


Nuclear Weapons and International Humanitarian Law: pursuing disarmament as humanitarian action.



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ISODARCO, January 2011**

2010 NPT Final Doc stated:

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.



THE PROBLEM OF NUCLEAR WEAPONS

Trident nuclear-armed submarine in Scotland





Nagasaki, August 1945



- What real, foreseeable uses of nuclear weapons would NOT violate International Humanitarian Law?
- What might be the practical situations in which a government chooses to use NW in defence with less risk to the lives, security and survival of their people than not using them?

ICJ and ICRC: 'inhumane' weapons as indiscriminate and disproportionate

- violate principles of distinction, necessity and proportionality (International Court of Justice, July 1996)
- “Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of humanity...”

Jakob Kellenberger, President of the International Committee of the Red Cross (ICRC) , April 2010.

The Humanitarian Imperative

- **Stigmatising weapons as inhumane paves the way for banning them**
- **Examples from other weapons:**
 - **asphyxiating chemicals**
 - 1925 Geneva Protocol (use) → 1993 CWC (all aspects)
 - **biological and toxin weapons**
 - 1925 Geneva Protocol (use) → 1972 BTWC
 - **antipersonnel landmines**
 - 1997 Mine Ban Convention (use, stockpiling, production and transfer...)
 - **cluster munitions**
 - 2008 Convention on Cluster Munitions (CCM prohibits use, production, stockpiling and transfer...)



NPT: the best deal available during the Cold War

The NPT has 190 states parties.

- Only 5 of them are nuclear weapon states (NWS)
- Articles I and II: no transfers of NW technologies, no acquisition by NNWS
- Article III: safeguards (only obligatory for NNWS)
- Article IV: no impediment for 'peaceful uses' of nuclear energy
- Article VI: pursue nuclear disarmament 'in good faith'
- India, Israel and Pakistan have nuclear weapons, having never joined NPT, and DPRK (North Korea) violated NPT, announced withdrawal in 2003 and in 2006 and 2009 conducted nuclear tests.
- **NPT did not address use or deployment**

- Concept of nonproliferation assumes status quo with 'haves' (the 5 NWS)
- All others should be 'have-nots' (NNWS)... BUT:
 - 3 (and a half) nuclear possessor states outside NPT
 - NATO and other nuclear alliances
 - Nuclear capable (technological insurance policies)
 - weak compliance and enforcement
 - limited safeguards regime (and contradictory dual role for IAEA) rather than effective verification
 - promotion of nuclear energy to detriment of nuclear security and nonproliferation needs
 -

NPT legacy problems

The norms, rules and institutions of non-proliferation do not function against the acquisition of nuclear weapons as intended, because the *possession* of nuclear arms still carries high value, both domestically (especially among P-5 and D-4) and in the international system.

Whilst proliferation is preached against, *successful* acquisition of NW is rewarded (and associated with national pride, independence, technological prowess, and the 'masculine' ability to punch above one's weight).

⇒ attitudes in P-5 and D-4

⇒ epitomised by 2010 outcome...

Though hailed a success, the 2010 NPT Review Conference was inadequate and disappointing in other ways

- Failed to strengthen safeguards or make the IAEA Additional Protocol a verification standard or condition for supplying nuclear materials or technologies
- Failed to strengthen the institutions and tools to prevent proliferation and terrorist access
- No critical assessment of US-India deal or Iran's programme and failed to hold NWS and some NNWS to account for violations of their treaty obligations
- On disarmament, the core Action Plan did little more than recommit to a step by step process negotiated and agreed to ten years ago by 2000 NPT RevCon (and barely implemented)...

Three possible futures

- Slow proliferation... gradual erosion of regime
- Fast proliferation... 'cascade' provoked by key regional player (Iran?) "going nuclear"
- Delegitimization of nuclear weapons and progressive disarmament, probably abolition-oriented rather than control-based

Maintaining status quo is not realistic option

Recent realist questioning

“Reliance on nuclear weapons for [deterrence] is becoming increasingly hazardous and decreasingly effective.”

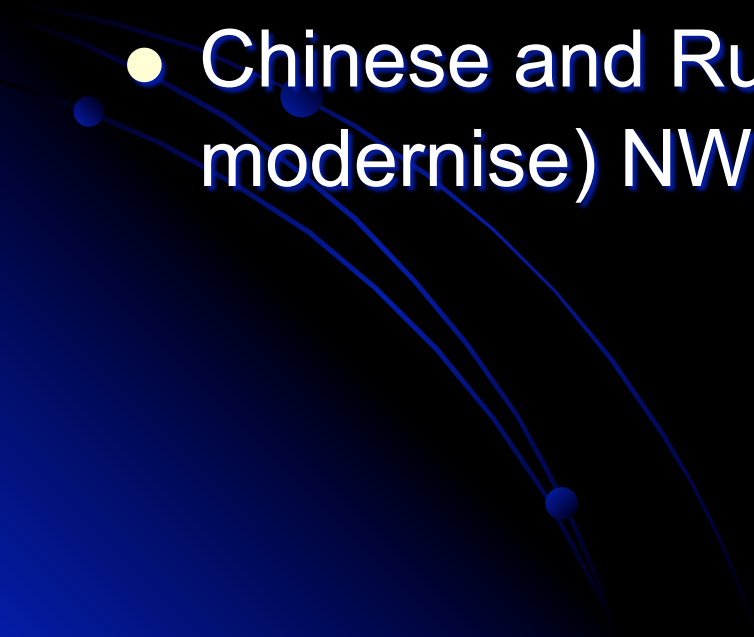
Kissinger, Schultz, Nunn and Perry, WSJ Jan 2007

• “I state clearly and with conviction America’s commitment to seek the peace and security of a world without nuclear weapons.”

President Barack Obama, Prague, April 2009

also: “if we believe that the spread of nuclear weapons is inevitable, then we are admitting to ourselves that the use of nuclear weapons is inevitable.”

But nuclear bureaucracies ignore

- Wikileaks cables w.r.t. US and UK
 - \$85 billion for US nuclear labs as price for New-START ratification
 - Trident renewal, UK-French nuclear cooperation agreement
 - Chinese and Russian modernising (or trying to modernise) NW delivery
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No wonder key NNWS are losing patience
and putting weight into nuclear abolition
approaches:

At the 2010 Review Conference, some 140
governments called for comprehensive multilateral
negotiations on a global nuclear abolition treaty –
i.e. a Nuclear Weapons Convention.



Did 2010 RevCon begin transition from nonproliferation to nuclear weapons abolition?

Many reaffirmations of previous undertakings, but 3 key areas of specific commitment and new understanding:

- 1) Affirmation that international humanitarian law (IHL) applies to nuclear weapons;
- 2) Commitment to achieve and maintain a nuclear weapon free world, requiring a comprehensive nuclear weapons convention of some form; and
- 3) 2012 Conference on implementing the 1995 Resolution on the Middle East, and Facilitator to take forward to 2015.

NPT 2010 Final Doc

- 81. The Conference notes the new proposals and initiatives from Governments and civil society related to achieving a world free of nuclear weapons. The Conference notes the proposals for nuclear disarmament of the Secretary-General of the United Nations to inter alia consider negotiations on a **nuclear weapons convention** or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.
- 82. The Conference affirms that the final phase of the nuclear disarmament process and other related measures should be pursued within an **agreed legal framework**, which a majority of States parties believe should include specified timelines.

NPT 2010 consensus Conclusions and Recommendations

Nuclear Disarmament Action Plan

B iii. The Conference calls on all nuclear-weapon States to undertake concrete disarmament efforts and affirms that all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons. The Conference notes 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.

BUILDING ON 1996 ICJ OPINION

ICJ concluded “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;”

President of ICJ Mohammed Bedjaoui now argues that ICJ equivocation was due to undue emphasis given to arguments of possibility of ‘warning shot’ for deterrence left ICJ equivocal on ‘extreme circumstance’ of state survival

Elements of humanitarian approach to abolish NW

- Delegitimise and devalue nuclear weapons
 - debunk deterrence, denuclearise alliances
 - Nuclear use as crime against humanity and war crime
- Revive and strengthen tools for national and regional security without nuclear weapons or nuclear deterrence doctrines
- Much deeper cuts in existing arsenals, implementation of existing treaties
- Reinforce International Humanitarian Law: disarmament as humanitarian and security action

**CREATE CONDITIONS, LAY THE GROUNDWORK FOR
A NUCLEAR ABOLITION PROCESS AND
NEGOTIATIONS ON A MULTILATERAL TREATY**

Crime against humanity

- Growing moves to go beyond positive and negative 'security assurances' to get the use of NW to be declared a crime against humanity and war crime
- Implications for delegitimizing nuclear doctrines and devaluing weapons
- Strengthens deterrence against terrorist use

ARMS CONTROL and NON-PROL APPROACH

HUMANITARIAN APPROACH

Regulating a high value,
desirable weapon

Abolishing an inhumane,
unusable weapon that is
contrary to humanity's
interests

Emphasis on reducing
numbers and preventing
new acquisition

Emphasis on banning use,
deployment and production
as well as reducing arsenals

Maintain strategic stability,
especially among NWS

Enhance global and human
security and prevent harm to
potential victims

Primary actors: nuclear
weapons states, military and
technical experts

Primary actors: non-nuclear
weapon states and all
sectors of civil society

ARMS CONTROL and NON-PROL PREMISES

HUMANITARIAN PREMISES

Proliferation is bad but can be managed. Stem proliferation by tightening controls on others.

Proliferation is bad and isn't being safely managed. Roll back spread and acquisition by making NW unusable, unattractive and pariah

NW have security value for deterrence but dangerous in the wrong hands.

Nuclear deterrence is a dangerously misguided belief system (voodoo), and doctrines of use and deployment create threats, risks and instabilities

Status quo possession is stabilising and disarmament is risky

The high value accorded to possessing NW is a salient proliferation driver

ARMS CONTROL and NON-PROL PROCESS

HUMANITARIAN PROCESS

Step by step reductions while maintaining infrastructure and options for modernizing and rearming

Delegitimize and devalue all NW, ban (or at least stigmatize) their use, then undertake progressive steps to reduce and eliminate

Objective: do enough to appease NNWS in NPT

Objective: verified elimination of all NW codified through a Nuclear Weapons Convention

The NWS determine the pace and terms; the biggest go first

Because of vested interests, NWS will fail to disarm w/out leadership from key NNWS

Bilateral (US-Russia)
voluntary unilateral
P-5 as numbers near parity?

Multilateral, including non-NPT
NW possessors

Verification Maxim: It is easier to verify a total prohibition than a partial limitation

The NPT regime relies on materials accounting and IAEA safeguards, bolstered by export controls and UNSC action.

A nuclear abolition regime would require much tighter controls on materials and NW technologies, increased barriers to prevent diversion from civilian uses

Arms control currently relies on complicated counting rules, and protection of military-nuclear interests, with anxieties about relative advantage or disadvantage at low levels

With human security at the centre, and any use of NW banned, verification of nuclear abolition would call on a range of political, legal, civil society and technical tools not available to arms control

If Arms Control and Nonproliferation fail or continue business as usual

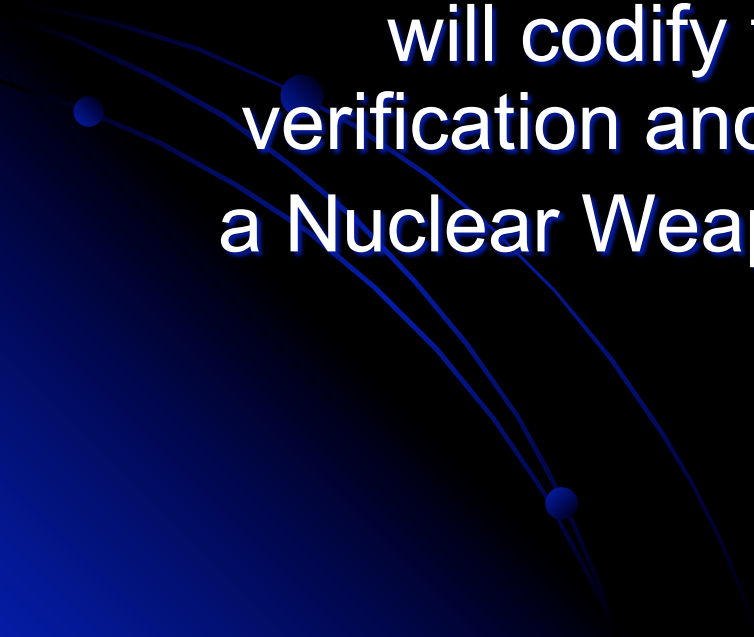
- breakdown and erosion of confidence in the NPT regime
- NW maintained in arsenals, doctrines and deployment (maybe increased and modernized)
- heightened risks of accident, rogue intentional use or military intentional use...
 - ⇒ retaliation ⇒ nuclear exchange
 - ⇒ nuclear war?

If nuclear abolition regime fails?

- Accidents and unauthorised uses less likely if NW not deployed on high alert
- main risk if materials are not adequately safeguarded would be terrorist use by rogue government or non-state actor
 - ⇒ single use without exchange: devastating but not global or even national catastrophe
 - ⇒ concerted international action to help victims and bring perpetrators to justice

Passing the baton: from NPT to NWC

To stem further proliferation, reduce nuclear dangers, and promote human security in the geostrategically more complex and multifaceted world of the 21st century, it will be necessary to outlaw the use of nuclear weapons and prepare the political ground for the legal agreements that will codify the obligations, prohibitions, verification and compliance requirements... i.e. a Nuclear Weapon Convention (of some kind)



New mindset needed

- Human security must take precedence over military notions of security – environmental/climate, health, water, food....
- Global security needs to be prioritised above national state 'defences'
- Governments need to implement in law the fragile taboo on the use of nuclear weapons. If the use of chemical and biological weapons and some conventional armaments are treated as war crimes or crimes against humanity, it is unreasonable to exempt NW
- Weapons that are indiscriminate, mass destructive and contrary to fundamental morality and humanity and collective environmental interests cannot be legitimately possessed and deployed by self-selecting minorities

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