independent entry-into-force process for each Protocol

10. States parties to the Main Body of the Framework Agreement are allowed to become parties to any of the above-mentioned Protocols at any time. A Protocol shall enter into force according to certain conditions specifically provided in that protocol.

11. Concerned non-nuclear states, which have been promoting the commencement of negotiations for a treaty to prohibit nuclear weapons, are likely to join all the protocols from the outset. Meanwhile, non-nuclear armed states relying on nuclear weapons might accede only to the Main Body at first. However, they might go on to join Protocol (b), (c) or (d); and hopefully more and more states might gradually become parties to Protocol (a) on general prohibition, as they fix their own conditions. Nuclear armed states should also be ready to approve the Main Body, and can further develop themselves to join Protocol (b), (c), (d) (in particular a “no-first-use protocol”), and eventually (a).