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United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination
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Agenda item 8 (b)
General exchange of views on all matters

Recommendations for the negotiation of a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination

Submitted by the secretariat of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean

I. Introduction

1. The General Assembly, by its resolution 71/258, decided to convene a United Nations conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. The objective of the Conference is thus clearly stated in the title itself.

2. The States Members of the United Nations overwhelmingly consider that there is a legal gap in the sense that nuclear weapons, unlike other weapons of mass destruction, are not subject to prohibition in international law.

3. The international regime on the non-proliferation of nuclear weapons has had relative success as, since 1967, just four States have become possessors of nuclear weapons. Some progress in the reduction of nuclear arsenals is also to be acknowledged. However, these advances are not enough to fulfil the provisions of article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which is the sole global commitment currently in existence in international law to achieve nuclear disarmament.

4. Among international efforts and initiatives on non-proliferation and nuclear disarmament, the establishment of nuclear-weapon-free zones represents a concrete achievement, given that it is focused on the prohibition of nuclear weapons, leading towards their total elimination.

II. Essential elements of a legally binding instrument to prohibit nuclear weapons

5. The United Nations conference is convened in order to negotiate a legally binding instrument. It is not a deliberative meeting. The objective of the legally binding instrument is nuclear weapons, and it is aimed at prohibiting them. In other words, the intention of the General Assembly is to establish the illegality of nuclear weapons by means of a legally binding instrument.

6. A legally binding instrument must therefore include, inter alia:

(a) A definition of what is being prohibited;

(b) The scope of the prohibition;

(c) Clauses concerning the modalities for ensuring compliance and measures in case of non-compliance;

(d) A mechanism for deliberation and exchange of information among the contracting parties and the services necessary for its functioning;

(e) Relationship to the United Nations, the International Atomic Energy Agency and the Treaty on the Non-Proliferation of Nuclear Weapons;

(f) Participation;

(g) Final clauses.

7. According to General Assembly resolution 71/258, the legally binding instrument should be conceived as leading towards the total elimination of nuclear weapons. This is an important clarification, as otherwise nuclear weapons would be made illegal or prohibited, but their existence would be authorized and their total elimination would not be foreseen. The prohibition envisaged does not address the use or the threat of use of nuclear weapons. The illegality of nuclear weapons, once established, logically leads to their total elimination. In its wisdom, the General Assembly separated the two stages but made it clear that the first leads to the second. The General Assembly proceeded in that way owing to the dauntingly complex operations involved in the elimination stage. The initial step of prohibition can be taken separately from elimination.

8. It is important not to confuse prohibition with elimination. Besides measures inherent to it, elimination may include many collateral undertakings such as humanitarian, environmental, financial, scientific and technical cooperation. If the two stages were to be negotiated at the same time in a single document, the probabilities of failure would increase dramatically. Prohibition is an essential foundation for elimination. The former should not be hostage to the latter.

9. The seven essential elements of the legally binding instrument highlighted in paragraph 6 above are briefly explained below, taking, as the case may be, the achievements in legal as well as in practical terms of the treaties establishing nuclear-weapon-free zones, the first being the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), which marked its fiftieth anniversary on 14 February 2017.

(a) Definition of what is being prohibited

10. The Treaty of Tlatelolco contains one of the first and few definitions of nuclear weapon in an international legal instrument. That definition has not been called into question, either by any State party to the Treaty of Tlatelolco or by any State party to the Additional Protocols to the Treaty.[1]

11. In article 5 of the Treaty of Tlatelolco, "nuclear weapon" is defined as follows:

> For the purposes of this Treaty, a nuclear weapon is any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes. An instrument that may be used for the transport or propulsion of the device is not included in this definition if it is separable from the device and not an indivisible part thereof.

(b) Scope of the prohibition

12. The Treaty of Tlatelolco is the first multilateral legal instrument to prohibit nuclear weapons, leading towards their total elimination.

13. Article 1 of the Treaty of Tlatelolco, regarding prohibitions and obligations, contains the following fundamental elements:

(a) Nuclear energy shall be used exclusively for peaceful purposes. This is the starting point of the Treaty of Tlatelolco;

(b) States parties to the Treaty are prohibited from the following five activities in relation to nuclear weapons: testing, use, manufacture, production, acquisition;

(c) States parties to the Treaty are prohibited from undertaking the above-mentioned five activities in relation to nuclear weapons pertaining to third States by means of receipt, storage, installation, deployment, possession;

(d) Such activities are prohibited to the States parties to the Treaty either in their territories or in the territories of third parties in any way;

(e) Prohibitions cover the actions of States parties directly or indirectly, by themselves or on behalf of anyone else.

14. Article 1 of the Treaty of Tlatelolco reads as follows:

> 1. The Contracting Parties hereby undertake to use exclusively for peaceful purposes the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories:
>
> a. The testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way, and

[1] China, France, the Netherlands, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States.

b. The receipt, storage, installation, deployment and any form of possession of any nuclear weapons, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way.

2. The Contracting Parties also undertake to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.

(c) Clauses covering the modalities for ensuring compliance and remedies for non-compliance

15. The United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons should include a control system to ensure compliance with obligations regarding the prohibition of nuclear weapons.

16. The control system established by the Treaty of Tlatelolco in articles 13-18 contains both subjective and objective elements. The subjective elements include the semi-annual reports whereby the Parties to the Treaty formally notify the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean that no activity prohibited by the instrument has taken place in their respective territories. The objective elements of the control system include the conclusion and implementation of safeguards agreements with the International Atomic Energy Agency (IAEA) in order to ensure that nuclear energy be used exclusively for peaceful purposes.

17. The role of IAEA in the legally binding instrument to prohibit nuclear weapons will need to be carefully studied and strengthened to ensure compliance with the prohibition of nuclear weapons.

(d) A mechanism for deliberation and exchange of information among the contracting parties and the services necessary to its functioning

18. The legally binding instrument to prohibit nuclear weapons could include conferences of the Parties with the support of the United Nations and IAEA. The Conferences might, as necessary, create an institution or secretariat to assist with the implementation of the treaty.

19. Article 7 of the Treaty of Tlatelolco reads as follows:

1. In order to ensure compliance with the obligations of this Treaty, the Contracting Parties hereby establish an international organization to be known as the “Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean”, hereinafter referred to as “the Agency”. Only the Contracting Parties shall be affected by its decisions.

2. The Agency shall be responsible for the holding of periodic or extraordinary consultations among Member States on matters relating to the purposes, measures and procedures set forth in this Treaty and to the supervision of compliance with the obligations arising there from.

> 3. The Contracting Parties agree to extend to the Agency full and prompt co-operation in accordance with the provisions of this Treaty, of any agreements they may conclude with the Agency and of any agreements the Agency may conclude with any other international organization or body.

20. Throughout the last 50 years, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean has fulfilled the functions conferred on it by the Treaty of Tlatelolco, namely, the implementation of the control system. The Agency's secretariat organizes the sessions of the general conference, which establish procedures for the control system in order to ensure observance of the Treaty in accordance with its provisions (see art. 9, para. 2 (b)).

21. The Council of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean has to date held 306 meetings, generally every two months, to ensure compliance with the obligations under the Treaty and to receive the semi-annual communications derived from article 14 of the Treaty, which relate to the absence of activities prohibited under the Treaty; and those reports derived from article 24 with respect to agreements concluded by States parties on matters with which the Treaty is concerned.

22. The establishment of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean has been effective not only in ensuring compliance with the obligations of States parties with respect to the Treaty of Tlatelolco. It has also served as a mechanism to strengthen transparency regarding non-proliferation obligations. The institutionalization of the commitments and obligations deriving from the Treaty of Tlatelolco, through the Agency, is based on the principle that States can address security concerns and prevent possible conflicts through legal provisions.

(e) Relationship to the United Nations, the International Atomic Energy Agency, the Treaty on the Non-Proliferation of Nuclear Weapons and the treaties establishing nuclear-weapon-free zones

23. The conference of States parties to the legally binding instrument to prohibit nuclear weapons could be held under the auspices of the United Nations. The experience and participation of IAEA in such conferences would also be valuable, to review the implementation of the legally binding instrument.

24. Since the negotiation of a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, is related to the provisions of article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, the review conferences of the Parties to the Treaty could include discussion on the implementation of the legally binding instrument.

(f) Participation

25. In its resolution 71/258, the General Assembly encourages all Member States to participate in the conference. In other words, the General Assembly is not excluding the participation of any State and the legally binding instrument should be open for signature to any State.

26. The General Assembly should call upon all Member States to adhere to the legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.

(g) Final clauses

27. The legally binding instrument to prohibit nuclear weapons should include a formula that makes viable its early entry into force. This means that the instrument should be in force once it has been ratified by a specified number of States, without any distinction of categories among them. Its entry into force cannot depend on its ratification by nuclear-weapon States or by any other category of States.

28. In both domestic and international law, full compliance with obligations is mandated. Laws must be fully complied with; therefore, semi-compliance is not an option. In this regard, the legally binding instrument should not be subject to reservations.