

Nuclear Disarmament: The Road Ahead

International Association of Lawyers

Against Nuclear Arms (IALANA)

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Introduction

Forty-five working papers by individual governments and governmental coalitions were submitted to the 2014 Preparatory Committee for the 2015 NPT Review Conference.¹ Six papers, submitted by the Arab states, the Non-Aligned Movement, the New Agenda Coalition (NAC), Iran, Cuba and China, dealt with nuclear disarmament. Of these, only one, submitted by NAC,² comes to grips with options for reaching a nuclear weapons-free world. The four options presented and discussed in the NAC paper are: a comprehensive nuclear weapons convention; a simple treaty outlawing nuclear weapons, generally referred to as the ban treaty; a framework arrangement of mutually supporting instruments; a hybrid arrangement incorporating elements of all or any of the other three options, or new elements.

Our colleagues at Reaching Critical Will have produced a useful summary of the NAC paper, followed by an argument for the second option, the ban treaty.³ This IALANA paper will argue why the convention, or some combination of the convention and the ban treaty, is the most practical approach. It will also offer recommendations for action at the Review Conference and beyond.

By way of introduction, a number of milestones on the so far interminable road to a nuclear weapons-free world must be noted:

- The very first resolution adopted by the UN General Assembly on 24 January 1946, in the shadow of the atomic bombing of Hiroshima and Nagasaki, called for the establishment of a Commission “to make proposals for the elimination from national armaments of atomic weapons”.⁴ Nothing came of this mandate. In

¹ <http://www.un.org/disarmament/WMD/Nuclear/NPT2015/PrepCom2014/documents.shtml>

² “Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Working paper submitted by Ireland on behalf of the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa),” <http://undocs.org/NPT/CONF.2015/PC.III/WP.18>

³ Ray Acheson, *Banning Nuclear Weapons: An Effective Measure for Disarmament*, Reaching Critical Will, October 2014, <http://www.reachingcriticalwill.org/images/documents/Publications/bnw-effective-measure.pdf>

⁴ A/RES/1(I), 24 January 1946

subsequent years, there have been innumerable General Assembly resolutions calling for a nuclear weapons-free world.

- Twenty-four years later a new legal instrument, the Treaty on the Non-Proliferation of Nuclear Weapons, or NPT, came into being.⁵ Its preamble begins by stating the need “to take measures to safeguard the security of peoples” against “the devastation that would be visited upon all [humankind] by a nuclear war”. Unlike other international treaties and conventions, when it comes to disarmament it is toothless because it lacks an institution for monitoring compliance.⁶ Unlike the Comprehensive Nuclear-Test-Ban Treaty (CTBT) Preparatory Commission, which, although the CTBT has not yet come into force, is headquartered in Vienna and performs valuable work in monitoring nuclear activity around the world, the NPT has no permanent organization and is not only toothless with respect to disarmament, but also homeless. What is more, its name is a grievous misnomer: Its purpose is not only to prevent the spread of nuclear weapons, but, in its Article VI, each party “undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.”
- In 1996, the International Court of Justice rendered its landmark Advisory Opinion which held that the threat and use of nuclear weapons is generally illegal under international law, that any use of nuclear weapons must comply with international humanitarian law and, unanimously, that “there 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.”⁷

The Model Nuclear Weapons Convention

In 2008 UN Secretary-General Ban Ki-moon said that one way to get to a nuclear weapons-free world is to start “negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations”. He added that the Model Nuclear Weapons Convention “offers a good point of departure”.⁸

⁵ 729 UNTS 161.

⁶ Even with respect to proliferation, the NPT plays a secondary role in monitoring; it is the IAEA that monitors and the Security Council that enforces.

⁷ *Legality of Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226. In follow-up to the ICJ opinion, Malaysia introduced a General Assembly resolution calling for implementation of the disarmament obligation through multilateral negotiations leading to the conclusion of a nuclear weapons convention. The resolution, which is adopted annually, is supported by over 130 countries including several of the nuclear-armed states (China, India, North Korea and Pakistan). For the most recent iteration, see A/RES/69/43, 2 December 2014, adopted by a vote of 134 to 23, with 23 abstentions.

⁸ http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351

The Secretary-General was referring to an official UN document produced by a number of civil society organizations, including IALANA.⁹

This document, the result of several years of work by civil society experts, seeks to demonstrate to governmental policy makers that a convention, similar to the Chemical Weapons Convention and the Biological Weapons Convention, is feasible. It is offered, not on a take-it-or-leave-it basis, but as an answer to policy wonks who argue that drafting such a convention is such a complex task that it should be deferred, without saying until when.

The model convention, which is available in the six official languages of the United Nations, as well as German and Japanese,¹⁰ deals with such subjects as general obligations, definitions, rights and obligations of persons, agency, declarations for implementation, phases for implementation, national implementation measures, verification, nuclear materials, nuclear facilities, delivery systems, dispute settlement, entry into force, financing, amendments, scope, application and conclusion of the convention. A complete package.

The Ban Treaty

The ban treaty, advocated by our colleagues at ICAN, offers simplicity over complexity. They believe, with some justification, that a very short treaty outlawing nuclear weapons would be easier to achieve than one dealing with all the fine points covered in the convention. They also believe, with less justification, that such a treaty, signed and ratified by the majority of non-nuclear weapon states, would eventually, by the sheer force of its numbers and normative impact, bring the nuclear-armed states into the fold.

The Case for the Convention

The United States and Russia, the two countries which, between them, have more than 90 percent of all the nuclear weapons in existence, have made it abundantly clear that at this stage they are not prepared to take any concrete steps toward complete nuclear disarmament. With the deterioration of the US-Russian relationship due to the ongoing events in Ukraine they cannot even point to the possibility of further reductions of their nuclear arsenals, following New START, as evidence of their compliance with the NPT Article VI “undertaking”. It is a pilgrimage which lacks both a first step and a goal.

What then would be the effect of a ban treaty, which, as its advocates admit, would, at this point in time, be limited to states which have no nuclear weapons? It would have no legally binding effect on states which do have nuclear weapons. At most, it would

⁹ http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf. For background, see <http://lcn.org/mnwc/index.htm>.

¹⁰ See <http://lcn.org/mnwc/index.htm> for links to translations.

reinforce existing norms on non-use and disarmament. The idea that the signatory non-nuclear weapon states would eventually embarrass the non-signatory nuclear-armed states into joining the treaty is misconceived. Countries that possess huge arsenals of the most destructive weapons in history do not embarrass easily. The valuable regional Nuclear Weapon Free Zone treaties, covering 115 states, have not galvanized disarmament by existing possessors.

But if the nuclear-armed states will not sign a ban treaty, why would they even consider talking about a convention? That is certainly a fair question and one to which there is no easy answer. The best answer, perhaps, is this: The model convention has been part of the nuclear dialogue since it was first published in 1997. The undertaking in Article VI NPT, together with the unanimous “obligation” in the ICJ opinion, amplified by Ban Ki-moon’s invitation to consider the model convention as a good starting point for negotiations, create a virtually irresistible mandate, not to *sign* a treaty now, but to *begin* an irreversible process of good-faith negotiations now, however long they may take to reach a conclusion. The position of the major nuclear weapon states – we are committed to a nuclear weapons-free world, but refuse to even talk about how to get there – is their Achilles heel. It gives those truly committed to total nuclear disarmament, whether states or civil society organizations, an ideal point of continued attack.

In IALANA’s view, because of their very nature, nuclear weapons are, and always have been, illegal under customary international law.¹¹ They cannot be used in compliance with fundamental principles protecting civilians and neutral nations from the effects of warfare, protecting combatants from unnecessary suffering, protecting the environment from severe and irreversible damage, and safeguarding the interests of future generations. Moreover, the imperative of eliminating nuclear arms has been recognized since the first General Assembly resolution. As a result, the tripartite mandate, arising out of General Assembly resolutions, the NPT, and the ICJ opinion, to create a nuclear weapons-free world can, and should, be pursued even without creating “a new norm” which already exists. In a world in which all governments are committed, in principle if not always in practice, to the rule of law, it should be easier to persuade them to comply with existing laws than to create new ones.

¹¹ This has been IALANA’s view since its founding in 1988. A recent articulation is the 2011 Vancouver Declaration, “Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World,” released by IALANA and The Simons Foundation, with signatures from many international lawyers. Text at <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>; signatories at http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx. IALANA’s view is broadly consistent with the 1996 Advisory Opinion of the International Court of Justice, resolutions of the Red Cross and Red Crescent Movement, and analysis by the International Committee of the Red Cross. Regarding the ICJ opinion, while the Court could not reach a conclusion regarding the lawfulness or unlawfulness of threat or use in an extreme circumstance of self-defence in which the very survival of a state is at stake, the thrust of the opinion is that the use of nuclear weapons is incompatible, “scarcely reconcilable” in the Court’s words, with international humanitarian law and therefore unlawful.

The Desirability of Cooperation

ICAN and its allies have in an inspiring manner devoted great energy and resources to alerting or re-alerting the world to the horrors of nuclear weapons. There have been very good results from this work both in the building of interest among youth and the re-energizing of states. Proposals for a ban treaty have also helped to re-open the political space for discussing the legal framework for a nuclear weapons-free world. Nonetheless, for the reasons stated above, we do not believe the ban treaty approach would be the best outcome of all this hard work. But there may be a way to increase the effectiveness of all of our efforts by taking the best from both. For instance, a slimmed down version of the convention could be elaborated, containing the essentials needed to make it work without *ab initio* dotting all the i's and crossing all the t's. Conversely, the ban treaty could recognize the pre-existing norm of illegality and the existing obligations to achieve complete nuclear disarmament. In general, there is plenty of room for productive discussion about the options for establishing a nuclear weapons-free world.

The NPT Review Conference and Beyond

IALANA recommends that at the Review Conference, states seek an agreement as part of the Final Document to launch a process of deliberation and negotiation on the establishment of a nuclear weapons-free world, with provision for participation by non-NPT states. Such a process would implement the disarmament obligation set out in NPT Article VI and the ICJ opinion, and is a logical outcome of the humanitarian initiative. It could, to begin with, examine the options put forward by the New Agenda Working Paper. For other IALANA recommendations for the Review Conference, see the Appendix.

To be sure, some of the NPT nuclear weapon states may very well refuse to agree to launch a process. Indeed, they did so in 2010 by rejecting the proposal, contained in the first draft of the action plan on disarmament,¹² that the Review Conference request the Secretary-General to convene a conference in 2014 to consider ways and means to agree on a roadmap for the complete elimination of nuclear weapons. If they again block launching of a process at the upcoming Review Conference, states should turn to the General Assembly, which has several options for breaking the deadlock. Unlike NPT Review Conferences, the General Assembly does not have a practice of limiting its decisions to those that achieve consensus, as demonstrated by the establishment of the 2013 Open-Ended Working Group (OEWG) to take forward proposals for multilateral nuclear disarmament negotiations. Following on to that initiative, the General Assembly could create an OEWG on nuclear disarmament.

¹² <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/MCI-ChairsDraft.pdf>, 14 May 2010

Whether generated by the General Assembly or the Review Conference, a vehicle for deliberation and negotiation could feed into the UN High-Level Conference on Nuclear Disarmament to be held by 2018 pursuant to a 2013 General Assembly resolution.¹³

In view of the recalcitrance of the NPT nuclear weapon states, on display since the 1995 NPT Review and Extension Conference, it is frustrating to work for nuclear disarmament in the NPT review process, the moribund Conference on Disarmament, and the General Assembly. But those are also the multilateral forums to which the NPT nuclear weapon states are committed, by law, and they and the nuclear-armed states outside the NPT, which are committed to the United Nations, are the states that have the weapons that must be eliminated. IALANA welcomes the commitment in the Austrian Pledge “to present the facts-based discussions, findings and compelling evidence of the Vienna Conference, which builds upon the previous conferences in Oslo and Nayarit, to all relevant fora, in particular the NPT Review Conference 2015 and in the UN framework”.¹⁴

If non-nuclear weapon states nonetheless determine, following the Review Conference and any initiatives in the General Assembly, that a process should be launched outside the NPT, UN, and CD, IALANA recommends that it focus on an agreement that includes mechanisms for elimination, *i.e.* an agreement more like a nuclear weapons convention than a simple ban treaty. Though it now seems unlikely, perhaps (some) nuclear-armed states could be drawn into a process and negotiations concluded on an agreement that would enter into force when ratified by, among others, the nuclear-armed states or some of them. If only non-nuclear weapon states participate in deliberations, they could produce a draft convention to present to the General Assembly prior to the 2018 High-Level Conference on Nuclear Disarmament.

Conclusion

Ultimately the nature of a convention or treaty – and there is no significant difference between a convention and a treaty – will have to be formulated by governments. But civil society, the survival of which depends on nuclear disarmament, should have a role to play, as it has since Little Boy was dropped on Hiroshima and Fat Man on Nagasaki.

¹³ (A/RES/68/32), “Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament,” 5 December 2013

¹⁴ http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Austrian_Pledge.pdf

Appendix

IALANA RECOMMENDATIONS FOR THE 2015 NPT REVIEW CONFERENCE

The International Association of Lawyers Against Nuclear Arms (IALANA) recommends that in its Final Document, the 2015 NPT Review Conference:

- Call for an immediate world-wide moratorium on holding exercises and war games involving nuclear forces and on testing nuclear weapons delivery systems, to lower the risks of nuclear war arising out of current crises and to set the stage for disarmament negotiations.
- Condemn statements that make or imply a threat to use nuclear weapons in any circumstance.
- Acknowledge that the threat and use of nuclear weapons is absolutely incompatible with international law, including international humanitarian law, and with morality.
- Immediately launch a process of negotiations on the establishment of a nuclear weapons-free world, with provision for participation by non-NPT states. If the Review Conference fails to do so, states should initiate a process in the UN General Assembly. Such a process would implement the disarmament obligation set out in NPT Article VI and the 1996 Advisory Opinion of the International Court of Justice, and is a logical outcome of the humanitarian initiative. As the UN Secretary-General has said, the Model Nuclear Weapons Convention is a good starting point for negotiations.
- Create an institutional capability for monitoring compliance with the obligations of nuclear disarmament and cessation of the nuclear arms race.
- Recognize that planning for long-term maintenance of nuclear arsenals is contrary to the objective of nuclear disarmament and demonstrates a lack of good-faith fulfillment of Article VI.
- Recognize that modernization of nuclear arsenals is contrary to the objective of cessation of the nuclear arms race at an early date and demonstrates a lack of good-faith fulfillment of Article VI, and is further contrary to the commitment to a diminishing role of nuclear weapons in security policies.

- Recognize that the humanitarian and environmental consequences of nuclear explosions are totally unacceptable. The impact of a nuclear weapon detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences, causing destruction, death and displacement as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development, social order and could even threaten the survival of humankind.
- Declare that the record of non-use of nuclear weapons since World War II should be extended forever. During those 70 years, the Hibakusha have continued to testify to the consequences of nuclear weapons, appealing for "No More Hibakusha" and calling for nuclear abolition. That reminds us all of why nuclear weapons must never again be used under any circumstance. The Conference should acknowledge and respond to the voices of the Hibakusha and reaffirm the undertaking to achieve the goal of a world free of nuclear weapons.

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