

# Responding to the “Ban”

remarks by

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Good morning, everyone. It is always a pleasure to come to the Carnegie Endowment for International Peace, and I’m very happy for the chance to talk to you. I would like to thank George Perkovich, Toby Dalton, and the entire team here at Carnegie for being such gracious hosts for this event – and to thank all of you for coming.

As many of you know, I serve as Special Assistant to the President and run the Weapons of Mass Destruction and Counterproliferation Directorate at the U.S. National Security Council. As I have previously noted in other fora, my team and I are leading policy reviews of various arms control and disarmament-related regimes and approaches. The purpose of these reviews is to ensure that U.S. policy in these areas does as much as it can to protect and advance U.S. national security interests. We are reviewing past policies inherited from multiple administrations and questioning received wisdoms in order to ensure that our approaches are grounded as much as possible in clear understandings of U.S. interests and administration priorities.

In some areas, our policies are likely to differ from what was done before, but in others there will likely be much continuity. Many of our reviews are still underway, but it is gradually becoming possible to say more about some matters.

To that end, I would like to spend a few minutes today speaking for the Administration on an issue related to nuclear disarmament, in particular, the treaty negotiated at the United Nations to “ban” nuclear weapons. As President Trump has said in the past, ideally he would like to be able to get rid of nuclear weapons: in a perfect world, they would not exist. Unfortunately, however, he also understands that we do not live in that perfect world – certainly not yet, at any rate.

The United States is committed, and is indeed bound by treaty, to pursue negotiations on effective measures for nuclear disarmament that might make such a world more likely. We have *no* obligation to pursue negotiations on *ineffective* measures, however, and in fact probably have

a moral duty to oppose measures which would make that potential future less likely by making the world of today less secure and less stable.

This is what concerns us about the proposed “ban” – which, whatever its arguable good intentions, certainly is not an effective measure relating to disarmament and is indeed very likely to be notably counterproductive. If anything, in fact, it is hard to imagine an effort that would be better calculated to discredit the disarmament community by demonstrating to nuclear weapons possessors – and to any state that in any way relies upon nuclear weapons for its national security – that advocates of the “ban” are fundamentally *unserious* about addressing the real challenges of maintaining peace and security in a complicated and dangerous world, and unserious about trying to make that world a genuinely safer place.

My complaints today about the “ban” fall into five basic baskets.

### **No Nuclear Reductions but Increased International Instability**

First, as many of you know, neither the United States nor any other state possessing nuclear weapons participated in the “ban” Treaty negotiations, and no such state will join such a Treaty. This simple fact leads one to the inexorable conclusion that the “ban” Treaty will not actually accomplish its stated purpose – to “ban” nuclear weapons – because it will not actually eliminate a single nuclear weapon.

What the “ban” treaty *may* do is make the world a more dangerous and unstable place by seeking to delegitimize the “extended deterrence” alliance relationships that the United States has with its allies in Europe and in the Asia-Pacific – relationships which for decades have contributed to international peace and security by deterring aggression by expansionist powers. Considering the threats that the United States, its extended deterrence allies, and its security partners face right now, it would be extraordinarily foolish and dangerous to undercut these deterrent relationships. If it harmed those extended deterrence relationships, the “ban” would actually work *against* international peace and security, making conflict and aggression more likely, degrading existing security relationships, and thus actually undermining stability and increasing the risk of escalation and nuclear conflict.

It is important to keep in mind that the “ban” attempts to bar any assistance to or involvement with any activity prohibited by the treaty and to make any involvement in nuclear weapons relationships an activity prohibited by the treaty. As a result of this combination, some might seek to interpret the “ban” to make it unlawful for any State Party to the “ban” to engage in *any* security relationship with a country that relies in part upon nuclear weapons for its own security. States Party to the “ban” might also be pressured to suppress any involvement by their nationals or businesses in commercial relationships with any entities involved in such

relationships. This could cut off scores of countries from essential security relationships they presently enjoy with any nuclear weapons possessors or any state in Europe or East Asia otherwise involved in “extended deterrence” relationships, upending much of today’s international security environment. Serious governments around the world may want to ask themselves whether they are sure this is a really good idea.

### **Make Disarmament More Unlikely**

Second, proponents of the nuclear weapons “ban” presumably seek to create a world in which nuclear weapons no longer exist, but what they need to realize, however, is that this treaty not only will not accomplish its purpose – the banning of nuclear weapons – it is also likely to make nuclear disarmament *less*, not more, likely. The nuclear disarmament policies of the Obama Administration, as stated in his 2009 speech in Prague, played to and encouraged unrealistic expectations for nuclear disarmament, as well as setting the stage for equally unjustified frustrations when such wildly unrealistic expectations were not met. The “ban” effort grows out of, and exacerbates, these dynamics, and will undoubtedly poison relationships between its advocates and the many countries that sincerely seek a better world but also either have nuclear weapons themselves or otherwise rely upon them for protection against potential aggression in the world in which we currently live. Meanwhile, the “ban” encourages a pernicious false equivalency between some states with nuclear weapons that seek to upend the global order, and none of which are representative democracies, and the United States and *our* Allies – who for decades have successfully used nuclear deterrence to prevent war between the great powers, to forestall forcible territorial revision in Europe and Asia, and to preserve global stability.

As a result, the new treaty may, ironically, make nuclear disarmament *less* likely than ever. But this is not only true in terms of broad geopolitical effect, for the proposed treaty bakes some actual impediments to disarmament into its very text. Its Article 1 provisions, for example, would actually prohibit a nuclear weapons possessor that joined the treaty from assisting with the safe and effective removal and dismantlement of another country’s nuclear weapons. Even if the ban effort otherwise made sense, this seems a needless, self-imposed obstacle to actually bringing about the global dismantlement the text purportedly wishes to see occur.

### **Disarmament and Nonproliferation Would be Unverifiable**

Third, any responsible effort to rid the world of nuclear weapons must address the challenges of verifying their elimination – and the “ban” conspicuously does not. The United States has long recognized the importance of verification measures and continues to support efforts, such as the International Partnership for Nuclear Disarmament Verification, to tackle this problem. The “ban” treaty, on the other hand, seems remarkably *unserious* about disarmament

verification, for it leaves all significant disarmament verification issues to be determined later – and what these are, and when this will be, it does not say. The idea that the ban treaty provides a workable framework for verifying the dismantlement of a state’s nuclear program is wishful, and indeed simply magical, thinking.

Indeed, on the crucial issue of nonproliferation verification, the “ban” actually enshrines a significant step *backwards* by endorsing a system that has been understood for the last two decades as being inadequate to the task of keeping a non-nuclear weapon state from diverting peaceful nuclear technology to prohibited purposes.

Under the new treaty, the baseline requirement for states to comply with their nonproliferation verification obligations is a so-called INFCIRC/153 comprehensive safeguards agreement with the International Atomic Energy Agency (IAEA). Such agreements require countries to declare their nuclear materials and authorize IAEA inspectors to verify that such materials are not diverted to improper purposes, but as the world’s experience with Iraq showed more than 20 years ago, INFCIRC/153 is not an sufficient tool to address a government that is seeking to hide a nuclear program. It is therefore appalling that negotiators, at the very least, did not see fit to also require adherence to an IAEA Additional Protocol – which does much more to address the challenge of detecting illicit activities that the host government does not actually *choose* to declare. The “ban” drafters’ choice to tie nonproliferation verification to a demonstrably obsolete measure strikes a blow against the existing verification standard.

The “ban” thus contains no system at all for verifying actual nuclear disarmament – a point that goes back to my earlier observation that the treaty is entirely unserious about real disarmament – and is a step backwards on the related critical issue of verifying nondiversion. This approach is doomed to ineffectiveness, particularly were these weak verification procedures applied to sophisticated former possessors of nuclear weaponry with long and deep experience in nuclear weapons design, development, production, and maintenance. The “ban” approach, in fact, is the same approach that in the past all but *invited some states to* cheat with regard to clandestine nuclear weapons programs.

The drafters of the “ban” were either unaware that their text suffered from these crushing problems, or they knew it and just didn’t care. In neither case, however, does the effort seem a very serious one; it’s hard to see how anyone who truly cared about these issues could support it.

## **Legal Implications**

Fourth, the “ban” has legal implications that are alternatively self-contradicting and potentially highly problematic. To be sure, those countries participating in the negotiation of the “ban” treaty text achieved their goal of producing a text as quickly as possible. But in doing so,

they also seem to have provided an example of the phenomenon described in the saying, “If you want it bad, you get it bad.” The treaty seems to fall on its face in its avowed purpose of seeking to create or foster a new legal norm of non-possession, and indeed its drafting seems likely to have some potentially perverse and very problematic consequences for States Party to the treaty.

Fundamentally, the “ban” treaty would not impose any new legal obligation upon non-participating nuclear weapons possessors or their allies. Moreover, the “ban” would have no impact upon customary international law. If anything, in fact, rather than creating or solidifying such a norm, the treaty process itself makes clear that there is *no* customary international legal norm against nuclear weapons possession.

To begin with, the states whose practice and *opinio juris* matter for purposes of forming new norms of customary international law related to the possession of nuclear weapons do not actually support the “ban”, do not believe there is any legal norm of non-possession, and have consistently and repeatedly voiced their opposition to any such legal rule.

Moreover, the “ban” document itself also demonstrates that there is no legal norm of non-possession of nuclear weapons, for its very text contradicts the idea that nuclear weapons possession is *per se* unlawful. The “ban” contemplates that countries may join it while still possessing nuclear weapons, or while having such weapons stationed in their territory. They would only have to eliminate such things pursuant to deadlines that are *not* set in the treaty itself and that would have to be determined by a meeting of States Party subsequent to their accession to the treaty. Countries with nuclear weapons can in theory remain in the treaty, therefore, for some period of time of indefinite duration that cannot be known beforehand, assuming that it is indeed set at all. Plainly, this does *not* support any belief in the *per se* impermissibility or unlawfulness of possession. Moreover, the “ban” treaty also expressly contemplates that it may not, in fact, be the final instrument on nuclear disarmament, since States Party are expected to consider “further measures for nuclear disarmament” in the future. This also seems incompatible with the existence of any norm of non-possession: what “further measures” did the drafters expect would be so important if prohibition and dismantlement had already occurred?

I should also point out another remarkable problem in the structure of the treaty that hasn’t drawn the attention it deserves. The text of the “ban” treaty seems to impose a grave and, I would submit, potentially fatal legal burden upon any State Party that is attacked by a more powerful state and decides it may need to acquire nuclear weapons – or to rely upon the weapons of another state – for its own self-preservation. Under the terms of the “ban,” a country can withdraw from the treaty only if “extraordinary events . . . have jeopardized the supreme interests of its country.” If an aggressor attacks that country during the 12 month period before such withdrawal becomes effective, however, the country will be *prohibited* from withdrawing for so long as such a conflict continues. Because withdrawal can only occur in the face of

“extraordinary events” that are “related to the subject matter of the Treaty,” it is not even clear that withdrawal would be permitted if a State Party were *not* attacked with nuclear weapons.

A State Party thus might, for instance, be required to suffer unlimited attack by overwhelming *conventional* military force without any lawful recourse to withdrawal from the “ban.” According to the text of the treaty, moreover, no reservations are permitted to any article of the treaty – including to the remarkable withdrawal restrictions. These withdrawal provisions therefore sound almost like they could require national suicide of any state attacked with nuclear weapons or with overwhelming conventional military force. It is very hard to see how it would be in the national security interest of any state to agree to any such rules.

### **Damage to the Global Nonproliferation Regime**

Fifth and finally, as a firm believer in the global nonproliferation regime, I would like to stress what a bad idea the “ban” treaty is likely to be from a nonproliferation perspective. U.S. policy – as well as that of many other nations, great and small, all around the world – has for decades sought, through a variety of bilateral and multilateral mechanisms, to *strengthen* the nuclear nonproliferation regime. The “ban” treaty, by contrast, is likely to harm the effective operation of the global nonproliferation regime by increasingly entangling and preoccupying vital nonproliferation institutions – *e.g.*, the Non-Proliferation Treaty (NPT) review process and the International Atomic Energy Agency – in sterile but contentious debates and disputes over disarmament policy, making it harder for them to do the job the international community *needs* them to do in preventing nuclear proliferation.

As I previously mentioned, the “ban” treaty is likely to undermine the effectiveness of IAEA nuclear safeguards worldwide, because it endorses and relies on a safeguards model from 1972 that the IAEA and the rest of the international community have known since the 1990s is dangerously inadequate for purposes of preventing illicit nuclear activity. This is likely to undermine longstanding IAEA efforts to move nuclear safeguards best practices to the model of the Additional Protocol of 1997, and thus is likely to have the net impact of making global nuclear safeguards weaker and less effective.

The “ban” treaty is also likely to damage the global nonproliferation regime by undermining the Non-Proliferation Treaty (NPT), which forms a cornerstone of that regime. In addition to the fundamental legal differences between the treaties – not least of which is the inadequate verification standard written into the “ban,” which I have already described, and which contrasts unfavorably with the evolving standard of the NPT – the “ban” is likely, in political and diplomatic terms, to create what is in effect a *competitor* regime to the NPT, and one that would be far less effective in controlling and reducing nuclear dangers. By impeding the effective functioning of the NPT regime – and perhaps even by enticing defections *from* the

NPT by countries looking for an excuse to shirk the responsibilities of nonproliferation seriousness without entirely forswearing opportunities for anti-nuclear virtue-signaling – the “ban” seems likely to undermine global nonproliferation norms and institutions in favor of an ineffective and dysfunctional alternative.

Why any *real* supporter of disarmament would countenance anything likely to have such a damaging effect upon the nonproliferation regime is beyond me. Whatever *other* conditions would also have to exist to make nuclear disarmament a feasible policy option for any weapons possessor, it is hard to imagine one could ever persuade a possessor to give up nuclear tools without rock-solid assurances that *other* countries will not be able to develop them – that is, without rock-solid confidence in the nonproliferation regime. If the “ban” damages the nonproliferation regime as I fear it is likely to do, therefore, this is yet another way in which the new treaty may be remembered as a spectacular “own goal” for the disarmament movement.

### **The Bottom Line**

For all of the foregoing reasons, it is hard to imagine a diplomatic and legal effort that would be better calculated to *discredit* the disarmament community by demonstrating – to nuclear weapons possessors, to any state that in any way relies upon nuclear weapons for its national security, and indeed to any thoughtful observer of this process – that advocates of the “ban” are fundamentally *unserious* about addressing the real challenges of maintaining peace and security in a complicated and dangerous world, and of trying to make that world a genuinely safer place.

Now, I don’t imagine I’ll have convinced all of you that this is the case, but I do hope I’ve been able to shine a little more critical light on the “ban” effort and on its myriad problems. If its proponents really wished to reduce global nuclear dangers and make the odds of achieving a peaceful, disarmed world at least somewhat better, there are surely far better things they could have done – and perhaps we’ll be able to talk about some such things here sometime soon. In the meantime, however, *this* mess of a treaty is only likely to make things worse. One can only hope that wiser heads will prevail, and that countries will see the “ban” as the counterproductive misadventure that it really is before they codify its errors and its confusions with their accession.

At any rate, thanks again for inviting me.

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