

Striving Toward Nuclear Disarmament, and the Humanitarian Approach

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1. Introduction

With the Ninth Review Conference of the Nuclear Nonproliferation Treaty (NPT) coming up this year, I review the current state of arguments regarding nuclear disarmament, and examine ways to further it.

This year, 2015, marks 70 years since the atomic bombings, the end of World War II, and the launching of the United Nations. Although we have also seen seven decades in which nuclear weapons were not used, those weapons still exist and continue to threaten humanity.

2. The Obligation for Nuclear Disarmament

The NPT, which this year marks its 45th year since entry into force, provides the legal basis for nuclear disarmament in Article 6. In 1995 after the Cold War, the NPT was extended indefinitely, and in conjunction with that, it has been repeatedly confirmed that Article 6 legally requires the abolition of nuclear weapons. According to the 1995 decision “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” the following measure is important “in the full realization and effective implementation of article VI”: “[t]he determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons.” In the 2000 Final Documents, the Conference agreed on “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.” In the 2010 Final Document, “[i]n pursuit of the full, effective and urgent implementation of article VI of [NPT]”, the Conference agreed on 64 Action Plans on nuclear disarmament which includes concrete steps “for the total elimination of nuclear weapons.” In the 1996 Advisory Opinion, International Court of Justice (ICJ) also held that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

Performance of this obligation for nuclear disarmament has still made no progress. Last year the Republic of the Marshall Islands filed suit in the ICJ over this issue, and non-nuclear weapons states are becoming increasingly frustrated with the delay in nuclear disarmament.

3. The Humanitarian Approach

In relation to the disarmament effort, starting with the 2010 Review Conference the involved parties have widely discussed and strived toward the humanitarian approach to nuclear disarmament. So far, five joint statements have been issued, and three international conferences have been held on this matter. The Final Document from the 2010 Review Conference stated, “The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.” The joint statements shared these elements: the importance that nuclear weapons are never used again under any circumstances, in view of the devastating consequences of their use, and the realization that the only way to insure that nuclear weapons are not used is to abolish them. At the three international conferences there was also a fact-based, profound recognition of the humanitarian consequences of using nuclear weapons, and it was emphasized that if nuclear weapons were used, humanitarian relief would be impossible. At the recent Vienna conference, participants shared a recognition of the current status regarding laws related to nuclear weapons use.

It is commendable that, thanks to this approach, efforts for nuclear disarmament are once again gaining traction.

There is, however, a counterargument from the standpoint of security. The 2010 Review Conference Final Document also said, “The Conference reaffirms that significant steps by all the nuclear-weapon States leading to nuclear disarmament should promote international stability, peace and security, and be based on the principle of increased and undiminished security for all.” A joint statement submitted by Australia to the 2014 UN General Assembly First Committee stated, “To create the conditions that would facilitate further major reductions in nuclear arsenals and eventually eliminate them requires the global community to cooperate to address the important *security* and humanitarian dimensions of nuclear weapons” (emphasis added).

Debate has not necessarily produced agreement on any specific plan for abolishing nuclear weapons. The New Agenda Coalition’s proposal is comprehensive, and the ban treaty advocated by the International Campaign to Abolish Nuclear Weapons (ICAN) has yet to be brought up specifically on the intergovernmental level. The chair’s summary from the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico said that the “time has come to initiate a diplomatic process conducive to this goal,” and further made mention of the firm belief that “this process should comprise a specific timeframe, the definition of the most appropriate fora, and a clear and substantive framework.” But the Austrian Pledge released at the subsequent Vienna conference merely called on all states parties to the NPT “to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons.”

4. From the Illegality of Using Weapons to Their Abolition

Let’s take a look at past examples of transitioning from making weapons use illegal to abolishing them. In the disarmament field, abolition of a certain category of weapons has been achieved by using specific legal instruments. In many cases the use of weapons has been restricted or banned, which is then followed by a ban on their possession, and

abolition. If we take biological and chemical weapons as examples, in 1925 the Geneva Gas Protocol was concluded, banning the use of poison gas and other weapons. This was followed by conventions which banned possession and made provisions for abolition (the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention).

We can learn the following lessons from these examples.

First, countries possessing the weapons ultimately must resolve to get rid of them, and for the most part this decision has been brought about by participation in an abolition convention.

Second, as an antecedent to an abolition convention, there have been norms which restrict or ban the use of the weapon in question. One can regard these antecedent restriction and prohibition norms as having ushered in the subsequent abolition treaties.

Third, there is nevertheless a legal gap between the norms restricting and banning use, and the abolition treaties. The former have not entirely restricted or banned the use of the weapons in question. With the Geneva Gas Protocol, for example, some countries made a reservation on prohibiting use based on reprisal. Therefore norms restricting or banning use cannot alone assure the weapons will not be used, which necessitates abolition treaties.

Fourth, it was the requirement of humanity that closed this legal gap. The Biological Weapons Convention refers to the “conscience of mankind” (Preamble). The Anti-Personnel Mine Ban Convention and the Convention on Cluster Munitions both imply in their preambles that their conclusion is based on the interpretation and application of international humanitarian law (IHL), which emphasizes the requirement of humanity. It is significant that security is also given consideration, but that this was overcome and the conventions were concluded.

5. How About Nuclear Disarmament?

First, there is still no convention for abolishing nuclear weapons. Although it has been proposed, the nuclear-weapon states make no effort to seriously consider it.

Second, there are nevertheless norms for restricting and banning the threat and use of nuclear weapons. Although the ICJ Advisory Opinion did confirm the general illegality of the threat or use of nuclear weapons mainly on the basis of IHL, it avoided coming to a definitive conclusion on their legality “in an extreme circumstance of self-defense.” This does not mean there is no applicable law; existing law was insufficiently applied. At present, therefore, the issue between those who argue legality and those who argue illegality is how to interpret and apply the law. Whether such law exists or not is not the issue.

Third, there is accordingly a legal gap between norms that restrict or ban use, and abolition conventions. As the situation now stands, an abolition convention is essential to assure that nuclear weapons will not be used.

Fourth, there is now an initiative to strengthen the requirement of humanity for closing the legal gap, and that is the humanitarian approach noted above. There are expectations for the role of the requirement of humanity, which is a set of social norms. This is expressed as the views of nations, international organizations, and civil society. At the same time, however, there is a counterargument from the viewpoint of security, and that has yet to be

overcome.

6. What Should We Do Now?

First, we need to stay on message: The use of nuclear weapons is illegal. At issue is the law's application, but inasmuch as we cannot have full expectations for a solution in the ICJ or other court, we must constantly assert the illegality of nuclear weapons use in every venue of international society. Here the International Committee of the Red Cross as the guardian of IHL, and the Red Cross and Red Crescent Movement, have major roles to play.

Next we need to obtain broad-based support for the humanitarian approach and stigmatize nuclear weapons. This provides the power to close the legal gap. It is important here to condemn the use and threat of nuclear weapons on the basis of what we know as fact about the consequences of nuclear explosions. Doing so will encourage a reconsideration of nuclear-dependent security, i.e., the doctrine of nuclear deterrence. From the stance of the humanitarian approach, we should doggedly make an issue of the very inhumaneness of the threat of nuclear weapons (i.e., nuclear deterrence). That in turn requires us to further the quest for and deepen understanding of the principle of humanity, and to broadly share the profound understanding obtained thereby.

In connection with this, by way of an approach from the perspective of disarmament law, it is perhaps important to have the viewpoint that a nuclear deterrence posture itself in some ways hinders nuclear disarmament negotiations. One can indeed argue that the very maintenance of a nuclear deterrence posture not only violates the obligation under NPT Article 6 to stop the nuclear arms race at an early date, but also violates the obligation to pursue nuclear disarmament negotiations in good faith and bring them to a conclusion. On this point, it is worth watching the Marshall Islands Cases, in which the obligation for nuclear disarmament is at issue.

Last comes starting a debate on specific initiatives aimed at an abolition convention. It is perhaps not exactly necessary to add new articles that prohibit use, because there are already principles and rules which prohibit use. The presence of such provisions in the abolition convention might keep nuclear-weapon states from participating. And if nuclear-weapon states indicate that they will not participate in the convention with such provisions, that could give those states a pretext for arguing that there are no norms banning use, or that they do not need to apply, because those provisions formally do not bind them.

By contrast, referring to the application of the principles and rules of IHL in the abolition convention's preamble or other relevant instruments might make it possible to render a collective judgment on application of the law. Especially if a majority of countries participate, and the community of the State Parties to the convention comes to be regarded as representative of international society, such judgments might be seen as authoritative interpretations.

Further, in the event that nuclear-weapon states participate in discussions meant to establish an abolition convention, one could expect that the posture of those states would build trust among the involved nations, so that, during the process of shaping the convention, the conditions under which nuclear-weapon states would accept rules totally

banning use would be created.

7. Conclusion

There are legal norms for banning nuclear weapons. Fully applying them would enable us to argue that all use of nuclear weapons is illegal. However, people who depend on nuclear weapons for their security do not agree with this interpretation and application of the law. We must therefore elicit change in their position on interpretation and application of the law. And that will require further elaboration, evolution, and innovation of the humanitarian approach.