Legal perspectives on effective measures, provisions and norms relating to nuclear disarmament

STATEMENTS

Remarks to the open-ended working group on taking forward multilateral disarmament negotiations, Geneva, 22.02.16.

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- I would like to thank the Chair, Ambassador Thani, for inviting me to participate in this panel. I am grateful for this opportunity to address the Open-Ended Working Group.

- As the title suggests: my approach to this is that of international law – in 2014, we at ILPI produced a book entitled Nuclear Weapons under International Law, which maps existing international law relevant to nuclear weapons.

- The first key point I want to make is that there is already a comprehensive body of law regulating nuclear weapons. There is no legal vacuum.

- There are instruments that explicitly regulate different activities related to nuclear weapons, including the Nuclear Non-Proliferation Treaty, the Nuclear-Weapons Free Zone Treaties, the Partial Test Ban Treaty and the Comprehensive Test Ban Treaty, UN Security Council Resolution 1540, the Nuclear Terrorism Convention, etc., and there are other instruments that regulate nuclear weapons implicitly, including international humanitarian law, environmental law and so on.

- Moreover, more than 100 countries are also parties to nuclear-weapons free zones. These treaties are fully-fledged prohibition treaties which are supplementing the obligations of the NPT.

- In most countries, bans on possession and development of nuclear weapons have also been implemented into national legislation—in accordance with obligations under UNSC Resolution 1540 and others, and the Nuclear Terrorism Convention.

- There are also several other areas of law that has an indirect bearing on nuclear weapons and that proscribes their development, use and possession in significant ways.

- First of all, the UN charter prohibits the use of armed force against states in general, but makes exceptions, as we know, for self-defense and for uses of force authorized by the Security Council. These rules in the charter apply to any use of force against states, irrespective of weapon type, and also include a prohibition on the threat of such use. And no restrictions are imposed on nuclear weapons as such under this body of law, but obviously, it does apply equally to use of nuclear weapons.

- International humanitarian law (IHL), which regulates among other things the conduct of hostilities in armed conflict, is particularly relevant for the use of nuclear weapons. While IHL does not specifically prohibit nuclear weapons, their use in armed conflict is regulated by the general rules of IHL.

- The most relevant rules in this regard being the rules on distinction, proportionality, precautions in attack and protection of the natural environment, as well as the prohibition on means of warfare of a nature to cause superfluous injury and unnecessary suffering to combatants. The sheer scale of the casualties and destruction resulting from the use of a nuclear weapon in itself puts the compatibility of such arms with IHL into serious doubt in most conceivable circumstances.
The second main point that I would like to make, and which is also a key conclusion of the book that I just mentioned, is that despite the wide-ranging existing regulations applicable to nuclear weapons, some important gaps still exist in the international legal framework if we compare it to, for example, other weapons of mass destruction. These observations also draw on a new study that ILPI and UNIDIR together have produced. While I will not go into all the details, I will give you a few examples.

First—and from an IHL perspective the most important—existing international law does not contain a universally applicable prohibition against the use of nuclear weapons.

As mentioned, this prohibition is included in several of the nuclear-weapon-free zone treaties, but the NPT does not deal with use, on the contrary; it foresees the possibility of the NWS using them.

This is because the primary objective of the NPT is to prevent proliferation, and not to prohibit nuclear weapons as such.

Historically, however, the primary focus of international treaties regulating specific categories of weapons has been on use. It was not the existence of the weapons that was seen to be the main problem; rather it was the fact that they were likely to be employed during armed conflict.

While the scope of arms control and disarmament treaties has expanded since the first IHL conventions, the idea of prohibiting the actual use of a given weapon still remains highly relevant. This is also why you will find that a prohibition on use is included in most other arms control and disarmament treaties, ranging from the chemical weapons convention, the mine ban convention, the cluster munitions convention, and the protocols under the CCW.

And I would just like to make a note here regarding the biological weapons convention, where the term ‘use’ was not included in the treaty text itself, but the States Parties to the treaty have subsequently specified that use is also prohibited under article 1 of this treaty.

The international legal framework pertaining to conduct of hostilities already restricts the possibility of use of nuclear weapons to a very limited range of scenarios, if any. Even so, the fact that no explicit international prohibition on the use of nuclear weapons exists, does create a certain amount of legal ambiguity. A prohibition on use would cover whatever is left of hypothetical legal use.

In terms of the different approaches to nuclear disarmament referred to by Tim Caughley earlier today, a prohibition on use would be relevant whether one talks about a comprehensive convention on nuclear weapons, a ban treaty, or a framework approach.

Related to a prohibition of use of nuclear weapons, the element of threat of use is also often mentioned. The UN Charter already prohibits all threats of use of armed force. This includes threats of use of nuclear weapons. Threats of use of nuclear weapons are therefore already prohibited, and would thus not seem to belong in a prohibition on nuclear weapons, in the same way as threats of use are not included in other weapons prohibition regimes.

Secondly, in addition to the issue of use, existing international law does not contain a clear, universally applicable prohibition against the development and testing, and against manufacturing and production of nuclear weapons. Such elements normally form part of more comprehensive arms prohibition regimes, such as those on biological and chemical weapons.

On the issue of development and testing, it should be noted that the partial nuclear-test-ban treaty (PTBT) from 1963 goes a long way in restricting how testing of nuclear weapons can be conducted. But it does not prohibit testing under ground—which is how all the nuclear tests in recent decades have been conducted.

The CTBT will, if it enters into force, remedy this situation, though critics have also pointed out that since the CTBT only prohibits nuclear explosions, it would not prevent subcritical tests of nuclear weapons, or computer-simulated tests.

Under the NPT, manufacturing is explicitly prohibited, but this is only applicable to the non-nuclear-weapon states.

In the conventions on chemical weapons, anti-personnel mines and cluster munitions, the term ‘manufacture’ is not used, but the terms ‘development’ and ‘production’ would normally be seen to cover the aspects of ‘manufacture’.

Two terms that are often mentioned in connection with nuclear weapons are stationing and deployment. These two terms are sometimes used interchangeably. ‘Stationing’ is generally understood as broader than ‘deployment’.

One key question with regard to prohibitions against stationing/deployment is whether the host state has jurisdiction and/or control over the weapons physically present in the territory.

Whether these elements would be covered in a potential legal framework would depend on a number of factors – not least on how one would solve the issue of military cooperation between parties to a prohibition and non-parties.

The terms possession and stockpiling are also often debated in relation to disarmament treaties. They are not synonyms, but they overlap – possession does not necessarily entail ownership, whereas stockpiling normally does – but neither are precise terms. The nuclear-weapons-free-zone treaties prohibit possession of nuclear weapons, whereas, for example, the Biological Weapons Convention, the Chemical Weapons Convention, the Mine Ban Convention and the Cluster Munitions Convention prohibit stockpiling.

To attain and maintain a world without nuclear weapons, the issue of stockpile destruction is a central one. Approaches to the destruction of weapons vary considerably.

The Chemical Weapons Convention contains elaborate provisions for the verified destruction of chemical weapons stockpiles, whereas this is not the case in the Biological Weapons Convention. The Mine Ban Convention and the Convention on Cluster Munitions establish deadlines for completing stockpile destruction, but they do not go into much detail as to how it is to be achieved.

How to address stockpile destruction in the context of nuclear weapons would depend on the approach taken. One of the key issues that States would have to consider would be the sequencing of prohibition and elimination. In a comprehensive nuclear weapons convention, prohibition and elimination would presumably be included in one single instrument, which would require elaborating detailed provisions for verified stockpile destruction, including, for example, and agreement on how to handle stocks of fissile material.

In a ban treaty approach, prohibition could be treated separately from elimination, and if so, such provisions would arguably not be necessary. Conversely, in a step-by-step approach, whereby the complete disarmament of all nuclear weapons would take place before the negotiation of a prohibition instrument, provisions on stockpile destruction would similarly not be as relevant. A framework approach would
be more flexible, and prohibitions and elimination could be pursued separately, but possibly within a common legal framework.

- In addition to the issues I have addressed, a number of other elements would also be relevant for a discussion about provisions and norms relating to nuclear disarmament, such as transit/transfer, assistance to prohibited acts, transparency, compliance mechanisms and cooperation/assistance.
- In our previously mentioned study, produced in collaboration between UNIDIR and ILPI, we go through these issues in more detail, and we welcome anyone interested to have a closer look.
- In summing up, Mr. Chair: First, there is a large body of international law already regulating nuclear weapons. Second, there are certain gaps, for example if compared with other weapons of mass destruction.
- Regardless of the preferred approach to nuclear disarmament, a number of questions concerning how to fill the legal gap will have to be addressed at some point in time, in one form of another.
- And with that, Chairperson, I conclude my remarks, and look forward to the exchange of views.
- Thank you.