

THE HUMANITARIAN APPROACH AND THE BAN NEGOTIATION: REFLECTIONS ON THE WAY AHEAD*

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Recommendations

It is important not to overburden the ban negotiation by raising questions about the global strategic context. Stick to basics.

However, a credible ban on use presupposes a comprehensive ban on possession. Preservation of reconstitution capabilities means a world of threshold states where deterrence mentalities remain. In addition to the weapons, the ban negotiation should therefore address dedicated nuclear infrastructure and weapon-grade materials as well.

A ban on possession is not at odds with alliance obligations, but an unconditional ban on use is. Not only do alliance doctrines envisage retaliatory use: they include possible first use as well. To be against any use while supporting possible first use is a clear-cut contradiction.

For alliance members who consider joining the current ban initiative, adoption of no-first-use positions offers a way out. Similar to the reservations made by parties to the Geneva Protocol of 1925 - which prohibited chemical and biological weapons, but in effect was a no-first-use protocol - they could sign on to the ban on the understanding that as long as nuclear weapons exist, this would be a no-first-use commitment. This would necessitate a reservation to alliance nuclear strategy – unless the US would take the lead and drop first use from its national doctrine.

Beyond the ban negotiation of 2017, ways should be sought to align the humanitarian approach with the concerns and agendas of the NWS and their allies, to maintain momentum and achieve tangible benefits.

If and when deep-cuts negotiations between the US and Russia resume, aligned and non-aligned states should lean on the negotiators to link measures and vision by identifying key markers on the way. This could start with a commitment from one step to the next, go on to the intermediate goal of multilateral disarmament talks and, at an advanced stage of the disarmament process, to a nuclear weapon convention outlining the parameters of the final jump to stable nuclear zero. Noting one or more of these milestones would convey a seriousness about nuclear disarmament that has been lacking so far.

*This brief is based on Sverre Lodgaard, ed., Stable Nuclear Zero (Routledge 2016), in particular Ch. 10 (The vision and its implications for disarmament policy), and conversations with Ambassador Alexander Kmentt (Austria) and Lord Des Browne (UK), November 2016. The responsibility is solely that of the author.

The humanitarian approach

Russia and the United States are modernizing their nuclear arsenals and the Asian powers are expanding theirs. Disarmament negotiations have been deadlocked since the conclusion of New Start in 2010. President Obama's last ditch effort to follow up on the Prague speech of 2009 came to nothing, mainly out of concern that it might harm Hillary Clinton's chances to win the election. Frustration with the lack of progress led non-aligned states and civil society organizations to call for the negotiation of a nuclear ban convention. The first session is scheduled for March 27-31 and the second for June 15-July 7, both in New York.

The initiative is based on the humanitarian approach to nuclear disarmament, which is founded on moral and legal considerations. The effects of nuclear weapons are so horrendous that any use should be prohibited. The best way to ensure this is to eliminate them all and develop an international legal instrument banning possession and use. There is much to build on: for instance, in its Advisory Opinion of 1996, the International Court of Justice said it is hard to imagine any use of nuclear weapons that would be compatible with international humanitarian law.¹ These arguments are easily understood, strong and straightforward, and they have universal appeal. The humanitarian approach has mobilized a broad range of civil society organizations behind the quest for a nuclear-weapon-free world. In this respect, it is already a success.

UN resolution L 41 is based on the preparatory work of an Open Ended Working Group. In line with the humanitarian approach the Group said no to any use, retaliatory use included, pointing beyond the nuclear deterrence doctrines that have legitimized nuclear weapons all through the nuclear age. Ingrained deterrence mind-sets are probably the biggest single obstacle to a world free from nuclear weapons, bigger than its physical manifestations.

NWS opposition

The P5 are hard put to agree on anything these days, yet they saw fit to come together to express "deep concern with efforts to pursue approaches to nuclear disarmament that disregard the global strategic context". In a Joint Statement from their September 15, 2016, conference in Washington, they warned that such efforts will threaten the consensus-based approach that has served to strengthen the NPT regime, and call on all states to engage in an open and constructive dialogue that is inclusive of all states.² However, the longer they fail to live up to the disarmament provisions of Art. VI, the

¹ Available at <https://www.icrc.org/casebook/doc/case-study/icj-nuclear-opinion-case-study.htm>

² Joint Statement From the Nuclear-Weapons States at the 2016 Washington DC P5 Conference, available at <https://www.state.gov/r/pa/prs/ps/2016/09/261994.htm>

more unreasonable the call for consensus becomes. The list of measures that they refer to, starting with further activities on the Glossary of Key Nuclear Terms, is meager to the point of being pathetic.

The humanitarian approach is often criticized for not taking the security dimension into account. An Austrian working paper to the Open Ended Working Group refutes that argument³. For nuclear deterrence to be credible, preparedness for use on short notice has to be convincingly demonstrated, and this creates risks of accidental, mistaken, unauthorized or sudden intentional use of the weapons. Arms control can reduce these dangers, but not eliminate them. On many occasions, nuclear use has been too close for comfort. Moreover, because of the immediate non-discriminatory effects and the mid- and longer-term atmospheric, climate and food-security consequences of even a “limited nuclear war” a ban is needed, i.e. for security reasons.

The P5 are right that the humanitarian approach disregards the “global strategic context”. To get to a nuclear-weapon-free world (NWFV) mind-sets, military postures and regional and global political orders have to change. Current rivalries have to yield to cooperative win-win endeavours. This is a tall order, given the complexity of contemporary international affairs. At the summit meeting in Reykjavik thirty years ago, the world was much simpler. It did not occur to the two superpower leaders that anybody else could interfere with their ambition to denuclearize. Together, they were dominant enough to rule the world, at least in their own eyes.⁴ The humanitarian approach does not address this huge category of issues.

Neither will the ban negotiation dwell on contemporary strategic realities – or it will do so only marginally: it remains to be seen what inputs the participants will offer. Most probably this is for the better, not to overload the agenda. Looking further ahead, however, it will be important to take the humanitarian approach forward and make it relevant to ongoing security debates. If not, the attention and support that it has received may soon dissipate. It is important that new generations understand the devastating effects of nuclear weapons, but in essence this is nothing new. The learning curve was much steeper 50-60 years ago when people rallied against nuclear weapon tests.

The path dependence of nuclear disarmament

On a related note, sceptics of nuclear disarmament hold that nuclear weapons have kept the peace. In the twentieth century, modern technologies made it possible to wage world wars – two of them in rapid succession. After World War II there has been no major war between the leading powers. Seventy years have passed without a third world war. An explanation, near at hand, assigns the absence of major war to the new factor in the equation – the nuclear weapon, which instills caution in the minds of leaders.

³ A/AC.286/WP.4, 23 February 2016

⁴ Sverre Lodgaard, Nuclear Disarmament and Non-Proliferation, (Routledge 2011), Ch.2

The correlation may be spurious, however, and there is much to suggest that it is. Studies of critical events, made possible as national archives have been opened, have found significant elements of good luck in some of the fortunate outcomes. Proponents of a NFWW therefore argue that the likelihood of nuclear war is unacceptably high and quite possibly growing, making it imperative to seek a world without these weapons.

These positions – the positive role of nuclear weapons in averting major war vs the risks of nuclear catastrophe posed by the deterrence postures - are matters of belief. Framed in such terms, there is no rational choice. However, one element is all too often missing in such discussions: the path dependence of nuclear disarmament. The road will be made while walking it.

To get to an NFWW there must be a qualitative shift in international security affairs. First of all, deterrence has to yield in favour of cooperative security thinking. Today, it is the other way around: deterrence is the name of the game, with cooperative security a mere add-on. Confidence must be built and security pursued as a win-win proposition. Approached as a matter of unilateral gain or sacrifice, it will lead nowhere. In the process, as confidence and cooperation gain ground, war between the major powers becomes less likely.

Legal gaps

References are made to two kinds of legal gaps. One of them is internal to the NPT: while the non-proliferation provisions of articles 1 and 2 have been ironed out and reinforced by a range of national, regional and international measures, legal and non-legal, summarily referred to as the non-proliferation regime, there is no similar guidance regarding what kind of negotiations that should be conducted under Article 6 on disarmament. “Cessation of the nuclear arms race at an early date” was always understood to refer to a test ban and a fissile material cut-off, but the test ban treaty (CTBT) is not in force and no negotiation of a cut-off treaty (FMCT) ever started. A third measure – negative security assurances – has been left in an unsatisfactory state as well. The ban negotiation aims to fill this gap by negotiating an international legal instrument prohibiting the use, production and stockpiling of nuclear weapons.

The NPT established two categories of states, the nuclear five and the non-nuclear others. When taking non-nuclear states on board, the Treaty turned a non-nuclear fact into a legal commitment to stay non-nuclear. Even South Africa, the only state that has eliminated its nuclear weapons, did so before it registered for membership. In these cases, therefore, the legal act to foreclose the weapons option codified a non-nuclear reality.

The ban negotiation starts from the opposite end, addressing what the prohibition should entail and seeking the widest possible acceptance of the new norm. The NWS, which stick to the norm of deterrence, refute it on the argument that the non-aligned and their NGO partners are putting the cart before the horse. The essence of the conflict

between them is a clash of norms, proponents of a ban challenging the belief in nuclear deterrence.

The other gap is in the context of weapons of mass destruction. Chemical and biological weapons are prohibited by treaty, nuclear weapons not. *Use* of chemical and biological weapons was prohibited already in 1925 by the Geneva protocol which, in practice, was a no-first use obligation. A number of states insisted that as long as the weapons were retained, an unconditional non-use obligation would not be credible. In the nuclear field, only China has a no-first-use doctrine (India coming close).

Compatibility with alliance obligations

A ban on possession is not at odds with alliance obligations. NATO keeps reiterating the objective of a NFWF, and Asian allies do the same. They find it awkward to go for a legal ban as long as this is a distant goal, preferring step-by-step disarmament instead, but these are not contradictory approaches. As emphasized by the four American leaders who revived the vision on the twentieth anniversary of the Reykjavik summit (Shultz, Kissinger, Perry and Nunn), they are mutually supportive. The vision is important to give full meaning to the measures, and the measures are important to give realism to the vision.

Non-use, on the other hand, is not compatible with alliance doctrines. Not only do these doctrines envisage retaliatory use: they include possible first use as well. The clash is all too obvious: to be against any use while supporting possible first use is a contradiction of sorts.

On many occasions, serious consideration has been given to adoption of no-first-use (NFU) doctrines. When extending unconditional negative security assurances to non-nuclear members of the NPT, the US Nuclear Posture Review of 2010 signaled a willingness to take it further: “we will work to establish the objective conditions for a transition to no-first-use.”⁵ In the autumn of 2016, it was up for discussion once more in the US, Europe and East Asia, but in vain.

The scope of the ban

The NPT is a roadmap to zero, but it is a rudimentary map and except for elimination of the weapons, it says nothing about what kind of vision to aim for. Care should be taken not to overburden the ban negotiation, but the negotiators must consider what it takes to make a ban on use credible.

Clearly, it does not suffice to eliminate the weapons and let the rest stay. If that were the case, one would be left with a world of threshold states. Virtual arsenals – a capability to reintroduce the weapons on short notice – would continue to exist along

⁵ US Nuclear Posture Review 2010, US Department of Defense, available at http://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf

with deterrence doctrines and the mentality that nuclear war might still happen. In such a setting, a ban on use would ring hollow. Nobody would be attracted by such a vision.

So in addition to the weapons, dedicated infrastructure and weapon-grade materials should be eliminated as well and related manpower transferred to other sectors. Virtual arsenals also need arsenal keepers and they are seldom neutral experts, but socio-political actors with a vested interest in what they are doing. If circumstances allow, they might act to expand their activities and argue for a return from virtual to real arsenals. As for weapons-grade materials, HEU is not the problem, but plutonium may be. If there is no technical solution, a compromise has to be struck with the civilian power industry.

A comprehensive ban on possession is therefore crucial in order to achieve a credible ban on use. Preservation of some reconstitution capability, however modest, suggests that remnants of old nuclear mind-sets still exist and that in the minds of important actors, nuclear war remains a possibility. This cannot but detract from the credibility of a ban.

On the margin, an argument can be made that in addition to a comprehensive ban on reconstitution capabilities, a new security culture would be needed that leaves no place for anything nuclear. If the prohibition is not convincingly underpinned by cultural inhibitions, effective verification would be needed to keep remaining elements of opposition at bay, and what is effective can always be a matter of debate. However, this eventuality can be rendered hypothetical by the nature of the war machines that remain. If nuclear weapons figure nowhere – no hint in the military doctrines, no trace in military exercises and nothing reminiscent of them in the military budgets – there is little to worry about.

The ultimate objective is analogous to the concept of security community, introduced by Karl Deutsch in reference to the Nordic countries.⁶ Between the Nordic countries, it is not that war is sometimes considered, but invariably found dysfunctional. War has disappeared from the list of options. There is no need for any agreement about it, and nothing to verify.

Perfection aside, for all intents and purposes a comprehensive ban on weapons and reconstitution capabilities would be enough to institute a credible ban on use, sustained – to the degree deemed necessary - by a system of verification.

Prospects

To maintain momentum the humanitarian approach has to connect, sooner or later, with the concerns and agendas of the NWS. For there can be no disarmament without

⁶ Karl Deutsch, The Nerves of Government: Models of Political Communication and Control, (New York: Free Press, 1962)

the participation of the possessors. There is an agenda for 2017 – the ban negotiation – but beyond that, a way should be found to align the two camps for the benefit of tangible progress.

The NWS are known to prefer a step-by-step approach. Cuts are primarily for the USA and Russia to undertake, but they are mired in the complexities of the “global strategic context”, and nuclear disarmament is out of favour in Moscow. However, they are under pressure to return to the table, and if and when negotiations resume, aligned and non-aligned states should lean on the negotiators to link new cuts to the vision of a NFWF by pinning down some markers on the way.

The least the US and Russia can do is to reiterate the objective of a NFWF in the preamble of future agreements. In view of existing undertakings, this is “free of cost”. Another possibility is to emphasize that, before it comes to elimination, the NWS would have to negotiate a convention defining the modalities of a NFWF and the final steps toward the goal. Yet another option would be to refer to the intermediate aim of multilateral disarmament talks – the deep-cut agreement being a step on the way to enlargement of the negotiating table. If it takes more than one step to get there, the next US-Russia agreement should contain a declaration of intent to seek further cuts. Taken together, it means references to the vision, to the need for a convention at an advanced stage of the disarmament process, to the intermediate goal of multilateral disarmament talks, and – before that – a commitment from one step to the next. Noting one or more of these milestones would convey a degree of seriousness about nuclear disarmament that has been lacking so far.

For alliance members who consider joining the current ban initiative, adoption of no-first-use positions offers a way out. Similar to the reservations made by parties to the Geneva Protocol - which prohibited the use of chemical and biological weapons, but in effect was an NFU agreement - they could sign on to the ban on the understanding that as long as nuclear weapons exist, this would be an NFU commitment. For the non-nuclear allies, this would necessitate a reservation to alliance nuclear strategy – unless the US would take the lead and drop first use from its national doctrine.

What’s the realism of it? In their minds, many US presidents seem to have taken a NFU position – Obama very clearly so - but they have not been ready to formalize it. In a statement to the US Congress in 2015 the incoming Secretary of Defense, James Mattis, therefore asked whether the US should declare that the sole purpose of nuclear weapons is to deter nuclear attack: “if (we mean that) we should say so, and the resulting clarity will determine the number we need”. The implication might be that the triad would be reduced to a dyad, ICBMs being retired to reduce the danger of false alarms.⁷

⁷ “James Mattis warned that land-based nuclear missiles pose false alarm danger”, [The Guardian](#), 4 December 2016.

