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Pursuing "effective measures" relating to nuclear disarmament: Ways of making a legal obligation a reality

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Abstract

This paper argues that pursuing negotiations in good faith on effective measures for nuclear disarmament is a legal obligation, not a foreign policy option. Drawing on the New Agenda Coalition paper of April 2014, which identified some pathways by which nuclear disarmament might be pursued, this paper identifies and analyzes international legal issues raised by each of those pathways. The paper concludes by explaining why legal analysis and discussion are important even in the absence of a settled political commitment to nuclear disarmament.

Keywords: nuclear disarmament, nuclear non-proliferation, NPT Article VI, effective measures, New Agenda Coalition.

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Introduction

The increasing political attention being paid to the humanitarian consequences of nuclear weapons is an important and timely reframing of the debates about nuclear weapons generally. It draws our attention to why nuclear disarmament is essential and underscores and strengthens the already existing taboo against the use of nuclear weapons.[1] While the humanitarian discourse explains why nuclear disarmament is desirable, this paper focuses on nuclear disarmament as a matter for legal analysis. It does so in two ways. First, it argues that pursuing negotiations in good faith on effective measures for nuclear disarmament is a legal obligation, not an optional foreign policy choice. Second, it explores the legal aspects of the different proposals that are being put forward as ways of advancing towards that goal.

While there has been some discussion on whether there is a legal obligation to pursue negotiations in good faith, it is time to renew a serious discussion about how that might happen and what legal tools are available to that end. Thus, having briefly traversed the legal obligation assumption, this paper goes on to draw on the Working Paper prepared by Ireland on behalf of the New Agenda Coalition in April 2014, which set out four possible pathways by which effective measures towards nuclear disarmament might be pursued.[2] This essay, based on an earlier presentation at the United Nations (UN) hosted by New Zealand, explores these pathways and draws out some thoughts on the potential legal issues involved in each pathway.

Finally, the paper sets out some reflections on why a legal discourse is important at this point, and how it acts as a complement to the humanitarian discourse. For seventy years, since the birth of nuclear weapons,[3] there has been a policy debate on whether we should pursue nuclear disarmament. For the past thirty-five years, the legal obligation to focus on disarmament in the NPT has been woefully neglected. I set out the reasons here why a legal framework of analysis is important even in the absence of a settled political commitment.

Pursuing "effective measures" as a legal obligation

Article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT) provides that:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early

1 See Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons since 1945*, Cambridge University Press, Cambridge, 2007. See also Maria Rost Rublee, *Nonproliferation Norms: Why States Choose Nuclear Restraint*, University of Georgia Press, Athens, GA, 2009.

2 "Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Working Paper Submitted by Ireland on Behalf of the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa)", NPT/CONF.2015/PC.III/WP.18, 2 April 2014 (WP.18), para. 29.

3 In fact, the debate preceded the actual advent of the bomb. See Andrew Brown, *Keeper of the Nuclear Conscience: The Life and Work of Joseph Rotblat*, Oxford University Press, Oxford and New York, 2012.

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> date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective control.[4]

Looking at the language of this provision, it is clear that States Parties undertake to pursue negotiations in good faith to achieve three different but related objectives (cessation of the nuclear arms race at an early date, nuclear disarmament, and a treaty for "general and complete disarmament").[5] The focus of this paper is on the obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament. Much ink has been spilt on what, precisely, it means to "pursue negotiations in good faith".[6] For present purposes, the important point is that Article VI uses the expression "undertakes". The *Oxford Dictionary of Law* defines an "undertaking" as a "promise, especially in legal proceedings, that creates an obligation".[7] Thus, pursuing negotiations in good faith on effective measures relating to nuclear disarmament is a promise, a legal obligation.[8]

The NPT States Parties have repeatedly affirmed this legal obligation. In 1995, in agreeing to extend the Treaty beyond its initial twenty-five-year term, the Conference of the States Parties affirmed the need to attain the ultimate goal of complete elimination of nuclear weapons.[9] In 2000, the States Parties agreed to 13 practical steps for systematic and progressive efforts towards disarmament.[10] The 2010 Review Conference affirmed that all States needed "to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons".[11] To that end, they adopted by consensus a set of Conclusions and Recommendations for Follow-on Actions, now commonly

4 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161, 1 July 1968 (entered into force 5 March 1970) (NPT), Art. 6.

5 And see Daniel Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, Oxford University Press, New York, 2011, p 99. Cf. Christopher Ford, "Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons", *Non-Proliferation Review*, Vol. 14, No. 3, 2007, p. 403.

6 For discussion, see D. Joyner, above note 5; see also Paul M. Kiernan, "'Disarmament' under the NPT: Article VI in the 21st Century", *Michigan State University Journal of International Law*, Vol. 20, No. 2, 2012; David A. Koplow, "Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?", *Wisconsin Law Review*, March/April 1993.

7 Jonathan Law and Elizabeth A. Martin, *A Dictionary of Law*, 7th ed., Oxford University Press, 2013.

8 For a recent discussion of the meaning of the good faith requirement in Article VI, see United States Court of Appeals, *Republic of the Marshall Islands v. United States of America et al.*, Ninth Circuit, Brief of Amicus Curiae Lawyers Committee on Nuclear Policy Supporting Appellant and Reversal, pp. 9–18. Cf. United States Supreme Court, *Medellín v. Texas*, 128 S. Ct. 1346 (2008), No. 06-984, 2008, in which the Supreme Court held that the expression "undertakes to comply" in Article 94 of the UN Charter was only "a commitment on the part of U.N. Members to take future action through their political branches".

9 "Extension of the Treaty on the Non-Proliferation of Nuclear Weapons", *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, NPT/CONF.1995/32, Part I, Annex, Decision 3, pp. 12–13.

10 "Article VI and Eighth to Twelfth Preambular Paragraphs", *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, NPT/CONF.2000/28, Parts I and II, pp. 14–15.

11 "Conclusions and Recommendations for Follow-on Actions", *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, NPT/CONF.2010/50, Vol. 1, pp. 19–24.

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known as the 2010 Action Plan.[12] The first twenty-two action points relate to nuclear disarmament.

Outside of the framework of the NPT, there has also been acknowledgement of the binding legal obligation by the International Court of Justice (ICJ). In a unanimous finding in the Nuclear Weapons Advisory Opinion in 1996, all fifteen of the judges expressed the view that there exists an "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".[13]

In 2008, the UN Secretary-General presented a five-point plan for achieving a nuclear weapon-free world, the first point of which called on all parties to the NPT to fulfil their obligation under Article VI of the Treaty to undertake negotiations on effective measures leading to disarmament.[14]

It should be noted that this legal obligation is not one that is imposed on nuclear weapons States alone, but rather is an obligation on all States party to the NPT. This is in no doubt from the terms of the NPT itself (Article VI does not confine itself to any category of State; rather, it is expressed in general terms), but it is also the experience of other multilateral disarmament treaties. Once in place, a legal regime might well create differentiated obligations (as indeed the NPT does), but the obligation to negotiate in good faith is one that applies to all parties. For example, during the negotiations within the Conference on Disarmament for the Chemical Weapons Convention (CWC), it was clear that only a handful of States would be declaring possession of chemical weapons, but it was nonetheless understood that the international community as a whole shared responsibility to build the regime against those weapons.[15] While the CWC does not perpetuate the division between possessor and non-possessor States in the same way as the NPT, it nevertheless stands as an example of all States Parties accepting disarmament obligations, while the practical impact of the obligation will differ from State to State.

Pathways to nuclear disarmament

In April 2014, pursuant to the obligation to negotiate effective measures towards nuclear disarmament, Ireland submitted a proposal on behalf of the New Agenda

12 *Ibid.*

13 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 105(2)(f). The issue is again being considered by the ICJ in the pending cases *Marshall Islands v. United Kingdom (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)*, *Marshall Islands v. Pakistan (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)*, and *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)*.

14 UN Secretary-General, "The United Nations and Security in a Nuclear-Weapon-Free World", address to the East-West Institute, New York, 24 October 2008, available at: www.un.org/disarmament/WMD/Nuclear/sg5point (all internet references were accessed in December 2015).

15 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 317, 13 January 1993 (entered into force 29 April 1997) (CWC).

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Coalition (Working Paper on Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, or WP.18) to the Third Session of the Preparatory Committee for the 2015 Review Conference of the NPT.[16] The paper was an attempt to think about ways in which States might sidestep the seemingly irreconcilable difference between those States that advocated an incremental approach towards eventual nuclear disarmament and those States that advocated a more immediate and comprehensive approach. The aim of the paper was to set out the different ideas and offer some reflections on each. Thus, the Working Paper outlined four possible options, or pathways, which could be explored as a means of achieving these effective measures. This paper seeks to further develop those ideas by exploring the various pathways from an international legal perspective.

First pathway: A comprehensive nuclear weapons convention

The first pathway identified in WP.18 is that States should explore the modalities of a comprehensive nuclear weapons convention.[17] Such a treaty would include a set of comprehensive prohibitions relating to the use, development and possession of nuclear weapons, and would create a system of verification to be conducted by a specially created inter-governmental agency.[18] Thus, the treaty would put in place a process for legally binding, time-bound, irreversible and verifiable nuclear disarmament. Such a concept has been around for quite some time; see, for example, the draft convention tabled by Costa Rica and Malaysia.[19]

A number of important legal issues are raised by such a proposal. The following comments are directed generally towards the idea of a comprehensive nuclear weapons convention, rather than at any specific proposal.

Substantive overlap with other regimes or obligations

There is no legal difficulty with, or constraint against, exploring additional treaties, protocols or agreements in furtherance of achieving effective measures towards nuclear disarmament. As has been pointed out previously,[20] the NPT does not require that those "effective measures" of Article VI be advanced under its umbrella. Further, it is clear that *any* instrument, no matter how broadly or narrowly drawn, would be at least an advance on the *status quo* and therefore compatible not only with Article VI of the NPT but more broadly with the object

16 WP.18, above note 2. The New Agenda Coalition is a group of countries currently comprising Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa. Established in 1998, the aim of the Coalition was to inject fresh momentum and thinking into the nuclear disarmament process. See New Agenda Coalition, *Towards a Nuclear-Weapons-Free World: The Need for a New Agenda*, Joint Declaration, A/53/138, Annex, 9 June 1998.

17 WP.18, above note 2, para. 29(1), and detailed in Annex I.

18 For instance, along the lines of the Organization for the Prohibition of Chemical Weapons, created by Article VIII of the CWC.

19 Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the UN Secretary-General, A/62/650, 18 January 2008.

20 WP.18, above note 2, para. 32.

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and purpose of the NPT as a whole. Concluding a comprehensive, verifiable nuclear disarmament treaty would be the gold standard – a full implementation of this aspect of the obligation set out in Article VI of the NPT.

That being said, consideration does need to be given to some complexities that may arise. Any such new comprehensive treaty will sit within a mosaic of treaties and agreements relating to nuclear weapons, including the NPT and the 1996 Comprehensive Test Ban Treaty (CTBT). Thus, for many States, there may be an overlap between the obligations in the new legal instrument and their existing substantive obligations. The potential overlaps will depend on the nature of the new proposed instrument, the particular States in question and their nuclear status, and the precise treaty obligation being considered. To give one simple example, non-nuclear-weapon States party to the NPT must not "manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices".[21] The CTBT prohibits nuclear weapons test explosions.[22] The prohibitions set out in a comprehensive prohibition treaty would almost certainly capture these prohibitions as well.

This raises no legal difficulties – indeed, repeating the prohibition in different treaty regimes gives additional normative support. Any potential overlap would strengthen, not undermine, the existing legal obligations. Indeed, reiteration is a familiar dynamic in other areas of international law. For example, in the human rights field, the right to life is enshrined in a series of human rights treaty regimes, many of which overlap.[23] The reiteration of this right, in different contexts, serves to strengthen the underlying norm. In the disarmament sphere, a clear example of how reiterations of a prohibition strengthen a norm is the way in which the prohibition against using chemical or biological weapons in the Geneva Protocol of 1925 laid the normative foundations for the CWC and the Biological Weapons Convention (BWC). The Geneva Protocol remains in force, even with the creation of the two more elaborate regimes.[24]

While it is clear that substantive overlap will give rise to greater normativity, regime overlap nevertheless poses some important issues that will

21 NPT, above note 4, Art. 2.

22 Comprehensive Nuclear Test Ban Treaty, 10 September 1996 (not in force) (CTBT), Art. 1.

23 Starting with Universal Declaration of Human Rights, UN Doc. A/810, 10 December 1948, Art. 3, the right to life is also protected in the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 6; the African Charter on Human and Peoples' Rights, 1520 UNTS 217, 27 June 1981 (entered into force 21 October 1986), Art. 4; the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, 4 November 1950 (entered into force 3 September 1953) (European Convention on Human Rights), Art. 2; and the American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (entered into force 18 July 1978), Art. 4. There are also related provisions in the Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990), Art. 6; and the Convention on the Rights of Persons with Disabilities, UN Doc. A/61/49, 13 December 2006 (entered into force 3 May 2008), Art. 10.

24 See CWC, above note 15, Art. XIII. Note that Article XVI of the CWC provides that the withdrawal of a State Party from the Convention does not affect the duty of States to continue fulfilling the obligations assumed under the 1925 Protocol. Similarly, see Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1015 UNTS 163, 10 April 1972 (entered into force 26 March 1975) (BWC), Art. VIII.

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need to be addressed. This is particularly the case when membership differs across the different treaty regimes. In addition, were there to be overlapping inspection or verification regimes, it is possible that there may be less than consistent results from any inspection or verification activity. Similarly, overlapping dispute resolution or enforcement mechanisms may produce conflicting outcomes and decisions.[25] There might also be resource implications, if two regimes are working separately to resolve a compliance concern. None of these are reasons to preclude the creation of overlapping regimes or substantive obligations; rather, they are factors that need to – and can – be managed.[26]

In the context of nuclear disarmament and non-proliferation, a potential solution would be for the regimes to work cooperatively. One recent example of this happening was with the chemical weapons inspections carried out by the Organisation for the Prohibition of Chemical Weapons (OPCW)–UN Joint Mission in Syria.[27] There would also be lessons to be learnt from the UN Special Commission and International Atomic Energy Agency mandates in Iraq in the 1990s. While such a cooperative framework will very much depend on political will, it will be important to ensure that the legal framework allows for the transfer of information across regimes, particularly in situations where the membership of each regime is different.

Particular issues with the Comprehensive Test Ban Treaty

The question of overlap with the CTBT gives rise to a different complexity because the Treaty is not yet in force. While this is not complicated in terms of the substantive obligation not to test a nuclear device (as discussed above), the fact that the CTBT has not yet entered into force raises interesting questions regarding the *de facto* implementation of the International Monitoring System (IMS), particularly in light of Article 18 of the 1969 Vienna Convention on the Law of Treaties.[28] Ideally, any new treaty would be able to draw on the data being

25 Repetition of substantive obligations across regimes and overlapping dispute resolution processes is far from unusual. In the context of international trade law, the US–Canada softwood lumber dispute illustrates the potential difficulties and possible solutions nicely. This trade dispute concerning imports of Canadian softwood into the United States was litigated extensively in both the World Trade Organization and under the dispute resolution procedures of the North American Free Trade Agreement, with the decisions pointing in completely different directions. For a discussion of the two regimes in this context, see Greg Anderson, "Can Someone Please Settle This Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO", *The World Economy*, Vol. 29, No. 5, 2006. In the end, a political settlement was reached between the two States.

26 See International Law Commission Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. Z/CN.4/L.682, 13 April 2006; International Law Commission Study Group, "Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", in International Law Commission, Report on the Work of the 58th Session, UN Doc A/61/10, 1 May–9 June and 3 July–11 August 2006.

27 UNSC Res. S/Res/2118(2013), 27 September 2013; OPCW Executive Council, *Decision: Destruction of Syrian Chemical Weapons*, EC-M-33/DEC.1, 27 September 2013.

28 This Article provides that a State which has signed or ratified a treaty that is not yet in force has an obligation to refrain from acts which would defeat the object and purpose of the treaty.

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gathered by the IMS, instead of duplicating what is already a highly effective monitoring system.[29] One way to achieve this would be to explore whether the CTBT could be applied on a provisional basis.[30] This approach would avoid duplication and would build on, rather than hollow out, the extensive system already in place.[31]

Leaving aside the political issues involved in such a process, international law on the provisional application of treaties has a long pedigree, and today is governed by Article 25 of the Vienna Convention on the Law of Treaties. Article 25 allows for provisional application of a treaty, provided that the treaty (that is, in this case, the CTBT) itself provides for this, or failing that, if the negotiating States have agreed. The CTBT does not provide for provisional application, and therefore consideration needs to be given as to whether the negotiating States might agree to provisional application. There are a number of examples of modern practice that might provide some guidance; for example, the 1982 UN Convention on the Law of the Sea (UNCLOS) and the 1947 General Agreement on Tariffs and Trade.[32]

Dispute resolution

A common feature of treaties, including in the context of arms control, is the inclusion of dispute resolution provisions. Generally speaking, there is a graduated system attempting to resolve the issue through the organs of the relevant organization, but with the ultimate option of referring the situation to the UN, and to the Security Council, should the issue constitute a threat to international peace and security.

In drafting the proposed comprehensive nuclear weapons convention, this pattern of a graduated response leading to the ultimate sanction of Security Council referral needs careful consideration. It would be uncertain in the early phases of the treaty's life whether all, or even any, of the permanent members of the Security Council would participate. As such, while it would be legally possible to replicate the typical dispute resolution clause, it is likely to be unacceptable politically to allow non-participants in a regime to have a decisive role in dispute resolution within that regime. In light of this, it may be more productive in the short term to consider a broad range of options for dispute settlement.[33]

29 See generally the studies discussed in Anthony Aust, Masahiko Asada, Edward Ifft, Nicholas Kyriakopoulos, Jenifer Mackby, Bernard Massinon, Arend Meerburg and Bernard Sitt, *A New Look at the Comprehensive Nuclear-Test-Ban Treaty (CTBT)*, Netherlands Institute of International Relations, Clingendael, September 2008, Chapter 3, pp. 9 ff.

30 For an accessible and up-to-date overview of the law on provisional application of treaties, see Robert E. Dalton, "Provisional Application of Treaties", in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford, 2012. For a discussion on provisional application in the specific context of arms control treaties, see Andrew Michie, "The Provisional Application of Arms Control Treaties", *Journal of Conflict and Security Law*, Vol. 10, No. 3, 2005.

31 Consideration could then be given to the question of whether the Preparatory Commission for the Comprehensive Test Ban Treaty Organization could enter into an information-sharing arrangement with a newly created agency.

32 Discussed by R. E. Dalton, above note 30, pp. 234–245.

33 Accepting, of course, that by virtue of the UN Charter, the Security Council would have the mandate, in any event, to deal with any issues threatening international peace and security, regardless of what the treaty provided.

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One option would be to consider whether arbitration could be a mode of dispute settlement.[34] Although not a feature of today's arms control treaties, historically such mechanisms did feature in some draft treaties from the League of Nations era.[35] Consideration could also be given to dispute resolution mechanisms which exist outside of the arms control sphere. For example, in the World Trade Organization (WTO) system, there is a carefully crafted and extremely successful dispute resolution system with stages moving progressively towards compulsory and binding dispute resolution. Importantly, in the WTO system, there is scope for participation by interested third parties in the process.[36] The model provided by UNCLOS (whereby States Parties have a "menu" of dispute resolution options to choose from) could also be considered.[37]

Verification – legal issues

Although primarily a technical area, creating a system of verification raises a number of legal questions.[38] The verification system of the CWC has been in operation since the Convention's entry into force in 1997 and, accordingly, there is a wealth of information on verification practices and related legal issues.[39] There are obvious differences in weapons type and therefore verification technologies, but there will be legal similarities across the regimes. It would be useful to engage in a "legal lessons learnt" process for negotiation of the verification system of the comprehensive nuclear weapons convention.

Implementation – legal issues

Similarly, there will be a number of legal questions to be addressed when considering the way in which the treaty should be implemented.[40] Many of these questions will have been addressed in the context of the implementation of the CWC. In all treaty negotiations, there is a tension between, on the one hand, the imperative to have fixed, time-bound obligations and, on the other, the need to allow sufficient

34 James D. Fry, "Arbitrating Arms Control Disputes", *Stanford Journal of International Law*, Vol. 44, No. 2, 2008.

35 *Ibid*., p. 372.

36 Agreement Establishing the World Trade Organization, 1994, Annex 2, "Understanding on Rules and Procedures Governing the Settlement of Disputes", Art. 10.

37 UN Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994), Art. 287.

38 For discussion in the context of the CWC, see generally Walter Krutzsch, Eric Myjer and Ralf Trapp (eds), *The Chemical Weapons Convention: A Commentary*, Oxford University Press, Oxford, 2014. For particular issues relating to verification, see Walter Krutzsch and Ralf Trapp (eds), *Verification Practice under the Chemical Weapons Convention: A Commentary*, Kluwer Law International, The Hague, London and Boston, 1999.

39 See, for example, Ralf Trapp, "The Chemical Weapons Convention a Decade after its Entry into Force", *Japanese Yearbook of International Law*, Vol. 52, 2009, p. 149.

40 For a range of issues, see Rodrigo Yepes-Enriquez and Lisa Tabassi (eds), *Treaty Enforcement and International Cooperation in Criminal Matters with Special Reference to the Chemical Weapons Convention*, TMC Asser Press, The Hague, 2002.

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flexibility for unexpected difficulties encountered by States acting in good faith and attempting to fully implement the treaty.[41]

In the event that the current possessor States remain outside the system (at least in the beginning), the legal provisions governing accession to the treaty will need careful consideration. It will be important not to put in place legal barriers to participation by possessor States. Thus, due regard needs to be given as to the relationship between any *bilateral* disarmament obligations that might exist, and this new multilateral obligation.

Ultimately, all of these implementation issues will be resolved by political agreement during the negotiations. However, that process can be facilitated by providing clear legal advice as to the options available to negotiating States and setting out examples and illustrations of how other regimes have managed, and solved, comparable issues.

Second pathway: A nuclear weapons ban treaty

The second pathway outlined in WP.18 is to explore the option of a nuclear weapons ban treaty. As articulated in WP.18, the essential difference between the comprehensive convention and a ban treaty is that the first pathway is directed towards time-bound, verifiable elimination of all nuclear weapons, whereas this second pathway is aimed at achieving a comprehensive ban on nuclear weapons, which would pave the way for their eventual elimination. That might be a simple ban on use, or it may extend to a much more comprehensive prohibition, as discussed in the paragraph below.[42] A number of specific legal considerations that arise in the context of a ban treaty are considered below.

Scope of the prohibition

The scope of the prohibition contained in such a treaty could vary considerably from a simple ban on actual use, or threat of use, of nuclear weapons to encompassing more comprehensive prohibitions on the development, manufacturing, control, possession, testing, stationing or transporting of any nuclear explosive device.[43]

While the narrower ban on use only would not be overly ambitious in scope, it would still have immediate normative impact. Both the CWC and the BWC grew out of an earlier (modest) ban on use, in the form of the 1925 Geneva

41 For example, the CWC specified an absolute deadline by which destruction of all chemical weapons stockpiles had to be achieved (no later than fifteen years after entry into force). Due to unforeseen complications (including radically different environmental regulations in force than when the treaty was negotiated), and notwithstanding the efforts of the United States and the Russian Federation, those deadlines were unable to be met, with the result that both States are now in technical non-compliance with the treaty.

42 Ray Acheson, Thomas Nash and Richard Moyes, *A Treaty Banning Nuclear Weapons: Developing a Legal Framework for the Prohibition and Elimination of Nuclear Weapons*, Article 36 and Reaching Critical Will, 2014, p. 4.

43 For a fuller discussion, see *ibid.*, Chapter 1.

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Protocol.[44] Attention would have to be paid to the need to avoid any implication that a use-only ban would explicitly or impliedly legitimize the *possession* of nuclear weapons.

If a more comprehensive ban were to be considered, there are a number of models that could be drawn on for inspiration. The CWC, for example, provides:

> Each State Party to this Convention undertakes never under any circumstances:
>
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
> (b) To use chemical weapons;
> (c) To engage in any military preparations to use chemical weapons;
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.[45]

The Model Nuclear Weapons Convention presented to the General Assembly articulates a range of prohibitions, including those relating to nuclear weapons delivery vehicles, and funding or conducting nuclear weapons research.[46] It would also be a useful exercise to map the prohibitions set out in the various Nuclear Weapons Free Zones against the aims of a ban treaty in this context and so identify which of those prohibitions could usefully be included.[47]

A ban treaty could even extend to destruction or disabling obligations, which would move it very close, in terms of its substantive obligations, to the first (comprehensive convention) pathway. The broader the scope of the prohibition, the closer the ban treaty option comes to the comprehensive pathway. In this sense, the first two pathways are best considered not as separate ideas but rather as pathways on a spectrum from, on the one end, a fully verifiable treaty

44 And indeed, it should be noted that even this prohibition on use was hollowed out by "no first use" reservations made by States Parties at that time.

45 CWC, above note 15, Art. 1. See also Article 1 of the BWC, with its slightly different articulation ("develop, produce, stockpile or otherwise acquire or retain"), and note that the BWC does not explicitly ban the "use" of biological weapons. However, the States Parties to the Convention subsequently confirmed that this was intended in the formulation. See Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Final Declaration, BWC/CONF.IV/9/PART II, Geneva, 25 November–6 December 1996, para. 3. For discussion, see Treasa Dunworth, Robert J. Mathews and Timothy L.H. McCormack, "National Implementation of the Biological Weapons Convention", *Journal of Conflict and Security Law*, Vol. 11, No. 1, 2006, p. 103.

46 International Association of Lawyers against Nuclear Arms, International Network of Engineers and Scientists against Proliferation and International Physicians for the Prevention of Nuclear War, *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention*, International Physicians for the Prevention of Nuclear War, Cambridge, MA, 2007, p. 48 (proposed Article 1). In some respects the prohibitions in the Model Convention were based on the CWC.

47 There are five Nuclear Weapons Free Zones currently in existence. See, generally, Michael Hamel-Green, "Peeling the Orange: Regional Paths to a Nuclear-Weapon-Free World", *Disarmament Forum*, No. 2, 2011. For a mapping of existing Zones, see International Law and Policy Institute (ILPI), "Nuclear-Weapon-Free-Zones", ILPI Nuclear Weapons Project, Nutshell Paper No. 1, 2012. For discussion and comparative evaluation focusing on the Southeast Asian Nuclear Weapon-Free Zone, see Lionel Yee Woon Chin, "Nuclear Weapon-Free Zones: A Comparative Analysis of the Basic Undertakings in the SEANWFZ Treaty and their Geographical Scope of Application", *Singapore Journal of International and Comparative Law*, Vol. 2, 1998.

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requiring time-bound disarmament of all nuclear weapons arsenals, through to less comprehensive prohibitions with little or no verification. While this would be a departure from modern practice in the context of arms control treaties, which have generally placed importance on verification mechanisms, a treaty with a weak or even non-existent verification system would still have some normative significance.

Forum for negotiation[48]

Although the obligation to pursue effective measures towards nuclear disarmament is founded in Article VI of the NPT, there is no obligation to pursue those measures within the NPT system itself. Indeed, the CTBT, seen as a key step towards creating the necessary framework to consider nuclear disarmament, was negotiated within the Conference on Disarmament (CD) before it was shifted to the UN General Assembly (UNGA) at a point when it became clear that the CD would block its adoption.[49] Given the seemingly intractable deadlock in that body, it does not seem useful to consider the CD as an appropriate forum for negotiation.

The UNGA offers a viable multilateral approach. One option would be an *ad hoc* committee of the UNGA, drawing on the approach used for the Convention on Nuclear Terrorism.[50] Most recently, negotiations for the Arms Trade Treaty (which had their genesis in a Group of Governmental Experts followed by an Open Ended Working Group) took place under the auspices of a UNGA Negotiating Conference. Working within the General Assembly would be a logical next step following the convening in 2013 of the Open Ended Working Group to carry forward multilateral nuclear disarmament negotiations.[51]

There are also a number of arms control initiatives that have taken place outside the formal, institutional, multilateral system but which are not considered to have threatened the multilateral system. The most well-known examples are the 1997 Anti-Personnel Landmines Convention and the 2008 Cluster Munitions Convention. Because the negotiations for a ban treaty would be an important step towards nuclear disarmament, far from being a threat to the multilateral system, such initiatives would complement both Article VI of the NPT and the spirit and purpose of the CTBT. In fact, it is not inconceivable that separating these negotiations from the NPT, particularly in light of the failure of the 2015 Review

48 See the useful overview of UN-related forums in United Nations Institute for Disarmament Research (UNIDIR), *The Treatment of the Issue of Nuclear Disarmament in Relevant Forums Established by the United Nations*, UNIDIR, 2013.

49 For more detailed discussion, see Rebecca Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, UNIDIR, 2009, Chapter 6.

50 R. Acheson, T. Nash and R. Moyes, above note 42, p. 20.

51 For an overview of the work of the Open Ended Working Group, see Christian N. Ciobanu, Esteban Ramirez Gonzalez, Jana Jedlickova and Alyn Ware, *Open the Door to a Nuclear Free World: Manual for Governments on the UN Working Group on Nuclear Disarmament*, Edition 1.0, Abolition 2000 Task Force on the Open Ended Working Group, Basel, 2010. See also Note by the Secretary-General, "Proposals to Take Forward Multilateral Nuclear Disarmament Negotiations for the Achievement and Maintenance of a World without Nuclear Weapons, UN Doc. A/68/514, 9 October 2013 (transmitting the report of the Working Group to the General Assembly)."

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Conference to reach agreement on an Outcome Document, might enhance the possibility of the four non-NPT States participating in such negotiations.

Verification

If this pathway were understood as not including a verification system, that may mean that achieving agreement is easier than under the first pathway. After all, as mentioned above, for most States (though, of course, not *all*) this treaty would be a reiteration of existing obligations. A ban treaty without a compliance or verification system would still be an important contribution to the nuclear disarmament effort because of its contribution to the normative force of the prohibition against nuclear weapons, whether or not a verification system were in place. There are many examples of disarmament agreements that do not have verification procedures in place but which are generally understood to have contributed in a meaningful way to the norm against the weapons in question. For example, neither the 1925 Geneva Protocol nor the 1972 BWC provided for verification, and yet there is international consensus that there is a binding prohibition on all States against the use of biological weapons.[52] That is not to say that it is ideal, or even sufficient, to have no treaty verification system in the BWC, but only that even without such a system, the treaty is important in terms of building the norm against the use and possession of biological weapons.

The CTBT presents us with a slightly different example. While it has an elaborate verification system, the Treaty is not yet in force, and therefore compliance with its terms cannot be verified in terms of legal determinations. That being said, it is generally accepted that the "treaty in waiting" has already contributed in a meaningful way to the norm against nuclear testing.[53]

Relationship with the other regimes

As with the first, comprehensive pathway discussed above, a nuclear weapons ban treaty will sit within a mosaic of regimes dealing with nuclear weapons and international security. Thus, many of the same complexities arise as set out in the discussion under the comprehensive pathway discussed earlier.

Third pathway: A framework approach

The third pathway suggested by WP.18 is that of a framework arrangement, whereby a series of mutually supporting instruments addressing different aspects of what is necessary in order to have a nuclear weapons-free world could be formulated.[54]

52 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 73 ("The use of biological weapons is prohibited").

53 Lisa Tabassi "The Nuclear Test Ban: *Lex Lata* or *Lege Ferenda*?", *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2009.

54 WP.18, above note 2, Annex III.

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A framework approach to building an international regime is a relatively recent development and is most common in the area of international environmental law. A framework approach involves negotiating a type of legally binding "umbrella" treaty that sets out broad commitments and a governance system which are then expanded upon in a further instrument or series of instruments that provide more detailed technical, legal and other arrangements.[55] Perhaps the best-known framework agreement is the UN Framework Convention on Climate Change (UNFCCC)[56] and its Kyoto Protocol.[57] There are many existing examples,[58] and others are being proposed.[59] In the weapons context, the 1980 Convention on Conventional Weapons, which now has five protocols, is an important model.[60]

The framework approach can be useful where there is a significant difference of interests between States and where, therefore, it is better to agree to an initial broad framework and then fill in the details at a later stage.[61] In other words, framework agreements are useful where parties are prepared to make general, broadly expressed legal commitments, but to defer the making of specific obligations to subsequent instruments or protocols. The initial substantive obligation can be quite vague (for example, asking for "appropriate measures" as in the Ozone Convention), but it will be combined with provisions setting up a conference of the parties (COP) as a forum for negotiations of future protocols, as well, perhaps, as a secretariat, dispute resolution provisions and decision-making rules.[62]

In the specific context of nuclear disarmament, contemplating a framework approach raises a number of legal questions.

55 Nele Matz-Luck, "Framework Agreements", in *Max Planck Encyclopedia of Public International Law*, 2011, para. 1, available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e703?prd=EPIL.

56 United Nations Framework Convention on Climate Change, UNGA Res. A/RES/48/189, 20 January 1994 (UNFCCC).

57 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148, 11 December 1997 (entered into force 16 February 2005).

58 Such as: Framework Convention on Tobacco Control, 2302 UNTS 229, 21 May 2003 (entered into force 27 February 2005); European Framework Convention for the Protection of National Minorities, 2151 UNTS 243, 10 November 1995 (entered into force 1 February 1998); Basel Convention on Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 57, 22 March 1989 (entered into force 5 May 1992); Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1651 UNTS 333, 23 June 1980 (entered into force 1 November 1983); Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 293, 22 March 1985 (entered into force 22 September 1988).

59 There are proposals for a Framework Convention on Global Health, for example.

60 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983).

61 N. Matz-Luck, above note 55, para. 11.

62 John K. Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law", *Harvard International Law Journal*, Vol. 37, No. 1, 1996.

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Sequencing

As outlined in WP.18, a framework pathway could build on some existing agreements, such as the NPT and the CTBT, but there would also be a need to negotiate other agreements or instruments, including a treaty on fissile material, as well as agreement on legally binding negative assurances and possibly a phased programme of destruction of weapons (or at least their lowered operational readiness).

The sequencing of these negotiations in the context of an overarching framework will be contentious and, in light of the political sensibilities, it does seem that *consecutive* negotiations of the various proposed agreements or protocols may not be possible. Simultaneous negotiations, while legally possible, may not be feasible in terms of the level of resources required to sustain them. One option may be to consider a system of negotiating the different instruments on the model of the "closed chapters" approach used in trade negotiations. This would allow negotiations to proceed consecutively but would prevent the entry into force (or even the opening for signature) of any one instrument until all negotiations are completed. In this way, nothing is ultimately agreed, in the sense of binding obligations, until everything is agreed, and yet, the negotiations could be undertaken "step by step".

Normative force

Despite this difficulty, a framework approach offers the possibility of normative evolution. The umbrella treaty would reiterate the NPT's Article VI obligation to enter into disarmament negotiations; indeed, the creation of the COP in itself would be facilitating the commencement of those negotiations. This would represent an immediate legal advance as it would mark a small but still significant step by elaborating the promise of disarmament. Even if the framework treaty contained just a simple repetition of the Article VI obligation, it would have normative impact. It is evident from other regimes that the reiterative nature of a framework arrangement does reinforce the evolution of normative and cognitive shifts.[63] If the framework treaty itself went beyond that iteration, and created a COP for further negotiations or discussions, that would be a small but important institutional and normative step.

Institutionalized framework

A key strength of a framework convention model is that it is specifically designed to promote long-term interaction between treaty parties.[64] There are already a number

63 Lawrence O. Gostin, "Meeting Basic Survival Needs of the World's Least Healthy People: Towards a Framework Convention on Global Health", *Georgetown Law Journal*, Vol. 96, No. 2, 2008.

64 Daniel Bodansky, Jutta Brunnée and Ellen Hey, "International Environmental Law: Mapping the Field", in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2007, pp. 21–23.

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of forums available to allow such interaction, including the Conference on Disarmament, the Review Conferences of the NPT, and the UNGA First Committee.[65] However, a framework model would be premised on a different basis because, unlike the CD, its membership could be open to *all* States. While the new treaty may not initially attract a membership broader than the existing CD, that possibility would at least be open to such States, and in that sense, it would have more legitimacy.

It would be desirable to encourage as broad a membership as possible to strengthen its normative impact. Further, the COP would determine its own rules of procedure and decision-making processes (for example, it could decide to follow the practices developed in the Ottawa Process for the Anti-Personnel Landmines Convention regarding the involvement of NGOs and other interested parties).[66]

A careful study and comparative analysis should be undertaken of the different approaches taken in the existing framework treaties in order to evaluate those approaches in light of what would be the best option in the context of nuclear disarmament.

Substantive content of a framework treaty

There is no standard format for the scope or design of framework treaties and consequently there is significant variance in format and scope. The UNFCCC, for example, really only sets out principles and objectives to guide global climate policy and establishes institutions and processes for further treaty development.[67] In contrast, while the CCW itself is devoid of any substantive obligations, States are required to ratify at least two of the protocols to the treaty in order to be brought within the system.[68] Generally, in framework treaties, there is a separation between the adoption by the COP of a protocol and the process of that protocol becoming a binding obligation on any State Party. This can encourage States to participate in the framework treaty without pre-determining their precise legal obligations. That being said, in addition to negotiating protocols, COPs in other contexts have made recommendations that are considered by some to be "soft law".[69]

65 For an overview and discussion of the different possible forums, see the brief prepared for the Open Ended Working Group: UNIDIR, *The Treatment of the Issue of Nuclear Disarmament in the Relevant Forums Established by the United Nations*, OEWG Brief No. 1, 2013.

66 L. O. Gostin, above note 63, p. 390; George W. Downs, Kyle W. Danish and Peter N. Barsoom, "The Transformational Model of International Regime Design: Triumph of Hope or Experience?", *Columbia Journal of Transnational Law*, Vol. 38, No. 1, 2000, p. 467.

67 UNFCCC, above note 56. Article 2 sets out the objective, which is the stabilization of greenhouse gas emissions; in Article 3 the States Parties agree to be guided by certain principles; Article 4 sets out commitments; and Article 7 establishes a COP.

68 UNFCCC, Art. 4.3.

69 Timothy Meyer, "From Contract to Legislation: The Logic of Modern International Lawmaking", *Chicago Journal of International Law*, Vol. 14, No. 2, 2014, p. 572.

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Relationship with other regimes

The question of linkage between existing treaty arrangements and a framework treaty would need to be considered carefully, and many of the same issues arise as with the comprehensive nuclear weapons convention pathway.[70] The starting point in this consideration is that a broadly stated framework treaty would simply reiterate the nuclear disarmament obligation of the NPT, thus duplicating (and complementing) the obligation to work towards effective measures towards nuclear disarmament.

The linkage between the CTBT and a framework treaty raises issues similar to those raised by the approaches already discussed above.

Fourth pathway: Other possibilities

WP.18 suggests that consideration should also be given to any combination of the first three pathways, as well as other pathways to "effective measures" for achieving and maintaining a world without nuclear weapons.[71]

No first use

Some commentators have raised the possibility of a "no first use" (NFU) treaty.[72] While some States have articulated an NFU strategy in their nuclear doctrine, an NFU treaty would harden this policy into a binding legal obligation which could apply universally. In itself, this will not lead directly to nuclear disarmament, but it would be confidence-building and would strengthen the norm against nuclear weapons.[73]

Another option to express the principle of no first use would be to provide a forum for States to make unilateral declarations that they will adhere to an NFU policy. These declarations could be made within any of the existing multilateral bodies (for example, the NPT Review Conference in 2015, the CD, or even at the UN itself), or indeed in any other way. Unilateral declarations, if made publicly and intended to produce obligations under international law, can be binding on States.[74]

70 See the "First Pathway" section above.

71 WP.18, above note 2, Annex IV.

72 For a recent example, see Ramesh Thakur, "Australia Should Take the Lead on Global No-First-Use Convention", Commentary, *Japan Times*, 18 August 2014. A "no first use" treaty or agreement is a system whereby the nuclear possessor State pledges not to be the first to resort to the use of nuclear weapons.

73 See the discussion by Scott Sagan on why the United States should adopt an NFU approach: Scott Sagan, "The Case for No First Use", *Survival*, Vol. 51, No. 3, 2009.

74 See International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, 2006. See also the discussion on the legal effect of unilateral declarations by the ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, *ICJ Reports 2006*, paras 46–54, and cases cited therein. See also the negative security assurances the P5 have made, which are considered to be binding: Reaching Critical Will, "Negative Security Assurances", Fact Sheet, available at: www.reachingcriticalwill.org.

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Alternative modes of negotiations

Negotiations towards effective measures for nuclear disarmament must necessarily canvass a broad range of complex issues. Not only is each issue itself complicated, but the negotiations must also hold together States with differing security concerns and understandings. These complexities are not unique to nuclear weapons issues – many areas of international law face similar challenges. As such, consideration should be given to the different ways in which negotiations could be approached, rather than resorting to traditional treaty negotiation practices.

Inspiration might be found in the "closed chapter" practices of the European Union when considering new members, and which are also used in some trade negotiations.[75] Broadly speaking, this approach allows negotiation and agreement of "chapters" which are then "closed" and, although negotiated, do not take effect until such time as the entire agreement is in place.[76] In the specific context of nuclear disarmament, such an approach might allow negotiations on different issues to proceed (for example, agreement on fissile material) without taking effect until the next step is also agreed.

An immediate step that could be taken is to engage in discussions on possible alternative negotiating procedures.

Why does law matter?

Just as the humanitarian discourse is an important means of reframing the nuclear weapons debate, in my view there is also an important reframing movement to be established in opening up the discourse on Article VI to include discussions about the nature of the legal obligations on States party to the NPT, and the legal vehicles by which those obligations can be articulated. A great deal has been said on whether there is a legal obligation to pursue negotiations in good faith, and it is time to renew a serious discussion about how that might happen, what legal tools are available to us and the legal complexities raised by each option.

It is true that, ultimately, there will need to be political will in order to move forward towards nuclear disarmament. Legal arguments, by themselves, will have insufficient traction. That being said, there are important reasons why it is timely to start a proper legal discussion.

The first reason is entirely pragmatic, and that is to ensure that any political agreement which might be forthcoming is legally workable. Regardless of the pathway chosen, the actual implementation and verification of nuclear disarmament will be immensely complicated from a legal point of view. Some issues raised in this paper illustrate that point, including the formulation of

75 For example, in the current negotiations for the Trans Pacific Partnership. For an overview, see Deborah Kay Elms, "The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch", *Asian Journal of WTO and International Health Law and Policy*, Vol. 8, No. 2, 2014, p. 379.

76 See discussion above.

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dispute resolution mechanisms, how to craft provisions for dealing with potential regime overlap, and even the structure of treaty regimes. There is a great deal of experience already to draw on, however, and one of the aims of this paper has been to identify some of that experience so that it can be explored further. Detailed legal analysis now can ensure that political will can be expressed in a legally workable way.

The second reason why it is timely to start the legal discussion is more conceptual. In this author's view, to argue that law has no place in the discussion prior to political agreement being reached is to misunderstand the dynamic and complex relationship between law and politics, or to put it another way, between law and society. As legal sociology tells us,[77] as well as the constructivist school of international relations,[78] law does not simply reflect our societies and their values – it shapes and reshapes them. Insisting on political agreement being reached prior to engaging in a legal discussion is to discount the social impact of law. It has long been accepted that there is a complex relationship between law and society in the context of domestic law,[79] and it must surely be accepted that a similar dynamic exists within the international community.

Conclusion

The ongoing failure to make any meaningful progress on nuclear disarmament is not only a breach of Article VI of the NPT, but also undermines the Treaty's objectives and purpose regarding non-proliferation by keeping the threat of nuclear weapons as an ever-present reality. The obligation under Article VI to pursue effective measures towards nuclear disarmament is an obligation that applies to all States party to the NPT, not just those States possessing nuclear weapons.

There is no legal impediment to exploring the pathways discussed in this paper, even without input from the nuclear possessor States. The difficulties are political, not legal.

All of the options discussed in this paper offer a means to strengthen the norm against the use, and eventually possession, of nuclear weapons. While this is insufficient in and of itself to fully satisfy the terms of Article VI, it is an important step in the right direction. A hardening of the norm against nuclear weapons would contribute to the growing impetus towards nuclear disarmament.[80]

77 See for example, Moshe Hirsch, "The Sociology of International Law: Invitation to Study International Rules in their Social Context", *University of Toronto Law Journal*, Vol. 55, No. 5, 2005. The leading legal sociology scholar was, of course, the great US jurist, Roscoe Pound.

78 Jutta Brunnée and Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law*, Vol. 39, 2000–2001.

79 Consider the evolution of society's thinking on issues such as domestic violence, alcohol and driving, homosexuality and, even now, physical disciplining of children.

80 And see R. Acheson, T. Nash and R. Moyes, above note 42, Chapter 3.

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