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

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## Developing a Robust Nuclear Weapons Ban Treaty

### Submitted by Peace Boat

#### Introduction

1. Developing a Nuclear Weapons Ban Treaty (NWBT) is a historic enterprise. Nearly 72 years have passed since the use of nuclear weapons on Hiroshima and Nagasaki. Today the average age of the survivors, or *Hibakusha* - those who have directly experienced the catastrophic humanitarian consequences - exceeds 80 years. The NWBT being negotiated needs to be a robust treaty that establishes an unequivocal and unconditional norm against nuclear weapons on high moral grounds, and categorically criminalizes nuclear weapons without exceptions. It will thus stand as a lasting legacy against nuclear weapons, even as direct memories of the human suffering may fade away.

2. Most of the states that possess nuclear weapons and other states that are dependent upon nuclear weapons in their security policies (hereafter, “nuclear-armed states” and “nuclear-dependent states”) have so far refused to participate in the UN negotiating process of prohibiting nuclear weapons. Indeed, such states will not be able to accede to the NWBT as long as they possess or continue to rely on nuclear weapons in their security policies. They will need to undertake fundamental changes to their security policies in order to accede to the NWBT. This may not take place in the immediate near future in many of those states. Any attempt to dilute the prohibitions of the NWBT to facilitate the accession of those states, in a way to allow them to accede to the treaty without clearly parting with their attachment to nuclear weapons, not only runs contrary to the central objectives of this treaty, but also is unlikely to result in their actual accession, given their refusal to participate in the negotiation so far. However, it is nonetheless important to prepare for the future accession of those states to the treaty, when they do eventually decide to part with nuclear-dependent policies.

3. The major tasks ahead therefore include, on the one hand, developing a robust treaty to prohibit nuclear weapons in unambiguous terms; and on the other, creating mechanisms to allow the future accession by nuclear-armed states and nuclear-dependent states, so as to engage those states in the process after the establishment of the treaty. Below are some key elements Peace Boat proposes to serve these purposes.<sup>1</sup>

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<sup>1</sup>As an International Steering Group member organization of the International Campaign to Abolish Nuclear Weapons (ICAN), Peace Boat aligns itself to ICAN's “Principles of a treaty banning nuclear weapons” <<http://www.icanw.org/wp-content/uploads/2017/02/ICAN-Principles-TBNW.pdf>>, as well as ICAN's Briefing Papers presented to the March 2017 session of the negotiation (available at the following links). This Working Paper is an effort by Peace Boat to build on them, focusing on some selected elements in reflection of the discussions at the March 2017 session.

<http://www.icanw.org/wp-content/uploads/2017/03/Briefingpaper-HLS.pdf>

<http://www.icanw.org/wp-content/uploads/2017/03/Briefingpaper-1.pdf>

<http://www.icanw.org/wp-content/uploads/2017/03/Briefingpaper-2.pdf>

<http://www.icanw.org/wp-content/uploads/2017/03/Briefingpaper-3.pdf>

### **Preamble – recognition of Hibakusha**

4. To show appreciation for the courageous testimonies and remarks by survivors of nuclear weapons made so far, the NWBT should reflect the call for “No More Hibakusha” in explicit terms. The preamble is the best place to do so.

5. The NWBT should acknowledge the immense devastation and human suffering experienced by the Hibakusha of Hiroshima and Nagasaki, and by the many survivors of nuclear tests around the world. It should also honour their efforts for and dedication to achieving a world free of nuclear weapons. Further, it should call for continued research and education about the reality of the humanitarian consequences of nuclear weapons.

6. Such recognition in the preamble can serve as the basis for the operative provisions on the positive obligations to ensure the rights of victims and survivors and to address the damage caused to the environment. Those provisions in the NWBT can be basic and simple, and do not have to be detailed. Taking into account the far-reaching and multidimensional nature of the damages caused by nuclear weapons, including the effects of radiation, thorough examination will be required for agreement on the practical details, probably in separate instruments in later stages.

### **Core prohibitions – comprehensive prohibitions without ambiguity**

7. The NWBT should prohibit its parties, their nationals, and any other individuals subject to their jurisdiction from engaging in activities such as development, production, testing, acquisition, stockpiling, transfer, deployment, and use and threat of use of nuclear weapons. The treaty should also prohibit its parties, their nationals, and any other individuals subject to their jurisdiction from assisting, financing, encouraging, and inducing prohibited acts.

8. **Development.** The definition of “development” of nuclear weapons is not always internationally established. The NWBT should provide to include the following:

- production of fissile materials for the purposes of nuclear explosive devices;
- design and development of computer models to simulate nuclear explosive devices; multi-point explosive detonation systems for a nuclear explosive device; explosive diagnostic systems suitable for the development of a nuclear explosive device; and explosively driven neutron sources.<sup>2</sup>

9. **Testing.** The NWBT should clearly prohibit any nuclear weapon test explosion or any other nuclear explosion, as prohibited in the Comprehensive Nuclear-Test-Ban Treaty (CTBT). The treaty should also prohibit other forms of nuclear tests, such as subcritical testing, computer modeling, and hydrodynamic trials.

10. **Use and threat of use.** The 1996 Advisory Opinion of the International Court of Justice (ICJ) ruled that the use or threat of use of nuclear weapons are generally contrary to international law, but also that it cannot conclude definitively whether they are lawful or unlawful in “an extreme circumstance of self-defense, in which the very survival of a State would be at stake.” The NWBT should unambiguously provide that any use or threat of use of nuclear weapons is unlawful without exception. Article 2 (4) of the United Nations Charter provides that member States shall refrain from threat or use of force. However, it is also understood that Article 51 of the Charter allows member States to use force in the exercise of their rights of self-defense. Therefore, for the NWBT to fill this legal gap, it is imperative to provide that the use or threat of use of nuclear weapons is unlawful *under any circumstances*.

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2 These refer to the Joint Comprehensive Plan of Action (JCPOA) Annex 1, agreed between EU+3 and Iran in July 2015, as an example of the attempt to define “development” of nuclear weapons.

11. **The threat of use** of nuclear weapons is at the core of nuclear deterrence policy, and constitutes the unique characteristic of nuclear weapons in comparison with other weapons. The concept of nuclear deterrence has provided the basis of justification not only for nuclear-armed states to retain those weapons, but also for other states to seek nuclear weapons. It is therefore important for the new NWBT to clearly prohibit the threat of use of nuclear weapons so that the policy of nuclear deterrence is provided unlawful.

12. **Assisting, financing, encouraging and inducing.** Like other treaties on weapons of mass destruction, there must be a clear provision prohibiting assistance, encouragement, and inducement-directly or indirectly- of the prohibited acts. This is particularly relevant to states that do not possess their own nuclear weapons but rely on nuclear weapons in their security policies through military arrangements with nuclear-armed states. Assistance should be defined to include, but not limited to, hosting, transporting, allowing transits in the territories, deploying on other's behalf, participating in planning, targeting and consultation, as well as financing.

13. UNSC Resolution 1540 (2004) on weapons of mass destruction provides a possible basis for the above-mentioned provisions. It provides that all States “shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use” those weapons and “shall adopt and enforce appropriate effective laws which prohibit any non-State actor” to engage in those acts and to “participate in them as an accomplice, assist or finance them.” The NWBT can adopt a similar approach and language in a way that covers not only non-States actor but also States. UNSC 1540 also decides that all States shall take and enforce effective measures, physical protection measures, effective border controls, national export and trans-shipment controls and law enforcement efforts. These provisions are a useful reference for developing the NWBT.

14. A robust and comprehensive NWBT that covers all nuclear-weapons-related activities, including, but not limited to the above, can be an effective tool to drive nuclear disarmament forward. It will establish a legal norm and create political, economic and social pressures on nuclear-armed states and nuclear-dependent states to take further actions, even without their accession at the initial stage.

#### **Verification challenges – upholding existing non-proliferation mechanisms**

15. Two dimensions of verification challenges are anticipated in the NWBT. One is to verify compliance by State parties that they are not making or having nuclear weapons. The other is to verify the dismantlement of nuclear weapons, when any of the nuclear-armed states eventually decide to abandon their arsenal and join the treaty. The former is the immediate task that can be dealt with by utilizing existing nuclear non-proliferation agreements. The latter is a more challenging task that can be developed and implemented in the future.

16. To verify that State parties are in compliance with the prohibitions on development, production, testing, acquisition, stockpiling, transfer and deployment of nuclear weapons:

- the treaty must provide that State parties shall adhere to full scope safeguards agreements (INFCIRC/153-type agreement) with the International Atomic Energy Agency (IAEA) as a minimum requirement;
- the treaty should uphold the verification regime against nuclear tests provided by the CTBT and also should provide that State parties shall fully cooperate with the CTBTO Preparatory Commission in this regards.

17. The above-mentioned provisions are particularly important to dismiss any claim that the NWBT allows circumvention of the existing non-proliferation mechanisms and thus undermines the NPT regime.

18. Moreover, beyond those existing measures, further strengthening and development of verification measures must be pursued. In order to avoid a prolonged negotiation of the NWBT itself, such efforts as the following can be made in the process of State parties meetings after the establishment of the treaty:

- State parties can agree on having Additional Protocols to the IAEA safeguards (INFCIRC/540 (corrected)) as standard requirements;
- international control on all weapons-usable fissile materials must be strengthened;
- further development of technology and capacity would be required to fully verify the absence of development and testing, including subcritical testing and computer simulation etc;
- verification of non-use of nuclear weapons, or assistance of these acts, can also be explored in the process of State parties meetings of the NWBT.

#### **Preparing for future accession of nuclear-armed states and nuclear-dependent states**

19. Nuclear-armed states and nuclear-dependent states shall only be able to accede to the NWBT after they decide to part with such nuclear-dependent policies, and, in case of nuclear-armed states, after they decide to dismantle all their nuclear arsenals. Thus, the treaty should only allow for their accession once they clearly establish that they are committed to parting with their dependence on nuclear weapons and, in the case of nuclear-armed states, present irreversible, concrete, time-bound, verifiable plans of action to achieve this.

20. The NWBT should clarify the conditions and procedures for nuclear-armed states and nuclear-dependent states to accede to the treaty. It can be discussed and agreed among State parties, possibly in the form of an attached protocol, when any such states expresses its intention or interest to accede to the treaty in the future. In the absence of such a prospect in the near term, this discussion does not have to be hurried and should not be an obstacle to the conclusion of the NWBT. The NWBT itself can be concluded even without defining detailed conditions or procedure in this regard.

21. Verification and enforcement are two key components to facilitate the future accession of nuclear-armed states and nuclear-dependent states. The verification and enforcement mechanisms to be developed and attached in the future must be credible enough for those states to feel confident. Those states that have relied on nuclear deterrence doctrines for their security may seek a strong assurance that the treaty-based framework benefits their security under the NWBT. To that end, it is vital to establish mechanisms within the framework of the NWBT to facilitate dialogue between NWBT State parties and the nuclear-armed states and nuclear-dependent states that are not party to the NWBT.

22. Credible verification mechanisms for nuclear weapons dismantlement shall require full cooperation by the concerned nuclear-armed states, with the participation of NWBT State parties.

23. The enforcement of the NWBT shall entail dispute-settlement mechanisms, including first and foremost through meetings of States parties. When a breach of core prohibitions of the NWBT is established and cannot be redressed through efforts among State parties, it shall be regarded as a threat to international peace and security and constitute a matter under Chapter 7 of the UN Charter. The UN Security Council should thus play a central role in the enforcement of the NWBT. However, because the permanent members of the UNSC-which happen to be the nuclear-weapon States under the NPT-have veto powers, other options should also be explored, such as rescinding veto powers on any dispute arising from the NWBT, and/or recouring to other UN mechanisms, including those in the UN General Assembly and the ICJ.

#### **Conclusion**

24. The proposals made above are designed to develop a robust NWBT so as to

rebut any claim that a NWBT would undermine or allow circumvention of the NPT. Establishing a robust NWBT is not only part of the implementation of Article VI, but also complements and strengthens the current non-proliferation mechanisms under the NPT.

25. The proposals made above encompass the essences of the CTBT, FMCT, and the IAEA safeguards- all measures that states advocating for a “building blocks” approach attach importance to. They have claimed that a legal prohibition of nuclear weapons can only be discussed at the final stage. However, there is no reasonable ground why they cannot now discuss how each of these building blocks can relate to the NWBT. All those states are encouraged to participate in the negotiations in good faith, should they claim to be committed to the goal of a world free of nuclear weapons.

26. Envisioning future accession of nuclear-armed states and nuclear-dependent states shall not allow in any way a “watering-down” of the treaty's core prohibitions. Any such states may decide, one day in the future, to abandon their dependence on nuclear weapons and accede to the NWBT either as a unilateral disarmament action or as a means of collective security by several states. Such states may also be those possessing nuclear weapons that are not party to the NPT. In order to meet the demands of those future scenarios, the NWBT being negotiated today must be concluded as a robust and unambiguous instrument, credible enough to provide nuclear-free security for all.