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Delegitimising Nuclear Violence

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December, in Vienna, saw the third international conference on the humanitarian impact of nuclear weapons.¹ Next April will see the 2015 Non-Proliferation Treaty Review Conference, and next August will mark the 70th anniversary of the nuclear bombings of Hiroshima and Nagasaki. All three events give us an occasion to pause, and, in different ways, to reflect on the continuing challenge of nuclear violence and on the global nuclear order we have constructed for ourselves.

Nuclear weapons mean different things to different people. In fact, it is difficult to understand national and global nuclear politics without considering the meanings or values assigned to these weapons. These values are about more than status and prestige.

In the UK, for example, nuclear weapons are assigned multiple meanings: domestic political value, not least around high-skilled jobs; identity value in terms of national role conceptions about who we think we are and how we should act in the world; institutional value in terms of the entrenched political privilege ascribed to the nuclear-armed P5 in institutions of global security governance; international order value in terms of the long-term general stability among the world's major powers attributed to nuclear weapons; relational value in terms of assured protection against specific adversaries (for the UK, the Russian bogeyman); and an operational value in terms of the value assigned to operating nuclear weapons in a 'proper' way (for the UK, nuclear-armed submarines permanently at sea on continuous alert).²

Together this set of values constitutes a specific 'regime of nuclear truth': a social, historical and generally elite discourse that legitimises and institutionalises what

The Marshall Islands' Two-Front Fight to Survive and Thrive: Climate Protection and Nuclear Disarmament

John Burroughs

"No one's drowning, baby," went the poem by Kathy Jetnil-Kijiner of the Marshall Islands that she read to the UN Climate Summit on September 23, 2014. "No one's moving/no one's losing their homeland/no one's becoming a climate change refugee." Why? "Because we baby are going to fight/your mommy daddy/bubu jimma your country and your president too/we will all fight." And: "Because we deserve to do more than just/survive/we deserve/to thrive."

And indeed the Marshall Islands is working hard to help make productive the negotiations about to begin on a new climate agreement. In August 2013, leaders of Pacific Island Forum states meeting in Majuro, the capital of the Marshall Islands, adopted a declaration setting forth commitments to implement national reductions in greenhouse gas emissions and to accelerate efforts to adapt to climate change. A stated aim of the Majuro Declaration is to contribute to mobilization of "...political will for a universal, ambitious and legally-binding climate change agreement by 2015."¹

Similar commitments were made at a meeting of a group of about 30 countries known as the Cartagena Dialogue held in Majuro in April of this year. As explained by Marshall Islands Foreign Minister Tony deBrum, the group "committed to bring forward our post-2020 emission-reduction targets as early as possible next year in time to seal an ambitious new agreement in Paris, and to use the agreement to take vulnerability assessment and adaptation planning to a new level globally."²

¹ See www.majurodeclaration.org.

² Quoted in Giff Johnson, "Majuro Cartagena Dialogue

continued from page 1

The Marshall Islands is also battling on another front. In April of this year, it filed applications in the International Court of Justice (ICJ) against the nine nuclear-armed states, claiming that they are in violation of the international legal obligation to pursue in good faith and achieve the global elimination of nuclear weapons. At the time, deBrum said: “Our people have suffered the catastrophic and irreparable damage of these weapons, and we vow to fight so that no one else on earth will ever again experience these atrocities.”³

For the Marshallese, global warming is truly an existential threat; the projected rise in the ocean will make their home islands unlivable, even disappear. And they know from first-hand experience the threat to everyone that nuclear weapons pose. The United States conducted 67 atmospheric nuclear weapon tests in the Marshall Islands from 1946 to 1958 while it was a UN trust territory. The power of the 1954 “Castle Bravo” nuclear test was 1,000 times greater than the bomb that destroyed the city of Hiroshima. The health and environmental effects of the tests still plague the Marshallese today. US tests of missiles and anti-missile systems are also conducted in the Marshall Islands. The control center for the Ronald Reagan Test Site, a Pacific missile test range, is at Kwajalein Atoll.

So the Marshall Islands has compelling reasons to fight on both fronts. Their experience and example are instructive. First, the world as we now know and inhabit it is imperiled by both nuclear weapons and global warming. Second, nuclear disarmament and climate protection are both intrinsically global political and legal processes. They involve implementation of general obligations setting a framework for action contained in international legal agreements, the 1968 Nuclear Non-Proliferation Treaty (NPT) and the 1992 UN Framework Convention on Climate Change (UNFCCC).

NPT Article VI requires the pursuit of negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament. The UNFCCC sets as the



Tony deBrum, Minister in Assistance to the President of the Republic of the Marshall Islands, delivers the key note address at Waves of Change: Climate Change in the Pacific Islands and Implications for Hawai‘i

“ultimate objective” the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic [human-caused] interference with the climate system.” It sets out general obligations, including that each developed state party “shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.” It also envisages further cooperative action, including the adoption of additional agreements.

In both arenas, a central question is whether states parties are acting in good faith to meet their obligations. That question is squarely raised by the Marshall Islands’ cases in the International Court of Justice, and also by the climate negotiations soon to be underway.

Wraps Up, Optimism Expressed,” Pacific Islands Report, April 7, 2014, <http://pidp.org/pireport/2014/April/04-07-06.htm>.

³ Quoted in “Marshall Islands Challenges Nine Nuclear-Armed States in Lawsuit before the World Court,” Press Release, April 24, 2014, <http://www.wagingpeace.org/pacific-nation-challenges-nine-nuclear-armed-states-in-lawsuits-before-the-world-court/>.

The Marshall Islands' Nuclear Zero Cases

The Marshall Islands' filings mark the first time the ICJ has been asked to address issues relating to nuclear weapons since its 1996 advisory opinion. In that opinion, largely interpreting Article VI of the NPT, the Court unanimously concluded 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." The initiative comes at a time when there are no negotiations on cessation of the nuclear arms race and nuclear disarmament. Indeed, aside from modest US-Russian bilateral agreements on reductions, that has been the case for many years, dating back to the 1996 Comprehensive Nuclear Test-Ban Treaty.

Three cases are now in motion: those against the United Kingdom, India, and Pakistan. They are the states among the nine nuclear-armed states which have accepted the general ("compulsory") jurisdiction of the ICJ. The Marshall Islands has invited the other states – the United States, France, Russia, China, DPRK, and Israel – to accept the jurisdiction of the Court in this matter and explain their view of the disarmament obligation. So far none have done so. The Marshall Islands also has a companion case against the United States in U.S. federal court in San Francisco.

In the UK case, a central issue is simple and stark: Is the UK's opposition to General Assembly resolutions calling for commencement of multilateral negotiations on a nuclear weapons convention, and its refusal to participate in the 2013 UN Open-Ended Working Group on taking forward proposals for multilateral negotiations, a violation of the obligation to pursue negotiations on nuclear disarmament?

In the India and Pakistan cases, a threshold question is raised by the fact that those states are not parties to the NPT. The Marshall Islands holds that they are nonetheless bound by customary obligations arising out of NPT Article VI as well as the long history of UN resolutions on nuclear disarmament. The framing of the nuclear disarmament obligation in the ICJ's 1996 advisory opinion and the Court's underlying analysis strongly suggest that they are so bound, but the question remains to be explicitly determined.

In all three cases, important issues are raised by modernization of nuclear arsenals through their

qualitative improvement and, for India and Pakistan, quantitative build-up and diversification. Among them: India and Pakistan call for commencement of negotiations on complete nuclear disarmament, but do not seek agreements that would, for example, cap the number and kind of delivery systems they possess. Is that posture a violation of the obligation to pursue negotiations on measures to halt the nuclear arms race? The same issue is raised by Pakistan's refusal to allow negotiations to begin in the Conference on Disarmament on a treaty cutting off production of fissile materials for weapons.

The UK, India, and Pakistan all are planning and spending for maintenance and modernization of forces and infrastructure over decades to come. Does that conduct undermine the achievement of the objectives of cessation of the nuclear arms race and nuclear disarmament? If so, it would seem to violate the fundamental legal principle requiring that international legal obligations be performed in good faith.

The relief requested is a declaratory judgment of breach of obligations relating to nuclear disarmament and an order to take, within one year of the judgment, all steps necessary to comply with those obligations, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.

The ICJ has set briefing schedules in the three active cases. Hearings on preliminary issues relating to whether the cases are suitable for decision by the Court probably



will take place by late 2015 or early 2016. Proceedings on the merits could take another two or three years. For the filings in the ICJ, media coverage, and presentations, see www.icj-cij.org, www.nuclearzero.org and www.lcnp.org/RMI.

Negotiations on a New Climate Agreement

Pursuant to the UNFCCC, in 1997 the Kyoto Protocol, itself a treaty, was adopted. It provided that developed states parties were to reduce their collective emissions of greenhouse gases by 5% by 2010 compared to the year 1990. The United States never became a party. Climate experts agree that the objective set by the Kyoto Protocol was much too modest. Global emissions have continued to climb, despite voluntary commitments on reductions made at annual meetings of the parties to the UNFCCC. In 2013, they rose by 2.3 percent, to a record 40 billion tons.⁴

Now there is a process to create a post-Kyoto agreement, still under the umbrella of the UNFCCC. A meeting in Lima in December will work on a draft text, and the final agreement is supposed to be adopted in Paris late next year. Even the form the agreement will take is up for grabs. Thus it could be a protocol, a legally binding supplementary agreement to the UNFCCC, like the Kyoto Protocol. Or it could be “an outcome with legal force,”⁵ which could reaffirm basic UNFCCC obligations and set out political commitments regarding reductions of emissions, policies of adaptation to climate change, and financial support for developing countries.⁶

The Obama administration may prefer the latter or similar approach that would not require gaining Senate approval of a treaty. The Marshall Islands and most other states would clearly prefer a global treaty containing binding obligations on emission reductions and other substantive matters.

Negotiations on a new agreement – and other actions and policies as well – should be guided by the objective set by the UNFCCC: stabilization of greenhouse

gas concentrations at a level that would prevent dangerous interference with the climate system. Indeed that is required by the legal principle *pacta sunt servanda*: a treaty is legally binding and must be performed in good faith. In this case that means negotiating within the UNFCCC process so as to achieve its objective; the same is also true of the NPT and its Article VI. Good faith in conducting negotiations requires among other things awareness of the interests of other parties; a persevering quest for an acceptable compromise, with a willingness to contemplate modification of one’s own position; and no undue delay or prolongation of the process.

Conclusion

In the seminal and too often forgotten 1978 Final Document of the First Special Session on Disarmament, the General Assembly declared that states should “refrain from actions which might adversely affect efforts in the field of disarmament, and display a constructive approach to negotiations and the political will to reach agreements.” That is the course of action the Marshall Islands is seeking to stimulate with its initiative in the International Court of Justice. The General Assembly’s injunction is a fitting guide as well for climate protection. In each field, the Marshall Islands exemplifies both what is at stake and the courage to fight for what is needed.

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⁴ See David Wei, “Six Feet Above Sea Level: Marshall Islands and Climate Diplomacy,” Courier, The Stanley Foundation, October 2014.

⁵ See “Durban: Towards full implementation of the UN Climate Change Convention,” http://unfccc.int/key_steps/durban_outcomes/items/6825.php.

⁶ Cf. Coral Davenport, “Obama Pursuing Climate Accord in Lieu of Treaty,” New York Times, August 26, 2014.