

United Nations General Assembly Open-ended Work Group on “Taking forward multilateral nuclear disarmament negotiations”, Palais des Nations, 11 May 2016

Panel V: Possible pathways to take forward multilateral nuclear disarmament negotiations

“Pathways to nuclear disarmament: delegitimising nuclear violence”

Presentation by Dr Nick Ritchie, University of York, UK

Email: nick.ritchie@york.ac.uk

Reducing and eventually eliminating the risk of nuclear violence remains a challenging task. It is a task that, in the end, only be accomplished by the nuclear-armed states.

This reality has empowered nuclear-armed states to stall and block disarmament steps that do not align with their individual and collective ideas of national security.

This has produced deep concern about the continued existence of nuclear weapons and frustration at the pace of nuclear disarmament. It has generated unease that the nuclear weapon states will never deliver on the commitment to nuclear disarmament under the NPT and that they view their possession of nuclear weapons as permanent, with all the continued risks of inadvertent or deliberate use this entails.

In build up to the 2010 NPT Review Conference a group of states responded with a new initiative to refocus disarmament diplomacy on the unacceptable humanitarian impact of nuclear violence. They argued that the singularly destructive power, the transboundary and intergenerational effects, and the scale of human suffering caused by the use of nuclear weapons would breach international humanitarian law in practically all conceivable circumstances.

This initiative rapidly gathered momentum and has led us to this point at this is OEWG where the task is to consider possible pathways to take forward multilateral nuclear disarmament negotiations. A number of governments and civil society organisations have highlighted four possibly pathways. These were labelled in the UNIDIR-ILPI study on a legal prohibition: 1) A comprehensive approach; 2) a framework approach; 3) a step-by-step approach; and 4) a ban treaty approach.

Devaluing nuclear weapons

I do not intend to go through these in turn. I’m sure you have all looked at the study and other reports by Article 36 and Reaching Critical Will and working papers submitted to this group that discuss similar pathways. Instead, I want to focus on the underlying preference for choosing a particular pathway. That preference depends on the purpose and feasibility of next steps towards multilateral nuclear disarmament and the purpose of the humanitarian initiative that has led to these OEWG discussions.

In doing so, it is useful to distinguish between a purpose of *reducing the value* of nuclear weapons and a purpose of *reducing the legitimacy* of nuclear weapons.

The post-Cold War nuclear disarmament process has generally focussed on efforts to reduce the value assigned to nuclear weapons by nuclear-armed states. Nuclear weapons remain highly valued assets for states that possess them and many of their allies. The values assigned to nuclear weapons can take different forms, but a value of security through the capacity to threaten other societies with nuclear violence is central.

The security values assigned to nuclear weapons have diminished since the end of the Cold War as the international social, economic and political landscape has changed, but this has been a limited process of what we might call 'surface devaluing'. This refers to a number of changes that have occurred in the nuclear policies of nuclear-armed states, particularly the US and Russia. They include: a general move away from nuclear defence and towards expeditionary conventional warfare; reducing the vast excesses of Cold War legacy nuclear forces; marginalising the idea of using nuclear weapons for battlefield 'war-fighting' (Russia and Pakistan); shifting some roles previously assigned to nuclear weapons to conventional weapons (mainly in the US); and consolidating formal declaratory policies about who might qualify for a nuclear attack and under what conditions.

All this is welcome, but it represents only limited or partial devaluing. 'Deeper' forms of devaluing that require more explicit changes to nuclear doctrines that would restrict the practice of nuclear deterrence have been largely rejected. These include familiar measures such as a no-first use agreement, de-alerting deployed nuclear weapon systems, and legally-binding negative security assurances.

Nevertheless, the NPT nuclear weapon states say this surface devaluing is excellent progress and fulfils requirements for meeting their nuclear disarmament responsibilities over the past five NPT review cycles from 1990 to 2015.

Focussing disarmament diplomacy on efforts to reduce the security value assigned to nuclear weapons by nuclear-armed states in terms of warhead numbers, types, and doctrine does a number of things:

- 1) Whilst it might accept that the risk of nuclear violence must be taken seriously, it suggests that the problem is not the weapons themselves or the practice of nuclear deterrence, but who has them, in what numbers, and how they are configured;
- 2) It says the risk of nuclear violence can be safely managed for the foreseeable future through adjustments to nuclear posture, doctrine, consolidation of nuclear forces, and vigorous counter-proliferation;
- 3) It devolves agency for nuclear disarmament to the nuclear-armed states and their agendas and relationships; and
- 4) It leaves the logic and practice of nuclear deterrence undisturbed and leaves the legitimacy of nuclear weapons intact as far as the nuclear-armed states and their allies are concerned.

We see this when nuclear weapon reductions are accompanied by statements that restate an unequivocal commitment to nuclear deterrence and the necessity of nuclear weapons for national security.

Delegitimising nuclear weapons

In response, a growing number of states have shifted their focus from devaluing nuclear weapons to delegitimising and stigmatising *nuclear violence*. In doing so, they have challenged the very *legitimacy of valuing* nuclear weapons at all – irrespective of whether a particular government values its weapons, its particular doctrine or its operational posture in one way or another.

In fact, delegitimising and stigmatising *nuclear violence* has been a core purpose of the humanitarian initiative. This was cemented in the Austrian government's pledge in 2014 to "stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks".

The humanitarian initiative argues that nuclear weapons are illegitimate because of the appalling and unacceptable humanitarian, health and environmental consequences of any use under any circumstances. Concerns with the effects of nuclear detonations is not a new phenomenon but it has taken on new salience as nuclear disarmament processes have slowed and concern at the permanence of nuclear weapons has increased.

This unacceptability is rooted in a collective moral revulsion and rejection of particular categories of violence, especially massive, inhumane and indiscriminate forms of violence. This has been progressively codified in legal rules and normative principles governing the conduct of war, in particular international humanitarian law applicable in armed conflict, but also international human rights law and international environmental law.

The legitimacy and authority of these norms and rules rests on their universality. According to these norms and rules, and by focusing on what nuclear weapons are rather than what purpose they are meant to serve, nuclear weapons are the very worst of all. This is compounded by the permanent risk of nuclear violence as long as nuclear weapons exists

Delegitimising nuclear weapons through prohibition

The legitimacy of a particular practice such as possessing or using nuclear weapons tends to rest on four broad factors: 1) legal validity; 2) the justifiability of prevailing rules that permit that practice; 3) popular consent; and 4) equality or non-discrimination.

Delegitimising nuclear weapons therefore suggests a set of processes that: 1) Undermine claims to legal validity; 2) Demonstrate withdrawal of consent for practices that legitimise nuclear weapons; 3) Highlight and address the discriminatory character of the nuclear weapons control regime under the NPT; and 4) Challenge the justifiability of the rules that serve as a source of legitimacy for nuclear weapons.

An obvious way of maximising the delegitimation of nuclear weapons is therefore through a comprehensive, non-discriminatory and unequivocal legal prohibition – one based on an alternative set of justifiable rules rooted in universal international humanitarian law rather than rules that permit the selective possession of nuclear weapons and the practice of nuclear deterrence. This would undermine existing claims for the legal validity of possessing and using nuclear weapons. It would address the inequality of the NPT's discriminatory nuclear weapons control regime. It would represent a withdrawal of consent by signatory governments for current practices and pathways that tacitly legitimise nuclear weapons, but only if it gathered significant support.

So a key difference between a focus on delegitimising nuclear weapons and a focus on measures by nuclear-armed states to reduce the value assigned to their nuclear weapons, is that the problem here is explicitly the weapon, not specific practices or specific actors. The threat to peace and security is not nuclear proliferation (which is a term that confines danger to the acquisition of nuclear weapons by additional states), the threat is the existence of the weapons themselves irrespective of who has them. Nuclear weapons become a collective international liability rather than an individual national asset.

Emphasising the delegitimation of nuclear weapons shifts the direction of disarmament diplomacy away from an exclusive focus on trying to change the policies of the nuclear armed states. It moves it towards changing the normative international environment in which nuclear weapons and nuclear-armed states are embedded.

It shifts the centre of power in disarmament diplomacy away from the agency of nuclear-armed states, their relationships with each other, and their capacities to resist. Instead, it empowers a

much broader community of states to change the international social structure of nuclear legitimacy and illegitimacy, and the relationship between nuclear-armed and non-nuclear-armed states.

Delegitimising nuclear weapons is therefore about challenging the international social acceptability of valuing the nuclear weapon. It is a process of widening and deepening a collective normative censure of nuclear violence. It is about codifying that censure in a legal form to maximize its authority and normative power. It is about diminishing nuclear weapons as a currency of power in the international system.

A nuclear prohibition treaty would perform that role. It would constitute an unequivocal delegitimation through a legal instrument that categorically prohibits the possession and use of nuclear weapons based on universal principles of unacceptable harm.

This, in turn, would likely stigmatise nuclear weapons and in so doing generate change. When society collectively labels a practice such as the possession and use of nuclear weapons (or piracy, or slavery) as illegitimate it moves it beyond the realm of 'normal' and acceptable behaviour within that society. When illegitimacy is rooted in moral revulsion then that practice can become stigmatised.

This is a process of separation, one that discriminates between those actors that engage in unacceptable behaviour and those that do not. Nonconformity is punished by shaming, moral opprobrium, sanction, and exclusion insofar as this is possible. A stigma therefore constitutes a prohibitory norm.

It cannot *prevent* a prohibited act if the means remain available, but it can mobilise sustained opposition and restrain behaviour. But a stigma also does more than that: it can also shape actors' identities in terms of whether you are the sort of actor that accepts or conforms to prohibitory norms such that you change your behaviour to reflect that identity, or whether you are an actor that does not.

Prohibition vs. regulation or prohibition *and* regulation?

Based on this, we can differentiate between two broad approaches to nuclear disarmament negotiations: First, a disarmament process guided by the subjective assessments of the nuclear-armed states about the relative value of their nuclear weapons in different and evolving security contexts. Second, a process that delegitimises nuclear weapons by undermining the legitimacy of valuing such weapons irrespective of their perceived utility by those that possess them (or indeed are possessed by them).

Advocates of a step-by-step and building blocks approach to nuclear disarmament tend to privilege the first approach. In doing so, they have suggested that a new legal instrument to prohibit nuclear weapons is either an unnecessary distraction from other important measures such as a Fissile Material (Cut-off) Treaty, a diplomatic insurgency that will imperil the NPT, or a deliberately divisive, exclusive and therefore invalid diplomatic process. Nothing about a prohibition seems to be incompatible with a step-by-step or building blocks approach, nor is it exclusive or in tension with the NPT as whole. A prohibition and other important measures such as entry into force of the CTBT, negotiation of an FM(C)T, nuclear stockpile reductions, disarmament verification research, and other 'building blocks' are not mutually exclusive. Political work is required on both physical constraints (on stockpiles, testing, fissile material production, deployments) *and* normative and legal constraints (on declaratory policy, use, possession).

Focussing on delegitimising nuclear weapons does not diminish the importance of efforts to reduce nuclear stockpiles and change nuclear doctrines, but neither does it restrict “effective measures” to the agency of those that have nuclear weapons. Delegitimising nuclear weapons would certainly change the context of future ‘steps’ and ‘building blocks’, indeed that would be the point, but it is not incompatible with them. A prohibition would, in effect, recognise the inability of the NPT to categorically delegitimise nuclear weapons and the practice of nuclear deterrence given the treaty’s discrimination between nuclear and non-nuclear states parties. And it would provide an appropriate solution that would constitute an “effective measure” under Article VI.

Arguments about mutual exclusivity seem to mask a deeper opposition to the delegitimation of nuclear weapons because those weapons and the practice of nuclear deterrence are still accepted as legitimate. It is resistance to a process of delegitimation that appears to have led nuclear weapon states to largely exclude themselves from the humanitarian impact of nuclear weapons conferences and the 2013 and 2016 OEWGs.

With that in mind, the OEWG and its community of participating states does face a choice. It is a choice defined by preferred pathways for social change rather than one discrete step over another. If the preference of states is to privilege limited and possibly ‘deep’ devaluing measures by the nuclear-armed states, to privilege their disarmament agency and therefore their disarmament agenda, to privilege that pathway as the outcome of this working group, then a step-by-step or building blocks process is likely the most appropriate approach. If the preference is to privilege delegitimising nuclear weapons, then a prohibition process of some form catalysed by the collective agency of the non-nuclear armed is likely the most appropriate approach.

A ban treaty or a ‘ban-plus’ framework for legal prohibition?

Whether a prohibition would take the form of a stand-alone ban treaty or a framework agreement would need further discussion. The idea of a framework has been talked about a lot recently, but the term ‘framework’ has been used loosely. It is worth, however, thinking about the framework convention-protocol approach. These have mainly been used in the field of International Environmental Law, but also in the Convention on Certain Conventional Weapons and Framework Convention on Tobacco Control.

Most framework conventions include a statement of objectives, guiding principles, basic obligations, and national measures. In doing so they often establish a general governance framework for an issue area together with some permanent institutions to support it, such as a secretariat, conference of parties, and scientific advisory body. The potential to provide a general governance framework for nuclear disarmament might be a key difference with a stand-alone treaty. There is a substantial institutionalised governance framework for nuclear non-proliferation and peaceful uses of nuclear energy, but governance for the process of nuclear disarmament is less developed. This is reflected in the strength of the NPT’s norm against nuclear proliferation and its codification in a range of legal instruments, compared to its weaker norm of an expectation of progress towards nuclear disarmament that is subject to far less legal codification.

A framework approach could therefore be attractive, but it would need to be a ‘ban-plus’ framework. It would need to include either specific prohibition obligations and substantive associated commitments in the parent agreement rather than the more usual general guidelines, or a general framework together with a mandatory prohibition protocol negotiated in parallel and adopted concurrently. A framework approach that failed to incorporate a prohibition from the outset would risk diluting the delegitimation of nuclear weapons as a core

purpose. It would risk codifying a set of open-ended disarmament aspirations similar to those contained in the 2000 '13 steps' and 2010 Action Plan that have to date been largely ineffective.

Conclusion

To conclude, the humanitarian initiative was born out of exasperation with the slow pace of nuclear disarmament, the continuing dangers of a nuclear-armed world, and a seemingly implacable commitment to the logic of nuclear deterrence by the nuclear-armed. Its core theme of delegitimising and stigmatising nuclear weapons has coalesced around the idea of a nuclear prohibition. Nuclear disarmament diplomacy as now arrived at a 'stick or twist' moment: stick with the prevailing pathway of step-by-step or building blocks that cedes disarmament agency to the nuclear-armed; or twist and pursue a pathway of delegitimation alongside other traditional steps. Momentum is building for a decisive 'twist' to challenge and destabilise the acceptability of nuclear violence, to create a crisis of legitimacy for nuclear weapons, and thereby precipitate change in the nuclear policies and practices of the nuclear-armed and their nuclear supporters, change that otherwise does not seem forthcoming.