

**Roads to Nuclear Disarmament: a Case of Convergence in Diversity  
Santiago, Chile  
January 8-9, 2014**

**Panel: Humanitarian Approach to Nuclear Weapons**

**Dr. John Burroughs**

**Executive Director, Lawyers Committee on Nuclear Policy, New York City**

**Director, UN Office, International Association of Lawyers Against Nuclear Arms (IALANA)**

Were nuclear weapons born illegal?

Soon after the atomic bombings of Hiroshima and Nagasaki, in a 5 September 1945 statement, the International Committee of the Red Cross publicly expressed the wish that nuclear weapons be banned. And in 1950, in a communication to states party to the Geneva Conventions, the ICRC stated that before the atomic age: “[W]ar still presupposed certain restrictive rules; above all ... it presuppose[d] discrimination between combatants and non-combatants. With atomic bombs and non-directed missiles, discrimination became impossible. Such arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple....”

In its 1996 advisory opinion, the International Court of Justice concurred with the ICRC: “[N]uclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence.” And, “the intrinsically humanitarian character of the legal principles in question ... permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.” While the opinion has its complications, it is fair to say that its thrust is that the use of nuclear weapons is generally incompatible with international humanitarian law – which preexisted the nuclear age.

In the decades since 1945, now nine states, plus many in nuclear alliances, have come to rely on nuclear weapons, signaling that they might indeed use such weapons.

But there is another dimension of the nuclear age, which has been submerged but, in light of recent developments, is now more visible in the history. That is the long struggle to prohibit and eliminate nuclear weapons; to codify their illegality which was discerned at the outset.

The very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”.

In resolution 808 A (IX) of 4 November 1954, unanimously adopted, the General Assembly concluded

"that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes."

The seminal UN General Assembly Resolution 1653 of 1961 declared the use of nuclear weapons "contrary to the rules of international law and to the laws of humanity." That resolution was contested and adopted by majority vote. But it sharply stated the essence of the matter and was pathbreaking.

The 1967 Treaty of Tlatelolco establishing the Latin American Nuclear Weapon Free Zone states in its preamble: "That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they re-lease, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable".

The NPT Preamble, first para, states: "Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples." If not referring specifically to the legal aspect, this clearly demonstrated a realization of the humanitarian imperative for non-proliferation and disarmament. The "measures" include the "effective measures" of disarmament promised in Article VI. The NPT acknowledges as a fact possession of nuclear weapons by the five states which had tested them prior to 1967, but in view of the preamble and Article VI, as well as the provision for a decision as to extension of the treaty 25 years after entry into force, such possession was intended to be only temporary, pending the elimination of those arsenals.

I am a member of the International Legal Team for the Marshall Islands in its Nuclear Zero lawsuits before the International Court of Justice. We have been scrutinizing what the Court said in its 1996 opinion about the disarmament obligation. And we have taken note that the Court says that Article VI of the NPT "recognizes" the obligation to conduct negotiations in good faith leading to "a nuclear disarmament", that is the elimination of nuclear arms. The Court also says that Article VI "expresses" the obligation. These language choices indicate that the Court views Article VI as codifying a customary obligation already in development beginning with the first UNGA resolution on elimination of atomic arms and other WMD.

One could go further, in light of the structure of the advisory opinion, and contend that the disarmament obligation reflects the intrinsic illegality of use of nuclear weapons under international humanitarian law that predates the nuclear age. The Court

concluded that, absent a specific and universal legal instrument, it could not fully declare the illegality of use of nuclear weapons in all circumstances. Its enunciation of the disarmament obligation rests on an appreciation of the humanitarian and legal imperatives for the establishment of such an instrument.

Three of the Marshall Islands cases are now active in the ICJ, against those countries which have accepted the compulsory jurisdiction of the Court, the United Kingdom, Pakistan, and India. Since Pakistan and India are not parties to the NPT, the claims against them rest on the customary obligation of nuclear disarmament, applying to all states, whenever one considers that its customary status was crystallized – in 1968 when the NPT was negotiated, in 1996 when recognized by the Court, or at some other time. But the point here goes beyond the Marshall Islands cases. The history demonstrates that many grasped the illegality and unacceptability of nuclear weapons at the outset, and that General Assembly resolutions, the NPT, the 1996 advisory opinion are episodes in which that illegality and unacceptability have been articulated.

### The Recent Humanitarian Initiative

In the last several years, especially beginning in 2010, there has been a resurgence of the humanitarian disarmament perspective.

In an important innovation in the NPT context, in the 2010 Review Conference Final Document, 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.” NPT parties have now taken on the existing obligation of compliance with international humanitarian law (IHL) with respect to nuclear weapons as an *NPT commitment* for which they are accountable within the NPT review process.

The Red Cross/Red Crescent Movement has affirmed that it is difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law. In a return to its positions taken early in the nuclear age, the International Committee of the Red Cross, most recently in remarks by Helen Durham, Director of International Law and Policy, at the Vienna Conference, has explained how use of nuclear weapons is incompatible with requirements of discrimination, proportionality in attack, and precaution.

In 2011, IALANA and The Simons Foundation released the Vancouver Declaration, signed by many prominent international lawyers, officials, diplomats, and others. It explains how the rules of IHL, including those protecting the environment, prohibit use of nuclear weapons. The Declaration also said: “That nuclear weapons have not been detonated in war since World War II contributes to the formation of a customary prohibition on use. Further to this end, in 2010 the United States declared that ‘it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,’ and President Obama and Prime Minister Singh jointly

stated their support for ‘strengthening the six decade-old international norm of non-use of nuclear weapons.’”

The Declaration also goes beyond use and threat to address possession, stating: “It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.”

A series of joint statements have been made in NPT PrepComs and in the UNGA First Committee by ever increasing number of states, reaching 155 in the last First Committee. Those statements underline the humanitarian imperative for non-use and elimination of nuclear weapons.

The Marshall Islands applications in the International Court of Justice seeking to enforce the nuclear disarmament obligation against the nine nuclear-armed states were filed in April 2014. They are not about international humanitarian law per se, though it is in the background. But because the disarmament obligation is based in part on humanitarian considerations, as the NPT Preamble conveys, and because the Marshall Islands suffered the devastating health and environment consequences, still persisting today, of 67 nuclear tests in the 1940s and 1950s, the cases relate broadly to the humanitarian campaign.

And, not least, there have been three conferences on the humanitarian impact of nuclear weapons, in Oslo, Nayarit and Vienna. I want to draw your attention to one of the findings of the Vienna conference as prepared by the government of Austria: “The impact of a nuclear weapon detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences, causing destruction, death and displacement as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development, social order and could even threaten the survival of humankind.” That is to say, a nuclear explosion anywhere in the world likely would have negative ramifications for all countries, including Chile.

Another of the findings is this: “The new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons could ever be used in conformity with IHL. As was the case with torture, which defeats humanity and is now unacceptable to all, the suffering caused by nuclear weapons use is not only a legal matter, it necessitates moral appraisal.” Further, “The catastrophic consequences of a nuclear weapon detonation event and the risks associated with the mere existence of these weapons raise profound ethical and moral questions on a level transcending legal discussions and interpretations.”

These findings reflect in part arresting remarks by Nobuo Hayashi, University of Oslo. He noted the impasse in consequentialist debates about reliance on nuclear weapons, with some maintaining that such reliance creates stability, and others saying that the risks are unacceptable. And he went on to suggest that, as with torture, a shift to a

deontological moral reasoning not dependent on weighing of consequences is needed; the use of nuclear weapons is just wrong, period, just as torture is wrong, whether or not it yields results in some cases. Indeed, I would add, such a categorical approach is contained in one of the humanitarian law requirements, that of discrimination; unlike others like those relating to proportionality in attack and the prohibition of the infliction of unnecessary suffering, the discrimination requirement does not involve weighing the effects of attacks on civilians against anticipated military advantage.

Hayashi's talk caught my attention in part because I had explored such issues in my long ago Ph.D. dissertation, in particular with respect to the bombings of Hiroshima and Nagasaki. Those bombings are defended as having brought the war in the Pacific to an end. I don't think that is true in view of the imminent Soviet invasion of Japan. But even if it were true, the bombings still initiated a nuclear age in which nuclear weapons were deployed and threatened to be used, with incredible risks. Those were consequences – and predictable ones - heavily weighing against the bombings. So consequentialist reasoning can capture relevant factors. Nonetheless, I agree that a shift is needed away from consequentialist analyses to categorical moral and legal prohibitions – and indeed this is in part what is happening in the recent humanitarian movement.

### Implications for Action

Let me close with some suggestions about next steps.

The first is a modest one. In the NPT Review Conference outcome document to be negotiated this spring, in connection with reference to humanitarian consequences and international humanitarian law, affirm that the record of non-use of nuclear weapons since World War II should be extended forever. This statement was originally in the 2010 US Nuclear Posture Review, and has since been picked up by the Non-Proliferation and Disarmament Initiative in which Chile participates.

The second is a far-reaching one. At the Review Conference, seek an agreement to launch a process of deliberation and negotiation for a nuclear weapons-free world, with provision for participation by non-NPT states. Such a process is the logical outcome of the NPT, and the recent humanitarian initiative.

Finally, consider ways that your governments can participate in, or otherwise support, the Marshall Islands Nuclear Zero cases.