

Toward a Nuclear Weapons Convention: A Role for Canada April 11th & 12th

Legal Panel

Address by Prof. Michael Byers

I've lived with the reality of nuclear weapons my entire life. When I was ten years old, I spent a summer on my grandparents' farm in southern Saskatchewan. I use to lie on my back looking at the prairie skies. As I lay there one day, I noticed some interesting contrails. In southern Saskatchewan, the contrails go east to west. But this time there were contrails going south to north. I asked my grandfather about these contrails going south to north. He had a grade six education, but he was a wise and knowledgeable man. He said, "those are B52s carrying nuclear weapons going on standby in the Arctic in order to be able to carry weapons to go into the Soviet Union to blow up our world." We were in the middle of nowhere in the middle of the Cold War. My son is ten years old now, and he too is asking questions about our world, a world over which the shadow of nuclear holocaust still hangs.

I want to begin today by talking about how international society develops taboos, that is to say, absolute prohibitions. We have a taboo on slavery. We have taboos on genocide, apartheid and torture. Not so long ago, these would have been difficult to contemplate. The prohibition against torture would not have been conceivable before 1973 when there was a military coup in Chile and a small London-based human rights group called Amnesty International rallied against the use of torture by General Pinochet and his henchmen. Not only did that prohibition come into being; it achieved the stature of a peremptory norm, while Amnesty International grew to become an actor of significance in international politics.

Of course, today we enjoy chocolate from the Ivory Coast produced by child slaves. Genocides still occur: in Rwanda and, most recently, Darfur. Apartheid in South Africa no longer exists but the situation in the Occupied Territories remains disturbingly similar. More than 100 countries still practice torture, though significantly they all deny and seek to conceal this behaviour.

In its remarkable 1996 Advisory Opinion, the International Court of Justice came extremely close to overturning a centuries-old conception of international law that had the nation state in the predominant position. It came to the edge of the divide, the tipping point, looked over and saw a future where the rights and interests of human beings trumped those of nation states. And it stopped there, saying that nations could perhaps use nuclear weapons in an extreme circumstance of self defence but not showing any conviction with respect to that traditionalist position. Instead, it spoke about International Humanitarian Law and asserted that it was difficult to conceive of any situation where the law would not be violated by the use of nuclear arms. In terms of the progressive evolution of international law, it was a huge step, taking us right to the edge of a new legal paradigm.

Just as interesting is what has happened since then in terms of the rights of individual human beings trumping those of the nation state. Consider the incredible year of 1998, which brought both the Rome Statute of the International Criminal Court and the

Pinochet Case. I was involved in the latter, the most important aspect of which was not the series of decisions by the House of Lords, but the flood of media attention, and through it the expression of a global public conscience in favour of states and presidents being held accountable for their actions under international law.

More recently, we have UN Security Council Resolution 1973 with respect to Libya. The resolution is an emphatic implementation of the responsibility to protect within the context of our global organization. It is a humanitarian resolution, directed at a no fly zone and the provision of safe havens for civilians. It was requested by the Arab League and voted for by all the Arab and African members of the UN Security Council -- who agreed that it was absolutely unacceptable for a national leader to use his air force against his own people and threaten them with murder on TV.

When you add up these and other developments, it is difficult to conceive that the 1996 Advisory Opinion would say the same thing now. The Court would go further today. It wouldn't talk about extreme situations of self-defence. It would say, emphatically, that the use of nuclear weapons would be illegal in all circumstances because it fails the standard requirements of proportionality and discrimination within international humanitarian law.

The problem is that we have at least nine noncompliant states. With all respect to our British colleague, and to all other representatives of Nuclear Weapons States, if you have a nuclear weapon, you have it for one purpose only, because you can conceive of using it to kill millions of people some day.

When considering international law and nuclear weapons, we need to focus our moral approbation on the Nuclear Weapons States. It is immoral and illegal that they have not ruled out the use of nuclear weapons. That should be the immediate and specific focus of our efforts. Whether through a UN Security Council resolution or a stand-alone declaration at an international summit or a purpose-specific treaty, this should be priority number one. And it's within our grasp because of international public opinion and broader developments in international politics. For I can imagine President Obama wanting an universal affirmation of the illegality of the use of nuclear weapons in any instance. Once we get that, it opens the way to a decision to get rid of any nuclear weapons anywhere. Yet the second step could be detrimental to the first step if the two are not separated out.

A few words on conventions. A convention banning nuclear weapons would not be like the UN Law of the Sea Convention, with concessions here and there making up a "package deal". How can you have a concession on a ban on nuclear weapons? It's all or nothing. So yes, it will be a complicated convention with elements of a test ban, and a ban on fissile materials, and it will have complicated provisions on verification. But ultimately what we want is a ban on the existence of any nuclear weapons at all. That is why I'm agnostic on the type of instrument: whether a convention or framework of instruments or a framework convention.

We need states to agree to the ban. Everything else is just process. If we allow ourselves to get tied up in complicated negotiations and obfuscations, we divert and delay the inevitable. Of course, it is important to have dialogue and I applaud the New

START treaty. The moment is an opportune one. But let's not get diverted by debating the type of instrument. Let's instead focus our moral suasion and demand an explicit affirmation of the illegality of use. And then, and only then, should we push for an outright ban on possession.

From the Question and Answer Session:

In response to an inquiry about the "framework" question, Prof. Byers commented: A framework of instruments approach does create possibilities for delay, and so I'd like to add a plug for a framework agreement. And it's important here to think about something other than the UN Framework on Climate Change, which doesn't seek to ban carbon dioxide emissions outright. A better parallel is the Vienna Convention for the Protection of the Ozone Level, which led to the "Montreal Protocol" and a ban on emissions of CFCs.

In response to these questions:

I would be grateful if Michael could enlarge a little bit about the need to outlaw use and then prohibition. Which comes first? Will it be conceivable that the Nuclear Weapons States as we know and love them today that they would outlaw use but still retain possession? I find that inconceivable. Isn't it the other way around? That possession is made illegal first?

Prof. Byers responded: I have two words for you: small pox. There are two stores of small pox in the world. There is no prohibition on them but there is a categorically prohibition on their use. We are so close to having a universal public sentiment in favour of a taboo on nuclear weapon use, given recent developments in international human rights and international humanitarian law. Let's seize the moment and look the Americans and Russians in the eye and ask, "are you going to tell the world it would be legal to use nuclear weapons?" Challenge them on that. Challenge them with the dictates of public conscience. And then, when they make that first step, push them to take the next one.

In response to a question on the implications of the agreement about the inclusion of international humanitarian law language in the Final Report from the NPT Review Conference, Prof. Byers said:

The language is significant as part of the evidence that law is shifting but it is also important not to over-estimate or exaggerate its relevance. I disagree with disarmament activists who try to read an absolute legal ban on nuclear weapons use into the 1996 Advisory Opinion. Yes, it took us to the watershed between state centric and humanitarian law, but it didn't quite take us to the other side. If we oversell our legal instruments, we risk our credibility. We still need to push for that explicit language in a treaty or framework agreement or UN Security Council Resolution. And one more point on small pox: I do regard the possession of small pox as a threat because the consequences would be catastrophic. There is no room for negotiation here. Possession is inexcusable -- and should be made illegal.

In response to a question on what could Canada do next to make progress, Prof. Byers commented:

Canada should withdraw from the Nuclear Planning Group at NATO. This should not be an insurmountable issue for NATO. Given the geographic importance of Canada to the alliance, they will have to suck it up and live with our decision.