

Protecting humanity from the catastrophic humanitarian consequences of nuclear weapons: Reframing the debate towards the humanitarian impact

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Abstract

The international community has been struggling to reach agreement on the non-proliferation and elimination of nuclear weapons since they were first used in 1945.

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Encouragingly, recent global debate has, for the first time, focused on the devastating humanitarian consequences that the use of nuclear weapons will have not only for nuclear weapons States but for all humanity. The fact that the risks and overwhelming humanitarian consequences of a nuclear event are so high, combined with the inability of the global community to adequately respond to the needs of victims, has compelled policy-makers to consider new ways to work towards the prohibition of the use of nuclear weapons under international law. This article examines how the “humanitarian initiative” has reframed the nuclear weapons debate away from the traditional realm of State security, deterrence and military utility, and towards the grim reality of the humanitarian impacts that would confront humankind if nuclear weapons were ever used again.

Keywords: nuclear weapons, humanitarian impacts, Humanitarian Pledge, IHL.

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In 1945, Hiroshima and Nagasaki were instantly destroyed by nuclear weapons. The earthly and human boundaries of these cities were overwhelmed by the immediate blast; the firestorm in Hiroshima incinerated everything within a 4.4-mile radius.¹ The effects destroyed the natural and built environment and ravaged human life and health. The evidence now reveals that nuclear weapons are “gene-targeting” weapons that induce cancer throughout a survivor’s lifetime.² The bombings left a profound scar on our collective human consciousness by revealing our willingness to inflict complete devastation upon one another. It was the first and last time nuclear weapons were used in war.

The aftermath of the Hiroshima and Nagasaki bombings rapidly revealed the devastating humanitarian consequences of nuclear weapons. From that moment, it was evident to many – in particular those affected and the humanitarian responders – that nuclear weapons should never be used again. Unfortunately, in 2015, seventy years after the first nuclear weapons devastated these cities and their people, the international community continues to struggle to achieve a world free from nuclear weapons.

At the end of World War II (WWII) and during the Cold War, a number of States pursued nuclear weapons tests with the intention of adding such weapons to their military arsenals. By 1960 the United Kingdom, the former Union of Soviet Socialist Republics and France had all tested nuclear weapons.³ Today, States possessing nuclear weapons continue to support the position that these weapons bolster national, regional and international security, because the threat of their use discourages military action by belligerent States. Many non-nuclear weapons

1 Joseph M. Siracusa, *Nuclear Weapons: A Short Introduction*, Oxford University Press, Oxford, 2015, p. 23.

2 Masao Tomonaga, “The Lifelong Health Effects of Atomic Bombs by Immediate DNA Damage”, presentation to the Second Intergovernmental Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 4–5 March 2013, available at: www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_tomonaga.pdf (all internet references were accessed in October 2015).

3 See Nuclear Threat Initiative, “Nuclear Disarmament Timeline”, 19 August 2011, available at: www.nti.org/analysis/articles/nuclear-disarmament-timeline/.

States claim protection under a “nuclear umbrella” through so-called “extended nuclear deterrence”,⁴ wherein a nuclear weapons State can threaten to use a nuclear weapon on their behalf.

Three intergovernmental conferences on the humanitarian impact of nuclear weapons, convened between 2012 and 2014, have re-examined the evidence of the short-, medium- and long-term humanitarian consequences of the use of nuclear weapons.⁵ The blast injuries, burns and effects of radiation from a nuclear explosion are now understood to be more severe than previously thought. In addition to the immediate suffering, there is no capacity for the international health-care system or humanitarian agencies to respond adequately to nuclear detonation, and the environmental consequences would also be catastrophic. This new information has led to renewed calls for the elimination of nuclear weapons, and has resulted in a shift in discourse away from military and security arguments for these weapons and towards a deep concern for the humanitarian consequences that they continue to pose.⁶

There is now growing confidence on the part of States, international organizations, the International Red Cross Red Crescent Movement (the Movement) and civil society groups that the emphasis on the humanitarian consequences of nuclear weapons provides a fresh opportunity to negotiate their eventual elimination. The Movement’s advocacy has played a critical role in this debate since 2010, and has been both persuasive and unrelenting.⁷ What has become known as the “humanitarian initiative” has gained momentum, both among States and in civil society, and it is arguable that we are now at a turning point in history for the prohibition of nuclear weapons.

This article will examine the evolution of the discourse on nuclear weapons. It will outline how the perception of the use of nuclear weapons immediately after WWII was used to build arguments in support of deterrence. It will then look briefly at disarmament, the Cold War and the legal discourse surrounding nuclear weapons. Finally, it will look at how the humanitarian consequences discourse has developed in the last five years, and how it has been possible, in such a short

4 Extended nuclear deterrence is the establishment of a so-called “nuclear umbrella”, under which a group of States that do not possess nuclear weapons claim protection from the nuclear weapons of another State. See Glenn Snyder, *Deterrence and Defense: Toward a Theory of National Security*, Princeton University Press, Princeton, NJ, 1961, pp. 276–277.

5 The most recent evidence presented at the Intergovernmental Conference on the Humanitarian Impacts of Nuclear Weapons, held in Vienna in December 2014, is available online and covers, *inter alia*, climatic effects, long-term health effects, the risk of a nuclear detonation, emergency response capabilities and the blast effects a detonation. All presentations are available at: www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons-and-nuclear-terrorism/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/presentations/.

6 For an overview, see John Borrie and Tim Caughley (eds), *Viewing Nuclear Weapons through a Humanitarian Lens*, United Nations Publishers, Geneva, 2013.

7 Nuclear weapons and weapons of mass destruction have been mentioned in several International Conference of the Red Cross and Red Crescent resolutions, but in recent times the Movement’s voice has been most prominently developed through its strong Council of Delegates 2011: Resolution 1, “Working Towards the Elimination of Nuclear Weapons”, Geneva, 26 November 2011 (2011 Resolution), and the detailed follow-up “Working Towards the Elimination of Nuclear Weapons: Four-Year Action Plan”, Sydney, 17–18 November 2013 (2013 Resolution).

time, to reinvigorate an old debate with a renewed desire to achieve the prohibition of nuclear weapons.

Nuclear weapons use: Perceptions of the atomic bombings in Japan and fashioning deterrence

The damage and suffering caused by the nuclear bombings of Hiroshima and Nagasaki were devastating. The Japanese Red Cross and the International Committee of the Red Cross (ICRC) were amongst the first responders to bring relief to the victims, and Dr Marcel Junod, an ICRC delegate, was the first foreign doctor to arrive in Hiroshima and provide medical relief. His reports to ICRC headquarters revealed that the bomb had spared no living or inanimate object.⁸ It exposed the inadequacy of the emergency response in the face of overwhelming death and destruction. Through Junod's reports and decades of subsequent reports,⁹ medical studies and education,¹⁰ the catastrophic humanitarian consequences of the use of nuclear weapons have become evident.

The creation of the atomic bomb marked a shift in the application of science and technology to military causes, by creating a weapon that has the potential to make life on earth unfeasible.¹¹ Nuclear weapons represent the ability to instantly unleash immense damage and incalculable human suffering in a single bomb. Evidence of this destructive capacity helped support the dominant post-WWII discourse that the nuclear bombings forced Japan to surrender to the Allied forces. Nuclear weapons, despite their destruction, were presented in the West as a necessary evil responsible for bringing WWII to a close. "Less people died than had the war continued" was a common defence of the weapons' use, and continues to be invoked today.¹²

Recently released archives have allowed historians to consider other factors that led to the surrender of Japan at the end of WWII. New evidence indicates that the entry of the USSR into the Pacific theatre of war was a more significant factor in

8 Marcel Junod, "The Hiroshima Disaster (I)", *International Review of the Red Cross*, Vol. 64, No. 230, 1982, available at: www.loc.gov/rr/frd/Military_Law/pdf/RC_Sep-Oct-1982.pdf; Marcel Junod, "The Hiroshima Disaster (II)", *International Review of the Red Cross*, Vol. 64, No. 231, 1982, available at: www.loc.gov/rr/frd/Military_Law/pdf/RC_Nov-Dec-1982.pdf.

9 See, e.g., Reaching Critical Will, *Unspeakable Suffering: The Humanitarian Impact of Nuclear Weapons*, 2013, available at: www.reachingcriticalwill.org/resources/publications-and-research/publications/7422-unspeakable-suffering-the-humanitarian-impact-of-nuclear-weapons.

10 International Physicians for the Prevention of Nuclear War (IPPNW) won the 1985 Nobel Peace Prize for their work to highlight the health effects of the use of nuclear weapons and educate the public about these effects. More information is available at: www.nobelprize.org/nobel_prizes/peace/laureates/1985/physicians-history.html.

11 Owen Toon, Alan Robock and Richard Turco, "The Environmental Consequences of Nuclear War", *Physics Today*, Vol. 61, No. 12, 2008.

12 For example, in the August 2014 issue of *The Diplomat*, Zachary Keck employs many of the best-known arguments in support of the premise that the Hiroshima and Nagasaki bombings saved millions of lives and have since prevented further use of atomic warheads. Zachary Keck, "How Hiroshima and Nagasaki Saved Millions of Lives", *The Diplomat*, 7 August 2014, available at: <http://thediplomat.com/2014/08/how-hiroshima-and-nagasaki-saved-millions-of-lives/>.

the surrender of Japan than the atomic bombings of Hiroshima and Nagasaki.¹³ It is now suggested that Japan had neither the economic nor military resources to continue the war, and a weak military strategy had allowed the USSR to invade Manchuria.¹⁴ Japan's capitulation was therefore due to the entry of the USSR into territory occupied by Japan and the prospect of war on two fronts, and not simply or exclusively due to the bombings of Hiroshima and Nagasaki.¹⁵

The narrative of the nuclear end to WWII benefited the victorious Allied forces, and especially the United States. The notion that nuclear weapons brought an end to WWII helped the United States' economic, political and military interests. Economically, the investment in the Manhattan Project was significant, and the expense was rationalized by its military utility in ending the war. This helped the United States establish itself as the principal political and military "superpower" after WWII.¹⁶

Consequently, viewing the bombings of Hiroshima and Nagasaki as the decisive moment at the end of WWII has allowed nuclear weapons to acquire an undeserved moral, political and military legitimacy. Their use was rationalized, or at least promoted, as the only means to end the most gruesome war in recent history. This potent narrative prospered in the years after WWII and continues today. Nuclear weapons are often seen as a necessary evil, and it is argued that international security is maintained on the basis of deterrence – through the threat of the use of nuclear weapons.¹⁷

The Cold War discourse: From massive retaliation to MAD and beyond

After WWII, nuclear weapons became a symbol of political and military power and were quickly obtained by the United Kingdom and the former USSR,¹⁸ now the Russian Federation since the end of the Cold War. With the proliferation of nuclear weapons came new considerations about their purpose. For the States possessing them, the immediate question was the role that they should play in

13 Ken Berry, Patricia Lewis, Benoit Pelopidas, Nikolai Sokov and Ward Wilson, *Delegitimizing Nuclear Weapons: Examining the Validity of Nuclear Deterrence*, Monterey Institute of International Studies, 2010, Appendices 1 and 2, "A More Detailed Analysis of the Nuclear Bombings of Hiroshima and Nagasaki", pp. 60–71.

14 *Ibid.*

15 *Ibid.*

16 See, e.g., Ivo H. Daalder, "Stepping Down the Nuclear Ladder: How Low Can We Go?", in Ivo H. Daalder and Terry Terriff (eds), *Rethinking the Unthinkable: New Directions for Nuclear Arms Control*, Routledge, New York, 2013, p. 81.

17 The North Atlantic Treaty Organisation (NATO) declares that "deterrence, based on an appropriate mix of nuclear and conventional capabilities, remains a core element of our overall strategy. The circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote. As long as nuclear weapons exist, NATO will remain a nuclear alliance." NATO, *Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of NATO*, 2010, p.14.

18 The former USSR carried out its first nuclear test on 29 August 1949, and the United Kingdom tested its first nuclear device on 3 October 1952.

military and security doctrines. As tensions developed between the United States and its allies and the former USSR, the doctrine of nuclear deterrence was developed.¹⁹ This doctrine, couched in military logic and strategy, was fashioned to justify the existence of nuclear weapons. During the Cold War, the deterrence discourse successfully overshadowed arguments about the military utility or humanitarian consequences of employing nuclear weapons.

Nuclear deterrence itself is a straightforward concept, defined as the use of threats of nuclear weapons use to convince another party to refrain from initiating some course of action.²⁰ Nuclear deterrence was expressed in the West in various forms during the Cold War, beginning with the US doctrine of “massive retaliation”. Massive retaliation consisted of the threat of the launch of US nuclear warheads on Soviet cities and military targets in answer to a Soviet act of aggression. As the arms race escalated and the USSR modernized and expanded its nuclear arsenal, massive retaliation was escalated to the aptly named doctrine of “mutual assured destruction” (MAD) in the 1960s.

MAD was developed because the United States and the former USSR saw the need for a “second strike capability” in case primary nuclear bunkers were targeted or destroyed.²¹ Under MAD, thousands of nuclear weapons were kept on hair-trigger alert, and could be launched within minutes. MAD, along with the resulting arms race, was the result of the belief that a reciprocal threat promoted stability and non-use.²² At the height of the Cold War, 60,000 nuclear warheads were in existence as a result of the arms race and the doctrine of MAD.²³

The *Bulletin of the Atomic Scientists*, known for its “Doomsday Clock”,²⁴ understood that deterrence only works in theory if enemies can communicate reciprocal threat levels. In what came to be the closing years of the Cold War, all communications between the United States and the former USSR, barring

19 G. Snyder, above note 4.

20 For an analysis of deterrence theory and its viability, see Paul K. Huth, “Deterrence and International Conflict: Empirical Findings and Theoretical Debate”, *Annual Review of Political Science*, Vol. 2, 1999. See also Keith B. Payne, *Deterrence in the Second Nuclear Age*, University of Kentucky Press, Lexington, KY, 1996, pp. 81–87.

21 For an exploration of the security and military arguments relating to nuclear deterrence, see Robert Green, *Security without Nuclear Deterrence*, Astron Media, Christchurch, 2010.

22 Between 2007 and 2013, under the aegis of the “Nuclear Security Project”, former US secretary of State Henry A. Kissinger, former US secretary of state George P. Shultz, former US secretary of defence William J. Perry and former US senator Sam Nunn co-authored a series of op-eds/statements in *The Wall Street Journal* rebuffing many of their earlier claims about the effectiveness of nuclear deterrence, especially in today’s context. See George P. Shultz, William J. Perry, Henry A. Kissinger and Sam Nunn, “Next Steps in Reducing Nuclear Risks: The Pace of Nonproliferation Work Today Doesn’t Match the Urgency of the Threat”, *The Wall Street Journal*, 6 March 2013; “Deterrence in the Age of Nuclear Proliferation”, *The Wall Street Journal*, 7 March 2011; “How to Protect Our Nuclear Deterrent”, *The Wall Street Journal*, 19 January 2010; “Toward a Nuclear-Free World”, *The Wall Street Journal*, 15 January 2008; and “A World Free of Nuclear Weapons”, *The Wall Street Journal*, 4 January 2007, all available at: www.nuclearsecurityproject.org/publications/wall-street-journal-op-eds.

23 See Hans M. Kristensen and Robert S. Norris, “Global Nuclear Weapons Inventories, 1945–2013”, *Bulletin of the Atomic Scientists*, Vol. 69, No. 5, 2013.

24 The Doomsday Clock is a clock face which represents how close humanity is to global catastrophe. Formerly, if the Clock reached midnight it meant that nuclear war had commenced, but now the Clock encompasses not only the threat of nuclear war but also issues such as climate change.

propaganda, had broken down. Without any knowledge of the other side's military status, any real or imagined threat risked being answered by a US or Soviet nuclear strike, and with second strike capability in place, the launch of thousands of nuclear warheads following an initial strike was likely. In 1983, as a result of these circumstances, the *Bulletin* set the Doomsday Clock to two minutes to midnight. This represented the journal's concern that nuclear war, represented by midnight, was imminent.²⁵

There are many problems with the MAD doctrine and the way it was promoted. It was clear that the destruction would not be limited to the United States and USSR, with the destruction of Europe by nuclear war the most likely outcome, especially because of nuclear sharing arrangements.²⁶ It was also an affront to the principles of the United Nations (UN) Charter and the maintenance of international peace, with cities and civilians threatened as targets worldwide. Meanwhile, the rest of the world would have been cast into a decades-long nuclear winter, a fate which has been verified recently with state-of-the-art climate modelling used to evaluate anthropogenic climate change.²⁷

Global disarmament efforts: Proceed with caution, risk annihilation

It is appealing to believe that upon entering the atomic age and creating the means for humanity to ensure its own destruction, the international community immediately pursued nuclear disarmament – and in part, this is true. It is significant that the very first resolution of the UN General Assembly (UNGA), Resolution 1(1), established the Atomic Energy Commission to deal with the problems associated with the emergence of atomic energy, and reaffirmed the UN mandate to facilitate disarmament efforts.²⁸ The first chairman of the Atomic Energy Commission was the Australian H. V. “Doc” Evatt, who went on to become president of the UNGA and to preside over the passing of the Universal Declaration of Human Rights. Yet alarmingly, as the UN dedicated itself to disarmament in the first years of its existence, States with nuclear weapons continued to manufacture them, and other States procured them or sought the means to build them. Nuclear disarmament efforts have developed and continued within this context, symptomatic of the tension between the national prerogatives of States and the global interests of humanity.

A nuclear disarmament timeline would be too long to publish in this paper, but it is worth noting that one example of such a timeline, from the International

25 *Bulletin of the Atomic Scientists*, Doomsday Clock Timeline, available at: <http://thebulletin.org/timeline>.

26 Nuclear sharing occurs when non-nuclear weapons States host nuclear weapons on their territories.

27 See, e.g., Alan Robock, “Nuclear Winter Is a Real and Present Danger”, *Nature*, Vol. 473, 2011; Alan Robock, Luke Oman, Georgiy L. Stenchikov, Owen B. Toon, Charles Bardeen and Richard P. Turco, “Climatic Consequences of Regional Nuclear Conflicts”, *Atmospheric Chemistry and Physics*, Vol. 7, 2007.

28 UNGA Res. 1(1), “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy”, 24 January 1946.

Atomic Energy Agency (IAEA), charts no less than 140 significant events since 1945.²⁹ The IAEA list is just one of the many timelines published, and reveals the range of issues under the disarmament track, including nuclear weapons testing, UNGA and UN Security Council resolutions relating to nuclear weapons, international summits on nuclear disarmament, the peaks and troughs of the Cold War nuclear arms race, and the agreement of a vast number of bilateral and multilateral nuclear weapons treaties.

The UN is the axis around which nuclear disarmament rotates. Global disarmament is so indelibly implanted within the UN that former Secretary-General Dag Hammarskjöld described it as a “hardy perennial”.³⁰ It is a cross-cutting theme addressed by the UN’s main bodies, as well as UN-established institutions such as the Conference on Disarmament (CD). The disarmament discourse has achieved many notable milestones, including the agreement of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and other treaties protecting the natural environment. However, the agreement of these treaties has taken decades, and some, such as the CTBT, have not come into force. During this time, nuclear weapons testing and proliferation have continued. Most regrettably, in recent decades the disarmament discourse, in particular within the CD, has slowed to a standstill as States have struggled to agree on a programme of work.

The NPT is the most important nuclear weapons treaty. It was agreed in 1968, and entered into force just two years later in 1970. The NPT was established in response to increased concern regarding the imminent threat of nuclear war following the Cuban Missile Crisis. A significant obligation in the NPT is found in Article VI, which requires States Parties to progress the global prohibition and elimination of nuclear weapons; it calls on all States to “undertake, in good faith, negotiations to lead to complete [nuclear] disarmament”.³¹

The NPT aspires to achieve general and complete disarmament, but it stipulates neither the international legal means to achieve this end, nor the time frame in which to do it. Commentary on the formation of the Treaty³² suggests that this “vagueness” was to ensure acquiescence to the NPT by all States. The aspirational language of Article VI gave States without nuclear weapons a vision of a nuclear-free future while avoiding delineation of process, verification, or punitive measures towards States already possessing nuclear weapons. The result is a treaty reflecting a mindset of non-proliferation rather than prohibition, and the division of the world into nuclear and non-nuclear States. By avoiding the

29 International Atomic Energy Agency, “The Treaty of the Non-Proliferation of Nuclear Weapons and the IAEA: A Chronology”, available at: www.iaea.org/Publications/Factsheets/English/npt_chrono.html#1940.

30 Dag Hammarskjöld, transcript of press conference, New York, 19 May 1955, in Andrew W. Cordier and Wilder Foote (eds), *Public Papers of the Secretaries-General of the United Nations: Dag Hammarskjöld*, Vol. 2, Columbia University Press, New York, 1972, p. 487.

31 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 729 UNTS 161, 1 July 1968 (entered into force 5 March 1970).

32 K. Berry, P. Lewis, B. Pelopidas, N. Sokov and W. Wilson, above note 13.

issues of how and when States should achieve general and complete nuclear disarmament, the NPT also allowed the continued possession of nuclear weapons in the interim.

Even if the “when” and “how” questions remain unanswered by the NPT, the “why” question is very clear. The preamble of the NPT³³ considers that to ensure the security of all peoples, every effort must be made to avoid nuclear war and its inevitable devastating outcomes. Forty-five years after the NPT’s entry into force, no multilateral negotiations have commenced to achieve this purpose, despite the Article VI good-faith obligations to pursue disarmament.

The establishment of a Conference on Disarmament³⁴ working group could begin the process of negotiations for a prohibition treaty in fulfilment of Article VI of the NPT. In 2013, in response to a lack of progress in the CD, the UNGA established an open-ended working group “to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons”.³⁵ Despite the promise of this working group breathing new life into the possibility of nuclear disarmament negotiations, the first session of the CD in 2015 showed no signs of progress.³⁶

The lack of progress by States in fulfilling their Article VI obligations reflects larger problems with the NPT in the twenty-first century. Since the establishment of the UN, the agreement of the Vienna Convention on the Law of Treaties, the proliferation of international treaty law and the increased codification of customary international law, there has been an increasing expectation that States should fulfil their international legal obligations. Additionally, the influence of non-NPT States on the process and outcomes of the Review Conference threatens the integrity of negotiations.³⁷ If the NPT is itself unable to realize progress towards either the prohibition or elimination of nuclear weapons, there is a chance that some States may go outside the NPT process and begin an independent process to prohibit nuclear weapons under international law.

Moving to a forum outside of the CD is not a new idea, although it might still be considered unconventional. In the 1990s, a group of like-minded States with the support of civil society groups saw an urgent need to progress a ban on landmines due to their unacceptable humanitarian consequences. Concerned by

33 The preamble reads: “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 ...”.

34 The Conference on Disarmament is the sole negotiating forum for disarmament issues, including nuclear weapons.

35 UNGA Res. 67/56, “Taking Forward Multilateral Nuclear Disarmament Negotiations”, UN Doc A/RES/67/56, 3 December 2012.

36 Reaching Critical Will stated that it will no longer monitor the CD because “after 17 years of inaction” in advancing nuclear disarmament, the group of States appears to work “in a vacuum”. Reaching Critical Will, *March 2015 E-News*, available at: www.reachingcriticalwill.org/news/latest-news/9565-march-2015-e-news.

37 See Ray Acheson, “Editorial: Uprising”, *NPT News in Review*, Vol. 13, No. 17, 25 May 2015, available at: www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/nir2015/No17.pdf.

the limitations of the Convention on Certain Conventional Weapons,³⁸ States began a treaty negotiating process outside the CD. This process concluded in Ottawa, and resulted in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.³⁹ At this point in time it appears that the NPT disarmament track is being outpaced by the humanitarian initiative, which could in fact begin an Ottawa-type process of its own.

The NPT reflected the aspiration of States to achieve a world free from nuclear weapons, while at the same time revealing the limitations of the CD framework set up to achieve these ends. The requirement of consensus has become a scapegoat for the lack of progress in the CD, but blaming a rule that member States imposed on themselves appears to be circular reasoning. Ultimately it is up to States to find common ground across their competing political priorities, within the framework they agreed, to ensure that nuclear disarmament negotiations advance. If the seemingly intractable problems of the CD are not resolved, a real prospect is that a group of States which support the prohibition of nuclear weapons will seek to establish an alternative forum for negotiations towards that end.⁴⁰

Imposing legal limits on weapons of mass destruction

The legal discourse has focused on the legality of both the use and possession of nuclear weapons. The most persuasive legal arguments for the prohibition of nuclear weapons are those that assess their use within the limits of international humanitarian law (IHL). These arguments propose that any use of such weapons contradicts both the general principles and the specific rules of IHL.

The legality of the use of nuclear weapons was not addressed by international tribunals in the years immediately following the bombings of Hiroshima and Nagasaki. The Allies of WWII established both the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East. Neither of these tribunals dealt with the issue of indiscriminate bombing by any forces during WWII or the use of nuclear weapons by the Allies.⁴¹ As a result of the failure to address the use of nuclear weapons under international

38 Convention on Certain Conventional Weapons, 1342 UNTS 137, 10 April 1981 (entered into force 2 December 1983).

39 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 241, 18 September 1997 (entered into force 1 March 1999) (Ottawa Treaty).

40 For an explanation of the challenges of progressing nuclear disarmament at the United Nations see Randy Rydell, *Explaining Hammarskjöld's "Hardy Perennial": The Role of the United Nations in Nuclear Disarmament*, United Nations Association – UK, 2013.

41 For an exploration of why the atomic bombings were not dealt with under international law immediately after WWII, see Yuki Tanaka, "The Atomic Bombing, the Tokyo Tribunal and the Shimoda Case: Lesson for Anti-Nuclear Legal Movements", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011. See also Richard Falk, "The Shimoda Case; A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki", *American Journal of International Law*, Vol. 59, No. 4, 1965.

law, the historical narrative about the necessity of the use of nuclear weapons to end WWII took hold, and the prerogative of States to threaten to use nuclear weapons during war remained unchallenged. As a result, the default legal position was that possession and use of nuclear weapons were permissible under international law until demonstrated otherwise.

On 5 September 1945, within one month of the nuclear bombings, the ICRC sent a circular to all National Red Cross and Red Crescent Societies (National Societies) questioning the legality of nuclear weapons because of the impacts of their use on civilians.⁴² Within four years of the bombings, the opportunity arose to explicitly outlaw nuclear weapons under IHL at the negotiation of the 1949 Geneva Conventions.

The use of nuclear weapons and airborne bombing was not on the agenda in the lead-up to the negotiation of the 1949 Geneva Conventions,⁴³ and the plenary ruled out a Soviet proposal to address their use during the conference. Immediately following the 1949 diplomatic conference, the ICRC expressed its desire to see States reach an agreement banning the use of nuclear weapons under IHL.⁴⁴ Despite further consideration by States, the Movement and civil society, any discussion of an explicit ban on nuclear weapons under IHL was specifically left out of the negotiations for the 1977 Additional Protocols to the Geneva Conventions.⁴⁵ This should not be viewed as a failure – IHL is a framework in which to appraise all weapons use, and an explicit reference to nuclear weapons is not required for their use to be regulated or restricted by the principles of IHL articulated in these instruments.

Even though the use of nuclear weapons had not been expressly prohibited under IHL, their use cannot be reconciled with the specific principles of IHL including, *inter alia*, the prohibition of attacks directed at civilians⁴⁶ and the rules of distinction,⁴⁷ proportionality⁴⁸ and against unnecessary suffering.⁴⁹ These basic principles, contained in Additional Protocol I (1977), are considered customary international law.⁵⁰ Unfortunately, the problem that has dogged the progression

42 Max Huber, “La fin des hostilités et les tâches futures de la Croix-Rouge” (“The End of Hostilities and the Future Tasks of the Red Cross”), *International Review of the Red Cross*, Vol. 27, No. 321, 1945, available at: <http://journals.cambridge.org/action/displayFulltext?type=1&pdftype=1&fid=6675344&jid=IRC&volumeId=27&issueId=321&aid=6675340>.

43 For a comprehensive overview of the ICRC’s position on nuclear weapons and the Movement’s five decades of resolutions and statements calling for their prohibition, see Francois Bugnion, “The International Committee of the Red Cross and Nuclear Weapons: From Hiroshima to the dawn of the 21st Century”, *International Review of the Red Cross*, Vol. 87, No. 859, 2005.

44 International Committee of the Red Cross Appeal to the High Contracting Parties Signatory to the Geneva Conventions for the Protection of the Victims of War: Atomic Weapons and Non-Directed Missiles, Geneva, 5 April 1950.

45 See F. Bugnion, above note 43.

46 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 51(1), 51(2).

47 AP I, Art. 51(4).

48 AP I, Art. 51(5).

49 AP I, Art. 35(2).

50 See Lou Maresca, “The Catastrophic Humanitarian Consequences of Nuclear Weapons: The Key Issues and Perspective of the International Committee of the Red Cross”, in J. Borrie and T. Caughley (eds), above note 6, p. 137.

towards general and complete disarmament has also detracted from the legal arguments against the use of nuclear weapons; States continue to invoke arguments of sovereignty and security to justify the possession of nuclear weapons as a latent threat towards perceived enemies.⁵¹

The most conclusive moment for the legal discourse came in 1996, when the International Court of Justice (ICJ) delivered its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion).⁵² The Advisory Opinion was obtained through the extensive lobbying and advocacy activities of a global network of civil society groups, driven by groups including the World Court Project, International Association of Lawyers against Nuclear Arms, International Physicians for the Prevention of Nuclear War (IPPNW), International Peace Bureau and International Commission of Jurists.⁵³

The process and outcome of the Nuclear Weapons Advisory Opinion had a lasting effect on the nuclear weapons debate. The ICJ received statements and evidence from parties it had not previously embraced, including non-State actors, individuals, *hibakusha* (the survivors of the Hiroshima and Nagasaki bombings) and victims of nuclear testing in the Pacific Islands.⁵⁴ Previous appeals to the ICJ, especially New Zealand's challenge to the legality of French nuclear testing in the Pacific, had achieved small wins against nuclear weapons testing, including prompting the secession of atmospheric testing by France in the Pacific,⁵⁵ but had failed to deal with the legality of their use.

The Nuclear Weapons Advisory Opinion confirmed that the principles and rules of IHL apply to nuclear weapons and concluded that the threat or use of such weapons would generally be contrary to the principles and rules of IHL. It also unanimously recognized the existence of an obligation under the NPT to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects.⁵⁶ Disappointingly, the hope that the ICJ would

51 For example, Russia threatened to aim its nuclear warheads at the Ukraine in 2008, well before the controversial referendum that led to Crimea's incorporation into Russia in 2014. See Luke Harding, "Putin Issues Nuclear Threat to Ukraine over Plan to Host US Shield", *The Guardian*, 13 February 2008, available at: www.theguardian.com/world/2008/feb/13/russia.putin; and the United States, through its nuclear posture review, stated that as long as nuclear weapons exist, it will maintain them as a credible deterrent and the measure of the consequences for an attack launched by an adversary. See United States Government, *Nuclear Posture Review*, 2010, available at: www.defense.gov/Portals/1/features/defenseReviews/NPR2010_Nuclear_Posture_Review_Report.pdf.

52 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (Nuclear Weapons Advisory Opinion), available at: www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=2.

53 For an exploration of the campaign to establish the World Court Project, the progression of the Nuclear Weapons Advisory Opinion in court, and the outcomes, see Catherine Dewes, "The World Court Project: The Evolution and Impact of an Effective Citizens' Movement", PhD thesis, University of New England, 1998.

54 The public record of oral statements presented during proceedings of the Nuclear Weapons Advisory Opinion, above note 52.

55 For a synopsis of New Zealand's challenge to French nuclear testing at the ICJ, see Arthur Watts, "Nuclear Tests Cases", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online ed., 2015.

56 Nuclear Weapons Advisory Opinion, above note 52.

find the use of nuclear weapons to be categorically illegal had not been fulfilled. Instead, States possessing nuclear weapons, with the support of their allies, argued that the Advisory Opinion confirmed that nuclear weapons were not explicitly illegal under international law, and that there were some extreme circumstances of self-defence that could justify their use.⁵⁷ Despite the many other facets of the Advisory Opinion, particularly the confirmation that use of nuclear weapons would generally be contrary to the principles and rules of IHL,⁵⁸ this legal gap came to be used as a justification for the continued possession of nuclear weapons.

The benefit of the Nuclear Weapons Advisory Opinion was that States, the Movement and civil society groups could appeal to its authority and encourage States to fulfil their obligations under Article VI of the NPT and pursue the elimination of nuclear weapons through an internationally legally binding agreement. The recognition of the existence of an obligation under Article VI of the NPT has been described as “a tremendous step forward, making it crystal clear that these weapons offended the basic principles of humanitarian law”⁵⁹ and that an obligation rests with nuclear powers to take meaningful steps to do away with their nuclear arsenals.

The international legal discourse⁶⁰ following the Nuclear Weapons Advisory Opinion focused on the development of a model nuclear weapons convention. The model convention is an “ideal-type” treaty developed in 1996, demonstrating how a verifiable, comprehensive and universally binding treaty to prohibit and eliminate nuclear weapons could be crafted. The model convention, a civil society initiative, was updated in 2007 and presented and endorsed by the UNGA as an official document of the 62nd Session of the UNGA.⁶¹ The model convention represents the most comprehensive means to ban nuclear weapons: not only does it prohibit the use of nuclear weapons, but it also addresses the verification of disarmament, testing and implementation, and provides a dispute resolution mechanism.⁶²

A new and increasingly dominant discourse was emerging – one which suggested that the nuclear weapons debate should focus not on the potential security benefits, but on the human security risks. Concerns regarding the global impacts and humanitarian consequences of any use of nuclear weapons gained

57 For example, see support for nuclear deterrence after the Nuclear Weapons Advisory Opinion from leading UK expert Michael Quinlan, *Thinking about Nuclear Weapons*, Royal United Services Institute for Defence Studies, London, 1997.

58 Nuclear Weapons Advisory Opinion, above note 52.

59 Christopher Weeramantry, *Towards One World: The Memoirs of Judge C. G. Weeramantry*, Vol. 3, Stamford Lake Publishers, Pannipitiya, 2014, p. 204.

60 For a view of international legal considerations on nuclear weapons outside of humanitarian law, see Gro Nystuen, “Legal Aspects of Nuclear Weapons: A ‘Bird’s Eye View’ of International Law and Nuclear Weapons”, ILPI Vienna Conference Series Paper No. 6, 2014, available at: <http://d2dczhp6dhfxqb.cloudfront.net/sites/30/2014/12/No-6-nuking-the-law.pdf>.

61 Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations, addressed to the Secretary-General, 62nd session, UN Doc. A/62/650, 2008.

62 See Treasa Dunworth, “Effective Measures Relating to Nuclear Disarmament: Some International Legal Issues”, discussion paper commissioned by the government of New Zealand, 2014.

momentum. This was no longer a question solely for nuclear weapons States, but a concern for all humanity.

Towards a humanitarian understanding of nuclear weapons

After the challenges of obtaining and interpreting the Nuclear Weapons Advisory Opinion, it took a number of years for the humanitarian arguments for the elimination of nuclear weapons to gain renewed support. It is difficult to attribute this to any specific event, but three developments stand out as bolstering the initiative: the 2007 publication of an academic article about the climatic effects of nuclear war;⁶³ the establishment of the International Campaign to Abolish Nuclear Weapons (ICAN), also in 2007; and the renewed commitment and strength of the Movement to this cause, precipitated in part by a 2010 public appeal to governments to increase their efforts to rid the world of nuclear weapons by then ICRC President Jakob Kellenberger.⁶⁴

The 2007 climate study, by some of the world's most eminent climate scientists, examined and modelled the effects of a nuclear war in a regional conflict employing only the smallest nuclear weapons. It confirmed that a protracted nuclear war would have devastating immediate and long-term effects on the earth's atmosphere and climate.⁶⁵ The consequences of this climatic change would bring about the collapse of the international agricultural system and food supplies, and threaten global starvation on a scale beyond that previously imagined. What can be concluded from the study is that the detonation of any form of nuclear weapon poses an existential threat to humanity as a whole. To avoid a so-called "nuclear winter", current stockpiles of nuclear weapons must be reduced dramatically,⁶⁶ with the elimination of nuclear weapons being the only way to completely safeguard humanity from the humanitarian consequences of nuclear detonation.

In the same year, ICAN was launched in Vienna. ICAN is fashioned in the image of the successful International Campaign to Ban Landmines,⁶⁷ a global network of civil society groups whose efforts resulted in States agreeing the Ottawa Treaty banning landmines. ICAN is an umbrella group for hundreds of civil society organizations and individuals, bringing together a diverse network of

63 Alan Robock, Luke Oman and Georgiy L. Stenchikov, "Nuclear Winter Revisited with a Modern Climate Model and Current Nuclear Arsenals: Still Catastrophic Consequences", *Journal of Geophysical Research*, Vol. 112, No. D13, 2007.

64 Jacob Kellenberger, "Bringing the Era of Nuclear Weapons to an End", Statement to the Geneva Diplomatic Corps, 20 April 2010, available at: www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm, also available in the "Reports and Documents" section of this issue of the *Review*.

65 See A. Robock, L. Oman and G. L. Stenchikov, above note 63.

66 *Ibid.*, p. 1.

67 Tim Wright, "Negotiations for a Nuclear Weapons Convention: Distant Dream or Present Possibility?", *Melbourne Journal of International Law*, Vol. 10, No. 1, 2009, p. 8. The International Campaign to Ban Landmines is a global network of civil society groups whose efforts resulted in States agreeing the Ottawa Treaty banning landmines.

anti-nuclear advocates including mayors, physicians, scientists, Nobel Prize winners, activists and celebrities.⁶⁸ From its inception it has been campaigning for the global prohibition and elimination of nuclear weapons. Its projects include a worldwide parliamentary appeal to gain support for a ban treaty, and a study into investment in nuclear armaments. ICAN continues to galvanize civil society groups in support of the humanitarian initiative against nuclear weapons, and there is no doubt that its tireless work continues to influence the decisions of States in regards to a treaty banning nuclear weapons.⁶⁹ ICAN was to become the key civil society partner for intergovernmental conferences exploring the humanitarian impacts of nuclear weapons.

The public appeal by the ICRC's then President Jakob Kellenberger about the humanitarian consequences of nuclear weapons was a surprise to many campaigners, advocates and governments. In April 2010, before an audience of the diplomatic corps in Geneva, President Kellenberger stressed that the debate about nuclear weapons must go beyond the legal and security considerations to encompass the ethical and humanitarian considerations. Further, he stated that the discussion on the efficacy of nuclear weapons must ultimately be about people and the future of humanity.⁷⁰

President Kellenberger delivered his speech one month before the 2010 NPT Review Conference in an attempt to encourage States to consider the humanitarian impacts of nuclear weapons during their deliberations. This was authoritative public positioning on the elimination of nuclear weapons from the ICRC, an organization whose signature approach to engaging with States is customarily confidential. This has been especially true in relation to nuclear weapons, in large part because most nuclear weapons dialogue has been grounded in security and political concerns. President Kellenberger enabled the entire Movement to promote its support for the prohibition of nuclear weapons by focusing the debate, and the concern of the Movement, in an entirely neutral, humanitarian context. Restating the Movement's position on nuclear weapons was a bold public gesture from President Kellenberger. His use of universal humanitarian values, IHL, the humanitarian consequences of a nuclear detonation for human health and organic life, the Movement's emergency and disaster relief expertise, and the direct experience of the Japanese Red Cross and the ICRC in WWII was persuasive, and the speech publicly reinjected the Movement into the nuclear weapons debate.

Two months after Kellenberger's speech, the 189 States Parties at the NPT Review Conference unanimously expressed their "deep concern at the ... catastrophic humanitarian consequences that would result from the use of

68 For an overview of the activities of ICAN, see the organization's website at: www.icanw.org.

69 ICAN is currently working to secure declarations by States in support of the Austrian Pledge from the Vienna Intergovernmental Conference on the Humanitarian Impact of Nuclear Weapons. See ICAN, "Humanitarian Pledge: Stigmatize, Prohibit and Eliminate Nuclear Weapons", available at: www.icanw.org/pledge.

70 J. Kellenberger, above note 64.

nuclear weapons”.⁷¹ At previous Review Conferences, the States party to the NPT had affirmed the risk that nuclear weapons pose to humanity, but never before had they explicitly employed the language of “humanitarian consequences”. By including this language, they recognized the legitimacy of the humanitarian perspective towards nuclear weapons, and indirectly acknowledged President Kellenberger’s speech to the diplomatic corps in Geneva.

The humanitarian discourse gains momentum

The humanitarian discourse on nuclear weapons has continued to gain momentum, and the role of civil society has been critical in pushing it forward. What has now become increasingly known as the “humanitarian initiative”⁷² has gained the full support of the Movement and ICAN and their partner organizations.

The role of the International Red Cross and Red Crescent Movement

By November 2011, eighteen months after President Kellenberger’s speech, the Movement recognized the need to make an official commitment to its long-standing work and advocacy on the elimination of nuclear weapons. At the Council of Delegates Statutory Meetings in 2011, a resolution was passed formally committing all components of the Movement – the ICRC, the International Federation of Red Cross and Red Crescent Societies, and 189 National Societies – to using the framework of humanitarian diplomacy in seeking the elimination of nuclear weapons.⁷³

The 2011 Resolution committed the Movement to engaging with decision-makers, opinion leaders, health professionals, scientists and the public in order to raise awareness about the catastrophic humanitarian consequences of nuclear weapons, and the need for concrete actions leading to their elimination. It specifically spoke of the need to engage with governments about the humanitarian and IHL issues associated with nuclear weapons, urging them to pursue in good faith negotiations to prohibit and eliminate such weapons.⁷⁴ The 2011 Resolution articulates that the Movement finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of IHL, and highlights the lack of any adequate humanitarian response capacity in the face of

71 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. 1, UN Doc. NPT/CONF.2010/50, 2010, p. 12.

72 At the Preparatory Committee for the 2015 Review Conference of the States Party to the NPT, 2nd Session, South Africa delivered for the first time a statement on behalf of the “humanitarian initiative”, available at: <http://papersmart.unmeetings.org/secretariat/unoda/npt/second-session-of-the-preparatory-committee-2013/statements/>.

73 2011 Resolution, above note 7.

74 *Ibid.*

the incalculable human suffering that can be expected as a result of any use of nuclear weapons.⁷⁵

The impact of this resolution on the broader humanitarian initiative was significant. It gave legitimacy to independent action by National Societies working with their governments towards the elimination of nuclear weapons. It also showed that the entire Movement was taking significant and strong action to work towards the elimination of nuclear weapons as a priority, and was willing to lead the nuclear weapons discourse alongside States and civil society groups. Many National Societies embraced the momentum towards nuclear elimination and worked tirelessly in their own communities to revitalize the debate and engender a new awareness of the danger that nuclear weapons represent. The Norwegian Red Cross, Netherlands Red Cross and Australian Red Cross were particularly active in ensuring that nuclear weapons remained high on the Movement's agenda.

In 2012, IPPNW met in Hiroshima, and its Congress Statement was indicative of the progress of the humanitarian dialogue. In it, the organization welcomed the strong position and "renewed resolve"⁷⁶ of the Movement, and noted too that at the NPT Preparatory Committee in Vienna, the Norwegian government had offered to host the first ever intergovernmental conference looking exclusively at the humanitarian impact of nuclear weapons.

The Movement's position was reinforced when it met in November 2013 in Sydney, Australia, and again reiterated its commitment to working actively for the elimination and prohibition of nuclear weapons through a second Council of Delegates resolution.⁷⁷ The 2013 Resolution set out a clear plan of action for all components of the Movement to engage their publics and governments on "the need for concrete action leading to a prohibition on the use of nuclear weapons and their elimination".⁷⁸

Intergovernmental conferences on humanitarian consequences

The first conference focusing solely on the humanitarian impact of nuclear weapons was convened by the Norwegian government in Oslo, in March 2013. It brought together 128 States, the UN, the Movement, non-governmental organizations (NGOs) and other members of civil society: ICAN was the leading civil society partner. The conference was remarkable as the first ever intergovernmental gathering focused on the humanitarian consequences of nuclear weapons. States were present and curious as to how the conference would progress. While none of the nuclear weapons-possessing permanent five members of the Security Council attended, Pakistan and India were both present. At the time, the States present at the conference were sceptical about whether the humanitarian

⁷⁵ *Ibid.*

⁷⁶ IPPNW, 20th World Congress Statement, 25 August 2012, available at: www.sfbaypsr.org/pdfs/HiroshimaCongressStatement0812.pdf?d0054e.

⁷⁷ 2013 Resolution, above note 7.

⁷⁸ *Ibid.*

discourse could bring any significant or serious offerings to the nuclear disarmament debate.⁷⁹ They were to be surprised.

The Oslo Conference agenda focused on preparedness and first-line response, as well as the medium- and long-term humanitarian, health, environmental, economic and development effects of a nuclear weapons detonation.⁸⁰ The chair noted the key learnings from the conference in his summary: that a humanitarian response to a nuclear weapons detonation might not be possible, that the long-term effects of nuclear weapons have been demonstrated, and that the destructive potential of nuclear weapons remains and would not be limited by national borders.⁸¹

It was becoming evident that the humanitarian impacts of nuclear weapons were “an issue of fundamental significance” for the international community and could no longer be ignored.⁸² The NGO Reaching Critical Will noted that “in the end, the conference was important not only because it provided the space needed to reframe the discourse around nuclear weapons but also because it was a significant first move towards negotiation of a treaty banning nuclear weapons”.⁸³ While this interpretation of the findings is perhaps generous, certainly there was a significant shift, and the government of Mexico, deeply concerned and committed to the discussions, offered to hold a second follow-up conference eleven months later, in early 2014 in Nayarit, Mexico.

The intent of the Nayarit Conference was to build upon the findings of the Oslo Conference and look at the challenges of a nuclear weapon detonation to national, regional and global economic growth and sustainable development, the public health impacts, and the very real risk of a nuclear blast in an era of cyber-warfare, terrorism and increased proliferation of nuclear weapons possessor States.

The conference confirmed many of the assumptions made about nuclear weapons since 1945. This includes the assumption that a nuclear weapons detonation would hamper economic development and growth, damage the natural environment and cause widespread suffering, particularly among the poor and vulnerable. Rebuilding a society after such an event would take decades, causing immense harm to the community as a whole. New evidence about the risk of a nuclear weapons detonation by accident, or by an act of terrorism or cyber-attack, gave rise to new concerns for the international community, and the risk of a detonation continues to grow with the proliferation of nuclear weapons.⁸⁴

79 Robert Tickner, CEO of Australian Red Cross, attended this conference, and these are personal reflections from that experience.

80 The Oslo Conference on the Humanitarian Impact of Nuclear Weapons Agenda is available at: www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/program0226.pdf.

81 Espen Barth Eide, Chair’s Summary, Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 5 March 2013, available at: www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/.

82 See Patricia Lewis and Heather Williams, “The Meaning of the Oslo Conference on the Humanitarian Impacts of Nuclear Weapons”, in J. Borrie and T. Caughley (eds), above note 6.

83 Reaching Critical Will, *Conference Report: Humanitarian Impact of Nuclear Weapons*, 4–5 March 2013, available at: www.reachingcriticalwill.org/images/documents/Disarmament-fora/oslo-2013/HINW-report.pdf.

84 Juan M. Gomez Robledo, Chair’s Summary, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, 13–14 February 2014.

The Nayarit Conference continued to note the inability of the international community, either States or the humanitarian community, to respond adequately to any nuclear detonation. The chair noted that the increasing awareness of the humanitarian impacts of nuclear weapons was “changing ... hearts and minds worldwide” and that “Nayarit was the point of no return”,⁸⁵ and stated that it was now time for States to begin a diplomatic process to achieve the prohibition and total elimination of nuclear weapons.⁸⁶ This conclusion took some States by surprise, and indeed in the months leading up to the third intergovernmental conference on the humanitarian impact of nuclear weapons, the Austrian government spent a significant amount of diplomatic energy assuring States that the Vienna Conference was not a negotiating forum for a new nuclear weapons agreement, but a continuation of the lessons and discussion on humanitarian impacts alone.⁸⁷

Throughout 2014 there was some concern by nuclear weapons possessor and umbrella States regarding a push for negotiation of a treaty outside of existing international legal mechanisms. These States affirmed the need for a step-by-step process within existing disarmament mechanisms. It was considered that any negotiations regarding nuclear weapons should take place inside the Conference on Disarmament and the NPT.⁸⁸ At the same time, the United States and United Kingdom were encouraged to attend the Vienna Conference. Some nuclear-aligned States felt that dialogue had continued for too long without their presence, and the Austrian government assured them that the conference would be focused on humanitarian impacts and not on suggested modalities for negotiations of a treaty.

While there may have been no intent in Vienna to begin negotiations for a legal instrument banning nuclear weapons, the increased resolve to achieve this end was evident.⁸⁹ There were 158 States represented, nearly a 10% increase in States since the Nayarit Conference. The ICRC strengthened its position in Vienna, noting that the new evidence shared as a result of the previous conferences casts further doubt on whether nuclear weapons could be used in accordance with the

85 *Ibid.*

86 *Ibid.*

87 See the overview by the Austrian government on the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, available at: www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons-and-nuclear-terrorism/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/.

88 For example, the Australian statement at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons outlined Australia’s desire to keep nuclear weapons negotiations within the existing framework: “Australia is pursuing a path that offers the most practical and realistic chance for disarmament. To be effective, disarmament must be based on high-level political will, supported by practical, sustained efforts, which we are pursuing, including through implementation of the 2010 Nuclear Non-Proliferation Treaty Action Plan and our membership of the Non-Proliferation and Disarmament Initiative.” Australian Statement at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8–9 December 2014, available at: www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Statements/HINW14_Statement_Australia.pdf.

89 For an overview, see Nick Ritchie, “The Story So Far: The Humanitarian Initiative on the Impacts of Nuclear Weapons”, ILPI-UNIDIR Vienna Conference Series, 2014, available at: www.unidir.org/files/publications/pdfs/the-story-so-far-en-616.pdf.

customary rules of IHL.⁹⁰ The Chair's Summary reiterated many of the findings of the Nayarit Conference, and confirmed that new evidence from the three conferences has shown that nuclear weapons threaten the very survival of human life, that the scope of and interrelationship between the humanitarian consequences of a nuclear weapons detonation are more complex than previously thought, and that the risk of a detonation, already high, increases over time.⁹¹

Certainly a sense of urgency about the need to prohibit nuclear weapons was emerging, not only in the discourse but also among participants in Vienna. The recognition of the risks to all of humankind provided a very real sense that we are at a turning point in history, a point where it is possible to make decisions that will advance the world either towards or away from self-destruction.

The Austrian/Humanitarian Pledge

Austria added to the sense of urgency when, immediately following the release of the relatively conservative Chair's Summary, the Austrian Pledge was revealed.⁹² The government of Austria outlined the need to consider human security broadly, and to promote the protection of civilians against nuclear attacks. To this end, it urged nuclear-armed States to reduce the operational status of their nuclear weapons, and called upon all States Parties to renew their commitment to the urgent and full implementation of existing obligations under Article VI of the NPT. Austria pledged to work with all stakeholders, including the Movement, to pursue measures to fill the legal gap in regard to nuclear weapons, including by promoting the evidence of the Vienna Conference at all relevant fora.⁹³ This pledge was an interesting diplomatic device as it significantly increased the pressure on nuclear weapons States and their dependents by placing the nuclear weapons issue firmly in the arena of civilian protection and human security, and while some diplomats passed it off as a "stunt", the Pledge has gained significant momentum.

In January 2015, the Austrian government invited States by a diplomatic *note verbale* to sign up to the Pledge, and on 29 January 2015, following the Third Summit of the Community of Latin American and Caribbean States, all thirty-three members of the Community endorsed the Austrian Pledge and endorsed the call to "fill the legal gap".⁹⁴ ICAN promoted the Pledge extensively throughout the NPT Review Conference in 2015, and it became renamed the Humanitarian Pledge. To date, 114 States have signed the Pledge.⁹⁵ This

90 Helen Durham, "The Use of Nuclear Weapons and International Humanitarian Law", presentation, Third Conference on the Humanitarian Impacts of Nuclear Weapons, Vienna, December 2015.

91 See J. M. Gomez Robledo, above note 84.

92 Sebastian Kurz, Austrian Pledge from the Third Conference on the Humanitarian Impact of Nuclear Weapons, delivered Vienna, 2014.

93 *Ibid.*

94 ICAN, "33 Latin American and Caribbean States Endorse Austrian Pledge and Call for Negotiations on a Ban Treaty", press release, 30 January 2015, available at: www.icanw.org/campaign-news/33-latin-american-and-caribbean-states-endorse-austrian-pledge-and-call-for-negotiations-on-a-ban-treaty/.

95 For more info on the Humanitarian Pledge, see ICAN, above note 69.

represents a significant number of States committed to filling the legal gap and working towards the prohibition of nuclear weapons.

Humanitarian discourse at the UN

While the series of intergovernmental conferences has been progressing, the humanitarian discourse has also been heard loudly at the UN. In 2013, there was the inaugural debate on humanitarian impacts at the First Committee of the UNGA.⁹⁶ The First Committee deals with disarmament and international security, and seeks solutions to challenges in the international security regime. It was this committee that in 1945 recommended the first UNGA resolution, entitled “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy”, as discussed above.⁹⁷ However, despite the Committee’s noble history and continuous concern for nuclear weapons, it was not until 2013 that it held the first debate focused not on the relative security merits of nuclear weapons, but on their humanitarian impacts.

In addition to general debate, and as a successor to the Swiss-sponsored statement⁹⁸ at the NPT Preparatory Committee in Vienna in 2012, the New Zealand government sponsored a statement, co-signed by 125 States, calling on all States to consider the humanitarian consequences of nuclear weapons and to fulfil their existing international commitments towards the prohibition and elimination of such weapons.⁹⁹ Twelve months later in October 2014, 155 States co-signed a similar statement. These statements, combined with the growing attendance at the three intergovernmental conferences on the humanitarian impact of nuclear weapons, build a picture of strengthening and irreversible momentum towards the establishment of a legally binding instrument for the prohibition and elimination of nuclear weapons.

On 18 February 2015, two months out from the commencement of the 2015 NPT Review Conference, there was a second significant and timely intervention from the ICRC. The current ICRC president, Peter Maurer, addressed the Permanent Missions in Geneva. He noted that with all the new evidence made available through the three inter-governmental conferences, it was more difficult than ever to envisage that the use of nuclear weapons could be consistent with IHL.¹⁰⁰

96 See UN Office for Disarmament Affairs, *First Committee Press Releases, Draft Resolutions, Statements, Secretary-General’s Reports, and Side Events*, available at: www.un.org/disarmament/meetings/firstcommittee-68/.

97 See above note 28.

98 Switzerland, “Joint Statement on the Humanitarian Dimension of Nuclear Disarmament”, First NPT Preparatory Committee, 2 May 2012.

99 New Zealand, “Joint Statement on the Humanitarian Impact of Nuclear Weapons”, UNGA, 21 October 2013.”

100 Peter Maurer, “Nuclear Weapons: Ending a Threat to Humanity”, speech to the Geneva Diplomatic Corps, 18 February 2015, available at: www.icrc.org/en/document/nuclear-weapons-ending-threat-humanity, also available in the “Reports and Documents” section of this issue of the *Review*.

President Maurer reiterated the important messages that have been developed through the conferences and reflected on the destructive power of nuclear weapons, the human suffering they would cause and the catastrophic, long-lasting consequences for health, the environment, climate, food production and socio-economic development. He reiterated concern for the weapons' long-term effects, and noted that in the immediate aftermath of a detonation there is no way of effectively treating or bringing relief to those affected. In addition to this, the effects would go well beyond the national borders of the country where the detonation occurred, and therefore any use of nuclear weapons must be of global concern. President Maurer argued that the elimination of nuclear weapons is now a "humanitarian imperative"¹⁰¹ and called on governments to establish a time-bound process to negotiate a legally binding instrument to this end, including the form such an instrument should take.

Concluding remarks

The pressure is on. There is no doubt that we are at a turning point in history. Throughout the last seventy years, the nuclear weapons discourse has focused on security and deterrence. The question of "whose security?" has not been of concern for the nuclear weapons States and those sheltering under their umbrella. What we now know is that the days of MAD were not only mutual assured destruction for the United States and the former USSR. Advances in science and research tell us that any action which would have led to the destruction of those two countries would also lead to the destruction of life as we know it. Indeed, detonation of a substantial portion of any of the world's nuclear arsenals would result in "self-assured destruction".¹⁰²

Nuclear weapons continue to exist and remain in the possession of a select number of States, yet it is increasingly the clear that the use of nuclear weapons would be illegal and their devastating effects are most likely irreversible. What the humanitarian discourse has done, so compellingly, is demonstrate why these weapons are of concern to us all. While we may accept that States have the sovereign right to security, we cannot accept security on the basis of weapons that are a threat to all life on Earth. As the ICRC's President Maurer has noted: "Protecting humanity from the catastrophic humanitarian consequences of nuclear weapons requires courage, sustained commitment and concerted action."¹⁰³ Now is the time.

¹⁰¹ *Ibid.*

¹⁰² See Alan Robock and Owen Toon, "Self-Assured Destruction: The Climate Impact of Nuclear War", *Bulletin of the Atomic Scientists*, Vol. 68, No. 5, 2012.

¹⁰³ P. Maurer, above note 100.