

International Conference to Continue the Battle to Permanently Prohibit
Nuclear Weapons and All Weapons of Mass Destruction
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The Nuclear Non-Proliferation Treaty and the Elimination of Nuclear Weapons

Greetings from the International Association of Lawyers Against Nuclear Arms (IALANA) and its UN Office, the Lawyers Committee on Nuclear Policy. I will address developments regarding the Nuclear Non-Proliferation Treaty (NPT), especially concerning the Nuclear Weapons Convention and the illegality of threat or use of nuclear weapons, and make some suggestions about what lawyers can do to advance the cause of nuclear disarmament.

The Nuclear Weapons Convention at the 2010 NPT Review Conference

The five-year NPT Review Conference was held this May at the United Nations in New York. Especially for about a year prior to the conference, civil society groups around the world had urged that the conference call for the start of negotiations toward the enactment of a global treaty banning nuclear weapons, a Nuclear Weapons Convention similar to the conventions already in place for biological and chemical weapons. Over 17 million signatures on petitions supporting this approach were collected, mostly in Japan, and presented to the President of the Conference, Ambassador Libran Cabactulan of the Philippines.¹

As for governments, the vast majority of them annually vote for a General Assembly resolution welcoming the International Court of Justice conclusion on the NPT disarmament obligation.² That resolution also calls for the commencement of negotiations on a Nuclear Weapons Convention. That does not mean, however, that the governments are especially energetic or strategic in advancing the convention in the face of nuclear weapon state recalcitrance; it can be a ritualistic exercise.

However, leading up to and at the Review Conference the Nuclear Weapons Convention was a live topic. In numerous meetings in the months before the conference with civil society and governments, Cabactulan, the conference president, urged that the conference address the topic of a convention. At the conference, the Non-Aligned Movement – 116 countries of the Global South, led this year by Egypt – put forward a plan for global elimination of nuclear weapons by 2025, with a convention providing for verification, conversion of weapons facilities to peaceful uses, *etc.*, entered into force by 2020. The Non-Aligned Movement has had a similar approach in the past, but they worked hard on updating it and showed unity around it.

Also importantly, 28 governments in their individual statements called for a convention, as the International Campaign for the Abolition of Nuclear Weapons recounts in an excellent report.³ This included countries of the South like Algeria, Indonesia, Mexico, Philippines, but also some new players from the North – Austria, Norway, Switzerland.

Many governments also supported identification of timelines and benchmarks – not just principles and objectives, as NPT conferences had mostly adopted in the past.

The first draft report produced by the Chair of Main Committee I on disarmament reflected the support for a convention and for timelines.⁴ It provided that the nuclear weapon states “shall” convene consultations by 2011 on rapid reduction of the global stockpile and other disarmament issues. Then the nuclear weapon states were to report back to all states in the review process in 2012. Then the UN Secretary-General was to convene a conference on 2014 “to consider ways and means to agree on a roadmap for the complete elimination of nuclear weapons within a specific timeframe, including by means of a universal, legal instrument.”

That conference could have been a launching point for negotiations on a Nuclear Weapons Convention. Ban Ki-moon is on record as saying that the model convention developed by IALANA and others is a “good starting point” for negotiations.⁵

Four of the five NPT nuclear weapons states – France, the UK, the US and Russia – made it clear that, if the conference wanted a consensus document, the original draft of Main Committee I would have to be watered down considerably, and so it was. In the agreed Final Document,⁶ the conference convened by the Secretary-General had disappeared. What was left of that provision was a call on the nuclear weapon states to “promptly engage” with a view to further reductions in their nuclear arsenals, reducing the role of nuclear weapons in security policies, and other disarmament matters, and to report to the 2014 preparatory meeting for the 2015 Review Conference, which in turn is to “take stock and consider the next steps for the full implementation of article VI” – the NPT disarmament obligation.

Reflecting the strong drive of the majority of the world’s countries and global civil society for commencement of negotiations on a convention, the Final Document does affirm “that all states need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons,” and notes in this connection “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.”⁷ The Review Conference thus acknowledged that elimination of nuclear weapons will require a global institutional and legal system.

Reaffirmation of Past NPT Disarmament Commitments

As expected, the Review Conference reaffirmed past NPT commitments: the unequivocal undertaking to accomplish the total elimination of nuclear arsenals; bringing into force the Comprehensive Nuclear-Test-Ban Treaty; negotiating a treaty banning the production of fissile

materials for weapons; accomplishing verified, irreversible reductions; reducing the role of nuclear weapons in security policies; strengthening assurances of non-use against non-nuclear weapon states parties to the NPT; and so on. It is important that the commitments were reaffirmed, but after 15 years in which they largely have not been implemented, it is now clear beyond doubt that having such commitments is not enough. That was the reason for the mostly unsuccessful effort to insert timelines and benchmarks.

The Middle East

As the media extensively reported, the Review Conference did produce movement regarding the Middle East, a make or break issue for an agreed outcome. The Final Document calls for a conference on the subject of a zone free of nuclear weapons and also chemical and biological weapons in 2012 and the appointment of a facilitator to make it happen.⁸ A Middle East nuclear weapon free zone would result in the denuclearization of Israel and its joining the NPT as a non-nuclear weapon state. A process for creating such a zone also would provide an opportunity to engage Iran. But even starting a process, let alone completing it, will be fraught with difficulty.

Non-proliferation Restrictions

An aim of great importance to the United States and many countries of the Global North was to strengthen measures on preventing the spread of nuclear weapons, including: enhancing the IAEA's inspection powers through the "Additional Protocol," multilateral controls on the production and supply of fuel for nuclear reactors, adding or recognizing restrictions on withdrawal from the NPT. Many non-nuclear weapon states resist such measures, contending that they have already "paid" for disarmament by joining and complying with the NPT. They fear that the end result would be increased discrimination, not only with respect to possession of weapons, but also with respect to nuclear power, especially the ability to produce nuclear fuel for reactors. As it turned out, the Final Document basically just affirmed the status quo. Accepting the Additional Protocol is encouraged, and multinational controls on production of nuclear fuel are to be considered.

International Humanitarian Law

In 1950, the Stockholm Appeal characterized the nuclear weapon as a weapon of terror and massive extermination of populations whose first use would be a crime against humanity. Sixty years later, an excellent Swiss initiative resulted in an innovation in the NPT review context, a consensus statement on the moral and legal dimensions of the imperative of non-use of nuclear weapons. The Action Plan for nuclear disarmament includes this provision: "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."⁹

In the general debate on May 4, Micheline Calmy-Rey, Head of the Federal Department of Foreign Affairs, stated that "Switzerland's aim is to bring the humanitarian aspect to the heart of the current debate on nuclear disarmament."¹⁰ To that end, on May 10 Switzerland and the James Martin Center on Nonproliferation Studies released the thoughtful publication *Delegitimizing Nuclear Weapons*.¹¹ Adding impetus to the Swiss effort was the April 20

statement of Jacob Kallenberger, President of the Geneva-based International Committee of the Red Cross (ICRC). It said that “the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.”¹²

The original version of the provision first appeared in the May 21 Revised Chair’s Draft Action Plan for nuclear disarmament. It read: “The Conference expresses its deep concern at the humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states to comply with international humanitarian law at all times.”¹³ In closed negotiations over the provision as first proposed, France reportedly called for its deletion, and the UK at least expressed doubts about it. In its idiosyncratic argument before the International Court of Justice (ICJ) in 1995, France remained silent on the application of international humanitarian law (IHL) to use of nuclear weapons, arguing instead that absent an express prohibition their use is “authorized in the event of the exercise of the inherent right of individual or collective self-defence.”¹⁴ In contrast, the US, UK and Russia accepted before the ICJ that IHL applies to nuclear weapons as it does to other weapons, though they contended implausibly that nuclear use could be compatible with IHL depending upon the circumstances.

As revised and approved by the Conference, the second part of the provision is changed to call for compliance “at all times” with “applicable international law, including international humanitarian law.” Why the reference to “applicable” law? First, because IHL governs methods and means of warfare, the extent of its application in time of peace is controversial; it is also sometimes a matter of dispute as to whether and where an armed conflict has commenced or ended. Second, the use of the phrase “at all times” could raise the question of whether that phrase should be added elsewhere in the Final Document when it calls for compliance with an NPT obligation. Modification of “at all times” by “applicable law” assuaged these concerns.

The reference to “applicable international law” is regrettable because it provides a textual basis for invoking self-defence and reprisal, though this could have been done in any case. And it muddies the argument that doctrines generally contemplating use of nuclear weapons – as opposed to signals in specific circumstances of armed conflict - are “threats” contrary to IHL. There is no question that the UN Charter prohibition of threat or use of force, which the ICJ found potentially applicable to doctrines of “deterrence,” is in effect whether or not an armed conflict is underway.

The reach of the Conference’s statement can be illustrated by a comparison with the 1996 ICJ advisory opinion on nuclear weapons. The Court explained that the principles of IHL protecting civilians and combatants are “fundamental” and “intransgressible,” and that “methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.”¹⁵ It found: “In view of the unique characteristics of nuclear weapons, ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.”¹⁶ However, given the facts and law available to it, the Court felt that it could go only so far as stating that threat or use of nuclear weapons would “generally be contrary” to international law, and could not reach a conclusion

one way or the other regarding an “extreme circumstance of self-defence, in which the very survival of a state is at stake.”¹⁷

Putting subtleties aside, the reference to the catastrophic humanitarian consequences of “any” use of nuclear weapons directly joined with the call for compliance with law implies that use of nuclear weapons is unlawful in all circumstances, as IALANA maintains.¹⁸ Further, since there is no doubt that IHL applies to armed conflict, the insistence on compliance with applicable international law “at all times” weighs against any suggestion that IHL bends or wavers depending upon the circumstances. That includes the “extreme circumstance” referred to by the ICJ, self-defence as invoked by the French, or second use in “reprisal” purportedly aimed at preventing further attacks. All such ambiguities and arguments probably can only be definitively resolved by a treaty obligation like that contained in the Chemical Weapons Convention, in which each state party “undertakes never under any circumstances to use chemical weapons.” But the Conference’s statement takes us closer to that day, and reinforces the moral unacceptability and presumptive unlawfulness of any use of nuclear weapons in the meantime.

Overall, the provision as adopted by the Conference without question develops the norm of non-use of nuclear weapons. Indeed, when combined with the *practice* of non-use since the US atomic bombings of Japanese cities, the provision strengthens the case for a customary legal obligation categorically prescribing non-use. The welcome US statement in its Nuclear Posture Review is also relevant here: “It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.”¹⁹

The NPT in Perspective

Mostly written by the United States and Russia in the 1960s, the Nuclear Non-Proliferation Treaty aimed to stop the further spread of nuclear weapons. It contains a very specific, clearly mandatory obligation not to acquire nuclear weapons, monitored and verified by the International Atomic Energy Agency (IAEA). To induce acceptance of the treaty, it also included a vague obligation to “pursue negotiations in good faith” on nuclear disarmament. That’s the famous Article VI. But there is no monitoring by an international agency, no timelines.

After the Soviet Union disintegrated, major efforts were made to rebalance the treaty. In 1995 in connection with indefinite extension of the NPT, and again in 2000, NPT conferences agreed to a road map for the achievement of a nuclear weapon free world: verified, irreversible reductions, test ban treaty, treaty banning production of fissile materials for nuclear weapons, reducing the role of nuclear weapons in security policies, etc.

But the hopes of the 1990s have yet to be realized. The nuclear weapons states, especially the United States, for the most part ignored the commitments made in 1995 and 2000. India and Pakistan, states outside the NPT, conducted test explosions of nuclear weapons in 1998, and the Democratic People’s Republic of Korea withdrew from the treaty and tested a device in 2006.

The NPT has serious problems.

There are very restricted means for ensuring compliance. The real action regarding non-proliferation takes place in the IAEA and its Board of Governors and in the Security Council. As to disarmament, there is nothing in place at all except for an important forum – the review conferences - for securing commitments and for very general discussion of implementation.

This reflects the fact that the non-proliferation regime has a fundamental problem of double, indeed triple standards. The NPT itself is a two-tier system, with nuclear haves and have-nots. Then there are the states with nuclear arsenals outside the NPT – India, Pakistan, and Israel, and recently the DPRK. This puts a lot of strain on some states inside the NPT required not to obtain nuclear weapons.

The Nuclear Suppliers Group exemption for India pushed by the United States exacerbates the uneven application of standards. It permits nuclear commerce with a state that has not even formally accepted the disarmament obligation and commitments undertaken by the nuclear weapon states within the NPT. Meanwhile, a non-nuclear weapon state in the NPT, Iran, is scrutinized and penalized due to a program suspected of aiming at making it capable of producing nuclear weapons.

The existence of triple standards is contrary to the essence of law, that the same rules apply to all. The International Court of Justice recognized the problem posed for a just and sustainable international legal order, stating:

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.²⁰

One manifestation of the instability caused by the possession of nuclear weapons by some states but not others is the doctrine of preventive war, which of course is contrary to the UN Charter. That doctrine was put into practice in the Iraq invasion and the recent Israeli strike on Syria and is raised with respect to Iran.

As the ICJ conveyed, there is only one solution to the problem of triple standards: the creation of a global system with one verified rule applying to all states, non-possession of nuclear weapons. That would be achieved through a global convention prohibiting and eliminating nuclear weapons.

The just concluded Review Conference put the Nuclear Weapons Convention on the agenda. We have to make sure it stays there.

What Lawyers and the IADL Can Do

The International Association of Democratic Lawyers (IADL) can lend its support to the demand for commencement of negotiations on a Nuclear Weapons Convention. And the IADL and lawyers generally can explain to the public basic legal truths and develop ways to act on them.

One truth is that nuclear weapons are incompatible with international humanitarian law. Let me mention some ways of pursuing this short of a Nuclear Weapons Convention. Mexico has proposed adding use of nuclear weapons as a specific war crime to the Rome Statute of the International Criminal Court. While this proposal was not considered by the ICC Review Conference just concluded in Kampala, it will be before a working group on amendments to be formed by the ICC Assembly of States Parties at the end of this year. IALANA intends to participate in the working group.

Also worth considering is advocating that non-nuclear weapon states, not part of nuclear alliances, adopt a treaty prohibiting use of nuclear weapons in any circumstance and providing for prosecution or extradition of any person complicit in threat or use of nuclear weapons. Such a project could help build the norm of non-use. In any case, short of a treaty a non-nuclear weapon state can, and some have, adopt national legislation criminalizing participation or complicity in nuclear weapons production and use.

Another truth is that there is a legal obligation to achieve the global elimination of nuclear weapons through *good-faith* negotiations. IALANA over the past few years has devoted considerable effort to developing the concept of “good faith” in the context of disarmament negotiations.²¹ At a conference we organized in 2008, Judge Mohammed Bedjaoui, former President of the International Court of Justice, declared that “Good faith is a fundamental principle of international law, without which all international law would collapse.”²²

Essentially, good faith means keeping promises in a manner true to their purposes and working sincerely and cooperatively to attain agreed objectives.

In the NPT context, that means implementing commitments agreed at Review Conferences – bringing the test ban treaty into force, and many others.

It means complying with Article VI in good faith by *commencing* negotiations on nuclear disarmament.

And once negotiations are commenced, it means *conducting* them in good faith. In turn, that requires making the negotiations meaningful, showing willingness to compromise, avoiding delay, and generally negotiating with a genuine intention to achieve a positive result. Indeed, the International Court of Justice held that the disarmament obligation encompasses both conduct and result.²³ States must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must actually achieve that result.

IALANA has also proposed to governments that they return to the ICJ on nuclear weapons by adopting a General Assembly resolution asking the Court to specify the requirements of good

faith negotiation of nuclear disarmament.²⁴ We continue to suggest that governments consider this option. Such a strategy could highlight the issue of whether the disarmament obligation requires the near-term adoption of a comprehensive approach – the negotiation of a Nuclear Weapons Convention. We would welcome IADL’s support of this initiative.

¹ Jacqueline Cabasso, “Global civil society says, ‘It’s Simple: Start Abolition Negotiations Now!’,” News in Review, May 28, 2010, pp. 12-13, available at <http://www.reachingcriticalwill.org/legal/npt/NIR2010/No20.pdf>.

² Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 64/55, UN Doc. A/RES/64/55 (Dec. 2, 2009). The Court concluded 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.” *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226, at ¶ 105(2)F.

³ See International Campaign to Abolish Nuclear Weapons, *Non-Proliferation Treaty Review Conference 2010: Towards Nuclear Abolition*, June 2010, pp. 2, 50-51, available at <http://www.icanw.org/files/RevCon2010.pdf>.

⁴ Report of Main Committee I: Chairman’s Draft, May 14, 2010, available at <http://www.reachingcriticalwill.org/legal/npt/revcon2010/MCI-ChairsDraft.pdf>.

⁵ UN Secretary-General address, “The United Nations and Security in a Nuclear-Weapon-Free World,” October 24, 2008, East-West Institute conference, “Seizing the Moment,” United Nations, New York, available at <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>. For the model Nuclear Weapons Convention and a book explaining it, *Securing Our Survival*, see <http://lcnw.org/mnwc/index.htm>. In 2008, the Secretary-General circulated the model convention to UN member states at the request of Costa Rica and Malaysia.

⁶ Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2010/50 (Vol. I), I(B)(iv), Action 5, p. 21, available at <http://www.reachingcriticalwill.org/legal/npt/revcon2010/FinalDocument.pdf>.

⁷ *Id.* at p. 20, I(B)(iii).

⁸ *Id.* at pp. 29-30, IV(7).

⁹ *Id.* at p. 19, I(A)(v) (emphasis supplied).

¹⁰ Statement by Micheline Calmy-Rey, Head of the Federal Department of Foreign Affairs, May 4, 2010, available at http://www.reachingcriticalwill.org/legal/npt/revcon2010/statements/3May_Switzerland.pdf.

¹¹ Ken Berry, et al, *Delegitimizing Nuclear Weapons: Examining the validity of nuclear deterrence*, Monterey Institute of International Studies, May 2010, available at http://cns.miis.edu/opapers/pdfs/delegitimizing_nuclear_weapons_may_2010.pdf.

¹² Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/nuclear-weapons-statement-200410>.

¹³ Subsidiary Body I, Revised Chairman’s Draft Action Plan, May 21, 2010, p. 1, available at <http://www.reachingcriticalwill.org/legal/npt/revcon2010/SBI-Revision2.pdf>.

¹⁴ International Court of Justice, Public Sitting, *Legality of Threat or Use of Nuclear Weapons*, Verbatim Record, November 1, 1995, p. 66, available at <http://www.icj-cij.org/docket/files/95/5927.pdf?PHPSESSID=824406939531fa21a815a5c0a3365dfe>.

¹⁵ *Legality of Threat or Use of Nuclear Weapons*, at ¶¶ 79, 95. Regarding the opinion generally, see John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (1997).

¹⁶ *Legality of Threat or Use of Nuclear Weapons*, at ¶ 95.

¹⁷ *Id.* at ¶ 105(2)E.

¹⁸ See, e.g., Lawyers Committee on Nuclear Policy, “Ending U.S. Reliance on Nuclear Weapons and Achieving Their Global Elimination: Wise Policy and Required by Law,” March 2008, available at <http://lcnw.org/disarmament/LCNPstatement2008.pdf>.

¹⁹ US Department of Defense, *Nuclear Posture Review Report*, April 2010, p. 16.

²⁰ *Legality of Threat or Use of Nuclear Weapons*, at ¶ 98.

²¹ For a summary, see John Burroughs, et al, “The Imperative of Good Faith,” Civil Society Presentation to the 2009 Preparatory Committee Meeting for the 2010 NPT Review, May 5, 2009, available at <http://www.reachingcriticalwill.org/legal/npt/prepcom09/ngostatements/GoodFaith.pdf>.

²² Mohammed Bedjaoui, Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, May 1, 2008, Geneva, p. 18, at <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>. Judge Bedjaoui was President of the ICJ when it gave its 1996 advisory opinion on nuclear weapons.

²³ *Legality of Threat or Use of Nuclear Weapons*, at ¶ 99.

²⁴ See *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice*, 2009, International Association of Lawyers Against Nuclear Arms and International Human Rights Clinic at Harvard Law School, available at <http://lcnp.org/disarmament/2009.07.ICJbooklet.pdf>.