Open-ended Working Group on taking forward multilateral disarmament negotiations

Panel I on substantively addressing effective legal measures, legal provisions and norms that will need to be concluded to attain and maintain a world without nuclear weapons

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At the outset, let me begin by thanking you, Ambassador Thani for inviting the ICRC to speak on this panel. The ICRC believes that the Open Ended Working Group represents an important opportunity to advance discussions on nuclear disarmament, which we urge States to seize.

The Red Cross and Red Crescent Movement, of which the International Committee of the Red Cross (ICRC) is a part, has long expressed its grave concern about the catastrophic humanitarian consequences of nuclear weapons. In 2011, we appealed to all States “to ensure that nuclear weapons are never again used” and “to prohibit the use of and completely eliminate nuclear weapons, through a legally binding international agreement, based on existing commitments and international obligations.”

One year ago, in the months preceding the Non-Proliferation Treaty Review Conference, the President of the ICRC, Peter Maurer, called on States to fulfil the commitments contained in Article 6 of the NPT and to establish a time-bound framework to negotiate a legally binding agreement to prohibit and eliminate nuclear weapons. He also urged States to consider the form that such an agreement could take. The ICRC sees the work of this Open Ended Working Group, which is tasked with addressing “effective legal measures”, as a crucial step in that direction.

I would like to take a few moments to present how international humanitarian law (IHL) – also known as the Law of Armed Conflict or the Laws of War -- has approached the regulation of weapons and provide some observations that can be drawn from that experience which may be relevant for the OEWG’s discussions on “effective legal measures”.

But first, let me recall that, although nuclear weapons are not expressly regulated by IHL, they must comply with IHL’s general rules applying to all weapons, in particular its rules aimed at protecting civilians from the indiscriminate effects of warfare, protecting combatants from unnecessary suffering, and protecting and preserving the natural environment. In light of the devastating effects of nuclear weapons, the ICRC and the Red Cross and Red Crescent Movement believe that it is difficult to envisage how any use of nuclear weapons could be compatible with IHL.

IHL has long regulated weapons for the purpose of preventing unacceptable human suffering in armed conflict.

Some of the earliest IHL treaties focused on prohibiting weapons that were a particular concern in humanitarian terms. These included the prohibition on exploding bullets found in the St. Petersburg Declaration of 1868, the prohibition on dum-dum bullets contained in The Hague Declaration of 1899 and the prohibition on poison gas and bacteriological methods of warfare established by the 1925 Geneva Protocol.
The approach taken by IHL in each of these instances was to prohibit the use and only the use of these weapons in armed conflict. Other acts such as possession, production and stockpiling and transfer were not prohibited. And while a ban on use had an important norm-setting quality, the 1925 Protocol did not prevent the development, stockpiling or proliferation of chemical or biological weapons in the decades that followed.

In recent years, it has become clear that if the use of a weapon is to be effectively prohibited for humanitarian reasons, other types of conduct should also be prohibited. Only by completely eliminating the weapon could it be assured that there would be no possibility for it to be used. Yet prohibiting the possession, development, production, stockpiling and acquisition of weapons is an approach typical to the field of arms control and disarmament.

In IHL, prohibitions broader than just use were first introduced in the Convention on Certain Conventional Weapons (CCW) where, among other things, Amended Protocol II banned the transfer of mines prohibited by the protocol and Protocol IV prohibited the use and transfer of blinding laser weapons.

As we know, more recent IHL treaties have taken this further and embraced a more comprehensive approach. Both the 1997 Anti-personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions prohibit a wide range of activity that includes use, development, production, acquisition, retention, stockpiling and transfer of these weapons as well as assisting, encouraging or inducing any of these actions. They also include provisions setting deadlines for the destruction of stockpiles.

These treaties reflect a close convergence of IHL and disarmament approaches, a convergence which had arguably been first achieved in 1993 with the Chemical Weapons Convention (CWC). Although the CWC is traditionally viewed as a “disarmament” treaty, the underlying reason for the ban on chemical weapons is first and foremost humanitarian (as is clear from the 1925 Geneva Protocol).

From these approaches and experience, there is a number of observations that can be made to feed the OEWG’s work to consider “effective legal measures” and the possible approaches to nuclear disarmament:

- At one end of the spectrum is a prohibition on the use of nuclear weapons, similar to the ban found in 1925 Geneva Gas Protocol. This approach is simple and may be easier to achieve than more comprehensive prohibitions. If widely ratified, it would have a norm-setting and stigmatizing value and send a signal that the use of nuclear weapons is unacceptable. However, on its own it would not address the development, production, stockpiling and transfer of nuclear weapons. With no provisions or framework for stockpile destruction, even if only in the form of a commitment for future elimination within defined timelines, such a treaty may be seen as conferring legitimacy on the continued possession of nuclear weapons.

It is also important to point out that in fact the 1925 Geneva Protocol turned into a “no first use” commitment due to the reservations and declarations made by several States Parties. A more comprehensive ban on biological and chemical weapons only came into being with the adoption of the Biological Weapons Convention 47 years later, and of the CWC 68 years later.
• At the other end of the spectrum is a comprehensive convention on nuclear weapons, establishing a full set of prohibitions (on use, development, production, acquisition, possession, stockpiling and transfer) and time bound actions for irreversible and verifiable nuclear disarmament. This is the most complete approach and is one similar to those found in the Convention on Chemical Weapons, the Anti-personnel Mine Ban Convention, and the Convention on Cluster Munitions. Its main advantages are that, in addition to having a strong norm setting value, it would include all of the necessary mechanisms to accomplish nuclear disarmament – including a verification regime – and therefore effectively address the prohibition and elimination of nuclear weapons once and for all. However, this is certainly the most complex and challenging approach to achieve.

• A possible middle ground is a treaty setting out a broad set of prohibitions (often referred to as a “ban treaty”) falling short of the comprehensive convention I have just mentioned. This approach would involve clear prohibitions on use, development, production, acquisition and transfer, but would leave the ban on possession and stockpiling for later. It could potentially establish a clear and forceful norm and have a strong stigmatizing effect.

However, like the ban on use, this approach would not immediately address the continued possession of nuclear weapons. In principle, the possession and stockpiling of nuclear weapons could be addressed at a later date through additional protocols and supplementary agreements. However, the principles or framework for addressing these subsequent issues, and committing States Parties to work to achieve that goal, would need to be agreed on so as to avoid implicitly conferring legitimacy on the continued possession of nuclear weapons.

In closing, it is important to note that each of the approaches that I have discussed can be packaged in a variety of ways, such as in individual stand-alone agreements or through a framework of mutually supporting instruments. Yet, each must be assessed on its own merits taking into account the goal for an effective measure “to achieve and maintain a world without nuclear weapons” and the legal, technical and political realities of today’s multilateral environment.

Equally important, in the view of the ICRC, is the clear imperative for urgent action in light of the evidence that the risk of intentional accidental use of nuclear weapons is significant, and of the catastrophic humanitarian consequences that any such use would entail. Inaction is not an option.

Thank you.