

A Legal Instrument for the Prohibition and Elimination of Nuclear Weapons

Presentation to the United Nations Open-ended Working Group
Taking Forward Multilateral Nuclear Disarmament Negotiations

Dr. Daniel Rietiker, PhD

International Association of Lawyers Against Nuclear Arms (IALANA)
Swiss Lawyers for Nuclear Disarmament (SLND)

1. I have the honour to make an intervention on behalf of IALANA – the International Association of Lawyers Against Nuclear Arms, an organisation of lawyers and law organisations that has been active on nuclear disarmament since 1988.
2. The issue of finding a path toward a nuclear weapons-free world has reappeared on the world's screen with the urgency which it deserves. The important conferences on the humanitarian consequences of nuclear explosions, and ongoing nuclear arms racing, have underscored the necessity of the OEWG's deliberations. The opportunity must not be lost and we are grateful that the OEWG has, in Ambassador Thani Thongphakdi, a leader well aware of the challenge. IALANA very much appreciates the constructive spirit in which non-nuclear weapon states have engaged in the work of the OEWG.
3. One of the options before the OEWG is a comprehensive instrument on the prohibition and elimination of nuclear weapons, a Nuclear Weapons Convention. A Model Nuclear Weapons Convention, which IALANA helped draft, has been circulated in the United Nations at the request of Costa Rica and Malaysia.¹ In a paper submitted to this session of the OEWG,² IALANA explains why the Model Convention could serve, as UN Secretary-General Ban Ki-moon has said,³ as a “good point of departure” for negotiations on a convention. Taking the Model Convention as a point of departure would discipline the negotiations to at all times remain focused on the end goal. That end goal is “nuclear disarmament in all its aspects,” the “precise result” the International Court of Justice unanimously concluded is to be achieved through fulfilment of the obligation of good-faith negotiation.
4. In the paper, IALANA notes several issues as to which the Model Convention may need to be modified, such as the entry-into-force clause that seems too ambitious today, in

¹ http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf. See also A/AC.286/WP.11, 24 February 2016, Model nuclear weapons convention, submitted by Costa Rica and Malaysia to the OEWG. For background, see <http://lcnp.org/mnwc/index.htm>.

² A/AC.286/NGO/12, 2 May 2016, A Legal Instrument for the Prohibition and Elimination of Nuclear Weapons, submitted to the OEWG by the International Association of Lawyers Against Nuclear Arms.

³ UN Secretary-General Ban Ki-moon, 24 October 2008, Address to the East-West Institute: "The United Nations and Security in a Nuclear-Weapon-Free World," available at http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351.

particular in light of the delay of the entry into force of the CTBT that contains a similarly strict clause.

5. IALANA also observes that under the umbrella of negotiations on a convention, supportive measures could be implemented, including unilateral, bilateral and plurilateral reductions, and creation of an official international institutional capability to monitor nuclear weapons. The latter step would remedy an egregious shortcoming of the current international nuclear order.
6. In the face of the resistance of most of the nuclear-armed states to negotiation of a convention, a continued OEWG, or a process outside the UN, could draft a convention and present it to appropriate forums in which nuclear-armed states participate for further deliberation and negotiation.
7. IALANA's paper also discusses other forms of agreement. One is a framework agreement on nuclear disarmament, which may be regarded as a variant of a convention. Another is an agreement on prohibition of nuclear weapons concluded if necessary without the participation of nuclear-armed states, a ban treaty. Significant support has been expressed for that approach at this session of the OEWG, including by states that have championed a nuclear weapons convention.⁴ Let me make some brief observations now.
8. The first is that pursuit of negotiation of a convention and negotiation of a ban treaty are not mutually exclusive courses of action.
9. The second is that any agreement on prohibition of nuclear weapons should be written so that it can be incorporated into a subsequent convention or framework agreement that would provide for the verified, irreversible, and enforceable elimination of nuclear arms. The alternative, that nuclear-armed states at some point would join a ban treaty, does not seem realistic. The nuclear-armed states are not likely to join a treaty whose terms they have not negotiated. Conceivably they would negotiate a protocol to a ban treaty, but even this is doubtful.
10. My third observation, as the paper emphasizes, is that a ban treaty should present the prohibition of use as a codification of an already existing customary norm and a confirmation of the existing illegality of use under fundamental principles of humanitarian and other international law. Moreover, such a treaty must state that obligations already existing under international law, in particular the prohibition of use of nuclear weapons, remain valid and are not affected by entry into force of the treaty. This is crucial because states might invoke their own non-ratification or non-ratification by a certain number of states to challenge the customary nature of the prohibition of use of nuclear weapons.

⁴ See A/AC.286/WP.34, 28 April 2016, Addressing nuclear disarmament: Recommendations from the perspective of nuclear-weapon-free zones, submitted to the OEWG by Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Indonesia, Malaysia, Mexico and Zambia.

11. This leads to the final point I want to make today, meant to clarify the concept of a “legal gap”. There is without question a compliance gap as far as obligations of disarmament are concerned: the nuclear-armed states are failing to meet those obligations under the NPT and customary international law. That point has been well developed by the Marshall Islands in its cases before the International Court of Justice.⁵ Indeed, the nuclear-armed states’ absence from the OEWG can be interpreted as a failure to *pursue* negotiations in the sense of seeking to bring them about. While there is a compliance gap, there is no lack – just the contrary – of international law applicable to the disarmament of nuclear weapons, developed and buttressed by General Assembly and Security Council resolutions and commitments made in the NPT review process.
12. Nor is there any lack of international law applying to the use and threat of use of nuclear weapons. In particular, international humanitarian law applies to the use of nuclear weapons just as it does to any other means or method of combat. As I said in my intervention in the February session of the OEWG, in IALANA’s assessment, because of their very nature, the use of nuclear weapons is and always has been illegal under international law. Moreover, use of nuclear weapons would constitute war crimes under the Rome Statute of the International Criminal Court, and in many circumstances, crimes against humanity as well.⁶ If, God forbid, the ICC or another court was called upon to assess a future use of a nuclear weapon that caused tens or hundreds of thousands of deaths and injuries, does anyone doubt that the court would find the use to be unlawful and criminal?
13. In conclusion, IALANA stands ready to support states in whatever path of deliberations or negotiations is chosen. Thank you for your attention.

⁵ See the website of the International Court of Justice, www.icj-cij.org, for the written and oral proceedings in the cases brought by the Marshall Islands against India, Pakistan, and the United Kingdom. See in particular the applications and the Marshall Islands’ memorial in the UK case.

⁶ For more analysis, see the 2011 Vancouver Declaration at <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>. Released by IALANA and The Simons Foundation, the declaration was signed by many international lawyers and others around the world. For a list of signatories, see http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx.