

Toward a Nuclear Weapons Convention: A Role for Canada

Ottawa, April 11-12, 2011

Panel: Legal Aspects of a Nuclear Weapons Convention

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Let me first thank the sponsors of this seminar, and in particular Bev DeLong and Doug Roche, for inviting me to participate and speak. I hope I can repay the honor in some small way.

One topic for this panel is elements of a legal architecture for the prohibition and elimination of nuclear weapons. The 2010 Final Document noted "the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, *inter alia*, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification."

The Secretary-General's proposal itself draws upon the broadly supported 2000 General Assembly resolution, "Towards a Nuclear-Weapon-Free World: The Need for a New Agenda." Among many other provisions, it affirms "that a nuclear-weapon-free world will ultimately require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments."

There is a pressing need to gain some clarity about the concept of a "framework," as well as "convention".

A "**framework of instruments**" could tie together agreements and institutions that now exist as well as ones yet to be created. It could, for example, incorporate some or all of the following: the NPT; the Comprehensive Nuclear Test-Ban Treaty (CTBT), still to enter into force; a Fissile Materials Cut-off Treaty, not yet negotiated, but on the present international agenda; nuclear weapon-free zones; bilateral or regional agreements on elimination of nuclear weapons; an agreement on elimination among states that possess nuclear weapons plus other representative states; a Security Council resolution declaring threat or use of nuclear weapons an international crime; an agreement providing the IAEA authority and resources to verify nuclear disarmament, or establishing a new agency for this purpose; the International Convention on Suppression of Acts of Nuclear Terrorism; Security Council resolution 1540; and an agreement on governance for the regime.

The tendency of this approach is to push finalization of the institutional and legal arrangements for elimination of nuclear weapons well into the future. That tendency is suggested by US Secretary of State Hillary Clinton's contention in her May 3, 2010, statement to the Review Conference that the new US-Russian START treaty "is consistent with the Secretary General's call to pursue nuclear disarmament through agreement on a framework of separate, mutually reinforcing instruments." We must resist the logic of sequentialism, that one instrument, for example the Fissile Materials Cut-off Treaty, must be completed, before another can be negotiated. Rather parallel tracks must be pursued.

There is another way the term "framework" is used, not specifically invoked in the Secretary-General's proposal, but familiar from the UN Framework Convention on Climate Change, which laid the foundation for the Kyoto Protocol and for current negotiations on a replacement for that protocol. A "**framework agreement on nuclear disarmament**" could set forth basic obligations of non-use of nuclear weapons and elimination of nuclear arsenals, and provide for further negotiations on matters that could not be settled at the outset, for example aspects of verification and enforcement, or possibly the sequence and timing of reductions and achieving zero.

A framework agreement would have the great benefit of early treaty codification of the obligation of non-use. That would in turn facilitate the process of reduction and elimination. Analysts worry about stability at low levels, citing the possible "vulnerability" of nuclear forces. An entrenched obligation of non-use would lessen such concerns.

A framework agreement would also seem more feasible to negotiate in the near term. However, states might be reluctant to enter into an agreement if crucial issues were left to further negotiations. Also, the process of going to zero would be disrupted if the further negotiations proved unsuccessful.

A "**nuclear weapons convention**" is often thought of as a single legal instrument addressing all aspects of elimination of nuclear weapons, like the Chemical Weapons Convention. However, given the already well-developed state of nuclear arms control and non-proliferation, in fact a nuclear weapons convention almost surely would incorporate or link to the CTBT, probably also elements of the NPT regime including safeguards agreements, and possibly other existing instruments like Security Council 1540 and treaties on nuclear terrorism and nuclear safety. In this sense, it would be in part a "framework of instruments," but one that comes earlier in the process of disarmament and defines and shapes that process rather than serving as its culmination.

In short, if we are trying to get the process in motion soon, a robust framework agreement establishing a template of obligations of non-use and further negotiations might be the best way to go. Whatever approach is chosen, there are of course multiple challenges to overcome, among them creating an acceptable verification regime and successfully managing nuclear power. One of those challenges is well worth thinking about now, the creation of an effective regime for inducing compliance and ensuring enforcement.

In the Chemical Weapons Convention, enforcement is entrusted to the Executive Council and Conference of States Parties, which can impose economic sanctions, and ultimately to the Security Council. A contention now heard in Washington think tanks is that the Chemical Weapons Convention model will not be sufficient for enforcement of a ban on nuclear weapons. The contention reflects, I think, a lack of appreciation for the absolute imperative of delegitimization of nuclear weapons, which would be accomplished in part by prohibiting their threat or use. It also reveals a related over-estimation of the potential benefits, in standard realist terms, of break-out.

Nonetheless, I do believe that the problem of enforcement deserves the closest attention. Nuclear weapons, after all, unlike chemical or biological weapons, have been at the core of global power politics since World War II, and unfortunately have taken on aspects of identification with state power and sovereignty for a number of major states.

Two approaches, at least, going beyond the Chemical Weapons Convention model have been proposed. One is put forward by in the book *Elements of a Nuclear Disarmament Treaty* (Stimson, 2010), edited by Barry Blechman and Alexander Bollfrass. That is to endow the conference of states parties for a nuclear disarmament treaty with the authority to undertake a military response to breakout. This proposal reflects pessimism about prospects for reforming the UN Security Council. It is difficult to reconcile with the UN Charter. However, it is suggested that the Security Council could delegate its powers to the Executive Council of a nuclear disarmament treaty. This recalls the proposal made by Ambassador Richard Butler, who is here at this conference, for the Security Council to form a Council on Weapons of Mass Destruction, where the veto power would not apply. The proposal is elaborated in his book *Fatal Choice: Nuclear Weapons: Survival or Sentence* (Basic Books, 2003).

A second approach is indeed to reform the Security Council. An absolute necessity would be to end the role of the veto in Security Council deliberations relating to enforcement of a ban on nuclear weapons. Beyond that, if the Security Council is to have the legitimacy necessary for enforcement, it will need to become more representative of the world; it can no longer be the P5 which dominate its proceedings.

It has been objected that calling for thoroughgoing Security Council reform in connection with nuclear disarmament is setting up another hard to fulfill precondition. My reply: this is not comparable to calls for demilitarizing global politics; it closely relates to the functioning of an abolition regime. If something is necessary, it's necessary. Beyond that, reform of the Security Council to me, contra Blechman, seems quite doable, frankly less challenging than the successful installation of a regime in which zero nuclear weapons is *confidently* verified. I distinguish such a regime from the prohibition and marginalization of nuclear weapons, which is within reach soon assuming political will.

A worthwhile project for the Government of Canada, and/or Canadian civil society, would be to launch an initiative that would make recommendations on governance, compliance and enforcement for a nuclear weapons-free world. This is a feasible project. It does not require bringing together scientists to examine issues of verification; it is a task eminently suited for former diplomats, international lawyers, political scientists, and NGOs.

Let me turn to the second topic identified for this panel: implications of an international humanitarian law approach for progress on a nuclear weapons convention.

You have in your packet the Vancouver Declaration: Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World, available online at www.lcnp.org.

This statement was released in March by The Simons Foundation and IALANA, drawing on a conference we convened in February in Vancouver.

In one sense, it is another in a series of civil society statements over the last few years, most recently an appeal issued in Hiroshima by Mayors for Peace and others in July 2010, and the Nobel Peace Laureates Hiroshima Declaration of November 2010. Also worth consideration is the Santa Barbara Declaration: Reject Nuclear Deterrence of February 2011, available at www.wagingpeace.org.

But the Vancouver Declaration also had a special purpose, which may not be immediately evident to you. That was to set forth the current state of the law applying to nuclear weapons, not as the International Court of Justice (ICJ) saw it in 1996, but as it exists now. The need for clarity is underlined by the 2010 Review Conference affirmation that states are to comply "at all times" with applicable international law, including international humanitarian law. And indeed the declaration takes firm positions on several issues which the 1996 opinion did not resolve.

That it is a solid statement of applicable law is signaled by its endorsement by two former ICJ judges, one, Mohammed Bedjaoui, who was president of the ICJ in 1996, and one, Christopher Weeramantry, who vigorously dissented from the 1996 opinion because it did not clearly find threat or use of nuclear weapons in all circumstances.

The Vancouver Declaration was also endorsed by a number of well-regarded international law professors, among them Louise Doswald-Beck, now at the Geneva Graduate Institute, and co-author of a two-volume, exhaustive International Committee of the Red Cross study of international humanitarian law, first released in 2005.

Here are some of the ways the declaration resolves matters left unresolved by the ICJ opinion.

1) The declaration states: "Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides *inter alia* that an attack directed against a civilian population is a crime against humanity." The United States, United Kingdom, and France in particular have resisted this position, for example making statements or reservations denying the application of the Protocol I prohibition of reprisals against civilian populations. The declaration, drawing on what the Red Cross has found to be a trend in international law, says this inhumane insistence on the lawfulness of reprisals can no longer be tolerated. By citing the Rome Statute provision regarding crimes against humanity, it signals that targeting civilian populations is not only to be judged on the terrain of war and now out-moded law regarding reprisals. Such policies are wholly inconsistent with respect for human rights and for what the ICJ called "elementary considerations of humanity."

In short, the declaration reflects the position taken by Mexico before the ICJ in 1995: "Torture is not a permissible response to torture. Nor is mass rape acceptable retaliation

to mass rape. Just as unacceptable is retaliatory deterrence—"You have burnt my city, I will burn yours."

2) The declaration holds that impacts of nuclear weapons on the natural environment are not only to be part of the calculus of proportionality in attack, balancing effects on civilians, civilian objects, and the environment against the anticipated military advantage. Additionally, use of nuclear weapons is subject to the prohibition found in Protocol I of use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. The ICRC study found that this prohibition has now become part of universally binding customary law. Obviously many uses of nuclear weapons come under the prohibition. Recent studies have demonstrated that the detonation of a small fraction of the global nuclear stockpile (e.g., 100 warheads) in cities and the ensuing fire storms would generate smoke causing a plunge in average global temperatures lasting years. Agricultural production would plummet, resulting in extensive famine.

3) The declaration states: "Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies ("deterrence") declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack." The ICJ had indeed clarified the law regarding threats of unlawful attack, but declined to pass judgment on deterrence. The declaration draws the unavoidable implication.

So what, the skeptic may say. But our belief is that the sort of in-depth understanding of the incompatibility of nuclear weapons with law the declaration is intended to convey is part and parcel of the ongoing process of delegitimization of nuclear weapons taking place on several fronts. Beyond that, it can give momentum to possible policy steps of the kind this conference is intended to explore.

1) The incompatibility of nuclear weapons with law supports making a categorical prohibition on threat or use as early as possible in the disarmament process.

2) It supports making a prohibition on use and threatened use of nuclear weapons part of the Rome Statute of the International Criminal Court through the amendments process, as proposed by Mexico. The prospects for this strategy appear to have improved given the way the recent ICC Review Conference in Kampala handled amendments on aggression and prohibited weapons in non-international armed conflicts. Most importantly, the Kampala conference established that amendments will be part of the evolution of the Rome Statute. The ICC Assembly of States Parties formed a working group on amendments in December, and Mexico has stated that it will continue to advocate for an amendment on nuclear weapons. Canada has been a strong supporter of the ICC. What will Canada's position be on the proposed amendment?

3) Finally, the incompatibility of nuclear weapons with law demands that nuclear weapon states, and their allies, come to grips with this contradiction in their doctrines and policies regarding threat and use of nuclear weapons. An encouraging step in this direction was the joint statement of President Obama and Prime Minister Singh stating their support for "strengthening the six decade-old international norm of non-use of nuclear weapons." The NPT nuclear weapon states are to report to the 2014 preparatory meeting for the 2015 review on actions they have taken to implement Action 5 of the 2010 Final Document. Among the steps included in Action 5 is diminishing the role of nuclear weapons. The connection to the application of international humanitarian law is obvious. However, we need to be careful about the means chosen for engaging the nuclear weapon states in this area; it would be counterproductive to have an exercise in which they simply reasserted their position that use of nuclear weapons can be lawful in some circumstances.