

The Enduring Nuclear Threat: A Deeper Look United for Peace and Justice Webinar, March 30, 2021

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International law is a many-sided human creation. Today I will take one important aspect: multilateral law-making, and examine US resistance to it, the consequences in the nuclear weapons sphere, and what can be done about it.

To understand our current predicament, I'll begin with the most recent period of vigorous multilateralism, the 1990s.

Negotiations on the most comprehensive ever weapons treaty, the Chemical Weapons Convention, were completed in 1993, and the treaty entered into force in 1997. That year the Senate approved ratification, though with some conditions that seem incompatible with the treaty. While perhaps not operationally significant, the conditions and the tough battle for ratification were a signal that clear sailing was not ahead for multilateralism. And indeed that is the last major multilateral treaty the United States has entered into. Two years later, the Senate refused to approve ratification of the Comprehensive Nuclear-Test-Ban Treaty.

In 1995, a legally binding agreement, not requiring ratification, was reached to extend the Nuclear Non-Proliferation Treaty indefinitely. In connection with that decision, a number of commitments were adopted, among them completion of negotiations on the test ban treaty by 1996, negotiation of a fissile material cut-off treaty, practical steps towards establishment of a WMD free zone for the Middle East, and systematic and progressive efforts to reduce nuclear arsenals with the ultimate objective of their elimination. Except for the CTBT commitment, the commitments have essentially not been fulfilled.

In 1996, negotiations were completed on the Comprehensive Nuclear-Test-Ban Treaty. As a price for pursuing US negotiation of and participation in the treaty, the Clinton administration committed to funding of extensive modernization and development of the US nuclear weapons infrastructure, known as the Stockpile Stewardship Program. Despite that program, as mentioned, in 1999 the Senate refused to approve ratification. That was a hard body blow to the nuclear non-proliferation and disarmament regime. The CTBT had been regarded as key to control of nuclear weapons for decades, is the only measure referred to in the NPT preamble, and was highlighted in the 1995 extension of the NPT.

Also in 1996, the International Court of Justice delivered its advisory opinion on the legality of the threat or use of nuclear weapons. While the United States strongly opposed the UN General Assembly's request for the opinion, the US did participate in the arguments before the Court. The Court found that the threat or use of nuclear arms is "generally" contrary to international humanitarian law forbidding the infliction of indiscriminate harm and unnecessary suffering in warfare. The Court declined to assess the legality of use of low-yield nuclear weapons in remote areas and of use of nuclear arms in reprisal against a nuclear attack or when a state's survival is endangered. While the Court's opinion thus was not definitive, it is also fair to say that the thrust of its reasoning was toward illegality in all circumstances.

The Court also held unanimously, interpreting Article VI of the NPT, that there is an obligation to pursue in good faith and conclude negotiations on nuclear disarmament in all its aspects. This is a powerful affirmation of the centrality of multilateralism to leaving the nuclear age behind. It has been welcomed by most countries, but not by the Western nuclear powers, the US, UK, and France, or by Russia. More importantly, the nuclear powers have not acted in accordance with the Court's holding, nor with the similar commitment made in connection with the 1995 NPT extension decision. Led by its indomitable foreign minister Tony de Brum, in 2014 the Marshall Islands sought to hold the nuclear-armed states accountable to the disarmament obligation in the Court, but by a narrow margin the Court declined to consider the question.

The final piece in the 1990s surge of multilateralism was the 1998 negotiation of the Rome Statute of the International Criminal Court. The United States participated in the negotiations, and made positive contributions such as the inclusion of gender-related crimes, while also diluting certain war crimes elements. An effort was made to include a specific prohibition of use of nuclear weapons, but that was rebuffed by the US and other states. A last act of the Clinton administration was to sign the treaty. However, under the guidance of John Bolton, the GW Bush administration withdrew the US signature. While the Obama administration in certain respects took a constructive attitude toward the International Criminal Court, at no time since the Rome Statute was negotiated has US ratification been on the table. The ICC is important – or potentially important – in many ways. Regarding nuclear arms, its provisions on crimes against humanity and war crimes are fundamentally incompatible with use of nuclear arms.

In summary, the turn against multilateralism was signaled by the difficulty of obtaining Senate approval of ratification of the Chemical Weapons Convention. It became entrenched with the Senate's refusal to consent to ratification of the Comprehensive Nuclear-Test-Ban Treaty in 1999. A later and important manifestation was the John Bolton-led US disruption and termination of negotiation of a verification protocol – a treaty – to the Biological Weapons Convention in 2003. Moreover, from 1997 on the United States, along with the UK, France, and Russia, opposed a General Assembly

resolution calling for negotiation of a nuclear weapons convention comparable to the Chemical Weapons Convention.

The anti-multilateralist posture reflected a post-Cold War triumphalism, coupled with a view that the United States should not accept limits on its power and a rejection of the view that a cooperative approach to security builds rather than erodes US security.

In the new environment of US or at least Senate resistance to multilateralism, there have been two key developments. One is that the Obama administration resorted to negotiating agreements that could be claimed under US law not to be treaties and therefore not subject to Senate approval. The Paris climate agreement was characterized in US law as an executive agreement. To accommodate the US, it was a combination of procedural requirements – hold meetings, make reports – with substantive goals, but not legally binding requirements. The Iran nuclear agreement, the JCPOA, was creatively written so that it did not explicitly convey that the parties were taking on legally binding obligations; it was framed more like a plan of action. In both cases, the claim that the agreement is not a treaty is questionable.

The second development is that other states have gone ahead with negotiating treaties regardless of whether the US participates in negotiations or is expected to join the treaty in the near to mid-term. That was the case with the treaties banning landmines and cluster munitions. And those treaties, certainly the one on landmines, have developed international norms whose force is felt by countries not party to the treaty.

The same approach was taken with the Treaty on the Prohibition of Nuclear Weapons, whose proponents were in part inspired by the landmines and cluster munitions agreements. Let me make a few comments on the TPNW, which entered into force early this year. At least from an optimistic point of view, the TPNW manifests a paradigm shift toward human-centered security, away from security of states. Legally this is expressed by the preamble's affirmation of international humanitarian law governing the conduct of warfare and of international human rights law. The paradigm shift is also visible by the inclusion, for the first time in a nuclear weapons-related treaty, of obligations of assistance to victims of nuclear testing and use and of environmental remediation.

The TPNW is grounded in the NPT and other international law and is a powerful statement of the humanitarian and legal principles that should guide the non-use and abolition of nuclear arms. The TPNW was negotiated in 2017. A year later, another important statement was made, by the UN Human Rights Committee. It found that the “threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is *incompatible with respect for the right to life* and may amount to a crime under international law.”

So the TPNW and the Human Rights Committee finding are valuable resources for advocacy of those principles and values in the United States. The TPNW's present operative significance in the US is doubtful. For the US to join the treaty, it would have to either engage in unilateral nuclear disarmament or engage in a process of verified elimination of nuclear arsenals with other nuclear powers that would enable the US and those states to join the treaty together. And it should be said, if the US, Russia, China and other nuclear powers engaged in a disarmament process resulting in global zero – as they are obligated to do by the NPT and international law – they still might not join the TPNW.

It is not an option for the US to sign but not ratify the treaty. Under international law, a signatory is obligated to refrain from act which would defeat the object and purpose of the treaty. In the case of the CTBT, which bans nuclear explosive tests, it makes sense for the US to be a signatory, since it is not conducting such tests. In the case of the TPNW, which bans among other things possession, threat and use of nuclear weapons, the US would be constantly engaging in acts contrary to the TPNW's object and purpose, absent a very, very drastic change in its nuclear weapons policies and practices leading to elimination of the US arsenal in the near term.

What can be done to advance nuclear disarmament in light of the entrenched opposition to multilateralism in the US?

- 1) Bilateral nuclear arms control with Russia – assuming Russia is willing in light of its concerns about overall US military capabilities – seems possible, and possibly too nuclear arms control agreements encompassing China and perhaps other nuclear powers.
- 2) The US can and should take steps on its own to reduce drastically the number and role of its nuclear weapons regardless of what other nuclear powers do. Unfortunately, it has become a habit to assume that the US posture must move in synch with that in particular of Russia. Moreover, the same forces that oppose multilateralism will likely oppose such unilateral steps. Having said that, there are signs that the Pentagon is more interested in developing its non-nuclear than its nuclear capabilities though it is certainly committed to maintaining and upgrading existing nuclear forces.
- 3) Concerning the high barrier of two-thirds of the Senate having to approve ratification of treaties, it must first be realized that this problem goes beyond the nuclear sphere. We have seen it in the climate arena, and in others as well, for example the Law of the Sea Convention. Its ratification is supported by the US Navy but that's not enough!

The problem of the 2/3 majority is compounded by the well-known fact that rural, less populated states are over-represented in the Senate.

One solution of course would be a wholesale change in the membership of the Senate, or a return of the Republican Party or a significant faction of it to supporting treaty-based international order. Absent that, for multilateral agreements it may be necessary to continue to rely on the sort of creative approach displayed regarding the JCPOA or the Paris agreement, or for that matter NAFTA, which was called not a treaty but a congressional-executive agreement.

As to nuclear weapons and other acute global challenges, solutions must be found, and we must be willing to think creatively and differently. My current assessment is this: We should work for fundamental changes in US society and politics that would naturally support a constructive attitude towards participating in cooperative global institutions. We should support further US-Russian nuclear arms reductions along with limits on non-nuclear capabilities like missile defense to make nuclear reductions possible from the Russian point of view. And we should support the broadening of nuclear arms control to include China and other nuclear powers.