



Nuclear Disarmament Briefing Paper

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Changing the Landscape:

The UN Open-Ended Working Group on Nuclear Disarmament

The 2016 UN Open-ended Working Group taking forward multilateral nuclear disarmament negotiations (OEWG) and the preceding governmental conferences on the humanitarian impact of nuclear weapons¹ have changed the landscape for efforts to achieve a world free of nuclear weapons. This is true even though, aside from the agreement with Iran on limiting its nuclear program, in other respects the trends have been quite negative. All states possessing nuclear arsenals are maintaining and modernizing them, with full-scale nuclear arms racing underway in South Asia and testing by North Korea, and there are serious geopolitical tensions between the United States and Russia, and the United States and China. Notwithstanding these trends, the OEWG and the humanitarian conferences reflect the determination by many non-nuclear weapon states (NNWS) to press forward; indeed in their view the global security climate makes it all the more urgent to do so. Three important results relate to the humanitarian consequences of nuclear explosions, the imperative of multilateral negotiations, and the nature of possible agreements.

Unspeakable suffering

As is widely acknowledged, the humanitarian conferences and the OEWG have refocused attention on the awful character of the devices known as “nuclear weapons,” underlining the imperative to prevent the use again of these instruments that inflict, as an excellent Reaching Critical Will publication is entitled, “unspeakable suffering”.² As a secondary matter, they have raised forcefully once again the incompatibility of employment of nuclear weapons with fundamental rules of the law of armed conflict limiting the scope of war and protecting non-combatants against its effects, as laid out, *inter alia*, by the Vancouver Declaration released by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms (IALANA) in 2011 and signed by many international lawyers and others around the world.³ While the states possessing nuclear arsenals continue to refuse to acknowledge that incompatibility, it is widely accepted by other actors. The gap here is fundamentally not one of law, but in declaring and acting upon adherence to the law. It is true, though, that natural and customary law are typically codified in conventional agreements.

Multilateral negotiations

Multilateral negotiations leading to nuclear disarmament are required to fulfill Article VI of the Nuclear Non-Proliferation Treaty (NPT), as was recognized shortly after the NPT was signed by the predecessor to today's Conference on Disarmament.⁴ The humanitarian conferences and the OEWG have highlighted that imperative and the concomitant need to focus on adoption and implementation of a legal instrument or instruments.⁵ Professions of intent, commitments, meetings, process are not enough; there must be a legal architecture.

Due to the opposition of the NPT nuclear weapon states, NPT review conferences outcomes have largely failed to reflect the imperative of multilateral negotiations. The 1985 conference did call for the commencement of multilateral negotiations on nuclear disarmament in the Conference on Disarmament.⁶ No such provision has been agreed by subsequent conferences. In the 2010 Review Conference, a proposal was on the table effectively to launch such negotiations, but it was rejected by the nuclear weapon states, taking advantage of the NPT practice of consensus. Early in the conference, a draft of the action plan on nuclear disarmament included a provision for an international conference in 2014 to "consider ways and means to agree on a roadmap for the complete elimination of nuclear weapons within a specified timeframe, including by means of a universal, legal instrument."⁷ That provision had disappeared by the end of the Conference due to opposition from some of the nuclear weapon states.⁸ The NPT nuclear weapon states also block such negotiations in the Conference on Disarmament.

By establishing the OEWG through a contested General Assembly vote, proponents of the humanitarian disarmament process have underlined the necessity of creating legal instruments through multilateral negotiations not hindered or blocked by a rule of consensus amounting to a requirement of unanimity. So far, however, this has come at the price of the non-participation of all nuclear-armed states.⁹ The somewhat hidden failure of the NPT nuclear weapon states to meet their Article VI obligation by participating in multilateral negotiations on nuclear disarmament has now been fully exposed. They did not participate in the OEWG, nor have they pursued any comparable course of action,¹⁰ now or in the past. Further, the signs to date are that the nuclear-armed states will not participate in any process established by the General Assembly to build on the work of the OEWG.

The lack of good faith is glaring. This is a matter not only of ethical or political evaluation. The principle of good faith is a fundamental legal principle integral to the functioning of international law and society. Among other things, the principle requires implementation of an obligation without unreasonable delay. Commencement of negotiations has already been unreasonably delayed; it has been 70 years since the first UN General Assembly resolution sought to set in motion a process for the elimination of WMD and 46 years since the NPT entered into force. Thus with respect to disarmament, there is no gap in the law, which is quite clear after the 1996 Advisory Opinion of the International Court of Justice. The Court unanimously concluded: "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."¹¹ There is a lack of compliance with the law. To be sure compliance will require negotiating and bringing into force legal instruments; in that narrow sense it could be said there is a "legal gap".

As to the role of NNWS, Brazil cogently observed in an OEWG working paper as follows:

A renewed protagonism on nuclear disarmament by the NNWS may seem to be a bold innovation, but it is in fact coherent with their leading role in proposing initiatives in this domain over the last 70 years, first and foremost through the establishment of nuclear-weapon-free zones The sovereign decision taken by 185 States to adhere to the NPT as NNWS is in itself the single greatest contribution to the nuclear disarmament and non-proliferation regime The legitimacy of the NNWS to spearhead the nuclear disarmament debate cannot thus be contested.¹²

The initiative of NNWS in the humanitarian conferences and the OEWG is worthy of the utmost respect, for the reasons Brazil states. It is also true, however, that in the end these and further efforts must be judged by the contribution they make to abolishing nuclear weapons. Choices as to process and the nature of the agreement to be negotiated should be guided by that objective.

Possible agreements

The OEWG provided a venue for energetic, constructive exploration of the nature of possible legal agreements relating to achieving and maintaining a world free of nuclear weapons.

Convention

With regard to a comprehensive agreement, a convention, Costa Rica and Malaysia once again put forward the Model Nuclear Weapons Convention, while also noting that the nuclear-armed states block negotiating a convention.¹³ IALANA commented that the Model Convention could be adjusted in various ways.¹⁴ Notably its entry into force could be made less restrictive, not requiring ratifications by all nuclear-armed states. At the same time it could provide that the implementation of certain obligations, for example reduction of nuclear arsenals below a certain level, will require that all nuclear-armed states have become parties, or that they have been subjected to basic obligations of the convention by the Security Council. Another salient point is that a convention or any of the types of agreement examined at the OEWG could and should recognize and address the rights and needs of victims of nuclear weapons explosions and nuclear testing, as advocates of a ban treaty and Pacific Islands states have rightly contended.

Framework agreement

Also discussed was a framework agreement. It could set forth basic obligations of non-use of nuclear weapons and possibly a timeframe in which they are eliminated, and provide for further negotiations on such matters as phasing of reductions, verification, and control and disposition of fissile materials. Such a framework agreement would be a variant of the convention approach, but have more flexibility. It would seem to make sense, however, only if there was participation by at least some nuclear-armed states.

Ban treaty

The concept of a prohibition or ban treaty received much attention. It would set forth basic obligations of non-use and non-possession while leaving to later negotiation, within or outside the prohibition treaty framework, issues relating to elimination of nuclear arms. The attraction, for many, of a prohibition treaty is that if necessary it could be negotiated and brought into force without nuclear-armed states. In this scenario, it would serve a function of entrenching norms of non-use of nuclear weapons and nuclear disarmament, and also catalyze and channel both popular and governmental pressure for achievement of a world free of nuclear weapons. In particular, it could serve to unite the regional nuclear weapon free zones into a potent collective political actor. It could also exert pressure on states in nuclear alliances to become more proactive in pushing for complete nuclear disarmament, or to modify their alliance role (depending on the treaty's terms), or leave the alliance entirely, so as to become a party to the treaty.

So far as its legal consequences, a prohibition treaty would have the beneficial effect of erecting a further barrier to the spread of nuclear weapons. If acceptable to non-nuclear weapons states, a prohibition treaty could even strengthen non-proliferation obligations. For example, it could prohibit the development of nuclear weapons, a step beyond the existing NPT prohibition of their manufacture, or (more ambitiously) it could prohibit the production of plutonium and highly enriched uranium. A prohibition treaty would not, however, in and of itself accomplish reduction or elimination of nuclear arsenals, or subject states outside the treaty to any obligations, for example non-use, to which they are not already bound by existing law.

Hybrid approach

Brazil championed a hybrid approach combining a prohibition treaty with “further developments,” including “protocols on national declarations, national implementation, verification and phases of destruction, assistance and technical cooperation, and the non-discriminatory regime to be implemented after the dismantlement of all nuclear weapons.”¹⁵ In part Brazil's proposal is similar to that found in the NPT.¹⁶ States parties to the NPT are subject to its basic obligations, but for the specifics of the Article III obligation to ensure that nuclear programs are for “peaceful” purposes only, they enter into individual safeguards agreements with the IAEA. Thus Brazil seems to suggest that nuclear-armed states which eventually became party to a prohibition treaty would be obligated to enter into an individual agreement governing the verified elimination of its arsenal.¹⁷ Brazil optimistically states that this approach would “provide a framework for the progressive inclusion of all States initially resistant to join in”.¹⁸ However, it is very much open to doubt whether nuclear-armed states would someday be willing to join a treaty they had not negotiated even if they accepted its basic terms and objectives.

Overall, based on their positions both in the General Assembly and the OEWG, a majority of states favor negotiation of a comprehensive convention, but recognize that the NPT nuclear weapon states oppose that approach, or indeed any approach other than the proclaimed incremental pursuit of various measures such as further agreements on nuclear arms reduction and a fissile materials treaty. In this circumstance many states, including Costa Rica and Malaysia, longtime champions of a convention, took the position that a treaty prohibiting nuclear weapons, adopted if necessary

without the nuclear-armed states, would be a positive step. In this view, legal provisions related to reduction and elimination of nuclear arsenals and to maintenance of a nuclear-weapons free world, for example verification, governance, and enforcement, could be negotiated subsequently with the participation of nuclear-armed states. One possibility is that a prohibition treaty would be later followed by a comprehensive convention or a framework agreement.

Looking ahead

In the First Committee of the General Assembly this fall, Austria, Mexico, South Africa, Ireland, Brazil and Nigeria are putting forward a resolution to establish a negotiating process under the auspices of the General Assembly in 2017 based on the recommendation of the OEWG. Adoption of a resolution and funding of a process will be highly contested. The United States has now publicly and squarely declared its opposition to such a resolution.¹⁹ And the vote on the OEWG report reflects division over the provision concerning commencement of a process.²⁰ The vote was 62 in favor, 27 against, with 8 abstentions. The report itself observed that some states did not agree with the recommendation, instead recommending the pursuit of practical steps consisting of parallel legal and non-legal measures leading toward a nuclear weapons free world. This was self-labelled the “progressive approach” and was largely supported by U.S. allies.

Assuming that a resolution is adopted and a process funded, how the process will unfold and what sort of agreement would be negotiated is quite speculative. The recommendation of the OEWG does not squarely foreclose the options – a treaty prohibiting nuclear weapons, leading to their elimination, could be any of the types of agreements examined by the OEWG. However, the report indicates that such a treaty would not include measures relating to the verified elimination of nuclear arsenals,²¹ and leading proponents presently seem to assume this approach. The following points should be kept in mind by governmental and civil society participants in a process.

First, as is the stated intention, at all stages every effort should be made to include and to engage with nuclear-armed states and their allies, formally or informally. The possibility that at least some nuclear-armed states will participate should be kept open. Further, if it is decided to negotiate and adopt a limited agreement along the lines of a prohibition treaty, with entry into force not requiring ratification by any nuclear-armed states, it should be drafted so that it could be referred to or incorporated in a later, more comprehensive agreement, or, less plausibly, serve as the basis for later inclusion of nuclear-armed states. Engagement with nuclear-armed states would be useful in this regard. Another possible route to engagement with nuclear-armed states would be the drafting of a comprehensive convention or framework agreement that could be presented to the 2018 high-level meeting on nuclear disarmament and the 2020 NPT Review Conference.

Second, an agreement negotiated and brought into force without the nuclear-armed states must by its terms serve to confirm the existing illegality of non-use of nuclear weapons under customary principles of international humanitarian law and other international law and the related at least emergent norm of non-use growing in part out of the record of non-use since World War II, as well as the universal obligation of pursuing and concluding negotiations on nuclear disarmament as stated by the International Court of Justice. Any implication that an obligation of non-use does not apply to states not joining a treaty must be strenuously avoided.

Notes:

¹ In Oslo, Nayarit, Mexico, and Vienna, in 2013 and 2014.

² Beatrice Fihn, ed., *Unspeakable suffering – the humanitarian impact of nuclear weapons* (Reaching Critical Will, 2013), online at www.reachingcriticalwill.org.

³ “Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World,” February 11, 2011, http://www.thesimonsfoundation.ca/sites/default/files/Vancouver%20Declaration_3.pdf; signatories are listed at http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx.

⁴ See Final Verbatim Record of the 390th Meeting of the Eighteen-Nation Committee on Disarmament, 15 August 1968, ENDC/PV.390, at 30, *available at* <http://quod.lib.umich.edu/e/encd/4918260.0390.001?rgn=main;view=fulltext>.

⁵ This has also been the thrust of the nuclear disarmament cases brought by the Marshall Islands in the International Court of Justice. For a full development of the argument regarding the legal obligation to pursue and conclude negotiations on complete nuclear disarmament, see the Marshall Islands’ memorial in the case against the United Kingdom at <http://www.icj-cij.org/docket/files/160/18906.pdf>. For information on the initiative, see www.lcnp.org/RMI and www.nuclearzero.org.

⁶ The 1985 Final Document states: “The Conference urges the Conference on Disarmament, as appropriate, to proceed to early multilateral negotiations on nuclear disarmament in pursuance of paragraph 50 of the Final Document of the First Special Session of the General Assembly of the United Nations devoted to disarmament.” NPT/CONF.III.64/1, Annex I, Final Declaration, p. 13.

⁷ Report of Main Committee I: Chairman’s Draft on Substantive Elements, NPT/CONF.2010/mc.1/CRP.2, 14 May 2010, Action 7, p. 8, <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/MCI-ChairsDraft.pdf>.

⁸ See W. Potter, et al, “The 2010 NPT Review Conference: Deconstructing Consensus”, CNS Special Report, James Martin Center for Non-proliferation Studies, June 17, 2010, p. 8, http://cns.miis.edu/stories/pdfs/100617_npt_2010_summary.pdf.

⁹ One is left to wonder how developments would have differed if the draft Final Document of the 2015 NPT Review Conference had been adopted, as seemed likely absent the disagreement over the Middle East provision. The draft included a provision, para. 154(19), which envisaged a General Assembly established process including the nuclear-armed states and operating, unlike the actual 2016 OEWG, on the basis of consensus. NPT/CONF.2015/R.3, 21 May 2015.

¹⁰ For exploration of other possible approaches, including nuclear disarmament summits and a framework agreement that is both political and legal in character, see report on a Middle Powers Initiative framework forum roundtable, “Issues and proposals for taking forward nuclear disarmament,” April 18, 2016, hosted by the Permanent Mission of Canada to the UN, Geneva, at <http://www.baselpeaceoffice.org/article/framework-forum-issues-and-proposals-taking-forward-nuclear-disarmament>.

¹¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, § 105(2)F.*

¹² “Effective measures, legal norms and provisions on nuclear weapons: A hybrid approach towards nuclear disarmament,” A/AC.286/WP.37, 9 May 2016.

¹³ “Model nuclear weapons convention,” A/AC.286/AP.11, 24 February 2016; “Empirical analysis of pathways for taking forward multilateral nuclear disarmament negotiations,” A/AC.286/WP.8, 23 February 2016.

¹⁴ “A Legal Instrument for the Prohibition and Elimination of Nuclear Weapons,” A/AC.286/NGO/12, 2 May 2016, para. 9.

¹⁵ “Effective measures, legal norms and provisions on nuclear weapons: A hybrid approach towards nuclear disarmament,” A/AC.286/WP.37, 9 May 2016.

¹⁶ See “Consolidated answers to the guiding questions submitted by Panel I on substantively addressing concrete effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons,” A/AC.286.WP.10, 24 February 2016, para. 12.

¹⁷ *Id.*

¹⁸ “Effective measures, legal norms and provisions on nuclear weapons: A hybrid approach towards nuclear disarmament,” A/AC.286/WP.37, 9 May 2016, para. 17.

¹⁹ “Nuclear Issues at the United Nations: What’s Next?” Remarks of Anita E. Friedt, Principal Deputy Assistant Secretary, Bureau of Arms Control, Verification and Compliance, Department of State, Center for Strategic International Studies (CSIS), Washington, DC, 27 September 2016, <http://www.state.gov/t/avc/rls/262479.htm>.

²⁰ As adopted, the provision read: “67. The Working Group recommended with widespread support for the General Assembly to 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.” Report of the Open-ended Working Group taking forward multilateral nuclear disarmament negotiations, 19 August 2016, advance copy at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/OEWG-report-final.pdf>.

²¹ See *id.*, paras. 34, 35, 36, and 67 (referencing para. 34).