



AGENCY FOR THE PROHIBITION OF NUCLEAR WEAPONS IN
LATIN AMERICA AND THE CARIBBEAN

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Regional consultations on the NPT: Towards the 2018 PrepCom

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Panel II: The NPT Review Cycle – The regional perspective

- **NPT challenges and opportunities for the GRULAC region. What is the relation between the Treaty on the Prohibition of Nuclear Weapons and the NPT? Experience from 50 years of Tlatelolco and the establishment of NWFZ**
- **Priorities for GRULAC region for the success of the 2020 NPT Review Conference**

We are in the second year of the 2020 Review Cycle. As we all know, it takes four years. The review cycle comes to its completion with the final document adopted by the Review Conference which meets every five years.

According to Article VIII, paragraph 3, of the NPT, the objective of the Conference is “to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised”. In this sense, the Conference is supposed to express the view of the parties concerning the operation of the Treaty in the preceding five years and to make recommendations concerning the next five years.

¹ This document was presented by the Secretary-General of OPANAL at the “Regional Consultations on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT): Towards the PrepCom 2018”. The consultations were convened by Mexico and Poland with two objectives: **1)** to promote debate among Latin American and Caribbean States towards the 2018 NPT PrepCom (Geneva, from April 23rd to May 4th, 2018); and **2)** to create a platform for the Preparatory Committee Chair (Amb. Adam Bugajski – Poland) to collect ideas, regional perspectives, and undertake broad consultations in the lead-up to the 2018 NPT Preparatory Committee.

The tenth Review Conference in 2020 will not have the advantage of a final document from the immediately preceding Conference. It should therefore examine the implementation of the last Final Document, which was adopted in 2010. In fact, as it happened in the previous Conferences, the Review should also take into account the results of the Conferences in 1995 and 2000. You all remember that the Conclusions and Recommendations for Follow-on Actions in the Final Document of 2010, contain 64 actions. Since I am invited to speak on the regional perspective, I would mention those actions which are related to this scope.

Action 9 encourages the establishment of further Nuclear Weapons Free Zones. In the last eight years there was no progress in this matter. That same Action 9 deals with the legally binding protocols to the NWFZ Treaties, which include negative security assurances, encouraging the concerned States to review any reservations to these Protocols.

In pursuance to Action 9, the Member States of OPANAL are proposing arrangements to France and Russia and are going shortly to do the same to the United Kingdom and the United States. These arrangements, under the form of Adjustments, will take the form of a common understanding between those Parties to the Protocols to the Treaty of Tlatelolco and the Parties to the Treaty. If the initiative succeeds, any controversy concerning those Protocols will disappear, consequently strengthening Tlatelolco and achieving a rare progress in the field of nuclear disarmament.

The 2010 Final Document also deals with the implementation of the 1995 Resolution on the Middle East. As you know, the main aspect of that text was the convening of a conference in 2012 on the establishment of a Middle East zone free of nuclear weapons and all other weapons of mass destruction to be attended by all States of the Middle East. It adds that the terms of reference of the conference would be the 1995 Resolution. This specific decision was not carried out. An attempt to make progress in this importantly crucial matter, which was included in the draft final document of the 2015 Conference, did not reach consensus leading to the failure of the Conference.

For the 2015 Review Conference, the States Parties to the Treaty of Tlatelolco submitted a working paper containing 16 elements that should necessarily be in the Final Document of the Conference (NPT/CONF/2015/WP.40). Those elements derive from the numerous declarations and communiqués issued by the members of OPANAL in previous occasions. Although there was no final document and, hence, those proposals were not included, they will be certainly the basis for further efforts OPANAL Member States will address in the current Review Cycle. A few weeks after the closure of the 2015 Review Conference, OPANAL issued a communiqué restating the main elements that our Member States would like to see in the failed final document. There is thus ample evidence that OPANAL and its Member States closely participate in the Review Process of the NPT showing their full commitment to the Treaty.

This is not surprising, since Latin America and the Caribbean was the first region that established a legal norm on nuclear disarmament and non-proliferation, preceding the NPT. The fact that the Treaty of Tlatelolco created an organization, the only one totally devoted to nuclear disarmament and non-proliferation, makes it possible that its 33 Member States conduct a constant coordination issuing at least twice a year comprehensive documents on the question of nuclear weapons. The Organs of OPANAL –the General Conference and the five States Council– provide the opportunity of frequent exchange of views.

It was not surprising that the Latin American and Caribbean States had a very active participation in the Open-ended Working Group which in 2016 proposed the negotiation of a legally binding instrument to prohibit nuclear weapons. It is not surprising either that the negotiating Conference was chaired by a distinguished ambassador from Costa Rica.

There is no doubt, at least to the majority of the international community, that the main event since the 2010 Review Conference has been the conclusion and opening for signature of the Treaty on the Prohibition of Nuclear Weapons, leading towards their total elimination. The Treaty has been receiving acerb criticism from the part of nuclear weapon possessors and States members of alliances based on nuclear weapons.

It is appropriate to address this matter, on this occasion, precisely because one of the arguments against the Treaty on the Prohibition of Nuclear Weapons is centred on the assertion that it undermines the NPT.

The main objective of the NPT was to prevent additional States from acquiring nuclear weapons after China had joined the club in 1964. In the NPT, the five permanent members of the United Nations Security Council (P5) are identified as Nuclear-Weapon States. Specialists generally agree that the NPT has been quite successful since, after five decades, the number of additional proliferators has been limited to four.

One of the statements by nuclear-weapon States at the First Committee of the UN General Assembly in 2017 sustains that:

“this ban treaty is at odds with the existing non-proliferation and disarmament architecture. This risks undermining the NPT, which has been at the heart of the global non-proliferation and disarmament efforts for almost 50 years, and the IAEA Safeguards regime which supports it”ⁱ.

It is important to quote some additional cries of alarm that bring a clear contour to this central block of argument. For example:

“[...] the ban treaty has the potential to do real damage to the NPT [...] It exacerbates political tensions on disarmament, dividing states into overly-simplified camps of ‘nuclear weapons supporters’ and ‘nuclear weapons banners’, rather than recognizing shared interests – specially on the challenges involved in creating the conditions that would make possible further disarmament progress. Reinforcing this false dichotomy and worsening the world’s polarization on disarmament will make further progress within the institutions that have been vehicles for success, such as the NPT review process, significantly more difficult”ⁱⁱ.

This last statement implies that inaction and conformism would be more likely to bring success for the NPT review process.

These alarming tones sound as a *procès d'intentions*. No objective observer of the whole process that led to the Prohibition Treaty, started at the United Nations General Assembly in 2015 and concluded in September 2017, would recognize and admit those alleged intentions of polarization.

The NPT was drafted and proposed by the Co-Chairmen –the United States and the Soviet Union– of the Eighteen Nations Disarmament Committee, the then specialized multilateral body.

In order to attract the support of the non-nuclear-weapon States which were and still are the majority of the international community, it was necessary that the NPT contained a *quid pro quo*. The so-called “grand bargain” is Article VI:

“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 date and to nuclear disarmament; and on a treaty on general and complete disarmament under strict and effective international control.” (Emphasis added)

Note that the subject of Article VI is “Each of the Parties”. The other articles that establish obligations have different subjects, namely:

Article I – “each nuclear-weapon State Party”;

Article II and III (par. 1 and 4) – “each non-nuclear-weapon State Party”;

Article III (par. 2) – “each State Party”;

Article VI – “each of the Parties”.

Articles I, II and III (paragraphs 1 and 4) are clear, referring either to “nuclear-weapon States” or to “non-nuclear-weapon States”.

Article III, Paragraph 2 is a negative obligation that has to be constantly observed by all (“each State Party”):

“Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.” (Emphasis added)

One could think that “each State Party” is a synonym to “each of the Parties”. But we have to bear in mind that any treaty, especially one of this importance, would not be drafted without the utmost care. This slight difference in the wording of the subjects cannot be considered a slip of style. The drafters worded the subjects differently according to the obligations involved.

The positive obligation contained in Article VI does not imply a constant observance. No prescribed timing is set for the general objective “to pursue negotiations”. Article VI contains several obligations. These obligations will be complied with in different manners, with different timings and will not necessarily involve all the Parties at every moment. That is why in Article VI we have “each of the Parties” whereas in Article III, paragraph 2, the subject is “each State Party”.

According to Article VI “Each of the Parties to the Treaty undertakes to pursue negotiations”. What are these negotiations about? The term “negotiations” refers to three different objectives, namely:

1. “Negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date”;
2. “Negotiations in good faith on effective measures relating” ... “to nuclear disarmament”;
3. “Negotiations in good faith” ... “on a treaty on general and complete disarmament under strict and effective international control”.

Let’s reflect on which States Party would have to be involved in each of those three negotiations. It should also be noted that the first two negotiations may not necessarily take the form of a treaty. That’s why the expression “effective measures” is employed.

The negotiation on “cessation of the nuclear arms race” is to be carried out by those which take part in that race: the Nuclear-Weapon States.

The “effective measures” concerning “nuclear disarmament” are to be negotiated by “Each of the Parties” to the NPT, whether they have or not nuclear weapons. The Ban Treaty is certainly an effective measure to achieve nuclear disarmament, even though Nuclear-Weapon States did not participate in its negotiation and strongly oppose it. The States that negotiated and support the Ban Treaty are clearly complying with Article VI of the NPT since the Ban Treaty aims at the elimination of nuclear weapons even though it cannot produce that result automatically unless all nuclear-weapons possessors become parties to it.

I sustain therefore that the Treaty on the Prohibition of Nuclear Weapons effectively corresponds to the implementation of the NPT. No one can say the opposite in good faith.

The third negotiation envisaged in Article VI: a “treaty on general and complete disarmament”, is not presented as an “effective measure”. It is the ultimate objective. It can only be reached by means of a treaty. It would deal not only with nuclear weapons. It would complete all the previously mentioned effective measures. It would come after the cessation of the nuclear arms race and it would complete all the efforts for nuclear disarmament. Moreover, it would aim at avoiding a race to develop conventional capabilities and raise military escalation. In that sense, that treaty supposes the broadest participation.

The three elements of Article VI are correlated but do not form a single compact block:

1. “Negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date”;
2. “Negotiations in good faith on effective measures relating” ... “to nuclear disarmament”;
3. “Negotiations in good faith” ... “on a treaty on general and complete disarmament under strict and effective international control”.

It is a misapprehension to consider –as mentioned by one delegation at the UNGA First Committee– that the Ban Treaty:

“dissociates itself from the goal of general and complete disarmament, which is at the core of Article VI of the NPT, the Treaty could lead to a race to develop conventional capabilities and consequently military escalation”ⁱⁱⁱ

Measures for the cessation of the nuclear arms race, which were generally successful, have never been criticized as impinging upon general and complete disarmament; and neither can this be said of the Ban Treaty.

The Ban Treaty does not ensure nuclear disarmament until the nuclear-weapon States join it. However, no one can prove that it is not an “effective measure” towards nuclear disarmament. The Treaty does not produce that result by itself, but it is a giant step in that direction. By contrast, a statement of intention or desire, which might take the form, for instance, of a declaration, could not be considered an “effective measure”.

This digression concerning Article VI of the NPT had to be made because those States opposing the Ban Treaty have been giving special emphasis to the allegation that it undermines the NPT. It is understandable that those States feel uncomfortable and even insecure with an initiative taken, regardless of their disapproval, by the majority of the Member States of the United Nations.

Suffice to read one of the paragraphs in the preamble of the Ban Treaty:

“Reaffirming also that the full and effective implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security.”

Reading the above quotation of this legal instrument, it is difficult to understand, as declared by one delegation at the First Committee, how the Ban Treaty:

“threatens to undermine the NPT and the non-proliferation regime by creating an alternative norm and refusing to enshrine the central importance of the NPT”^{iv}

The States that support the Ban Treaty do not consider it to be an alternative to the NPT. They consider it a complement that strengthens compliance to the NPT.

Another strange argument was heard at the First Committee, that:

“in the event of conflicting norms with existing instruments and regimes including the NPT, the negotiators decided that the Prohibition Treaty shall prevail. In concrete terms, this means that States will be able to choose to leave the NPT, while outwardly and without verification displaying commitment to disarmament and non-proliferation”^v.

Where do we find in the Ban Treaty any basis for such assertion?

A reverse argument affirms that a State Party to the NPT cannot be a party to the Ban Treaty since the NPT expressly refers to “nuclear-weapon State Party” thereby admitting the possession of nuclear weapons by five States Party. Therefore, to prohibit nuclear weapons would purport to deny the validity of the NPT. This argument reveals that some have the strange conviction that the NPT is a treaty designed to confirm the possession of nuclear weapons by some States while forbidding this condition to the other States. On the contrary, the Preamble of the NPT is clear on the goal of nuclear disarmament, which cannot be achieved if the nuclear-weapon States do not relinquish their arsenals. In that sense, the NPT is an interim legal instrument. It is not conceived as the end of the road.

Other arguments criticising the Ban Treaty are rather ambiguous. They take the form of: “*yes, maybe but not now, not this way*”. This is apparent in the following passage also stated at the First Committee:

“we do not question the possibility of and even the need for a ban on nuclear weapons as an effective nuclear disarmament measure under the NPT Article VI at a final stage of multilateral nuclear disarmament process so as to make it irreversible. Under the current circumstances such a step is clearly premature”^{vi}.

The great majority of the UN membership thinks that the ban on nuclear weapons should come at an early stage, not at a final stage. The Ban Treaty is thought to lead to the elimination of nuclear weapons. If we reach “a final stage of multilateral nuclear disarmament process”, it would mean that the prohibition has already been accepted by all.

That same State added the following comment:

“the way [...] chosen – to impose nuclear weapons ban through a treaty – seems fundamentally wrong and counterproductive from the viewpoint of nuclear disarmament prospects”^{vii}.

It is not possible “to impose nuclear weapons ban through a treaty” on any State, unless that State, in the exercise of its sovereign right, decides to accept such prohibition, by means of ratifying or acceding to the treaty. Any student of International Law knows that a treaty cannot impose anything *per se*. In order to “impose” an obligation, a treaty has to be signed and ratified by the State that undertakes to fulfil such obligation.

International Law functions differently from internal law.

It would seem that nuclear weapons possessors feel indeed the danger of being imposed upon. This is not so much because they are ignorant on the Law of Treaties. In fact, they feel that nuclear weapons as weapons of mass destruction are intrinsically illegal.

i http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/6Oct_UK.pdf

ii http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/12Oct_USA.pdf

iii http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_France.pdf

iv http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_France.pdf

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vi http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_Russia.pdf

vii http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_Russia.pdf