

A black and white photograph of a severely damaged brick building, likely a church or cathedral, with a tall, narrow tower. The structure is in ruins, with debris scattered around the base. The sky is overcast and grey.

IMPLICATIONS OF A NUCLEAR WEAPONS BAN TREATY FOR JAPAN

Japan—both a nuclear umbrella state and the only country to have suffered attacks by nuclear weapons—will be facing some very difficult decisions as the process towards a treaty prohibiting nuclear weapons moves forward

International Law
and Policy Institute (ILPI)

Center for the Promotion of
Disarmament and Non-Proliferation (CPDNP)
The Japan Institute of International Affairs (JIIA)

ABOUT THE AUTHORS

- **Hirofumi Tosaki** is a Senior Research Fellow at the Center for the Promotion of Disarmament and Non-Proliferation (CPDNP), the Japan Institute of International Affairs (JIIA). He is the author of numerous articles on nuclear arms control, non-proliferation, nuclear strategy and deterrence, missile defense, and so on. He earned his Ph.D. from Osaka University.
- **Nobuo Hayashi** is a Senior Legal Advisor at the International Law and Policy Institute (ILPI). He specializes in public international law, including the use and threat of force, the law of armed conflict, and international criminal law. He has extensive experience publishing academic works, authoring court submissions, advising prosecutors, training professionals, and teaching post-graduate students.

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Executive summary

On 27 October 2016, the UN General Assembly's First Committee voted to commence negotiations in 2017 for the adoption of a legally-binding instrument to prohibit nuclear weapons. This latest development in the movement known as the "Humanitarian Initiative" comes at a time when the divide between the proponents and opponents of a nuclear weapons ban has become increasingly entrenched.

Japan finds itself torn. It is both a state that has relied on a nuclear umbrella for its security in a volatile region, and the only country ever to have suffered nuclear strikes. Japan must consider carefully whether to take part in the negotiations and, if a ban treaty is adopted at the end, whether to sign and ratify it.

Japan must consider carefully whether to take part in the negotiations and, if a ban treaty is adopted at the end, whether to sign and ratify it.

Use and threat of use of nuclear weapons are likely to be among the treaty's core prohibitions. The treaty could affect Japan's security interests, should the prohibition on use be sufficiently broad to encompass use by the United States. The same might result if the treaty were to prohibit threat of use by way of extended nuclear deterrence. Some of the treaty's seemingly procedural provisions, such as the permissibility of reservations, derogations and withdrawals, would also be of relevance to Japan.

Japan's attitude will depend on a number of factors. They include the modalities of the negotiations; the treaty's potential for reducing nuclear threats in Northeast Asia and its perceived impact on Japanese security; Japan's relations with the US, other Western partners, and the Non-Proliferation and Disarmament Initiative; Japan's advocacy of a building-block approach to nuclear disarmament; and public opinion.

It is highly likely that Japan will participate in ban-related debates. The more contentious

issue is whether Japan takes part in the treaty negotiations themselves.

That Japan should do so in view of its historical legacy, humanitarian concern and claim to international moral authority on matters relating to nuclear weapons, as well as domestic and international public expectations of it, is clear.

What is less clear is the negotiations' security implications. On the one hand, Japan's participation in various multilateral fora relating to a nuclear weapons ban to date has not undermined its security in the region or the credibility of its US alliance. Fidelity to the self-appointed task of a "bridge-builder" would also mean that Japan should seek to influence the outcome from within. On the other hand, Japan's participation may prove futile if the adoption of a ban treaty deemed detrimental to Japanese security is in fact a foregone conclusion. In addition, Japan would find it difficult to participate should it encounter US objections.

Whether Japan will sign and ratify the eventual ban treaty is a matter that is shrouded in even more uncertainties. Arguably, the treaty will be similar to numerous other programmatic treaties that are intended to engender convergent state behavior over time, as well as those intended to embody and promote weighty international values. From this point of view, Japan should accept the ban treaty, as long as (a) it does not worsen Japan's security in the region; (b) it preserves conventional deterrence; and (c) it enables Japan to catalyze change in Northeast Asia's security environment, rather than merely maintaining the status quo and reacting to external changes.

It may be objected that nuclear-armed states and umbrella states consider a ban on nuclear weapons without the support of effective compliance, verification and enforcement a poor substitute for their nuclear deterrence. Japan will need to be convinced not only of the treaty's adequacy as a means with which to mitigate nuclear threats in Northeast Asia, but also of its compatibility with the US nuclear umbrella.

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List of acronyms

CTBT	Comprehensive Nuclear Test-Ban Treaty
DPRK	Democratic People's Republic of Korea
IAEA	International Atomic Energy Agency
ICBM	Inter-continental ballistic missile
ICJ	International Court of Justice
MRBM	Medium-range ballistic missile
NGO	Non-governmental organization
NATO	North Atlantic Treaty Organization
NNWS	Non-nuclear-weapon state
NPDI	Non-Proliferation and Disarmament Initiative
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NSS	National Security Strategy
NWBT	Nuclear weapons ban treaty
NWS	Nuclear-weapon state
OEWG	Open-Ended Working Group
PrepCom	Preparatory Committee for the NPT Review Conferences
SLBM	Submarine-launched ballistic missile
UN	United Nations
UNGA	United Nations General Assembly
US	United States

1. Introduction

On 27 October 2016, the UN General Assembly (UNGA)'s First Committee voted, 123 in favor and 38 against, with 16 abstentions, to adopt a resolution according to which there will be “a United Nations conference in 2017, to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination”.¹ Japan voted against the resolution.

This resolution marks the latest and most concrete step taken by the proponents of a new legal instrument banning nuclear weapons. Although it is not clear what form the final product will take, a nuclear weapons ban treaty (NWBT) is perhaps the likeliest. This initiative comes as the divide between the idea's proponents and opponents, with some of the nuclear umbrella states caught in between, has become increasingly entrenched over the years. It is harder than ever before to maintain the “middle road” in such a setting. The proverbial bus is about to leave, and one must decide whether to get on board or let it go.

It is harder than ever before to maintain the “middle road” in such a setting. The proverbial bus is about to leave, and one must decide whether to get on board or let it go.

The choices are particularly daunting for Japan. Japan is both a state that has relied on a nuclear umbrella for its security in a volatile region, and the only country ever to have suffered nuclear strikes. On the one hand, Tokyo has been critical of what it calls a premature attempt at prohibiting nuclear weapons, citing the need for realism in Northeast Asia with a bellicose

nuclear-armed state in the neighborhood and the stabilizing role that the Japan-US security alliance has played therein. On the other hand, Japan finds itself under growing domestic and international pressure to promote nuclear disarmament by supporting the ban. Civil society actors, including the “hibakusha” (atomic bomb survivors) in particular, would be bitterly disappointed if Japan chose not to get involved.

Japan is both a state that has relied on a nuclear umbrella for its security in a volatile region, and the only country ever to have suffered nuclear strikes.

The question before us is therefore two-fold. First, should Japan participate in NWBT negotiations? If so, why? If not, why not? Second, assuming that an NWBT of some description is adopted in the end, should Japan sign and ratify it? If so, why? If not, why not?

This report proceeds as follows. First, it synthesizes the historical background and Japan's approach to nuclear disarmament. Second, we consider some of the main prohibitions the eventual treaty is likely to contain, as well as those factors that are likely to affect Japan's attitude on the matter. Third, the paper presents arguments for and against Japan's participation in the negotiations. Questions such as whether taking part would expose Japan to security threats, and whether the process proves sufficiently inclusive to accommodate Tokyo's concerns, are key. Fourth, we assess considerations in favor of Japan signing and ratifying the eventual NWBT, as well as those against it. Of particular significance here are the treaty's effectiveness and its impact on the Japan-US alliance.

1 71/XX Taking Forward Multilateral Nuclear Disarmament Negotiations, para. 8. Available at http://www.icanw.org/wp-content/uploads/2016/09/71UNGA-Taking-Forward-DRAFT-RESOLUTION-28-SEPTEMBER-2016.pdf?mc_cid=f9972d09a3&mc_eid=69289b91ca.

2. Background

Let us begin by briefly recapitulating the international milestones through which the idea of a nuclear weapons ban has come to where it is today. We will then survey Japan's approach

to nuclear disarmament, including its official stance vis-à-vis the humanitarian dimensions of nuclear weapons.

2.1 Road to a nuclear weapons ban treaty

The past half-century has witnessed at least four major turning points in the process towards a nuclear weapons ban. They are: (a) the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) adopted in 1968; (b) the International Court of Justice (ICJ)'s advisory opinion on nuclear weapons rendered in 1996; (c) the NPT Review Conference noting the weapons' "catastrophic humanitarian consequences" and giving birth to a movement known as the Humanitarian Initiative, in 2010; and (d) the Open-Ended Working Group (OEWG) adopting its final report in 2016 in which the group's majority recommended the commencement of NWBT negotiations.

North Korea) declared its withdrawal from the treaty in 2003, although the precise legal status of this action is unclear.

The idea of a ban as it is currently debated cannot be adequately understood without appreciating the crucial role that the NPT regime has played in its development.

2.1.1 NON-PROLIFERATION TREATY, 1968

The NPT is a cornerstone of the international nuclear disarmament and non-proliferation regime. The NPT itself does not specifically refer to the negotiation or conclusion of a treaty banning nuclear weapons. Nevertheless, the idea of a ban as it is currently debated cannot be adequately understood without appreciating the crucial role that the NPT regime has played in its development.

The NPT's Article IX(3) limits its parties designated as nuclear-weapon states (NWSs) to those which have "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967". So defined, the NPT treats the following states as NWSs: China, France, Russia, the United Kingdom and the United States. Article I binds NWSs in their obligation

not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

The NPT opened for signature in 1968 and entered into force in 1970. Its provisions mainly concern three areas (sometimes called "pillars"), namely: the non-proliferation of nuclear weapons; nuclear disarmament; and the right to peaceful uses of nuclear energy. Initially given a 25-year lifespan, the NPT was extended indefinitely in 1995. Today, nearly all UN member states, including the five nuclear-armed permanent members of the Security Council, are parties to the treaty. Of the four additional states commonly thought to possess nuclear weapons, India, Israel and Pakistan are not NPT parties and therefore formally remain outside of its regulatory framework. The Democratic People's Republic of Korea (DPRK, or

Whether Article IX(3) designations necessarily entail the conclusion that the NPT confers upon NWSs "the right to possess nuclear weapons", as Tony Blair stated in the British Parliament on 21 February 2007,² may be debatable. The treaty does create one set of rights and obliga-

² Available at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070221/debtext/70221-0003.htm>.

tions and tie them to a historically frozen group of states, however, an important element in the “grand bargain” struck with the NPT’s other states parties.

Within the meaning of the NPT, all other states parties are non-nuclear-weapon states (NNWSs). Article II obligates NNWSs

not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

By virtue of the NPT’s Article III, NNWSs also undertake to accept full-scope safeguards regimes agreed upon with the International Atomic Energy Agency (IAEA).

It is often said that the NPT embodies a “grand bargain” struck between NWSs and NNWSs. One component of the bargain concerns NNWSs effectively renouncing their right to acquire nuclear weapons, a significant concession vis-à-vis their nuclear-armed counterparts. This, combined with NWSs’ undertaking of non-transfer and non-assistance, makes up the NPT’s non-proliferation pillar.

Of the bargain’s two other components, commitment to nuclear disarmament is directly relevant to our discussion (the other relates to the peaceful uses of nuclear energy). According to Article VI,

[e]ach of the Parties to the Treaty undertakes to pursue negotiation 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.

These are effectively compensations requested by NNWSs in exchange for their acceptance of non-proliferation obligations.

The NPT has largely been considered a success on the non-proliferation and peaceful uses pillars. Although, technically, Article VI addresses itself to all NPT states parties, progress on the nuclear disarmament pillar has in practice depended almost entirely on NWSs. Its unevenness over

the years has left the NWS side of the “grand bargain” largely unfulfilled, inspiring growing frustrations among numerous NNWSs and civil society along the way.

2.1.2 NUCLEAR WEAPONS ADVISORY OPINION, 1996

On 15 December 1994, the UN General Assembly adopted Resolution 49/75K. “Noting the concerns expressed in [the 1990 NPT Review Conference] that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time”, the assembly requested the ICJ to give an advisory opinion on the question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”

“No comprehensive and universal prohibition of the threat or use of nuclear weapons exists” – the ICJ

On 8 July 1996, the ICJ issued its landmark advisory opinion on nuclear weapons.³ In it, the court found, *inter alia*:

- That no customary or treaty-based international law specifically authorized the threat or use of nuclear weapons;
- That no comprehensive and universal prohibition of the threat or use of nuclear weapons existed;
- That nuclear weapons may not be used or threatened in a manner contrary to Article 2(4) or not in fulfilment of all the requirements under Article 51 of the UN Charter;
- That a threat or use of nuclear weapons was subject to the international law applicable in armed conflict, as well as other treaty obligations and undertakings dealing expressly with such weapons; and

3 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226. Available at <http://www.icj-cij.org/docket/files/95/7495.pdf>. See also Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law* (Cambridge: Cambridge University Press, 2014).

- That there is an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects and effective international control.⁴

By far the most controversial aspect of the court's opinion concerns its agnosticism regarding extreme self-defense. The ICJ adopted the following passage in a seven-to-seven split decision, with the president's casting vote:

[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; [h] owever, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.⁵

In his declaration, President Bedjaoui warned against those “who will inevitably interpret [this paragraph] as contemplating the possibility of States using nuclear weapons in exceptional circumstances”.⁶ He continued: “I feel obliged in all honesty to construe that paragraph differently, a fact which has enabled me to support the text”.

Rather than unreservedly affirming the illegality of nuclear weapons, the ICJ essentially left the question unresolved.

Despite Bedjaoui's exhortations, however, the opinion did embolden nuclear-armed and umbrella states in their claim that international law authorized them to threaten or use nuclear weapons in such circumstances. Rather than unreservedly affirming the illegality of nuclear weapons—an outcome that those who had pressed for an ICJ advisory opinion had hoped and confidently expected—the court essentially

left the question unresolved. On the contrary, the opinion's ambiguities only served to entrench the two diametrically opposed positions, each “taking the advisory opinion as evidence that it was right”.⁷

2.1.3 HUMANITARIAN INITIATIVE

The 2010 NPT Review Conference adopted by consensus a final document in which it twice noted with concern “the catastrophic humanitarian consequences” that would result from any use of nuclear weapons.⁸ This gave rise to what is known as the “Humanitarian Initiative”.⁹ In May 2012, the NPT Review Conference's Preparatory Committee (PrepCom) received a joint statement presented on behalf of 16 states on the “humanitarian dimension” of nuclear disarmament. During the committee meetings, Norway also announced its intention to host “a conference in spring 2013 to highlight the humanitarian consequences of nuclear weapons, including the incompatibility of their use under international humanitarian law”. Five months later, 35 states jointly submitted a statement to the UNGA First Committee in which they broadly reiterated nuclear disarmament's humanitarian dimension.

To date, three major international conferences have been held on the humanitarian impact of nuclear weapons. In March 2013, Norway gath-

7 Gro Nystuen and Kjølsv Egeland, “A ‘Legal Gap?’ Nuclear Weapons Under International Law”, March 2016. Available at https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law.

8 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document Vol. I Part I Review of the operation of the Treaty, as provided for in its article VIII (3), taking into account the decisions and the resolution adopted by the 1995 Review and Extension Conference and the Final Document of the 2000 Review Conference, NPT/CONF.2010/50 (Vol. I), 18 June 2010, at pp. 12, 19. Available at [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)).

9 See, e.g., Alexander Kmentt, “The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and Its Effect on the Nuclear Weapons Debate”, 97 *International Review of the Red Cross* (2016), pp. 681-709.

4 *Nuclear Weapons Advisory Opinion*, paras. 105(2)(A)-(D), (F).

5 *Ibid.*, para. 105(2)(E).

6 *Ibid.*, Declaration of President Bedjaoui, para. 10.

ered 128 states, as well as numerous intergovernmental organizations and NGOs, with a view to developing a fact-based understanding of the impacts of nuclear weapons detonations and to facilitating an informed discussion amongst various stakeholders. Discussion continued one year later in Nayarit, Mexico, where the conference chair observed:

[I]n the past, weapons have been eliminated after they have been outlawed. We believe this is the path to achieve a world without nuclear weapons. In our view, this is consistent with our obligations under international law, including those derived from the NPT as well as from Common Article 1 to the Geneva Conventions. The broad-based and comprehensive discussions on the humanitarian impact of nuclear weapons should lead to the commitment of States and civil society to reach new international standards and norms, through a legally binding instrument.¹⁰

The 2010 NPT Review Conference adopted a final document in which it twice noted with concern ‘the catastrophic humanitarian consequences’ that would result from any use of nuclear weapons.

The most recent gathering took place in Vienna, Austria, in December 2014. One hundred and fifty-eight states, including four that are nuclear-armed (India, Pakistan, the United Kingdom and the United States), as well as intergovernmental organizations and civil society groups, took part. It is also in Vienna that the participants first formally addressed legal and normative questions. Here is how Austria summarized the conference’s relevant findings:

Looking at nuclear weapons from a number of different legal angles, it is clear that there is no comprehensive legal norm universally prohibiting possession, transfer, production and use.

10 Second Conference on the Humanitarian Impact of Nuclear Weapons Chair’s Summary, 14 February 2014. Available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf>.

International environmental law remains applicable in armed conflict and can pertain to nuclear weapons, although it does not specifically regulate these arms. Likewise, international health regulations would cover effects of nuclear weapons. The new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons could ever be used in conformity with [international humanitarian law].¹¹

“In the past, weapons have been eliminated after they have been outlawed. We believe this is the path to achieve a world without nuclear weapons” —Mexico

Austria concluded the Vienna conference by announcing a “pledge”. Offered “solely in her national capacity, and without binding any other participant”, the pledge outlined the various efforts that Austria would endeavor to take in order “to stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks”.¹²

Initially called the “Austrian Pledge”, these undertakings began to attract formal support or endorsement from other states. On 7 December 2015, almost one year after Vienna, the UN General Assembly adopted Resolution 70/48¹³ entitled “Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons”, with 139 states voting in favor, 29 voting against, and

11 Vienna Conference on the Humanitarian Impact of Nuclear Weapons 8 to 9 December 2014, Report and Summary of Findings of the Conference, presented under the sole responsibility of Austria. Available at https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf.

12 Pledge Presented at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons by Austrian Deputy Foreign Minister Michael Linhart. Available at https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Austrian_Pledge.pdf.

13 Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/48.

17 abstaining (including Japan). The resolution's paragraph 3 reads:

The General Assembly ... [u]rges all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and calls upon all States to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons and to cooperate with all stakeholders to achieve this goal.

“The new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons could ever be used in conformity with international humanitarian law” —Austria

2.1.4 OPEN-ENDED WORKING GROUP, 2016

The 2015 NPT Review Conference failed to adopt a final document. This failure was blamed, at least officially, on the disagreement amongst participating states over a conference for the establishment of a weapons of mass destruction free zone in the Middle East. During the review conference, however, there were already concerns that its successive draft final documents had become watered-down, particularly with reference to the “humanitarian consequences” of nuclear weapons.

Five months later, the UNGA First Committee once again heard increasingly heated arguments both for and against a ban on nuclear weapons. On 7 December 2015, the UN General Assembly adopted Resolution 70/33, with 138 states voting in favor, 12 against, and 34 abstaining (including Japan), in which it decided to convene an OEWG “to substantively address concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons”.

The OEWG met in February, May, and August 2016. None of the nuclear-armed states participated on the ground that it would not proceed on

consensus. A number of umbrella states, including Japan, did. On 19 August 2016, the OEWG adopted its report, by a non-recorded vote with 68 in favor, 22 against and 13 abstentions (including Japan), to be submitted to the UN General Assembly.¹⁴ The report notes the OEWG's recommendation “with widespread support”¹⁵ that the General Assembly convene a conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons.

2.1.5 TO GET ON THE BAN(D)WAGON OR NOT—THAT IS THE QUESTION FOR JAPAN

The draft UN General Assembly resolution noted at the outset calls for a United Nations conference in 2017 “to negotiate a legally-binding instrument to prohibit nuclear weapons”. There has been a turbulent few weeks this fall in New York, with those in favor of a ban rallying around core proposals and those against them closing ranks.

As was the case with the OEWG's establishment in 2015, however, the majority voting rule that governs General Assembly decision-making means that a resolution authorizing the commencement of NWBT negotiations—with or without nuclear-armed states on board—is likely. The question for Japan, then, is this: Should it, or should it not, jump on the NWBT ban(d)wagon?

There has been a turbulent few weeks this fall in New York, with those in favor of a ban rallying around core proposals and those against them closing ranks.

14 Report of the Open-Ended Working Group Taking Forward Multilateral Nuclear Disarmament Negotiations. Available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B7F8C26BC8E15317C1258018003E1D71/\\$file/Final+Report+of+the+OEWG,+as+submitted+to+GA+\(clean\).pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/B7F8C26BC8E15317C1258018003E1D71/$file/Final+Report+of+the+OEWG,+as+submitted+to+GA+(clean).pdf).

15 *Ibid.*, para. 67.

2.2 Japan's approach to nuclear disarmament

Traditionally, Japan has sought to reconcile its aversion to nuclear weapons with its reliance on nuclear deterrence. The complexity entailed by these considerations has also influenced Japan's official position on the humanitarian dimensions and prohibition of nuclear weapons.

2.2.1 TWO MINDS ON NUCLEAR DISARMAMENT

Since the Cold War, Japan's approach to nuclear disarmament has been driven by two essential tenets emanating from its historical experiences and geostrategic considerations.

Since the Cold War, Japan's approach to nuclear disarmament has been driven by two essential tenets emanating from its historical experiences and geostrategic considerations.

On the one hand, the devastation of atomic bombings in Hiroshima and Nagasaki in August 1945 has been engraved in Japan's collective memory. It remains the foundation of Japanese thinking on nuclear weapons that they should never be used again and must be eliminated. As the only country to have ever suffered atomic bombings in war, Japan has actively sought to achieve the goal of a world without nuclear weapons.

On the other hand, the unstable relationship Japan has with three nuclear-armed neighbors has shaped its security and disarmament policies. In order to address nuclear threats, Japan has relied on extended nuclear deterrence provided by the United States under their bilateral alliance. This reliance has led to Japan's caution about some of the nuclear disarmament measures and approaches that might adversely affect the US nuclear umbrella's credibility and effectiveness.

In its first-ever National Security Strategy (NSS), adopted in December 2013, Japan reaffirmed its resolve to "continue its vigorous efforts to seek

'a world free of nuclear weapons'", and to "lead international efforts on disarmament and non-proliferation ... in a manner consistent with the maintenance of the credibility of extended deterrence under the Japan-US alliance".¹⁶ This explains Tokyo's advocacy of a progressive approach to nuclear disarmament. It has proposed pragmatic and effective steps in various fora, including the NPT Review Conferences and the UN General Assembly.¹⁷

These tenets have been criticized for being contradictory.¹⁸ Japan seems to consider the matter differently. It appears that both nuclear disarmament and the US nuclear umbrella are deemed indispensable for Japan's security, as are efforts to improve regional and international security environments more generally. On this view, these measures permit Japan to achieve two policy objectives, i.e.:

- To refrain from acquiring its own nuclear deterrent in accordance with its domestic and international commitments, including the implementation of the NPT and the Three Non-Nuclear Principles¹⁹; and
- To address and reduce the nuclear threats it has faced and will face for the foreseeable future.

According to the government, these measures and efforts together contribute to a safer and more stable world and ultimately to the total elimination of nuclear weapons.

16 National Security Strategy (NSS), 17 December 2013, pp. 29-30. Available at <http://www.cas.go.jp/jp/siryoku/131217anzenhoshou/nss-e.pdf>.

17 In 2015, for instance, Japan sponsored a UN General Assembly resolution on nuclear disarmament entitled "United Action with Renewed Determination towards the Total Elimination of Nuclear Weapons" (A/RES/70/40, 7 December 2015). Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/40.

18 See, e.g., "EDITORIAL: Japan's Vote against Nuke Ban Talks Mocks Its Anti-Nuke Credo", *The Asahi Shimbun*, 29 October 2016 (available at <http://www.asahi.com/ajw/articles/AJ201610290021.html>).

19 See below.

2.2.2 OFFICIAL STANCE ON THE HUMANITARIAN DIMENSIONS AND PROHIBITION OF NUCLEAR WEAPONS

Japan's aforementioned approach has also been reflected in its official stance on the humanitarian dimensions of nuclear weapons as well as their prohibition.

Japan describes itself as the country that “best understands the tragedy of the use of nuclear weapons”.²⁰ As such, the importance Japan attaches to the humanitarian dimensions of nuclear disarmament²¹ arguably predates the current initiative. After the 2010 NPT Review Conference, Tokyo actively participated in discussions at the Oslo, Nayarit and Vienna conferences.

Japan's support of the humanitarian initiative has not been without conditions.

Japan's support of the initiative has not been without conditions, however. At the 2015 NPT Review Conference, Foreign Minister Fumio Kishida stated: “Political leaders must have an objective assessment of the security environment of their country. But at the same time I believe it is important that we all clearly understand the humanitarian consequences of the use of nuclear weapons and stand by our ideals”.²² The Japanese delegation also stressed that the initiative “should work for *inclusive and universal* discussion for all nuclear disarmament approaches, and should therefore *not divide* NPT States Parties”, and that

“the discussions on the humanitarian impact of nuclear weapons should cross borders and generations, and work as a *catalyst* for nuclear disarmament”.²³

These statements imply that Japan would not fully support the normative approach on nuclear disarmament if, in its view, the humanitarian group:

- Pursued nuclear disarmament by excluding views that were different from its own, particularly regarding security issues;
- Adopted a confrontational attitude vis-à-vis nuclear-armed states; or
- Proposed nuclear disarmament unlikely to lead to the actual and concrete reduction in the number and roles of nuclear weapons.

At the 2013 UNGA First Committee session, Japan participated for the first time in the joint statement on the humanitarian impact of nuclear weapons delivered by New Zealand, together with more than 100 co-sponsors. This reversal came about after the following sentence was inserted in the statement: “[A]wareness of the catastrophic consequences of nuclear weapons must underpin *all approaches and efforts towards nuclear disarmament*”.²⁴

During the same session, Australia, co-sponsored by Japan and other mainly US allies, delivered another joint statement on the subject. It posited: “Banning nuclear weapons by itself

²⁰ NSS, p. 7.

²¹ See, e.g., Directorate General, Arms Control and Scientific Affairs, Ministry of Foreign Affairs (ed.), *Japan's Disarmament Policy*, March 2003, pp. 22-28. Available at <http://www.mofa.go.jp/policy/un/disarmament/policy.pdf>.

²² “General Statement by H.E. Mr. Fumio Kishida, Minister for Foreign Affairs of Japan”, NPT Review Conference, 28 April 2015. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/27April_Japan.pdf. In this statement, he also proposed that political leaders and youths visit Hiroshima and Nagasaki and “witness with their own eyes the reality of atomic bombings”.

²³ “Statement by H.E. Mr. Toshio Sano, Ambassador, Permanent Representative of Japan to the Conference on Disarmament”, Main Committee I, NPT Review Conference, 1 May 2015. Emphasis added. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/1May_Japan.pdf. This belief echoes Japan's participation in two joint statements on the humanitarian consequences of nuclear weapons, led by the humanitarian group and western NNWSs, respectively, at the 2013 UNGA First Committee meetings. See below.

²⁴ “Joint Statement on the Humanitarian Consequences of Nuclear Weapons Delivered by New Zealand”, UNGA First Committee, 21 October 2013. Emphasis added. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/statements/21Oct_Joint.pdf.

will not guarantee their elimination without engaging substantively and constructively those states with nuclear weapons, and recognising both the security and humanitarian dimensions of the nuclear weapons debate”.²⁵ This passage captures the view held by nuclear umbrella states, including Japan, that a ban treaty should be pursued with a longer perspective, possibly as the final “building block”. In other words, while Japan does not oppose the idea of negotiating and adopting a legal instrument banning nuclear weapons *per se*, it does consider moving forward premature at this stage.

Japan does not oppose the idea of negotiating and adopting a legal instrument banning nuclear weapons *per se*, but it does consider moving forward premature at this stage.

Japan’s concerns include the possibility that the humanitarian initiative might influence the negotiations in a manner incompatible with its security policies including, in particular, its reliance on extended nuclear deterrence. One reason for which Japan declined to participate in the joint statement at the 2012 UNGA First Committee session is its demand that states “must intensify their efforts to *outlaw* nuclear weapons and achieve a world free of nuclear weapons”.²⁶ Nor did Japan take part in the joint statement issued at the 2013 NPT PrepCom according to which “[i]t is in the interest of the very survival of humanity that nuclear weapons

are never used again, *under any circumstances*”.²⁷ In Japan’s view, terms such as “outlaw” and “under any circumstances” strongly imply that it would no longer be able to rely on its US nuclear umbrella even when faced with nuclear threats.

The humanitarian initiative might influence the negotiations in a manner incompatible with Japan’s security policies including, in particular, its reliance on extended nuclear deterrence.

In Tokyo, it is considered inappropriate to negotiate and conclude a treaty on prohibiting nuclear weapons when the international community is widely divided over its desirability, no nuclear-armed state is likely to join it, and it enjoys few prospects of bringing about concrete progress on reducing the number and roles of nuclear weapons.

As noted earlier, Japan abstained from the UN General Assembly’s 2015 “Humanitarian Pledge” resolution in which all states were called upon to “identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons ... [and] all stakeholders ... to cooperate in efforts to stigmatize, prohibit and eliminate nuclear weapons in the light of their unacceptable humanitarian consequences and associated risks”.²⁸ At the 2016 OEWG, Japan stated its position thus:

[T]o attain real progress in nuclear disarmament, it is essential to ensure the united actions of the entire community, including the NWS. Without participation of the NWS, the effectiveness of the implementation for a nuclear disarmament agreement would be questionable ... [L]ooking over the present security situation, we are not yet

25 “Joint Statement on the Humanitarian Consequences of Nuclear Weapons Delivered by Australia”, UNGA First Committee, 21 October 2013. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/statements/21Oct_Australia2.pdf.

26 “Joint Statement on the Humanitarian Dimension of Nuclear Weapons”, UNGA First Committee, 22 October 2012. Emphasis added. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/statements/22Oct_Switzerland.pdf.

27 “Joint Statement on the humanitarian impact of nuclear weapons delivered by South Africa”, NPT PrepCom, 24 April 2013. Emphasis added. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/24April_SouthAfrica.pdf.

28 Many western NNWSs voted against this resolution.



The Representative of Japan addresses during the High Level Segment of the 2015 Conference on Disarmament, Palais des Nations, Geneva, Tuesday 3 March 2015 (Photo: Violaine Martin / UN Geneva).

at the stage in which we are ready to take united actions, as well as NWS, to start negotiation of [a legally binding instrument of prohibiting nuclear weapons].²⁹

These actions also underscore Japan's alarm—as well as that of other nuclear umbrella states—that the premature conclusion of a ban treaty would widen the gap between NWSs and NNWSs. On this view, such a treaty would impede rather than promote steady and concrete progress on nuclear disarmament.

Japan has expressed its fear that an NWBT would have repercussions for the nuclear non-proliferation regime.

Lastly, Japan has expressed its fear that an NWBT would have repercussions for the nuclear non-proliferation regime:

[G]iven the frustration prevailing among some Member States to the NPT, we cannot exclude the possibility that such a treaty may be formulated as posing less restrictive non-proliferation obligations compared to those under the NPT. Then, there is a possibility that countries leave the NPT regime and enter the new treaty. It may erode the international legal norm on nuclear non-proliferation.³⁰

²⁹ “Statement of Japan”, OEWG, 23 February 2016. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Statements/22Feb_JapanPM.pdf.

³⁰ *Ibid.*

3. A ban treaty and Japan's options

In its final report, the OEWG recommended that the UN General Assembly “convene a conference in 2017, open to all States, with the participation and contribution of international organizations and civil society, to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination”.³¹ The draft resolution takes the matter one step further. It

has been adopted, and it seems very likely that there will be a United Nations conference held “under General Assembly rules of procedure unless otherwise agreed”. This means that the final instrument could be adopted by a simple majority, rather than, for example, by consensus as practiced at the Conference on Disarmament.

3.1 The core content of a ban treaty

Admittedly, the current process may well produce a treaty other than an NWBT in the end. Alternatives such as a framework agreement³² have been proposed and debated.

The OEWG report identifies six possible elements of an NWBT, viz.:

- a) prohibitions on the acquisition, possession, stockpiling, development, testing and production of nuclear weapons;
- b) prohibitions on participating in any use of nuclear weapons, including through participating in nuclear war planning, participating in the targeting of nuclear weapons and training personnel to take control of nuclear weapons;
- c) prohibitions on permitting nuclear weapons in national territory, including permitting vessels with nuclear weapons in ports and territorial seas, permitting aircraft with nuclear

weapons from entering national airspace, permitting nuclear weapons from being transited through national territory, permitting nuclear weapons from being stationed or deployed on national territory;

- d) prohibitions on financing nuclear weapons activities or on providing special fissionable material to any states that do not apply IAEA comprehensive safeguards;
- e) prohibitions on assisting, encouraging or inducing, directly or indirectly, any activity prohibited by the treaty; and
- f) recognition of the rights of victims of the use and testing of nuclear weapons and a commitment to provide assist to victims and to environmental remediation.³³

Let us focus on two core prohibitions here. The most important element here is banning the use of nuclear weapons. Their “use” *qua* the prohibition’s object may then be divided into use by a ratifying state, and a ratifying state’s reliance on nuclear weapons used by its ally. The main dilemma in our context concerns the latter.

Threats of use of nuclear weapons are another element that current international law arguably leaves ambiguous. The ICJ’s agnosticism regarding the lawfulness of nuclear weapons

³¹ OEWG report, para. 67.

³² According to the OEWG, a “framework agreement” would comprise “either a set of mutually reinforcing instruments dealing progressively with various aspects of the nuclear disarmament process, or a chapeau agreement followed by subsidiary agreements or protocols that would lead gradually to a nuclear-weapon-free world ... [A] first subsidiary agreement or protocol that could be negotiated could be a prohibition on the use or threat of nuclear weapons”. See *ibid.*, para. 38.

³³ *Ibid.*, para. 35. The report also contains a separate, and more expansive, list of suggested elements for effective legal measures. See *ibid.*, Annex II.

in extreme self-defense encompasses not only their use but also threats of their use.³⁴ Will the NWBT prohibit threats of use of nuclear weapons?

3.1.1 USE BY RATIFYING STATE

As explained further below, this report proceeds on the assumption that Japan will not acquire nuclear weapons of its own. It follows that there will be no nuclear weapons for Japan to use.

A few words may nevertheless be said about the NWBT and the use of nuclear weapons by a ratifying state. Three aspects are particularly relevant here, namely: prohibition “under any circumstances”; prohibition of second use; and prohibition of use against NWSs and NNWSs alike.

Use under any circumstances? First, it is highly likely that the prohibition itself would be unqualified, encompassing not only *jus in bello* but also *jus ad bellum*. This, however, remains to be seen. Second, the prohibition would not contain *a priori* disclaimers of the kind seen in the ICJ’s 1996 advisory opinion regarding an extreme circumstance of self-defense. Third, if not even an NWS defending itself in such an extreme circumstance would be permitted to use nuclear weapons, it would, *a fortiori*, not be entitled to do so in extreme defense of its NNWS ally either.

The prohibition on use would not contain *a priori* disclaimers of the kind seen in the ICJ’s 1996 advisory opinion regarding an extreme circumstance of self-defense.

Were it otherwise, the scope of this prohibition would add nothing new to what the ICJ had already suggested was applicable law in 1996.

³⁴ *Nuclear Weapons Advisory Opinion*, para. 105(2) (E) (emphasis added) (“[T]he Court cannot conclude definitively whether the *threat* or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”).

Leaving this loophole unfilled would greatly diminish the NWBT’s perceived added-value.

First use only? The NWBT is likely to prohibit not only the first use of nuclear weapons but also their second use or use in reprisal. Here, too, it is difficult to envisage how the current momentum would settle with an NWBT that did not outlaw the latter uses. It would also appear unacceptably backward, given how the international law on weapons has generally evolved since the 1925 Gas Protocol.

No use against NNWSs and NWSs alike? Prohibiting the use of nuclear weapons both against NNWSs and NWSs alike would have a two-fold significance. First, it would amount to converting existing negative security assurances vis-à-vis NNWSs into an affirmative legal obligation. Second, if combined with mandatory no first use, an NWS would no longer be entitled to use nuclear weapons against another NWS even in the event of an armed attack mounted by the latter involving nuclear weapons.

3.1.2 USE BY ALLIES

Whether the NWBT would prohibit its parties from relying on the use of nuclear weapons by their allies is a separate matter altogether. In self-defense or not, situations may arise where an NNWS bound by the NWBT finds itself acting in military operations alongside an NWS not bound by the treaty. Should the latter state use nuclear weapons during these operations, what impact, if any, would such use have on the former’s NWBT obligations?

Interoperability became a major issue in the regulation of cluster munitions. Article 21 of the 2008 Convention on Cluster Munitions provides, among other things:

3. Notwithstanding the provision of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
 - a) To develop, produce or otherwise acquire cluster munitions;

- b) To itself stockpile or transfer cluster munitions;
- c) To itself use cluster munitions; or
- d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

The OEWG's report notes that the legal instrument could prohibit "participat[ion] in any use of nuclear weapons".³⁵ These expressions appear sufficiently broad to encompass situations in which an NNWS acts in combined military operations with an NWS in which the latter uses nuclear weapons. It would not matter whether the nuclear weapons were used for the NWS's individual self-defense and/or for the NNWS's collective self-defense.

Should the ban treaty prohibit reliance on the use of nuclear weapons by one's ally, it would indeed create formidable difficulties for Japan.

Should the NWBT prohibit reliance on the use of nuclear weapons by one's ally, it would indeed create formidable difficulties for Japan.³⁶ Its current security doctrine is premised on the use of nuclear weapons, if need be, by the United States.

3.1.3 THREATS OF USE

The OEWG's final report contains two lists of possible prohibitions, i.e., in para. 35 and Annex II. Threatening to use nuclear weapons appears only in Annex II.

This ambiguity is understandable. One reason is that there is no authoritative definition of threatening to use armed force, including force by way of nuclear weapons, under today's international law. We may tentatively regard it as follows: "one entity threatens force against another entity where the former communicates

its intention to use force, and its intention to do so is apprehended as such by the latter".³⁷

There are both considerations for and against the inclusion in the NWBT of a ban on threats of use of nuclear weapons.

It may be argued that doing something, on the one hand, and threatening to do so, on the other, are normatively distinct acts in general.

Considerations for including threats. First, as is apparent from the language of Article 2(4) of the UN Charter, using force and threatening to use force are two distinct acts in *jus ad bellum*. Indeed, it may be argued that doing something, on the one hand, and threatening to do so, on the other, are normatively distinct acts in general.³⁸ Article 2(4) prohibits both acts "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The prohibition against threat and use of force within the meaning of Article 2(4) is without prejudice to the "inherent right of individual or collective self-defense when an armed attack occurs" enshrined in Article 51. It stands to reason that this right includes not only actual use of force but also threatened use of force in self-defense.

Banning use of nuclear weapons in any circumstances whatsoever would mean banning their use even in self-defense including, presumably, extreme self-defense. What about threat of use of nuclear weapons? If, as noted earlier, using

37 Nobuo Hayashi, "Legality under *Jus Ad Bellum* of the Threat of Use of Nuclear Weapons", in Nystuen, Casey-Maslen and Bersagel (eds.), *supra* note 3, at p. 51.

38 According to one account of 1999 Rambouillet negotiations, Russia "could accept the threat of force to get a deal, but not its actual implementation if the threat did not work". See Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge: Cambridge University Press, 2007), p. 157 (citing Ivo H. Daadler and Michael E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo* (Washington, D.C.: Brookings Institution Press, 2001), p. 74).

35 OEWG report, para. 35. Emphasis added.

36 See further discussions below.

force and threatening to use force are indeed discrete acts, then even where the former is categorically banned, the latter may not necessarily be unlawful. If threats of use of nuclear weapons were to be prohibited, it would need to be done separately.

Attempting to address questions of threatened use in a ban treaty may amount to validating the security-driven argument that nuclear weapons somehow enjoy special status.

Second, limiting the prohibitive language used in an NWBT strictly to use may tempt an argument that it does not ban threats. The argument would run as follows. Article 2(4) of the UN Charter explicitly prohibits use and threat of force. Article 1 of Protocol I to the Pelindaba Treaty also specifically bans threats. Omitting threat of use of nuclear weapons from the list of prohibited acts in the eventual NWBT must mean, *a contrario*, that it leaves such acts unbanned. For, should the NWBT be intended to ban threats, it would surely specify them just as the UN Charter and Protocol I to the Pelindaba Treaty do.

Consideration against including threats.³⁹ Meanwhile, it is also possible that the NWBT will not specifically ban threats. One reason for this possibility is the rationale that underlies the so-called “Brownlie formula”: “If the promise is to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal”.⁴⁰ If, as is widely assumed, the formula’s rationale were correct as a matter of

law, then banning use of nuclear weapons under any circumstance whatsoever would *ipso facto* amount to banning threats of use of nuclear weapons under any circumstance whatsoever. It would follow that an NWBT banning all nuclear weapons use would have no need for a separate provision banning their threats.

Omitting threats of use of nuclear weapons from the NWBT also accords with how international law has dealt with other weapons. Neither the 1925 Gas Protocol, nor the 1972 Biological Weapons Convention, nor the 1992 Chemical Weapons Convention, prohibits threats. Nor does any of the more recent weapons treaties, such as the 1997 Ottawa Convention on anti-personnel landmines and the 2008 Oslo Convention on cluster munitions, respectively, ban threats of use of these weapons. It stands to reason that these instruments are preoccupied, first and foremost, with the effects of their actual use, rather than their threatened use.

And so it has been the case with the humanitarian initiative as well. It is the catastrophic humanitarian *consequences* of nuclear weapons use that have fueled the movement. Why should nuclear weapons be treated differently? Attempting to address questions of threatened use in an NWBT may amount to validating the security-driven argument that nuclear weapons somehow enjoy special status.

It is arguable that a ban treaty that left threats of use of nuclear weapons unbanned would be more tolerable for umbrella states.

There is another, if somewhat counterintuitive, reason for excluding threats. Banning threats under any circumstances might have far-reaching consequences when considering the legality of nuclear deterrence. The ICJ effectively equated nuclear deterrence with threatening use of nuclear weapons (although the court declined to examine its legality in the end).⁴¹ It

39 See, e.g., John Borrie et al., *A Prohibition on Nuclear Weapons: A guide to the issues* (Oslo, Geneva: International Law and Policy Institute, United Nations Institute for Disarmament Research, 2016), pp. 28-29. Available at <http://www.unidir.org/files/publications/pdfs/a-prohibition-on-nuclear-weapons-a-guide-to-the-issues-en-647.pdf>.

40 Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), p. 364. See also *ibid.*, p. 431 (“an illegal threat is a conditional promise to resort

to force in circumstances in which the resort to force will be itself illegal”).

41 *Nuclear Weapons Advisory Opinion*, paras. 48, 67. See also Hayashi, *supra* note 37, pp. 39-42.

might also be argued that placing oneself under a nuclear umbrella is tantamount to threatening to have one's ally use its nuclear weapons. Should this be so, not only would banning threats under the NWBT amount to outlawing nuclear deterrence practiced by NWSs themselves; but it would also arguably outlaw the placing of an NNWS under a nuclear umbrella.⁴²

Conversely, it is arguable that an NWBT that left threats of use of nuclear weapons unbanned would be more tolerable for umbrella states.

Key questions for Japan would be:

- Does nuclear deterrence amount to threatening to use nuclear weapons?
- If it does, does placing oneself under a nuclear umbrella amount to threatening to have the nuclear weapons of one's ally use for its benefit?
- If it does, would the NWBT prohibit nuclear umbrellas?

3.1.5 OTHER ELEMENTS

"The devil is in the details", as the saying goes. It is one thing for the NWBT to contain a robust set of prohibitive rules. Much of their robustness would be diluted, even lost, if the conditions for the treaty's entry into force were set high, or if the treaty were seen to permit reservations, suspensions, derogations, and similar caveats.

Setting the minimum number of ratifications required affects how soon the NWBT enters into force. Those strongly in favor of an NWBT today would press for a relatively low ratification threshold, whereas those not so strongly in favor or more reluctant would advocate a higher threshold. Whether to require one or more NWSs to ratify the NWBT as a condition of its entry into force would also prove controversial. It is unlikely that such a condition would receive widespread support, in view of the Comprehensive Nuclear Test-Ban Treaty (CTBT) that has yet to enter into force 20 years after its adoption because of such a requirement.

The ICJ's 1996 advisory opinion upheld the prohibition of nuclear weapons as a matter of generality, and then arguably added an escape

or savings clause by noting its ambivalence in situations of extreme self-defense. If, having prohibited nuclear weapons under any circumstances, the NWBT were then to permit deviations therefrom, the treaty's added value would greatly diminish.

Accordingly, whether the NWBT should be subject to formal reservations is a matter that is likely to prove highly contentious. Should the treaty contain a provision permitting states to reserve to themselves the non-application of an otherwise unqualified prohibition on use or threat of nuclear weapons in the event of extreme individual or collective self-defense? The same goes, *mutatis mutandis*, for the permissibility of interpretive declarations, though what legal effect such declarations generate remains unclear under the law of treaties.

Whether the NWBT should be subject to formal reservations is a matter that is likely to prove highly contentious.

For the same reasons, whether and, if so, how quickly and through what steps the NWBT should permit a state party to withdraw from it, suspend its operation or derogate from its provisions, would affect its attractiveness to various states. The narrower the scope of such possibilities, the more appealing the treaty would be to the proponents of a nuclear weapons ban. Conversely, the more flexible its terms, the more palatable it would be to umbrella states and possibly even some NWSs.

Questions for Japan would therefore include:

- Can Japan sign and ratify the NWBT in the expectation that its entry into force will take some time?
- Will the NWBT permit Japan to invoke serious security situations as grounds for modifying its obligations under the treaty (e.g., via reservations or interpretive declarations), withdrawing from it, suspending its operation, or derogating from its provisions?

⁴² See also *ibid.*, pp. 56-57.

3.2 Factors affecting Japan's attitude

The Japanese government has argued that it is inopportune to negotiate or conclude a legal instrument on prohibiting nuclear weapons. That, according to the government, is so insofar as regional as well as international security relationships are unstable and volatile; every nuclear-armed state continues to modernize its nuclear arsenals; nuclear threats in Northeast Asia have been increasing; today's world opinions remain divided on the desirability of such an instrument; no nuclear-armed state is likely to join it; and concrete progress could not be expected just by its adoption.

3.2.1 JAPAN AS A NON-NUCLEAR-WEAPON STATE

Let us proceed on the assumption that Japan will not acquire nuclear weapons. It is widely believed that Tokyo—engaged as it is actively in peaceful uses of nuclear energy, including uranium enrichment and reprocessing of spent fuel—has the ability to manufacture nuclear weapons. Amid the deteriorating security situation in Northeast Asia, a small number of Japanese experts occasionally argue that Japan should possess its own nuclear arsenal. Furthermore, since the 1960-70s, the government has interpreted Article 9 of Japan's Constitution⁴³ as not precluding possession of nuclear weapons if and to the extent deemed strictly necessary for its self-defense capabilities.⁴⁴

43 The article reads:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

44 According to the Japanese defense ministry, "[t]he possession of armaments deemed to be offensive weapons designed to be used only for the mass destruction of another country, which would, by definition, exceed the minimum necessary level, is not permissible under any circumstances. For example, the SDF [Self-Defense Forces] is not allowed to possess intercontinental ballistic missiles (ICBMs), long-range strategic bombers, or attack aircraft

At the same time, however, it is highly unlikely that Japan's formal commitments both domestically and internationally to renouncing its option to acquire nuclear weapons will change. Internationally, Japan is bound by the NPT as an NNWS, and has fully complied with nuclear non-proliferation obligations. Domestically, Japan's 1955 Atomic Energy Basic Act stipulates that "[t]he research, development and utilization of nuclear energy shall be limited to peaceful purposes". In 1967, the Japanese Diet (parliament) adopted the Three Non-Nuclear Principles, under which Japan pledges not to manufacture, possess or permit the introduction of nuclear weapons onto Japanese soil.

If, having prohibited nuclear weapons under any circumstances, the ban treaty were then to permit deviations therefrom, the treaty's added value would greatly diminish.

Given increasing security and nuclear risks, it is not surprising that "Japan's antimilitarism sentiment may be gradually declining and its nuclear allergy may also be diminishing".⁴⁵ On this view,

changing configurations of the security environment in East Asia may widen a gap between the moralistic position that the Japanese try to maintain on nuclear disarmament and the security policy reality that Japan has to face.⁴⁶

Nevertheless, many in Japan share a strong anti-nuclear sentiment or nuclear allergy. It deeply affects Japan's decision-making regarding nuclear issues. Japan also considers that

carriers". See http://www.mod.go.jp/e/d_act/d_policy/dp01.html.

45 Nobumasa Akiyama, "Japan's Disarmament Dilemma: Between the Moral Commitment and the Security Reality", in George P. Shultz and James E. Goodby (eds.), *The War That Must Never Be Fought: Dilemmas of Nuclear Deterrence* (Stanford: Hoover Institution Press, 2015), p. 456.

46 *Ibid.*, p. 442.

the “non-nuclear option is the rational strategic choice, not just an emotional choice based on history”.⁴⁷ Unless Japan faces an extremely serious security threat against its survival, it is highly unlikely to seriously consider acquiring its own nuclear weapons.

3.2.2 NEGOTIATIONS AND CONTENTS

Japan’s position and attitude vis-à-vis NWBT negotiations will largely depend on their modalities, including venues, procedural matters (particularly regarding decision-making), agendas, and likely participants. These factors affect how discussions evolve, whether a treaty is adopted in the end and, if it is adopted, what form it takes. The approaches taken by those in favor of a ban, including their proposals on the principles, rights and obligations and other provisions that the instrument is to contain, as well as its expected ratifiers, are also relevant considerations. These elements will influence Japan’s policy not just by themselves but also in combination with some of the factors discussed below.

Unless Japan faces an extremely serious security threat against its survival, it is highly unlikely to seriously consider acquiring its own nuclear weapons.

3.2.3 POSSIBLE REDUCTION IN NUCLEAR THREATS?

Tokyo’s attitude towards an NWBT will be influenced by whether and how it can effectively promote nuclear disarmament in a manner that helps reduce the nuclear threats Japan perceives vis-a-vis North Korea, China and Russia in particular.

North Korea. Pyongyang is estimated to possess approximately 10-20 nuclear weapons. It continues active development of its nuclear weapons and missiles, both qualitatively and quantitatively, in defiance of UN Security Council resolutions.

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In 2016, Pyongyang executed its fourth nuclear test, claiming that it had exploded a hydrogen bomb in January. The following month, it (test-) launched Taepo-dong 2 inter-continental ballistic missiles (ICBMs) under the guise of the “Unha-3” space launch vehicle. Subsequently, North Korea repeatedly conducted test-flights of Musudan (Hwasong-10) intermediate-range ballistic missiles capable of reaching Guam and Bukkeukseong-1 (Polaris-1) submarine-launched ballistic missiles (SLBMs). Moreover, Pyongyang occasionally test-fired Scud ER and Nodong medium-range ballistic missiles (MRBMs). The Nodong fired in August flew about 1,000 kilometers before plunging into the waters near Japan’s exclusive economic zone.

Furthermore, on 9 September, it conducted a fifth nuclear test. North Korea’s Nuclear Weapons Institute stated that this was a test “for the judgment of the power of a nuclear warhead newly studied and manufactured [which] has been standardized to be able to be mounted on strategic ballistic rockets”.⁴⁸ North Korea is likely to possess nearly 100 or more Nodong MRBMs, which can load nuclear warheads and reach almost all of Japan’s territory. Kim Jong-un reportedly said: “The nuclear warheads have been standardized to be fit for ballistic missiles by miniaturizing them”.⁴⁹ Japan, as well as the United States and South Korea, estimates that North Korea may have already acquired such a capability.

48 “DPRK Succeeds in Nuclear Warhead Explosion Test”, *Korean Central News Agency*, 9 September 2016. Available at <http://www.kcna.co.jp/index-e.htm>.

49 “Kim Jong Un Guides Work for Increasing Nuclear Arsenal”, *Korean Central News Agency*, 9 March 2016. Available at <http://www.kcna.co.jp/item/2016/201603/news09/20160309-01ee.html>.

47 *Ibid.*, p. 438.

After the fourth nuclear test, Pyongyang stepped up its provocations by loudly threatening to conduct, even preemptively, nuclear strikes against the United States and, albeit to a lesser extent, against Japan and South Korea as well. One analysis warns:

Pyongyang would probably have no ... hesitation in using nuclear weapons against Japan. It would not be hard to imagine that if the tide turned against the North, in part because of Japan's role in assisting the US and South Korea, Pyongyang would not hesitate in using these weapons against civilian and military targets in that country.⁵⁰

China. Japan's relationship with Beijing is complicated. The two countries have become interdependent, particularly in the area of economics. Japan is also increasingly alarmed, however, over what it considers a rising China's assertive and provocative behavior incompatible with the existing international and regional order. Examples include China's assertion over the Senkaku Islands and economic interests in the East China Sea, as well as its territorial claims and efforts to establish a *fait accompli* in the South China Sea.

Beijing is estimated to possess 250-300 nuclear warheads. It has actively modernized the quality of its nuclear forces, including, in particular, ICBMs and SLBMs, with a view to strengthening the reliability of its nuclear deterrence vis-à-vis the United States. Meanwhile, according to the US Defense Department, China already possesses dual-capable 200-300 MRBMs and 200-300 ground-launched cruise missiles that are capable of covering Japan.⁵¹

Since its first nuclear test in 1964, Beijing has declared a no first use policy of its nuclear forces and offered unconditional negative secu-

urity assurances to NNWSs. According to some experts, however, China may have shifted from minimum deterrence based on countervalue targeting to limited deterrence including counterforce targeting, through the use of dual-capable missile forces at the tactical and theater level.⁵² This implies that Japan may be included in China's nuclear targets, despite the latter's declared policy to the contrary.

Japan is also concerned over what is sometimes called "stability-instability paradox". As Beijing grows more confident in its strategic nuclear deterrent vis-à-vis the United States, it may lower the threshold for engaging in tactical/theater-level provocation or military action against Japan in order to create a *fait accompli* or change the status quo in the region.

Japan is increasingly alarmed over what it considers a rising China's assertive and provocative behavior incompatible with the existing international and regional order.

Russia. Moscow maintains the largest nuclear arsenal, matching that of the United States. Despite its reduced nuclear threat against Japan in the post-Cold War era, Russia has reaffirmed its policies on active development and deployment of new types of strategic delivery vehicles, mainly with a view to replacing their aging predecessors.

Russia has also increased reliance on nuclear deterrence. It has done so, partly in order to maintain its nuclear superpower status equivalent to the United States, and partly to complement its inferior conventional forces vis-à-vis NATO. Moscow reserves the right to use nuclear

50 Joel S. Wit and Sun Young Ahn, "North Korea's Nuclear Futures: Technology and Strategy", *North Korea's Nuclear Future Series*, February 2015, p. 30. Available at <http://38north.org/wp-content/uploads/2015/02/NKNF-NK-Nuclear-Futures-Wit-0215.pdf>.

51 Office of the Secretary of Defense, US Department of Defense, Annual Report to Congress: Military and Security Developments Involving the People's Republic of China, April 2016, p. 109. Available at <http://www.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf>.

52 See, e.g., Alastair Iain Johnson, "China's New 'Old Thinking': The Concept of Limited Deterrence", 20 *International Security* 3 (1995/1996); Bates Gill, James Mulvenon and Mark Stocks, "The Chinese Second Artillery Corps: Transition to Credible Deterrence", in James C. Mulvenon and Andrew N.D. Yang (eds.), *People's Liberation Army as Organization* (Santa Barbara: RAND, 2002), pp. 511-512.

weapons even in the case of a massive conventional attack that imperils its survival.

Since its invasion and annexation of the Crimea in 2014, Russia has engaged in nuclear saber-rattling against its neighbors, both NATO members and non-members, even to the point of implying an early use of nuclear forces.⁵³ While Moscow is currently focused on Europe, the fact remains that Russia is in dispute with Japan over the Kuril Islands and that it has engaged in geostrategic competition vis-à-vis Western countries in some regions including Northeast Asia.

Russia is in dispute with Japan over the Kuril Islands and it has engaged in geostrategic competition vis-à-vis Western countries in some regions including Northeast Asia.

Summary. Japan would be anxious to see whether, how, and to what extent the proposed nuclear weapons ban would effectively decrease or remove these nuclear threats. Also, as a proponent of pragmatic and effective nuclear disarmament, Japan is likely to assess whether the proposed NWBT revitalizes and promotes global nuclear disarmament that has been gridlocked since President Obama's Prague speech in April 2009. It would be important to see what kind of impact an attempt to create a norm banning nuclear weapons would have for the reduction of nuclear threats, as well as for the efforts to achieve a world without nuclear weapons.

53 See, e.g., "Putin Says Russia Was Ready for Nuclear Confrontation over Crimea", *Reuters*, 15 March 2015 (available at <http://www.reuters.com/article/us-russia-putin-yanukovich-idUSKBNOMB0GV20150315>); "Russia Threatens to Aim Nuclear Missiles at Denmark Ships If It Joins NATO Shield", *Reuters*, 22 March 2015 (available at <http://www.reuters.com/article/us-denmark-russia-idUSKBNOMIoML20150322>).

3.2.4 POSSIBLE DETERIORATION IN JAPAN'S SECURITY?

Another consideration for Tokyo would be whether promoting an NWBT might undermine Japan's security.

As mentioned earlier, the US nuclear umbrella has been one of the most essential components of Japan's national security strategy. Having renounced its option to acquire nuclear weapons, Japan relies on this umbrella with a view to deterring nuclear-armed neighbors from using or threatening to use nuclear weapons against it, preventing aggression by a nuclear-armed state, and maintaining stability in Northeast Asia's security environment.⁵⁴ The latter has grown increasingly uncertain in recent years. In response, Japan and the United States have taken steps to bolster their alliance, such as launching consultations on extended deterrence dialogues in 2009, and revising Japan's defense legislations as well as the Guidelines for Japan-US Defense Cooperation in 2015.

Japan is therefore highly likely to consider carefully whether and how its participation in NWBT negotiations would affect the credibility and effectiveness of the US nuclear umbrella and, indeed, the Japan-US alliance itself. Should Japan decide to take part in the negotiations, it might need to identify means to preserve the

54 For the theoretical literature on the effects of nuclear weapons as a deterrent, see, e.g., Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981), pp. 213-219; John J. Mearsheimer, "Nuclear weapons and deterrence in Europe", 9 *International Security* (1984), pp. 19-46; Kenneth N. Waltz, (1981), "The Spread of Nuclear Weapons: More May Be Better", 171 *Adelphi Papers* (London: International Institute for Strategic Studies, 1981). For the empirical testing of these theoretical claims, see, e.g., Mark Bell and Nicholas L. Miller, "Questioning the Effect of Nuclear Weapons on Conflict", 59 *Journal of Conflict Resolution* (2015), pp. 74-92; Bruce Bueno de Mesquita and William H. Riker, "An assessment of the merits of selective nuclear proliferation", 26 *Journal of Conflict Resolution* (1982), pp. 283-306; Paul Huth and Bruce Russett, "General Deterrence Between Enduring Rivals: Testing Three Competing Models", 87 *The American Political Science Review* (1993), pp. 61-73.

alliance's credibility and effectiveness, including alternatives to extended deterrence.

3.2.5 JAPAN'S DIPLOMACY

Participating in NWBT negotiations will also affect Japan's diplomatic relations with key countries and groups, as well as its position on nuclear disarmament and nonproliferation.

United States and other Western partners. Preserving and enhancing a close relationship with the United States, with whom it shares fundamental values and strategic interests in maintaining extended (nuclear) deterrence, is clearly the most significant consideration for Japan. Its relations with other Western powers, mostly US allies themselves, are also important as they belong to the same caucus at multilateral disarmament fora, such as the NPT review process and the UN General Assembly.

Despite some difference on policies and stances over nuclear issues, Japan, the United States and other Western countries share common interests in a number of areas regarding security as well as nuclear disarmament and nonproliferation. Maintaining its relationship and cooperation with them is one of the key policy ingredients for Japan vis-à-vis an NWBT.

Non-Proliferation and Disarmament Initiative. Japan will also care about its ties with members of the Non-Proliferation and Disarmament Initiative (NPDI). Since its establishment in 2010 under Japan and Australia's initiative, this group has sought to advance nuclear disarmament and non-proliferation agendas through converging different ideas, opinions and proposals. The NPDI consists of twelve NNWSs, ranging from Western countries to members of the New Agenda Coalition and Non-Aligned Movement, as well as one leading proponent of the humanitarian initiative.⁵⁵

Given the widening rift among NNWSs, Japan would explore ways to utilize the NPDI as a platform on which to bridge them in their promotion of nuclear disarmament. It is true, however, that the diversity among NPDI members ema-

nates not only from their geographical locations but also from their views on nuclear disarmament, including the humanitarian dimensions and legal prohibition of nuclear weapons. NPDI management may prove challenging for Japan.

Japan's advocacy of the building-block approach. Japan is likely to consider that its attitude towards NWBT negotiations should be consistent with its disarmament and non-proliferation policy and diplomacy. As noted earlier, Japan has proposed the progressive or building-block approach on nuclear disarmament highlighting national, regional and international security considerations. Meanwhile, for historical reasons, Japan earnestly desires the total elimination of nuclear weapons, acknowledges the importance of their humanitarian dimensions, and asserts moral authority on nuclear disarmament issues. Finding a right balance between these two dimensions would be crucial for Japan.

3.2.6 PUBLIC OPINION

Whatever position Japan takes on an NWBT, it cannot escape the demands, criticisms and protests of those active in nuclear issues. On the one hand, the hibakusha, the municipalities of Hiroshima and Nagasaki, and domestic as well as international antinuclear groups and NGOs, will call upon the Japanese government proactively to make an NWBT a reality. On the other hand, Japan's security community has cautioned against rushing under the current security situation and urged that it rather continue with the existing policies, e.g., pursuing practical and effective nuclear disarmament, and maintaining the US nuclear umbrella.

Given the widening rift among NNWSs, Japan would explore ways to utilize the NPDI as a platform on which to bridge them in their promotion of nuclear disarmament.

A similar division is also visible in Japan's public opinion. While some strongly support a nuclear abolition, others recognize the significance of the US nuclear umbrella amid Northeast Asia's deteriorating security.

55 NPDI member states are Australia, Canada, Chile, Germany, Japan, Mexico, the Netherlands, Nigeria, the Philippines, Poland, Turkey and the United Arab Emirates.

4. Participating in ban treaty negotiations?

Given the likely content of an NWBT and the various considerations affecting Japan's attitude towards it, should Japan participate in the treaty negotiations? This report endeavors to identify and consider both considerations in favor of Japan's participation and those against it. Our aim here is to develop these arguments and offer them as food for thought, not to come to a definitive view on the matter.

The only scenario in which Japan would not take part in the negotiations is where participation would cause Japan's current security situation to deteriorate.

4.1 Arguments for participation

Domestically, Japan's participation in NWBT negotiations would be consistent with its Three Non-Nuclear Principles and public opinion. Participation would also be consistent with Japan's desire for international moral authority on matters relating to nuclear weapons, as well as international civil society's expectations of it. Conversely, if Japan decided against taking

As a preliminary matter, we should distinguish between global security and regional security. It has been suggested that the continuous presence of nuclear weapons is detrimental rather than beneficial to global security.⁵⁶ From time to time, it is also asserted that nuclear weapons do not deter attacks from non-state entities such as terrorist groups.⁵⁷ It follows—or so the argument goes for those in favor of an NWBT, in any event—that banning nuclear weapons strengthens, rather than weakens, global security.

Be that as it may, the fact remains that Northeast Asia is a region beset by Cold War-esque nuclear brinkmanship. One cannot reasonably demand that Japan's responsible political leaders set aside their legitimate security interests and expose their population to nuclear threats⁵⁸ in the region, *even if it is true that nuclear weapons undermine global security.*

part in the negotiations, such a decision would undermine its claim to moral authority. International civil society pressure would increase.

There are two further considerations. One concerns the impact that Japan's participation might have on its security. The other involves the “bridge-building” role that Japan has given itself.

56 See, e.g., “Nuclear Weapons and Security: A Humanitarian Perspective”, working paper submitted by Austria, OEWG, 22 February 2016. Available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/WP.04.pdf>.

57 See, e.g., Robert H. Gregory, “On ‘Reaffirming the Utility of Nuclear Weapons’”, 43 *Parameters* (2013), pp. 124-125.

58 See, e.g., Martti Koskeniemi, “Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons”, 10 *Leiden Journal of International Law* (1997), pp. 137-162.

4.1.1 JAPAN'S SECURITY

That Japan's security environment is in a tenuous state is one thing. Whether Japan's participation in NWBT negotiations would have a positive impact, a negative impact or no impact on that state, is another. It may be argued that the only scenario in which Japan should not take part in the negotiations is where participation would cause Japan's current security situation to deteriorate.

It is not entirely clear whether Japan's participation in the negotiations would prove detrimental to its security. Pyongyang appears dog-

gedly determined to proceed with its nuclear weapons testing, come what may. Neither the US's absence from the 2016 OEWG, nor Japan's decision to attend and present its views there, seems to have affected North Korea's behavior vis-à-vis Japan in one way or the other. It would therefore appear reasonable to expect the same should Japan decide to take part in NWBT negotiations.

The Japan-US pact, including, in particular, its extended deterrence, is a centerpiece of Japan's security policy. It is understandable if Tokyo wished to avoid any appearance of discord with the US. This anxiety was vividly demonstrated in recent months, when President Obama proposed the adoption of a no first use policy, only to be met with nervous pleas from some of its allies and eventually to abandon the idea.⁵⁹

Japan's participation in the negotiations would be seen as a rift between Tokyo and Washington if, *but only if*, by doing so, Japan acted in a manner contrary to the US's wishes and the latter somehow let that become public knowledge. So far, the US appears content with Japan's (self-appointed) role as a champion of the progressive or building block approach at major nuclear disarmament fora.⁶⁰ There is no reason to expect that the US would suddenly want a different role for Japan in NWBT negotiations.

In other words, Japan's participation in NWBT negotiations *per se* is unlikely to embolden North Korea in its already tenacious effort to acquire nuclear weapons capabilities, or to undermine the credibility of Japan's security alliance with the US.

4.1.2 UNENVIABLE ROLE TO WHICH JAPAN HAS ASSIGNED ITSELF

Were Japan to stay true to its role as the "bridge-builder" between NNWSs growing impatient with the lack of progress in nuclear disarmament, on the one hand, and nuclear-armed states and those under their umbrellas, on the other, it should not hesitate to articulate its positions—however awkward and unpopular they might be—during NWBT negotiations rather than declining to take part.

In all likelihood, Japan's middle-of-the-road advocacy would draw harsh criticisms during the negotiations. Drawing such criticisms is not the same as endangering Japan's security, however. In fact, the discrepancy between Japan's anti-nuclear weapons rhetoric and its reliance on US nuclear deterrence and refusal to support a nuclear weapons ban has already been attracting unflattering commentary. And yet, it has never been seriously suggested that this discrepancy, or the criticism, threatens Japan's national security.

One compromise Japan might consider proposing involves a caveat—whether in the form of an explicit exception added or as a prohibition open to reservations—that is similar in spirit if not words to the "circumstance of extreme self-defense" left ambiguous by the ICJ in 1996. For the reasons stated earlier, it is exceedingly unlikely that those in favor of a robust NWBT would easily agree to compromises such as this. Nevertheless, if Japan genuinely believes that adding flexibility would enable its otherwise contradictory policy considerations to be narrowed, then it must try it.⁶¹ Similarly, Tokyo should advocate the clause's inclusion if the treaty were to become more attractive to NWSs and umbrella states.

Significantly, the ICJ's 1996 advisory opinion did not limit its "extreme self-defense" agnosticism to situations in which the defending state experiences an extreme circumstance of self-defense involving the use of nuclear weapons against it. At least theoretically, such a circumstance could also arise from a large-scale conventional invasion.

59 See below for further discussions.

60 See below for further details.

61 See, e.g., Akira Kawasaki, "Japan's Policy Options vis-à-vis the Legal Prohibition of Nuclear Weapons", in Center for the Promotion of Disarmament and Non-Proliferation (ed.), *Effective Measures and Nuclear Disarmament Policy Based on Article 6 of the Non-Proliferation Treaty (NPT) Regarding the Humanitarian Dimensions of Nuclear Weapons* (Tokyo: Center for the Promotion of Disarmament and Non-Proliferation, Japan Institute of International Affairs, 2016), pp. 3-18. Available (in Japanese only) at <http://www.cpdnp.jp/pdf/003-01-015.pdf>.

4.2 Arguments against participation

Let us now turn to some of the reasons for which Japan should be cautious about participating in NWBT negotiations.

When deciding whether to participate in debates about a nuclear weapons ban or take part in NWBT negotiations, Japan would consider, among other things:

- Would such a treaty be effective in reducing the number and roles of nuclear weapons?
- Would it contribute to the alleviation and removal of nuclear threats that Japan faces?
- At a minimum, would it not undermine Japan's security?

Participation in the ban discussions can be a realistic option for Tokyo, insofar as they present it with opportunities to counter positions it finds unacceptable, shape opinions favorable to it, or steer diverse views towards what it considers a more appropriate approach to nuclear disarmament.

Whatever form the proposed treaty may take, Japan is likely to act as dictated by its national interests. Should the aforementioned questions be answered in the negative, Japan, while earnestly desirous of the total elimination of nuclear weapons, might decline to support negotiations leading to their ban.

4.2.1 DISCUSSIONS ON A NUCLEAR WEAPONS BAN TREATY

The pros and cons of an NWBT may not be the only factors when Japan contemplates whether to participate in its discussions before the negotiations begin. Participation in the ban discussions can indeed be a realistic option for Tokyo, insofar as they present it with opportunities to counter positions it finds unacceptable, shape

opinions favorable to it, or steer diverse views towards what it considers a more appropriate approach to nuclear disarmament.

Participation of nuclear-armed states, including the United States in particular, is preferable but not necessarily indispensable.

Participation of nuclear-armed states, including the United States in particular, is preferable but not necessarily indispensable. Japan actively attended several international gatherings regarding nuclear disarmament from which many nuclear-armed states stayed away. Examples include the Oslo and Nayarit conferences, as well as the 2013 and 2016 OEWGs. Japan abstained in the 2015 resolution in which the UN General Assembly decided to convene the latter. It did so, in part, on the ground that nuclear-armed states were unlikely to be part of processes that would not operate on a consensus basis.

With the international community divided over how best to promote nuclear disarmament, Tokyo has repeatedly stressed the importance of thorough discussions, whatever their format and modalities. It has done so with a view to promoting concrete and practical steps; demonstrating how Japan's approaches, proposals and arguments are appropriate and effective; bridging the gap in the international community; and cementing the shared objective of a world without nuclear weapons.

4.2.2 TREATY NEGOTIATIONS

Japan would find it difficult to join treaty negotiations if it was clear that the final instrument would have negative implications for its national security. The same would be true for negotiations held as though they were merely a formality ahead of a treaty's adoption.

Nor is it likely that Japan will consider it fruitful to engage with NWBT proponents if the latter are exclusively focused on their objective of imposing a nuclear weapons ban. The prospects of Japan's participation will diminish further

if they are unprepared to incorporate diverse opinions and interests of other parties—in other words, if those in favor of a ban have no intention of modifying their positions or considering other parties' proposals and opinions.

An NWBT negotiated without the involvement of NWSs is unlikely to attract their accession in the near future. Such an instrument may be seen as offering little meaningful, actual or concrete progress in nuclear disarmament; nor will Japan expect the treaty to improve its security. These perceptions may discourage Japan from taking part in the negotiations.

Japan's US security tie will also affect its decision as to whether it should participate in NWBT negotiations. Japan and the United States do not always share common interests in nuclear disarmament. It is possible that the United States may strongly oppose some of the measures that Japan supports. Where this occurs, however, the two close allies consult with each other and coordinate their actions, with a view to reconciling their differences or finding mutually agreeable alternatives.

Should the United States oppose it, Japan might have to decline to take part in the negotiations.

Still, should the United States oppose it, Japan might have to decline to take part in the negotiations. Japan might have to do so despite the fact that such a decision would almost certainly draw heavy criticisms from those states, civil society organizations and, most importantly, Japanese citizens in favor of a nuclear weapons ban; and that this would strain Japan's credibility as the only country to have suffered nuclear bombings and a leading proponent of nuclear disarmament.

We should not underestimate the possibility that American opposition could override these concerns, if Japan were to conclude that its reliability as a US ally—which underpins the United States' commitment to the provision of extended nuclear deterrence—would be at stake. It is likely that Japan will have to face criticism, no matter whether it chooses to or chooses not to take part in NWBT negotiations. Should this

be so, siding with the United States, even at the expense of Japanese public sentiment, might very well be more beneficial to Japan's national interests, all things considered, given its volatile security and nuclear environment today.

The situation surrounding nuclear weapons is qualitatively different from those surrounding weapons such as anti-personnel landmines and cluster munitions.

It is arguable that the situation surrounding nuclear weapons is qualitatively different from those surrounding weapons such as anti-personnel landmines and cluster munitions. Under pressure from states and NGOs advocating these weapons' ban, Japan decided to negotiate and, in the end, chose to accede to the Ottawa and Oslo Conventions, respectively.

This was done out of Japan's humanitarian concern, although it deemed landmines and cluster munitions important for its national security as well. It appears that Japan considers the importance of extended nuclear deterrence to its security to be of a different magnitude altogether. Japan is likely to find analogies drawn between these types of weapons that overlook their dissimilar national security implications unpersuasive.

It might be felt that Japan should participate in the negotiations in order to have its proposals and positions reflected in the final text, rather than simply wait on the outside without influence. Having participated in the negotiations, Japan could always choose not to sign or ratify the treaty if it is unlikely to contribute to Japanese security.⁶²

⁶² Though in a different context, Joseph Goldblat argues that "there is no risk to national security in adopting veto free procedures, because no conference or organization can impose treaty obligations on a sovereign state through voting". Joseph Goldblat, "The Conference on Disarmament at the Crossroads: To Revitalize or Dissolve?", *7 Nonproliferation Review* (2000), pp. 106-107.

It is equally possible, however, that this course of action may result in Japan losing out both on its alliance with the United States (if it is opposed to Japan's participation) and on its disarmament credential (if Japan ends up not signing or ratifying the treaty on account of its national security).

One commentator noted: "Because of the enormous effort required to produce a negotiated

4.3 Summary

It appears fairly certain that Japan will participate actively in ban-related debates. The question is whether Japan takes part in NWBT negotiations themselves and, if it does, under what circumstances and over what content it does so.

That Japan should be part of the treaty negotiations in view of its historical legacy, humanitarian concern and claim to international moral authority on matters relating to nuclear weapons, is clear. What is less clear is how, and to what extent, participation in the negotiations will adversely affect Japan's national security.

Japan's participation in various multilateral fora relating to a nuclear weapons ban has not undermined Japan's security vis-à-vis its nuclear-armed neighbors.

We have examined reasons why Japan's security might not be adversely affected, should it chose to negotiate the treaty. Japan's participation in various multilateral fora relating to a nuclear weapons ban has not undermined Japan's security vis-à-vis its nuclear-armed neighbors. Nor has Japan's active engagement with these processes prompted the United States to express discomfort publicly or otherwise create an appearance of weakened commitment to Japan's

outcome, such pressure would be much more intense than exists in relation to the blocking of the initiation of the negotiation".⁶³ While it is too early to say, it seems likely that the proponents would stick to their positions, remain inflexible, convene negotiations with or without NWSs on board, and adopt an NWBT more or less in their image.

security. In view of its self-appointed role as a "bridge-builder", Japan should remain engaged and seek to influence the outcome from within.

We have also seen arguments against Japan's participation. To begin with, it may prove futile if the adoption of an NWBT deemed detrimental to Japanese security is in fact a foregone conclusion. More importantly, Japan would find it difficult to participate in NWBT negotiations should it encounter US objections. All the more so, arguably, if Tokyo comes to the conclusion that it cannot satisfy public sentiments and moral imperatives without alienating Washington or vice versa.

The kind of norms the final text is likely to contain, as well as how flexible or inflexible NWBT proponents may prove during the negotiations, will influence Japan's decision even at this preliminary stage. The extent to which Japan feels encouraged to negotiate the treaty depends, at least in part, on how meaningfully Japan can fulfil its role as an advocate of accommodation.

63 Tim Caughley, "Breaking the Ice in the Conference on Disarmament: A Wrap-up", *UNIDIR Resources*, April 2011, pp. 4-5. Available at <http://www.unidir.org/files/publications/pdfs/breaking-the-ice-in-the-conference-on-disarmament-a-wrap-up-376.pdf>.

5. Signing and ratifying a ban treaty?

Let us suppose that the negotiations do result in the adoption of an NWBT. Assume further that the treaty contains fairly robust prohibitions on use and threat that are phrased along the lines suggested earlier. Should Japan sign and ratify it?

Whether Japan should present unpopular positions during the negotiations is one thing.

Whether it should sign and ratify an NWBT that has been adopted is quite another. For being bound by an NWBT that contains none of a negotiating state's serious demands for compromise—such as, for instance, a caveat on account of extreme self-defense—may indeed be seen to undermine that state's security.

5.1 Arguments for signature and ratification

As is the case with participation in NWBT negotiations, signing and ratifying the treaty would be consistent with Japan's public opinion, Three Non-Nuclear Principles and claim to international moral authority on nuclear weapons abolition. To these, one may add (1) the programmatic and expressive value of an NWBT; (2) the reasonable prospect that Japan's signature and ratification may not undermine its national security; and (3) the treaty as an opportunity for Japan to shape, rather than react to, Northeast Asia's prevailing security environment.

5.1.1 PROGRAMMATIC AND EXPRESSIVE VALUE OF A TREATY

It is often argued that there is “no shortcut” to the long journey of nuclear disarmament, and that the NWBT itself would not bring about the elimination of nuclear weapons.⁶⁴ Of course it would not. Strictly from an international law point of view, however, a treaty's modest effectiveness *per se* is no reason against signing or ratifying it.

To begin with, treaties are often *programmatic*, in the sense that they are intended to engender convergent behavior amongst states parties

over time. Unlike customary international law, which earns validity precisely because states have through conduct and *opinio juris* already expressed their acceptance of the prevailing circumstances, multilateral treaties are typically forward-looking and describe the state of affairs to which their parties aspire.

Treaties are often *programmatic*, in the sense that they are intended to engender convergent behavior amongst states parties over time.

The NWBT would be one such treaty. As noted in the OEWG report, it “would be an interim or partial step towards nuclear disarmament as it would not include measures for elimination and would instead leave measures for irreversible, verifiable and transparent destruction of nuclear weapons as a matter for future negotiations”.⁶⁵

Numerous treaties are concluded and ratified by states for the norms they uphold.

64 See, e.g., remarks of Robert Wood, US Special Representative to the Conference on Disarmament, UNGA First Committee, 27 October 2016. Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/eov/27Oct_USA.pdf.

65 OEWG report, para. 36.

Second, numerous treaties are concluded and ratified by states for the norms they uphold. Examples of such treaties abound in international human rights law, international humanitarian law, international criminal law—and, arguably, even in the international law on peace and security. These treaties are *expressive*, or “norm-generating” according to standard international law terminology,⁶⁶ in the sense that they endeavor to safeguard weighty values and condemn unacceptable behavior.

Similarly, the NWBT would be an expressive instrument. In the OEWG’s words: “It would also contribute to the progressive stigmatization of nuclear weapons”.⁶⁷

5.1.2 THE QUESTION IS NOT THE BAN TREATY’S EFFECTIVENESS AS SUCH; IT IS RATHER SIGNATURE AND RATIFICATION’S SECURITY IMPLICATIONS FOR JAPAN

Seen in this light, although a treaty’s effectiveness is important, it need not be—in fact, it rarely is—a matter of *immediate* effectiveness. States routinely sign and ratify treaties in full knowledge that their normative content does not (yet) correspond to reality. Moreover, this is the case whether the treaty in question is or is not accompanied by verification or similar arrangements.

If the worst that signing and ratifying the nuclear weapons ban treaty could do to Japan’s security is to perpetuate the status quo, then Japan should still sign and ratify the treaty, all things considered

In fact, demanding that an NWBT be effective—and, conversely, that a state not ratify an ineffective NWBT—amounts to demanding that the treaty more or less instantaneously guarantee no change or deterioration in the ratifying state’s security.

66 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, paras. 71-74. Available at <http://www.icj-cij.org/docket/files/52/5561.pdf>.

67 OEWG report, para. 36.

As was the case with participation in NWBT negotiations, the mere fact that Northeast Asia is a volatile region for Japan’s security is not *per se* a relevant reason against signing or ratifying the treaty. For if the worst that signing and ratifying the NWBT could do to Japan’s security is to perpetuate the status quo, then Japan should still sign and ratify the treaty, all things considered.

The fear is rather that signature and ratification would be affirmatively harmful to Japan’s security. The Japan-US alliance is once again a key factor. The deterrence this alliance provides is a combination of conventional and nuclear arms. The notion that conventional superiority by one bloc (e.g., the United States, Japan, and/or South Korea combined) may cause another bloc (e.g., North Korea) to compensate for its conventional inferiority by increasing its nuclear strength may, or may not, accurately explain Pyongyang’s pursuit of nuclear weapons capabilities. What is apparent is that neither the United States’ nuclear superiority, nor Japan’s NNWS status, has suppressed North Korea’s nuclear endeavors.

At issue here is therefore not if Japan’s signature and ratification of the NWBT would prompt North Korea to act in a way that would threaten its security. Rather, the real issue is three-fold:

- Whether the Japan-US alliance would change significantly if Japan signed and ratified the NWBT;
- If the alliance’s nuclear deterrence component were indeed to change significantly, whether that change would embolden North Korea to act in a way that would threaten Japan’s security; and
- If the alliance’s conventional component were (also) to change significantly, whether that change would embolden North Korea to act in a way that would threaten Japan’s security.

The answer to the first question may very well be in the affirmative. Given America’s fierce and persistent resistance to the idea of an NWBT, and how strained its bilateral security relations with a hitherto umbrella state such as New Zealand became when the latter had gone anti-nuclear, one can expect with a reasonable degree of confidence that Washington’s attitude vis-à-vis

Tokyo would sour should Japan sign and ratify the NWBT.

Even though the NWBT is likely to prohibit its parties from using or threatening to use nuclear weapons, it does not necessarily follow that they may no longer place themselves under nuclear umbrellas. Much depends on the treaty's actual terms,⁶⁸ and it is possible—though not very likely—that reliance on a nuclear umbrella provided by a non-party NWS may escape a ban.

Should Japan ratify the NWBT yet continue to rely on the US nuclear umbrella for its security, it would almost certainly be criticized for being inconsistent. Nevertheless, not even such criticisms in and of themselves amount to a reduction in Japan's security. It is unclear whether, *all else being equal*, North Korea would have acted any more aggressively towards Japan than it has been to date but for Japan's American nuclear umbrella.

From Washington's point of view, today's nuclear status quo in Northeast Asia need not be immutable in every respect.

What is perhaps more important is whether, and if so, to what extent, Japan's signature and ratification of the NWBT would affect the conventional component of its alliance with the United States. If it did, and if this change were to embolden North Korea, then NWBT signature and ratification would indeed generate security implications for Japan.

5.1.3 FROM REACTING TO SECURITY RISKS TO SHAPING THEM

As noted earlier, one cannot expect Japan's elected leaders to act irresponsibly by compounding its population's vulnerability to nuclear threats.⁶⁹ That, however, does not mean that Japan should limit itself to *maintaining* the status quo (e.g., keeping its US alliance as is), or *reacting* to changes in its security environment

brought about by the others (e.g., North Korea's relentless pursuit of nuclear capabilities).

Obama's effort shows that a state's security policy need not limit itself to following what the prevailing security environment dictates.

On the contrary, Tokyo should actively seek to elicit desirable changes. President Obama's recent effort to embrace a policy of no first use is a case in point.⁷⁰ Though ultimately unsuccessful,⁷¹ his action has raised two issues. First, this exposed Tokyo's professed fear of abandonment by the United States if it did anything to change the regional status quo—such as, for example, supporting a nuclear weapons ban—to be more debatable than might first appear. Second, security policy is as much a product of a state's security environment, as it is a potential catalyst for that environment's change.

To begin with, from Washington's point of view, today's nuclear status quo in Northeast Asia need not be immutable in every respect. Arguably, Obama did not consider unilateral action of this kind to undermine the security of its allies in the region. This also means that, in his view, nuclear weapons might not be needed to deter conventional attacks on its allies. *Vis-à-vis* the latter needs, adjusting conventional deterrence according to the prevailing threats might be sufficient.

70 See, e.g., Josh Rogin, "Obama Plans Major Nuclear Policy Changes in His Final Months", *The Washington Post*, 10 July 2016. Available at https://www.washingtonpost.com/opinions/global-opinions/obama-plans-major-nuclear-policy-changes-in-his-final-months/2016/07/10/fe3d5ca-4521-11e6-88d0-6adee48be8bc_story.html?utm_term=.16d8520089db.

71 See, e.g., David E. Sanger and William J. Broad, "Obama Unlikely to Vow No First Use of Nuclear Weapons", *The New York Times*, 5 September 2016. Available at <http://www.nytimes.com/2016/09/06/science/obama-unlikely-to-vow-no-first-use-of-nuclear-weapons.html>.

68 See above.

69 See above.

Moreover, such a policy change in American nuclear deterrence would have placed Japan in an awkward position. That it would have done so was vividly on display when it was reported that Japan urged the United States to reconsider the matter.⁷² There is now a real possibility that the two allies did not share a common view on Northeast Asia's security. Should Obama's initial assessment turn out to be closer to the truth, that would mean that Japan might have been exaggerating the security threat it said it had been facing. If, on the other hand, Tokyo's assessment were closer to the truth, Japan might have had to augment its defense to make up for the deficiency anticipated by the US policy change. The oft-cited concern that Japan might "go nuclear"⁷³ broadly falls under this heading.

Whether to take an active role in reshaping regional security, or to sit idly by and let Asia's other powers define what Japan needs to do, would be a matter for its leaders to decide.

We will not find out whether the Obama proposal, if implemented, would have affected the region's security in any way. In order for Japan's professedly greater vulnerability to reveal itself, it would have had to be shown that the US policy change had caused Japan's potential nuclear-armed adversaries to change their behavior for the worse. Conversely, a failure to show such deterioration would have meant that Japan's security had not really been affected by changes in the US nuclear umbrella—including, in particular, the introduction of no first use.

Obama's effort also signals something else. It shows that a state's security policy need not limit itself to following what the prevailing security

72 See, e.g., "Abe Tells U.S. of Japan's Concerns over 'No First Use' Nuke Policy Being Mulled by Obama", *The Japan Times*, 16 August 2016. Available at <http://www.japantimes.co.jp/news/2016/08/16/national/politics-diplomacy/abe-tells-u-s-japans-concerns-obama-mulled-no-first-use-nuke-policy/#.WBXWwKOZOuU>.

73 See above.

environment dictates. Geostrategic uncertainties, even considerable ones, are not necessarily a bar to pursuing a forward-looking policy change and, with it, to triggering a change in the status quo for the better, if a state's leadership is suitably minded to accept the attendant risk in doing so.

China's longstanding and publicly declared policy of no first use is well known.⁷⁴ Northeast Asia would arguably become more stable if neither China nor the US retained a first strike option. In such an environment, the very worst that could happen to Japan would be to have to maintain its current defense capabilities. Whether to seize such an opportunity and take an active role in reshaping regional security, or to sit idly by and let Asia's other powers define what Japan needs to do, would be a matter for its leaders to decide.

Arguably, the same reasoning applies *mutatis mutandis* to Pyongyang. North Korea's behavior regarding nuclear weapons has so far been destabilizing for its neighbors. It has been predictably unpredictable, however, broadly consistent with North Korea's existential anxiety and desire to ensure its survival vis-à-vis external threats such as the United States and South Korea. Importantly, North Korean behavior to date does not appear to have been affected significantly by Washington's implicit readiness to use nuclear weapons first.

Needless to say, we must carefully assess what kind of external security conditions Pyongyang responds to and, when it does, how it responds. Key questions for our purposes include:

- Whether Japan's US nuclear umbrella is in fact one of these conditions;
- Whether, *all else being equal*, North Korea would have reacted to America's unilateral introduction of a no first use policy by behaving in a manner detrimental to Japan's security; and, by extension,
- Whether Japan's security vis-à-vis North Korea could not be ensured by a Japan-US alliance that did not include a nuclear umbrella.

74 See above.

5.2 Arguments against signature and ratification

As noted earlier, Japan can, and should, actively promote nuclear disarmament-related treaties if they are likely to (a) reduce the number and roles of nuclear weapons in a concrete and practical manner, (b) decrease the nuclear threats that Japan faces, and (c) enhance—or, at any rate, not undermine—Japan’s security. Japan can promote such treaties by signing and ratifying them.

It is naïve to expect that Japan’s signature and ratification *alone* will bring about a reduction in the number and roles of nuclear weapons, or the nuclear threat it currently faces.

Whether the same goes for an NWBT depends on several considerations. Chief among them is the fact that the total elimination of nuclear weapons will take some time after the treaty’s adoption. Japan is likely to find it essential that the treaty not adversely affect its security policy, including, in particular, the nuclear umbrella that the United States provides, during the interim period. It is likely that the NWBT as currently envisioned will cause concern on this score, and leave Japan feeling reluctant to be bound by its terms as a result.

5.2.1 EFFECTIVENESS OF A TREATY

One may safely assume that no nuclear-armed state, including those present in Northeast Asia, will ratify and implement the NWBT for the time being. They are unlikely to change their minds solely on account of the normative pressure the NWBT may generate.

Rather, their national security considerations will prove decisive. It is in the nature of multilateral agreements on nuclear disarmament that the non-participation of even one nuclear-armed state could seriously undermine the national security of those who do participate. Few of them would consider acceding to the NWBT unless most or all of the others also do.⁷⁵

It is therefore naïve to expect that Japan’s NWBT signature and ratification *alone* will bring about a reduction in the number and roles of nuclear weapons, or the nuclear threat it currently faces.

Japan would also hesitate to be bound by an NWBT that lacks verification measures. Such measures would be vital when ensuring compliance with disarmament and nonproliferation obligations. While legal undertakings might appear more solemn than unilateral or political commitments, the former would not immediately or automatically ensure its observance. A disarmament treaty without verification measures would cast serious doubt about its effectiveness. In addition, given the tremendous destructiveness of nuclear weapons, an ineffective NWBT suffering from the non-participation of key states could have negative implications for the international and regional order.

Proponents argue that verification measures could be separately negotiated and established after the NWBT’s entry into force. However, fundamental disarmament and nonproliferation obligations are typically paired with corresponding verification measures. Verification-related difficulties have prevented some proposed obligations from being stipulated in a treaty. For example, the CTBT does not prohibit nuclear tests without explosion, such as computer simulations and subcritical tests, partly because of the argument that they are unverifiable. Other obligations might be regarded as merely political commitment and violated by key states parties with relative ease.

The effectiveness of an NWBT is not just a matter of observance and verification. On the contrary, it extends to non-compliance by states parties as well as the behavior of non-participating states. Some mechanism must be in place to sanction breaches and protect the security of ratifying states, and yet the treaty in question is unlikely

for international security, the more important the participation of all key states will be. On the other hand, accepting the need for broad participation in such a treaty necessarily entails offering some concessions on several issues, including the rights and obligations it will stipulate. Striking the right balance between the aspirations of a ban treaty’s proponents and its effectiveness would be a challenge.

75 On the one hand, the more significant implications a nuclear disarmament treaty has

to contain any. Even with enforcement measures, it might still be insufficient to change the attitude of those non-complying or non-participating states determined to possess or acquire nuclear arsenals.

Even with enforcement measures, a ban treaty might still be insufficient to change the attitude of those non-complying or non-participating states determined to possess or acquire nuclear arsenals.

It might even be argued, paradoxically, that the very existence of nuclear weapons and their acknowledged role are what underpins the enforcement of nuclear disarmament treaties. Given the anarchical character of today's international system, in which it is ultimately up to individual states to apply sanctions, nuclear deterrence may function as a key self-help measure vis-à-vis nuclear-armed states acting in breach of their own disarmament obligations. This is to say nothing of the possibility that resorting to nuclear deterrence *qua* sanction may be met with nuclear retaliation. If that is possible, however, a nuclear weapons ban without credible enforcement risks being even less effective.

Furthermore, we should consider the effectiveness of the prohibitive norm itself. According to Ray Acheson and Beatrice Fihn,

[a] treaty banning nuclear weapons would put more pressure on states outside the treaty to eliminate their weapons of terror by stigmatizing the weapons ... Banning specific weapon systems can and does have a wide-ranging ethical standard-setting function that goes far beyond the terms and signatories of a particular treaty. Banning nuclear weapons will affect the calculations of the nuclear-armed states. It will be an additional obstacle to justifications of their continued possession and modernization of these weapons ... In addition, the stigmatization effects described above will make nuclear weapons incompatible with the principles of human rights and humanitarian law, becoming increasingly unattractive to governments that

wish to be viewed in good standing in the international community.⁷⁶

Others argue that “[s]trengthening the norm against the use and possession of nuclear weapons—on the coat tails of growing concerns about humanitarian impacts of those armaments—would in turn be a catalyst for their complete elimination”.⁷⁷

It is doubtful, however, whether Japan and other states that face serious nuclear threats and rely on the US nuclear umbrella for protection would choose to entrust their security entirely in the strength of a norm. As noted earlier, no nuclear-armed state would renounce its nuclear weapons simply because a group of states are working on their prohibition. Quite the contrary may well be true. Some nuclear-armed states might regard such a normative development as an opportunity to change the status quo in their favor through nuclear coercion.

That humanitarianism and prohibition should lie at the foundation of our effort to promote and achieve the total elimination of nuclear weapons goes without saying. At the same time, however, the mere imposition of a ban does not ensure its effectiveness. It is quite possible that a national, regional and global security condition conducive to the effectiveness of a nuclear weapons ban—including, in particular, the ban's acceptance by nuclear-armed states—may need to exist beforehand. In the absence of such a condition, states that accept the prohibition would risk exposing themselves to nuclear bullying.

5.2.2 JAPAN-US ALLIANCE

Another significant challenge to Japan's signature and ratification of an NWBT is its security alliance with the United States. One view holds that:

76 Ray Acheson and Beatrice Fihn, “Preventing Collapse: The NPT and a Ban on Nuclear Weapons”, *Reaching Critical Will*, October 2013, p. 9. Available at <http://www.reachingcriticalwill.org/images/documents/Publications/npt-ban.pdf>.

77 Torbjørn Graff Hugo, “About a Ban: Dismantling the Idea of a Ban on Nuclear Weapons”, *Policy Paper*, International Law and Policy Institute, No. 3 (October 2013). Available at <http://nwp.ilpi.org/wp-content/uploads/2015/03/PP03-13-About-a-Ban.pdf>.

While participation in military alliances that include nuclear-armed states would not be prohibited, the treaty should require states parties not to participate in any act prohibited under the treaty. In this regard, states parties that belong to alliances that envision the use of nuclear weapons could be obliged to effectively renounce their participation in any doctrine or policy involving the stockpiling, deployment, use, or threat of use of nuclear weapons. While joining the ban treaty would not necessarily have to require any state to exit its alliance, this principle could compel them to ensure that their participation is compatible with their commitments and policies under the ban treaty. Similarly, any bilateral arrangement involving hosting of nuclear weapons would likely need to be revisited. The ban treaty could make it clear that nuclear weapons are illegal and states parties cannot plan to benefit from or support their use or continued possession. In this regard, relationships of extended “nuclear deterrence,” in which a nuclear-armed state pledges to use nuclear weapons to “protect” an ally, would likely need to be renounced by states parties.⁷⁸

Both idealism and realism have informed Japan’s approach to nuclear weapons. For historical reasons, many expect Japan to lead the international community in its effort to eliminate all nuclear weapons. At the same time, today’s volatile Northeast Asian geopolitics means that Japan needs a security policy that effectively counters potential and overt threats emanating from its nuclear-armed neighbors. In this regard, Japan has so far considered the United States’ extended nuclear deterrence indispensable to its security.

More than the mere adoption of an NWBT would be needed to ensure the total elimination of nuclear weapons. The treaty itself is unlikely to change the fact that Japan will continue to face nuclear threats for the foreseeable future. Japan’s signature and ratification seems destined to enjoy very limited prospects, as long as Tokyo deems the treaty inadequate as a means to address nuclear threats and detrimental to the US nuclear umbrella.

The most fundamental condition for America’s extended nuclear deterrence to function is that it has both the capability and willingness—or resolve, as the case may be—to use nuclear weapons in Japan’s defense.⁷⁹ Reciprocally, Japan ought to be resolved that the United States may use nuclear arsenals on its behalf.

If Japan’s current position on nuclear weapons—i.e., advocating their total elimination on account of their humanitarian impact while relying on the US nuclear umbrella for its security—is already contradictory, signing and ratifying an NWBT will only make the contradiction more glaring.⁸⁰ Moreover, the latter may bring Japan’s resolve to have the United States use its nuclear weapons into question, gravely jeopardizing their security alliance.

In theory, the United States, with the most powerful conventional forces in the world, might still be able to remove the nuclear component of its overall extended deterrence for Japan. It might also be possible that America’s extended conventional deterrence in fact suffices. These scenarios are unlikely, however, lest a nuclear-armed opponent deter Japan and the United States from resorting to collective self-defense in the first place by simply threatening to use nuclear weapons against them. It would therefore be unsound of Japan to ask that the United States defend it against its nuclear-armed neighbors only through conventional deterrence. To do so would accomplish little but needlessly restrict the range of US actions.⁸¹

78 Ray Acheson, Thomas Nash, and Richard Moyes, “A Treaty Banning Nuclear Weapons: Developing a Legal Framework for the Prohibition and Elimination of Nuclear Weapons”, *Reaching Critical Will*, May 2014, p. 13. Available at <http://www.reachingcriticalwill.org/images/documents/Publications/a-treaty-banning-nuclear-weapons.pdf>.

79 The success of extended deterrence would depend more on a state’s willingness to use nuclear weapons than its capability to do so. See, e.g., Glenn H. Snyder, *Deterrence and Defense: Toward a Theory of National Security* (Princeton: Princeton University Press, 1961), p.79.

80 That is, unless Japan abandons its US nuclear umbrella.

81 Entering reservations is one possibility that Japan may pursue with a view to signing and ratifying an NWBT while maintaining its US nuclear umbrella. For example, Japan might accept the treaty if it permitted reliance on extended nuclear deterrence pending the total elimination of nuclear weapons. As noted earlier, however, such a reservation would fundamentally contradict the spirit of a treaty prohibiting the use of nuclear weapons. In any event, it is unlikely that the treaty’s proponents will agree to the permissibility of reservations.

Naturally, Japan and the United States should continue to consult with each other on nuclear strategy and disarmament policy. They should work together to reduce their reliance on extended nuclear deterrence and promote effective disarmament measures under the prevailing circumstances. It is nevertheless important to remember that the United States may require nuclear capabilities and postures beyond what is strictly necessary for Japan's security, and that

5.3 Summary

Two major sets of considerations will affect Japan's likely action vis-a-vis an NWBT. One set relates to the treaty's characteristics. Whether Japan should or should not sign and ratify the treaty would depend in part on how it chose to characterize it.

Arguably, the NWBT is like numerous other programmatic treaties typically intended to engender convergent state behavior over time. Those supporting the idea of an NWBT stress that it would only be the first of many disarmament measures intended ultimately to bring about the total elimination of nuclear weapons. In addition, the NWBT as well as a number of other legal instruments would embody and promote weighty international values.

It may be objected that an NWBT is different from other programmatic and expressive treaties. Confidence in its effective compliance, verification and enforcement is more immediately crucial for nuclear-armed states and umbrella states. They are likely to regard an international norm prohibiting nuclear weapons alone as a poor substitute for nuclear deterrence. Unless their nuclear-armed foes reciprocally abandon—or, at least, dramatically reduce the number and roles of—their nuclear weapons, lifting their nuclear umbrella may expose these states to dangers of nuclear bullying.

This leads us to the second set of considerations, i.e., how Japan's signature and ratification of the NWBT would affect its security and alliance with the United States. It is not clear whether North Korea would have sought to acquire nuclear weapons capabilities regardless of Japan's US security pact or, conversely, whether Pyongyang would have acted more aggressively towards Japan absent its US nuclear umbrella. If the former were closer to the truth, then it is

Washington will reject a nuclear weapons ban on account of its overall security strategy.

The existence of certain perception gap between allies is a fact of life. Assuming that Japan wishes to continue to rely on the US nuclear umbrella, Tokyo and Washington need to continue to narrow their differences, with a view to safeguarding the credibility of their extended deterrence and promoting nuclear disarmament.

arguable that Japan should sign and ratify the NWBT.

President Obama's no first use proposal also shows that today's nuclear status quo in North-east Asia need not be deemed immutable. Japan certainly could, and perhaps should, shift its policy priorities from maintaining the status quo and reacting to changes in its security environment, to shaping desirable changes itself.

It would be unsound of Japan to ask that the United States defend it against its nuclear-armed neighbors only through conventional deterrence.

Here, too, one may reply that Japan will need to be convinced not only of the treaty's adequacy as a means with which to mitigate nuclear threats in Northeast Asia, but also of its compatibility with the US nuclear umbrella. Tokyo is unlikely to sign and ratify the NWBT if such action jeopardizes Washington's resolve to defend Japan. The same would result if signature and ratification unnecessarily limited the permissible range of US action by requiring the alliance in effect to rely exclusively on conventional deterrence.

6. Conclusion

Whatever one's opinion about the desirability of an NWBT under the present circumstances, there is no denying that the prospects of it being negotiated, and perhaps even adopted, have never been more imminent. This puts Japan, a nuclear umbrella state where the memories of Hiroshima and Nagasaki still endure, in an awkward position. Torn between domestic and international civil society organizations urging moral authority on the one hand, and nuclear-armed states as well as fellow umbrella states opposed to the proposed ban treaty on the other, Japan must decide whether to take part in the negotiations and, should the treaty come into being, whether to sign and ratify it.

This report comes to the conclusion that Tokyo will actively engage in broad discussions leading up to the commencement of NWBT negotiations. It is harder to predict what attitude Japan will adopt towards the negotiations themselves. There are several considerations, such as public sentiments, historical legacies, and moral convictions, that clearly go into participation's favor. Participation in the negotiations *per se* may be unlikely to undermine Japanese security. To this, one might add Japan's role as a voice of gradual progress. At the same time, however, the negotiations' likely modalities raise concerns. They include the danger that the adoption of an NWBT is a foregone conclusion, that the ban's hardline supporters may not take contrary opinions seriously, and that Japan may be reduced to a token presence. Moreover, Tokyo would find it difficult to participate over Washington's objection.

Tokyo will actively engage in broad discussions leading up to the commencement of ban treaty negotiations.

Whether Japan should sign and ratify the eventual NWBT is a question that is riddled with even more uncertainties. That the treaty alone will not result in the total elimination of nuclear weapons is clear. The question is whether this should be seen as an obstacle to Japan's signature and ratification. It can be argued that

Japan should sign and ratify an NWBT for its programmatic and expressive value. One may counter that Japan should not do so, as long as confidence in the treaty's effective compliance, verification and enforcement is lacking.

That the treaty alone will not result in the total elimination of nuclear weapons is clear. The question is whether this should be seen as an obstacle to Japan's signature and ratification.

Japan's signature and ratification would also depend on how the treaty affects its security and US alliance. It might be that, having ratified the NWBT, Japan could still deter threats from its nuclear-armed neighbors with the combination of Japanese and US conventional forces, or even catalyze amelioration in Northeast Asia's nuclear security environment. Such would not be the case, however, should Japan's NWBT ratification undermine its reliability as a US ally and expose it to graver nuclear threats.

With its engine already running, the metaphorical bus—destination “Nuclear Weapons Ban”—is ready to depart. The journey is expected to be a perilous one. Many of Japan's friends have taken their seats, urging it to join them. Meanwhile, Tokyo's other friends stand back, arms crossed, unconvinced that anything good awaits them at the journey's end. To go or not to go—it is soon time for Japan to make up its mind.



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