

Multilateral negotiations on nuclear disarmament – ways forward

Sharing views on possible elements of effective measures for nuclear disarmament: Presentation, by Dr. Gro Nystuen, Senior Partner, International Law and Policy Institute (ILPI), Norway

I would like to thank Thailand and Ambassador Thani and all of the other sponsors for inviting me to participate in this panel.

First of all, I would like to point out that my approach to the issue of nuclear disarmament is that of international law. This is one of several perspectives that we have worked with at the International Law and Policy Institute (ILPI) over the past years. For example, in 2014, we published a book called *Nuclear Weapons under International Law*, which maps and analyses existing international law relevant to nuclear weapons. ILPI has also, together with UNIDIR, produced a paper on legal perspectives on measures for nuclear disarmament with a view to inform the discussions in the OEWG on legal aspects of a possible prohibition treaty.

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.

On the one hand, we have the instruments that **explicitly** regulate nuclear weapons: to have, as well as to develop (which *in practice* includes testing) nuclear weapons, is already prohibited for 185 states under the NPT.

In addition, a customary prohibition now seems to exist on atmospheric and under water testing of nuclear weapons. Underground testing will be prohibited under the CTBT, provided that this treaty enters into force.

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

On the other hand, there are also several other areas of law that has an **indirect** bearing on nuclear weapons, and that proscribe 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-defence 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. No explicit restrictions are imposed on

nuclear weapons *as such* under this body of law, but obviously, it does apply equally to 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 are 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 will in most conceivable circumstances entail violations of IHL.

Other areas of international law are also relevant for nuclear weapons, including, for example, environmental law, human rights law, and international criminal law, but in the interest of time I will not go into these here.

Thus, although nuclear weapons are not in some kind of legal vacuum, it is clear that the legal patchwork of rules regulating these weapons is in many respects different from the frameworks regulating for example the other weapons of mass destruction.

In what follows, I will discuss some of the areas where the nuclear weapons regime is different from other weapon regimes. This is by no means a comprehensive comparison—I will only highlight some of the aspects of legal regulation that illustrates this point.

I should add that these observations build upon the study I mentioned, published by UNIDIR and ILPI earlier this year.

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.

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 prohibiting *use*, to prevent these weapons from being used in hostilities.

Prohibition on use therefore feature prominently in 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. IHL already restricts the possibility of use of nuclear weapons to a very limited range of scenarios, if any. Yet, the fact that the use of nuclear weapons is not explicitly prohibited in an international treaty seems like an inconsistency from legal point of view.

Related to a prohibition of use of nuclear weapons, the element of **threat of use** is also often mentioned, and I note that a prohibition on the threat of use of nuclear weapons is included in the list in Annex 2 to the report adopted by the OEWG in August this year. As noted earlier, the UN Charter already prohibits threats of use of armed force, save in situations of self-defence and authorisations by the Security Council. This includes threats of use of nuclear weapons. It is important to note that no other weapon regimes deal with threats. This is because weapons regimes are founded on the need for strengthened implementation of the rules of IHL – for example, the other two categories of weapons of mass destruction are based on a need to ensure respect for the rules on distinction and on unnecessary suffering.

In addition to the issue of use, existing international law does not contain a clear, and 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.

Regarding development and testing, it should be noted that the PTBT goes a long way in restricting how testing of nuclear weapons can be conducted. But it does not prohibit underground testing—which is how all the nuclear tests in recent decades have been conducted. The CTBT will, if it enters into force, remedy this situation. 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’.

The terms **possession** and **stockpiling** are also often discussed 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.

Approaches to the **destruction** of weapon stockpiles in other regimes 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 contain specific inspection or verification regimes.

In addition to the issues I have addressed, a number of other elements would also be relevant for a comparison with other weapons regimes, such as transit/transfer, stationing, deployment, assistance in the commission of prohibited acts, transparency, compliance mechanisms and cooperation/assistance. In our previously mentioned study, we go through these issues in more detail.

In summing up: First, there is a large body of international law already regulating nuclear weapons. Second, there are significant differences between the legal framework regulating nuclear weapons and other weapon regimes, including the frameworks regulating other weapons of mass destruction.

And with that I conclude my remarks, and look forward to the exchange of views.