

Linking Humanitarian Law and Nuclear Disarmament Action: The Case for a Nuclear Weapons Convention

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Forty years after the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force there are still more than 23,000 nuclear weapons in the hands of nine states. What are these for? The Final Document of the 2010 Review Conference stated in its consensus conclusions:

The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.¹

Put like this, can we imagine any real use of nuclear weapons that would not violate international humanitarian law? Of equal importance, can we envisage practical situations in which a government uses nuclear weapons to protect a particular country without risking the security and survival of the majority of its people? This recognition must be the starting point for a radically different approach to addressing nuclear dangers and fulfilling numerous treaties and UN resolutions that express the importance of nuclear disarmament.

Two other elements of the 2010 NPT conclusions and recommendations also point to a shift from the arms control and non-proliferation framework that developed during the Cold War to a nuclear weapons abolition paradigm that better reflects the humanitarian and human security concerns of peoples in this interdependent 21st century. The very first consensus actions (I and II) enshrined commitments to 'pursue policies that are fully compatible with

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¹ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Part I, UN Doc. NPT/CONF.2010/50 (Vol. I), at 19.

the Treaty and the objective of achieving a world without nuclear weapons' and 'to apply the principles of irreversibility, verifiability, and transparency in relation to the implementation of their treaty obligations'. And in the introductory paragraphs to Actions 3, 4, 5 and 6 on the disarmament of nuclear weapons, the conference

calls on all nuclear-weapon States to undertake concrete disarmament efforts and affirms that all States need to make special efforts to establish the *necessary framework to achieve and maintain a world without nuclear weapons*. The Conference notes the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.²

It is sixty years since the UN General Assembly, in its first resolution, called for 'the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction'. In that time, multilateral treaties have banned the production and use of biological and chemical weapons, but left nuclear weapons in an ambiguous situation.

The fundamental treaty relating to nuclear armaments enshrined the concept of non-proliferation – preventing the *spread* of nuclear weapons. By defining five countries as 'nuclear weapon states' it gave the appearance of condoning the nuclear doctrines and arsenals of these five – China, France, Russia, the United Kingdom and the United States – while exhorting all others to renounce any attempt to get nuclear weapons. The non-nuclear participants managed to get a weakly-worded obligation on the nuclear-weapon states to negotiate in good faith on nuclear disarmament into the NPT's Article VI, but the distinction the treaty made between nuclear and non-nuclear weapon states has had the negative consequence that the norms, rules and institutions of non-proliferation have not reduced the role of nuclear weapons as intended. This is primarily because the NPT is seen to heighten rather than diminish the status and high domestic and international value attached to nuclear weapons.

The pressure imposed on certain governments that try to circumvent the NPT and acquire nuclear weapons nowadays may be considerable, but the possession – that is to say, the *successful* acquisition – of nuclear weapons has become associated with an exclusive club. Moreover, the NPT nuclear-armed club has the same membership as the P-5 permanent

² *Ibid.*, at 20 [emphasis added].

members of the UN Security Council. Joining – or staying in – these apparently exclusive guilds becomes for some governments a matter of national pride, independence and power projection. UK spokespeople often speak of nuclear weapons enabling Britain to ‘punch above our weight’. Such associations were also embedded in India’s explanation following its May 1998 nuclear tests, that they ‘had to prove that we are not eunuchs’.³ At the heart of the non-proliferation regime, therefore, are powerful political and psychological incentives and justifications for acquiring nuclear weapons.

Even as the use, production, transfers and stockpiling of biological and chemical weapons were being prohibited, on grounds that their use would be ‘repugnant to the conscience of mankind’⁴, the non-proliferation approach to controlling nuclear weapons exempted – in effect, if not intention – the most mass destructive and inhumane weapons of all from international efforts to outlaw their use, production and deployment.

In the past two decades, humanitarian concerns have once again driven disarmament action, this time achieving multilateral treaties banning anti-personnel mines and cluster munitions and an international programme of action on small arms and light weapons.

The humanitarian case for banning nuclear weapons can be made on three core grounds: ethics, international law, and human security and survival. This article will focus primarily on international humanitarian law and security. After considering the basic arguments, I will briefly discuss how centralising humanitarian interests over national military concerns will make the achievement of a comprehensive nuclear weapons convention (NWC) more realisable and practical in the near term than sticking with the step-by-step arms reduction paradigm that keeps faltering and sliding backwards.

I. Nuclear Weapons – The Most Profoundly Inhumane of All

All weapons are intended to injure and most are designed to kill. So what does it mean to designate a particular type of weapon ‘inhumane’? Anti-

³ Balasaheb Thackeray, prominent member of the Bharatiya Janata Party (BJP), quoted in C. Cohn/F. Hill/S. Ruddick, ‘The Relevance of Gender for Eliminating Weapons of Mass Destruction’, 80 *Disarmament Diplomacy* (2005) 39.

⁴ Preamble, 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163.

personnel landmines, cluster munitions and chemical weapons were labelled inhumane for different reasons but with a similar purpose: to prevent their further use and campaign for their treaty-mandated global prohibition and elimination. Nuclear weapons have not been formally designated as 'inhumane weapons', and yet over time a strong taboo against their use has been absorbed into most if not all national political and military cultures. This is because the legacy of the atomic bombs dropped on Hiroshima and Nagasaki and the data and observations from over 2,000 nuclear tests demonstrated that nuclear weapons are uniquely destructive, with appalling long term consequences that could make the living envy the dead. To the indiscriminate and massive annihilation caused by the immediate blast and heat from the detonation would be added serious radiation, health and environmental effects. By contaminating food and water and causing genetic damage to biological organisms, including human beings, just one nuclear weapon can cause long-lasting harm, notably cancers, birth defects and related health problems for the survivors and their descendants. If other weapons are recognized to be 'inhumane', nuclear weapons qualify as the most humane of all.

Addressing the opening day of the 2005 NPT Review Conference, UN Secretary-General Kofi Annan reminded the delegates of other long-lasting suffering that would be caused far beyond the direct site of 'a nuclear catastrophe in one of our great cities':

In the chaos and confusion of the immediate aftermath, there might be many questions. Was this an act of terrorism? Was it an act of aggression by a state? Was it an accident? These may not be equally probable, but all are possible. Imagine, just for a minute, what the consequences would be. Tens, if not hundreds, of thousands of people would perish in an instant, and many more would die from exposure to radiation. The global impact would also be grave. The attention of world leaders would be riveted on this existential threat. Carefully nurtured collective security mechanisms could be discredited. Hard-won freedoms and human rights could be compromised. The sharing of nuclear technology for peaceful uses could halt. Resources for development would likely dwindle. And world financial markets, trade and transportation could be hard hit, with major economic consequences. This could drive millions of people in poor countries into deeper deprivation and suffering.⁵

⁵ K. Annan, The Secretary-General Address to the Nuclear Non-Proliferation Treaty Review Conference, 2 May 2005, available at <http://www.un.org/en/conf/npt/2005/statements/npt02sg> (last visited August 18, 2011).

Annan gave this speech before the publication of even more compelling analyses on the climatic consequences of the use of nuclear weapons. Refining the studies on 'nuclear winter' developed by US and Soviet scientists during the 1960s and 1970s, Rutgers University scientist Alan Robock and climate researchers have developed models of regional nuclear conflict involving the detonation of only a fraction of today's current arsenals. Taking as their baseline the detonation of 100 Hiroshima-sized bombs (only 0.03 per cent of the explosive yield of the current global nuclear arsenal) detonated primarily on cities in a sub-tropical zone (e.g. South Asia), Robock's team have concluded that in addition to producing 'direct fatalities comparable to all of those worldwide in World War II', the 'indirect effects' would be globally catastrophic. Agricultural collapse would follow abrupt global cooling caused by the circulation of irradiated smoke, ash and debris in the mid and upper stratosphere. Severe reductions in the planet's protective ozone layer would be likely. According to recent analyses revisiting research on nuclear weapons effects and 'nuclear winter', even a limited regional use of nuclear weapons could cause global agricultural collapse, persisting for at least ten years (a conservative estimate, depending on the size, number and location of the nuclear bomb detonations). These studies indicate that in addition to the suffering of people living close to the nuclear explosions, peoples far away from the zone of combat would suffer widespread famine, economic collapse and deaths in the millions.⁶

The uniquely long-enduring and destructive effects of nuclear weapons are germane to the humanitarian case for them to be abolished. This was clearly stated by the International Court of Justice (ICJ) when it considered the question of the legality of the use and threat of use of nuclear weapons, referred by the United Nations General Assembly in resolution 49/75K, adopted in 1994:

in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.⁷

⁶ C. Bardeen *et al.*, 'Climatic Consequences of Regional Nuclear Conflicts', 7 *Atmospheric Chemistry and Physics* (2007), available at <http://www.atmos-chem-phys.net/7/2003/2007> (last visited 18 August 2011).

⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226, at 244, para. 36.

Noting that 'nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom'⁸, the Court provides this clear description:

By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.⁹

The Court also made reference to developments in international humanitarian law that recognise that the methods and means of warfare are not unlimited. The International Committee of the Red Cross played an important role in achieving such protocols. It went even further in the 1990s and 2000s, providing legal and technical support for civil society's efforts to stigmatize and ban two important classes of weapons – anti-personnel landmines and cluster munitions.

Recently the Red Cross has been again turning its attention to nuclear weapons, after saying little for over 25 years. In a ground-breaking statement to the 'Geneva Diplomatic Corps' on April 20, 2010, just before the 2010 NPT Review Conference, the President of the ICRC, Jakob Kellenberger, quoted from the eyewitness account of Dr Marcel Junod, who was one of the first foreign doctors to arrive after the bombing of Hiroshima:

thousands of human beings in the streets and gardens in the town centre, struck by a wave of intense heat, died like flies. Others lay writhing like worms, atrociously burned. All private houses, warehouses, *etc.*, disappeared as if swept away by a supernatural power. Trams were picked up

⁸ *Ibid.*, at 243, para. 35.

⁹ *Ibid.*

and hurled yards away, as if they were weightless; trains were flung off the rails (...). Every living thing was petrified in an attitude of acute pain.¹⁰

Kellenberger's statement further spelled out:

The suffering caused by the use of nuclear weapons is increased exponentially by devastation of the emergency and medical assistance infrastructure. The specific characteristics of nuclear weapons, that is, the effects on human beings of the radiation they generate, also cause suffering and death for years after the initial explosion. For survivors, the immediate future may include life-threatening dehydration and diarrhoea from injuries to the gastrointestinal tract, and life-threatening infections and severe bleeding caused by bone marrow suppression. If they survive these threats, they face an increased risk of developing certain cancers and of passing on genetic damage to future generations. Thus over time many more lives are lost. In Hiroshima and Nagasaki, fatalities increased two- to three-fold over the following five years.¹¹

Kellenberger went further than any previous ICRC president in his conclusion and direct appeal for nuclear weapons never to be used again:

Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of humanity. The ICRC therefore appeals today to all States to ensure that such weapons are never used again, regardless of their views on the legality of such use.¹²

Kellenberger's statement opened the way for further initiatives on nuclear weapons, especially from national Red Cross affiliates. These led to a resolution on 'Working towards the elimination of nuclear weapons' being adopted by the Council of Delegates of the International Red Cross and Red Crescent Movement on 26 November 2011. Echoing many of the points made by Kellenberger, the resolution referred to the 'serious implications of any

¹⁰ Quoted in J. Kellenberger, 'Bringing the Era of Nuclear Weapons to an End', Statement by the President of the ICRC to the 'Geneva Diplomatic Corps', 20 April 2010, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/nuclear-weapons-statement-200410> (last visited 18 August 2011).

¹¹ *Ibid.*

¹² *Ibid.*

use of nuclear weapons for humanitarian assistance activities and food production over wide areas of the world' and stated that 'the existence of nuclear weapons raises profound questions about the extent of suffering that humans are willing to inflict, or to permit, in warfare'. Operative paragraph 1 speaks of 'incalculable human suffering' and the 'absolute imperative to prevent such use'. Paragraph 2 'finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality'.¹³

In its operative paragraph 3, the resolution 'appeals to all States:

- to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons
- to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations.'¹⁴

II. Codifying Moral and Humanitarian Norms: The Impetus to Ban Certain Weapons

Treaties and UN Security Council resolutions are the most recognised means to codify norms and prohibit certain weapons or practices. From dum dum bullets to chemical weapons, there are many precedents for banning weapons on grounds that they are contrary to our humanity. Before being banned, anti-personnel landmines and cluster munitions were increasingly recognized – and stigmatized – as inhumane weapons because they maimed and killed indiscriminately and remained as unexploded ordinance and 'remnants of war', harming non-combatants and restricting land use long after their ostensible military purpose ended. Noting that the established arms control patterns of debating the military justifications and rationale for such weapons have tended at best to result in restrictions, civil society pushed governments to go outside the old-fashioned approaches and stagnant fora and negotiate total bans on these weapons. Survivors and people involved in demining and medical assistance joined humanitarian non-governmental organizations

¹³ Resolution adopted by the Council of Delegates of the International Red Cross and Red Crescent Movement, 'Working towards the elimination of nuclear weapons', Geneva, 26 November 2011, Doc. CD/11/R1.

¹⁴ *Ibid.*

(NGOs) to demonstrate that the humanitarian case for prohibition of these weapons over-rode the military case for keeping them. The experiences and images of victims, especially children, played an important role in persuading public opinion, parliamentarians and governments to do something.¹⁵

As with nuclear weapons, existing treaties and machinery proved incapable of delivering appropriate *human security* solutions with the urgency that humanitarian disarmament advocates perceived as necessary. As noted by the director of the UN Institute for Disarmament Research for the period 1997-2007, Patricia Lewis, who was herself active in many of these campaigns,

[i]n trying to work through the CCW [1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), also known as the Inhumane Weapons Convention, also sometimes called the 'Inhumane Weapons Convention'], the attempts to address the humanitarian crisis caused by antipersonnel landmines floundered in the face of military and state power interests. Although many of the states were attempting to put the humanitarian problem at the centre of the negotiation, several significant military powers blocked progress in that regard and succeeded in watering down language and removing the guts of a protocol that eventually ended up as an amended version of Protocol II on the use of mines, booby traps and other devices.¹⁶

The CCW, which dealt only with conventional weaponry, had in an earlier age played a useful role in developing the principles for determining the 'inhumaneness' of certain weapons that cause 'superfluous injury or unnecessary suffering' and 'widespread, long-term and severe damage to the natural environment', as well as reinforcing 'the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited...'¹⁷ In the 1990s, however, the tactics of

¹⁵ See J. Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*, (2009); R. Price, 'Reversing the Gun Sights: Transnational Civil Society Targets Landmines', 52 *International Organization* (1998) 613; and M.A. Cameron/R.J. Lawson/B.W. Tomlin (eds.), *To Walk Without Fear: The Global Movement to Ban Landmines* (1998).

¹⁶ P.M. Lewis, 'A New Approach to Nuclear Disarmament: Learning From International Humanitarian Law Success', *Research Papers for the International Commission on Nuclear Non-Proliferation and Disarmament* (2009).

¹⁷ Preambular paragraph 3, 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be

a few states rendered meaningful negotiations impossible within the CCW framework. With the 66-member Conference on Disarmament (CD) – self defined as the UN's negotiating body – also bogged down by its structural inadequacies, it made sense for humanitarian disarmers to initiate an independent multilateral negotiating process. Known as the 'Ottawa Process', in recognition of the driving role played by Canadian Foreign Minister Lloyd Axworthy, this partnership between governments and humanitarian civil society actors achieved a comprehensive ban on anti-personnel landmines in 1997.¹⁸

A decade later, after the wars in ex-Yugoslavia, Afghanistan and Iraq had demonstrated the humanitarian effects of using cluster bombs, concerned governments and civil society quickly concluded that they would more efficiently reach their objective of a ban on cluster munitions if they emulated the Ottawa Process and established an independent negotiating forum and process. Initiated by Norway, and strongly backed by civil society in key countries, the Oslo process managed to telescope the negotiating period into a couple of concentrated years, resulting in the Cluster Munitions Convention being adopted in Dublin in 2008 and opened for signature a few months later.¹⁹

It is argued – generally by opponents of the Mine Ban Treaty and the Cluster Munitions Convention – that by going outside the established consensus-seeking machinery as employed in the CCW and the CD, the 'virtuous states' have simply managed to reach an agreement amongst themselves, allowing the major producers of the weapons to boycott the treaties. Three points are relevant to take into account. First, if proponents of bans on landmines and cluster munitions had waited for the CCW or CD to negotiate on these issues, they would still be waiting. The CD has been paralysed ever since it concluded negotiations on the Comprehensive Nuclear-Test-Ban Treaty (CTBT) in 1996. Similarly, opponents of a ban would find it easy to tie the CCW up in endless debates about military utility and regulatory options. Second, both treaties have entered into force, and in their short lives have already attracted more signatories and adherents than many more established UN treaties. Third, the 'virtuous club' criticism ignores the real and significant normative power exerted by these treaties. Under pressure from domestic and international civil society, many countries that used to manufacture, deploy and sell such weapons stopped doing so as

Excessively Injurious or to Have Indiscriminate Effects (CCW), 1342 UNTS 137.

¹⁸ See Price, *supra* note 15; Cameron/Lawson/Tomlin, *supra* note 15.

¹⁹ See Borrie, *supra* note 15.

the treaty-making process gathered momentum. Even among the countries that so far have refused to sign or ratify, most have had to restrict their manufacture, use and marketing of the weapons, and some, including the United States, now contribute significantly to demining and other forms of assistance, as the treaties require.

If sufficient numbers of states accede to a disarmament treaty or international law institution, it will exert compelling force even on those governments that do not join. Moreover, holding multilateral negotiations with all relevant states does not necessarily deliver a better agreement and carries no guarantee that all will accede to the agreement they negotiated. India, for example, was fully involved in the negotiations on the NPT and CTBT, but has refused to sign (and has acted to undermine) both treaties. The involvement of states with national military interests or rivalries can (and generally does) lead to key provisions being distorted or watered down, thereby weakening the normative and operative effectiveness of such agreements.

III. The Seductions of Deterrence and Other Security Myths That Impede Disarmament

It appears clear that if nuclear weapons were to be used again – that is, detonated and exploded – their mass destructive effects would be so profoundly inhumane as to constitute clear violations of international humanitarian law, arguably amounting to a crime against humanity. By their effects, nuclear weapons can hardly be considered less indiscriminate and inhumane than landmines, cluster munitions or chemical weapons. Demonstrating the human misery caused by inhumane and environmentally destructive weaponry has frequently been the prelude to getting those weapons banned. Yet nuclear weapons remain unbanned. The reasons are two-fold: the current possessors are some of the most powerful states that dominate the United Nations system and its negotiating fora; and upholders of doctrines of nuclear deterrence have sought to sever the normal perceptual and military linkages between possessing and using weapons.

With different degrees of openness or opacity regarding their doctrines, those responsible for developing and deploying nuclear weapons tend to argue (from two different angles) that there are uses of nuclear weapons that would not contravene international humanitarian law, and that therefore doctrines and policies constructed around such uses are consistent with international law.

A central post-cold-war justification for keeping nuclear weapons is that they are an insurance against future uncertainty, unknown or unforeseeable security threats. Proposing the UK White Paper on replacing Trident, Tony Blair exemplified this approach: 'Our independent nuclear deterrent is the ultimate insurance.'²⁰ An insurance against what? Nuclear attack? War? Conventional attack? Occupation? Loss of our coastal regions due to climate change? Tony Blair tries to explain:

The whole point about the deterrent is not to create the circumstances in which it can be used but on the contrary to try to create circumstances in which it is never used.²¹

Quite what this means in operational terms is kept ambiguous, although the Ministry of Defence may now be willing to reduce its requirement of 'continuous at sea deterrent' patrols, necessitating a fleet of four nuclear submarines armed with 48 warheads six times more destructive than the Hiroshima bomb on long range Trident ballistic missiles. Defending its position to the ICJ a few years earlier, UK leaders sought to evade the assumption that the use of nuclear weapons was essentially inhumane by positing hypothetical scenarios in which a nuclear weapon might be used at sea as a 'shot across the bows' of an aggressor and barely harm anyone:

[...] Nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.²²

²⁰ Tony Blair, House of Commons, Statement on Trident to the UK Parliament, December 4, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/6207584.stm (last visited 22 September 2011).

²¹ *Ibid.*

²² United Kingdom, Written Statement, at 53, para. 3.70, quoted in *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 7, at 261-262, para. 91.

The American arguments were broadly similar. France, by contrast, does not tip-toe around the question of whether their nuclear weapons would cause unacceptable civilian harm.

All those who would threaten our vital interests would expose themselves to severe retaliation by France resulting in damages unacceptable to them, out of proportion with their objectives. Their centres of political, economic and military power would be targeted on a priority basis.²³

Whether a state says it relies only on 'second strike' deterrence, such as China and India, or on 'tailored deterrence' with an option of first use, such as the NATO states, Russia, Pakistan and probably Israel, the fact remains that deterrence doctrines requires that in deploying these weapons of terror, governments and militaries must be sufficiently convincing in their postures and threats that a potential adversary would believe them enough to be deterred by this from launching their own nuclear weapons or, if the adversaries are non-nuclear, other forms of relevant aggression.

This is a tall order, with a great capacity for confusion, miscalculation and disaster. When analysts point out all the wars in which nuclear-armed states failed to deter aggression, and in some cases suffered ignominious or political defeat – such as Vietnam (the United States), Afghanistan (Soviet Union), Falklands/Malvinas (United Kingdom) – the stock answer from nuclear proponents is that these were not the kind of wars that nuclear weapons were meant for. Likewise, nuclear deterrence won't work on terrorists. Tony Blair had to acknowledge: 'I do not think that anyone pretends that the independent nuclear deterrent is a defence against terrorism.'²⁴ Similarly, the US administration of George W. Bush admitted in the 2002 US National Security Strategy: 'We know from history that deterrence can fail; and we know from experience that some enemies cannot be deterred.'²⁵

Such admissions seldom reach the public, who continue to be fed on the reassuring seductions of nuclear deterrence to ensure that they continue to acquiesce in keeping nuclear forces going. People are essentially decent

²³ Statement by Nicolas Sarkozy, President of the French Republic, during the presentation of *Le Terrible*, Cherbourg, 21 March 2008, quoted in R. Johnson, 'Is the NPT Being Overtaken by Events?', 87 *Disarmament Diplomacy* (2008).

²⁴ Speech by Tony Blair to the House of Commons, 19 October 2005, quoted in 'UK Trident Replacement a "Material Breach" of the NPT', 81 *Disarmament Diplomacy* (2005).

²⁵ US National Security Strategy 2002, at 30, available at http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf (last visited 18 August 2011).

and humane so governments garner public acquiescence on the basis that 'our' nuclear weapons are not to be used for killing, but are merely to deter other potential killers. In a statement to the House of Commons, UK Prime Minister Tony Blair used 'deterrent' or 'deterrence' to describe British or American nuclear weapons and policies twenty-three times. By contrast, the term 'nuclear weapon' appeared only six times, in relation to North Korea, Iran, Russia and China, as well as in the term 'nuclear weapon states'.²⁶ The implication is that *they* have nasty dangerous nuclear weapons (or ambitions to acquire them), while *we* have a nice safe 'nuclear deterrent'. Such linguistic strategies have fostered a psychological and emotional cementing together of the concepts of nuclear weapons and deterrence; but they cannot create a logical or factual connection if one does not exist.

While deterrence is inherently unprovable and unverifiable, the past five decades have witnessed several near misses that could have had catastrophic consequences. Though a potent taboo against launching nuclear weapons appears to have become embedded in the military cultures of most possessor states, the NPT failed in its mission to create a normative barrier against possessing nuclear weapons, though it did place legal and technical hurdles in the path of wannabe proliferators. For the first time in the NPT context, the 2010 Review Conference debates and outcomes reflected the unsustainable disconnect between the perceived value of possessing nuclear weapons and the normative taboo against using them, which has profound implications for non-proliferation and security.

Furthermore, the euphemisms of deterrence are used to mask the real implications of nuclear deployments, in which 'countervalue' targets – cities, communications and transport centres – are as important as 'counterforce' military targets. Nuclear deterrence starts off by sounding moral and reassuring: who wouldn't want a magic bullet that can ward off war, aggression and all other kinds of mass destructive weaponry while providing ultimate insurance against uncertain situations and unknown future threats? But for the voodoo to work, not only we but all others have to believe in it, because if they don't, then the nuclear 'last resort' will be fired at innocent non-combatants and risk the annihilation of everything worth living for. Though the ICJ in 1996 ended up equivocating over the question of whether

²⁶ See Blair, *supra* note 20; for analysis of the ways in which deterrence is employed by politicians to gain acceptance for nuclear weapons, see R. Johnson's introductory essay, 'Turning Back From Doomsday', in Commander R. Green (Royal Navy, retired) (ed.), *Security Without Nuclear Deterrence* (2010) 15; the whole book provides a wealth of research and analysis on the myths and failings of nuclear deterrence.

the threat or use of nuclear weapons might be 'lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake',²⁷ the President, who gave the casting vote, stated at the time:

[T]he use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.²⁸

Those advocating nuclear weapons for insurance and deterrence are left with a conundrum wrapped in a paradox wrapped up in the irrationalities of deterrence theory: if nuclear weapons are launched to preserve a state's survival, the state will probably not survive. Moreover, how can a state's nuclear policies and operations be sufficiently convincing to deter without violating international law or risking preemptive strikes or, indeed, providing the rationales that others – including new proliferators – could use to justify acquiring such potent weapons of terror/deterrence?

It is a principle of law that if a particular act is unlawful then threatening to commit that act is likewise against the law. It should therefore follow that nuclear doctrines of deterrence (which by their logic must threaten to use nuclear weapons in certain conditions) are also unlawful. If so, then it is difficult to see how any government that respected the rule of law could continue to deploy nuclear weapons. And if they cannot be deployed, then what would be the point in possessing and keeping such expensive and useless arsenals? By that logic, we should expect the nuclear weapon possessors to be at the front of the queue to negotiate and accede to a comprehensive nuclear abolition treaty, as they did on biological weapons in 1972 and chemical weapons in 1993.

The rational approach to preventing the use and threats associated with nuclear weapons is through abolishing and eliminating nuclear weapons for everyone. This is what the vast majority of non-nuclear weapon states have argued for years. In 2007, experience and 'realist' logic led George Shultz, Henry Kissinger, William Perry and Sam Nunn to a similar conclusion

²⁷ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 7, at 266, para. 105(e).

²⁸ Declaration of President Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 7, at 273, para. 22.

when they declared that reliance on nuclear weapons for deterrence was 'becoming increasingly hazardous and decreasingly effective'. Twenty years on from the Reykjavik summit, the most significant of the Wall Street Journal op-eds from these retired US leaders on defence and security issues, argued that the goal of a world free of nuclear weapons – as shared by Reagan and Gorbachev in 1986 – needed to be re-established and action 'energetically taken' on 'a series of agreed and urgent steps that would lay the groundwork for a world free of the nuclear threat'.²⁹ Within a couple of years, however, the 'Four Horsemen' had been pulled back into the nuclear fold. Their third op-ed, published in 2010, justified spending billions of additional dollars on the upkeep of US nuclear weapons and laboratories, falling back on familiar, short term arms control trade-offs that have for many years undermined the longer term interests of US and international security as well as disarmament efforts.

IV. The Security Case for Banning Nuclear Weapons

The raising of public awareness turned the tables and made treaties banning landmines and cluster munitions possible against the wishes of some of the most dominant military powers in the world. But the hold of the pro-nuclear establishments in the nuclear-armed countries and some of their allies (notably in NATO, Japan and South Korea) is stronger than for landmines or cluster bombs. That should not be surprising, since nuclear weapons have long been accorded elevated status and properties as a strategic asset. In these countries, powerful interests, institutions and structures have developed around the objectives of getting and keeping nuclear weapons. Unlike for most other weapons systems, associated interests and institutions have also become established around nuclear arms control and non-proliferation. Though they have the declared purpose of restricting nuclear weapon numbers and access (for some), the arms control establishment does little if anything to devalue and delegitimise the weapons and doctrines; thus they perpetuate

²⁹ H.A. Kissinger *et al.*, 'A World Free of Nuclear Weapons', *Wall Street Journal*, 4 January 2007, at 15; this group is sometimes referred to as the Hoover 'Gang of Four' or the Four Horsemen. Henry Kissinger was President Nixon's Secretary of State in the 1960s and '70s, George Shultz was President Reagan's Secretary of State in the 1980s, William Perry was President Clinton's Defense Secretary in the 1990s, and Sam Nunn was a long time Chair of the Senate Foreign Relations Committee and architect (with Senator Richard Lugar) of legislative and political initiatives on cooperative threat reduction at the end of the cold war.

the assumptions and infrastructures that impede efforts to pursue genuine nuclear disarmament.

There is, however, a compelling security case to be made for pursuing nuclear abolition. A seldom-acknowledged problem for advocates of the current structures and approaches of arms control and non-proliferation is that they are failing to deliver their own objectives, let alone the nuclear disarmament goal implied in the 'world without nuclear weapons' rhetoric that since President Obama's Prague speech has been inserted into UN Security Council Resolution 1887 (2009), the 2010 US Nuclear Posture Review, and the 2010 NPT Review Conference's final document. Though glossed over with clever linguistic compromises, the limitations of the traditional non-proliferation and arms control approaches came to a head in the NPT Review Conference.

Apart from the watered down references to international humanitarian law and a nuclear weapons convention in the passages quoted at the beginning of this essay, the 2010 Review Conference failed to get much further than the level of commitments adopted by the 2000 Review Conference. Ten years on, some of these were dropped while others were reaffirmed, reflecting that they are still a long way from being implemented. Nor was disarmament the only issue where images of agreement were prioritised over tackling the substantive problems. The adopted text was unable to go much beyond reaffirmations, exhortations and language agreed in 1995 or 2000 on universality, strengthened safeguards and the IAEA's additional protocol, export controls, or the safety and security of nuclear materials, transportation and facilities. After almost a decade of debates on disincentives to make withdrawal from the treaty more difficult and to increase the NPT regime's tools for accountability, compliance and implementation, there was no consensus on these important issues in the conclusions and recommendations. Similarly, arms control may be laudable, but the reductions will not go far under this process, which is primarily a bilateral game for Russia to re-establish its strategic relationship with the United States. While overall numbers of weapons are cut, arms control appears to have the counter-productive side effect of increasing the value and status attached to possessing at least some nuclear weapons. The nuclear modernization programmes that accompanied numerical reductions in the arsenals of several nuclear-armed states, as well as President Obama's difficulties getting ratification of the CTBT and START through a parochial and partisan Senate, have underscored why this approach continues to foster nuclear business as usual, with attendant contradictions and proliferation incentives.

With non-proliferation and arms control approaches failing, the inability of the NPT machinery to deal with noncompliance and to strengthen its own verification and implementation processes adds a strong security plank to the humanitarian case for pursuing the abolition of nuclear weapons. Whilst acknowledging the importance of the NPT in containing proliferation, the message from the 2010 Review Conference was that dealing with nuclear weapons dangers in the 21st century will require genuine progress towards establishing 'the necessary framework to achieve and maintain a world without nuclear weapons'.³⁰ The limitations of arms control and non-proliferation will only be overcome by a universal approach aimed at achieving a global nuclear abolition treaty. Such an approach is needed to build a stronger and more sustainable regime to ban nuclear weapons for everyone, reinforce what is best in the non-proliferation system and establish stronger verification and safeguards mechanisms to prevent nuclear proliferation or terrorism.

Traditionally it has been assumed that this could only be initiated by the nuclear weapon states, since they are the ones that have to manage the actual reductions in their arsenals. Their view of national military security has thus dominated and blocked considerations of the processes and timelines for getting to zero.³¹ By focussing on the numbers and masking dilemmas of use in the platitudes of deterrence, the traditional arms control approach keeps getting stuck on the complexities of strategic balance and stability, resulting in the political, security and verification difficulties being exaggerated, all of which plays into the interests of the nuclear establishments in the nuclear-armed states – and, incidentally feeds the professional interests of the arms control establishments too, since their jobs and funding all too often depend on keeping the process going round in complex circles.

The humanitarian approach to disarmament radically changes the perspective and strategy. Military operations that harm large numbers of civilians are no longer tolerated. Instead of setting daunting preconditions and being obsessed by processes, humanitarian approaches for disarmament focus on human security objectives and try to work out a practical route to remove the threats that the weapons pose to the security of people and

³⁰ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1.

³¹ Examples of this are too numerous to list; for one of the most thoughtful analyses, which nonetheless falls into this trap, see G. Perkovich/J.M. Acton, 'Abolishing Nuclear Weapons', Adelphi Paper No. 396, International Institute for Strategic Studies (2008), available at http://www.carnegieendowment.org/files/abolishing_nuclear_weapons_debate.pdf (last visited 18 August 2011).

environments.³² In arms control, the weapons possessors dictate the pace and terms. Taking the humanitarian disarmament approach, by contrast, confers responsibilities and obligations on everyone. The doctrine of 'responsibility to protect' vulnerable people provided a basis for challenging the national sovereignty of Westphalian states in situations where human rights were being systematically violated by dictators and inhumane governments. In similar ways, humanitarian disarmament approaches challenges traditional notions of national defence and security that are based on sacrificing or targeting the homes, environment, security and lives of the people. This not only allows the non-nuclear-weapon states to initiate disarmament actions, but in the absence of effective action by the weapons possessors, it requires others to take the lead. Until now, the weapons possessors have marginalised or dismissed the concerns and interests of countries that do not themselves pose a nuclear threat. From now on, countries that have renounced nuclear weapons themselves will begin to set the pace and terms of nuclear disarmament action.

V. Next Steps to Outlaw and Abolish Nuclear Weapons

*Weapons of mass destruction cannot be uninvented. But they can be outlawed, as biological and chemical weapons have been, and their use made unthinkable. Compliance, verification and enforcement rules can, with the requisite will, be effectively applied. And with that will, even the eventual elimination of nuclear weapons is not beyond the world's reach.*³³

In 2009, President Barack Obama declared 'clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons'.³⁴ He appeared to understand what is at stake by reminding people:

'One nuclear weapon exploded in one city – be it New York or Moscow, Islamabad or Mumbai, Tokyo or Tel Aviv, Paris or Prague – could kill

³² See, for example, Lewis, *supra* note 16.

³³ Weapons of Mass Destruction Commission, 'Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms', Final Report, 1 June 2006, at 17, available at http://www.un.org/disarmament/education/wmdcommission/files/Weapons_of_Terror.pdf (last visited 22 September 2011).

³⁴ Barack Obama, President of the United States of America, Speech at Hradcany Square, Prague, 5 April 2009, available at http://www.whitehouse.gov/the_

hundreds of thousands of people. And no matter where it happens, there is no end to what the consequences may be – for our global safety, security, society, economy, and ultimately our survival.³⁵

Talk of a world free of nuclear weapons without being prepared to consider the legal and technical framework that would be needed to mandate and oversee the process of disarmament is little more than rhetoric. In practice, US policies under Obama have been dedicated (like his predecessors') to refurbishing a US nuclear arsenal with thousands of weapons and resisting calls for a comprehensive process to abolish nuclear armaments globally. A smoker who pledges to give up, but then pulls back, murmuring 'perhaps not in my lifetime' clearly needs help from others.

As the NPT outcome made clear, genuine progress towards realising security in a world free of nuclear weapons will require not only concrete disarmament steps but the establishment of 'the necessary framework to achieve and maintain a world without nuclear weapons'. The concept of a nuclear weapon convention has been around for decades, discussed in the United Nations and promoted by a number of governments and NGOs. In October 2008, the UN Secretary-General highlighted consideration of such a treaty in his five-point disarmament proposals and talked about states pursuing the goal of nuclear disarmament through agreement on a framework of separate, mutually reinforcing instruments or by 'negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations'.³⁶

Those seeking to eliminate nuclear dangers and threats *in our lifetimes* need to stop tip-toeing around the perceived interests of the nuclear-armed

press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/
(last visited 18 August 2011).

³⁵ *Ibid.*

³⁶ UN Secretary-General Ban Ki Moon, Speech to the EastWest Institute Consultation on Breakthrough Measures to build a new East-West Consensus on WMD and Disarmament, New York, 24 October 2008; the text to which he referred is an NGO-drafted Model Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Nuclear Weapons and on their Elimination that was submitted by Costa Rica to the UN General Assembly and issued in the UN languages as UN Doc. A/C.1/52/7; this was updated and reissued in M. Datan *et al.* (eds.), *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention* (2007); as noted by the Secretary-General, the research and the options discussed in these model texts can a useful resource and starting point for consideration of what needs to be addressed as part of a multilateral treaty-making process.

states and proliferators and put the humanitarian imperative front and centre of disarmament action. Those clinging to nuclear deterrence need to wake up to the 21st century. One of the most effective ways to deter terrorists or other potential nuclear weapon users is to treat the use of nuclear weapons as a crime against humanity and hold suppliers and traffickers to account as well as governments and other relevant state and non-state leaders. To build confidence for nuclear abolition and deter adversaries from using nuclear weapons, it is imperative now to bring forward the recognition in law of the widely accepted humanitarian understanding that any use of nuclear weapons would be a crime against humanity.

Instead of watching as the nuclear possessor states tinker with their nuclear doctrines, declaratory policies and conditional security assurances, the non-nuclear weapon states need to take the lead to rule out the use of nuclear weapons altogether. Global security and deterrence would be enhanced if nuclear weapon possessors, proliferators and suppliers finally accepted that there are no circumstances in which the use of nuclear weapons would be acceptable or consistent with international humanitarian law. Declaring the use of nuclear weapons a crime against humanity would not eliminate nuclear dangers overnight, but would have major impact in taking nuclear weapons off the list of objects of political status and desire. Such a declaration would greatly diminish any perceived gains and so tilt the political calculus away from nuclear weapons use and proliferation. If the Security Council cannot lead on this issue because five major nuclear weapon states hold veto power as the P-5 permanent Council members, then there are alternatives that could be worth pursuing, including amending the Rome Statute that established the International Criminal Court.³⁷

If governments are slow to act, particularly in countries that are part of nuclear-military alliances, such as NATO and Japan, then individual citizens, parliamentarians, local governments and city mayors could play a very influential role in raising awareness of what is at stake. One initiative,

³⁷ For developing perspectives on this, see R. Johnson, 'The Missing Link: Political Decision and Will to Build and Manage Security Without Nuclear Weapons', in H. Swoboda/J.M. Wiersma (eds.), *Peace and Disarmament: A World Without Nuclear Weapons?* (2009) 77; R. Johnson, 'Towards 2010 and Beyond: Security Assurances for Everyone', 90 *Disarmament Diplomacy* (2009), available at <http://www.acronym.org.uk/dd/dd90/90sa.htm> (last visited 18 August 2011); and R. Johnson, 'Nuclear Weapons Abolition: An Idea Whose Time Has Come', 8 *Blackaby Papers* (2010), available at <http://www.abolition2000uk.org/Blackaby%208%20final%20complete%20with%20cover.pdf> (last visited 18 August 2011).

begin at grassroots level in Britain, educates the general public on these issues by inviting them to sign 'affirmations' that they regard the use of nuclear weapons to be a crime against humanity and telling nuclear-armed governments that their own citizens do not want nuclear weapons to be threatened or used on their behalf.

The body of International Humanitarian Law already provides a strong legal framework for recognizing that the use of nuclear weapons would be unlawful. On this basis, it would be useful to develop alternatives to the current system of partial and conditional negative security assurances (NSA) granted by the nuclear powers, which have the unintended consequence of increasing the value attached to nuclear weapons by nuclear-armed states and nuclear alliances, while leaving others feeling more vulnerable. What is now needed is a universal system of negative and positive security assurances based on the universal recognition that the intentional detonation of a nuclear weapon would constitute a crime against humanity and/or war crime, and that all UN member states have responsibilities to prevent such use, provide assistance to any country threatened or attacked with nuclear weapons, and bring the perpetrators to justice. Deterrence for all peoples would be enhanced by such a legal understanding, which could be promulgated through the UN Security Council or International Criminal Court.

There is no legal or political need to attempt multilateral negotiations on a 'no use treaty'. This would likely be counter-productive. The task at this time is to use existing law and fora to gain broader political and legal recognition that all military and terrorist uses of nuclear weapons would, in fact, be contrary to international law. The priority negotiating goal needs now to be some form of treaty for the comprehensive prohibition of the use, development, production, acquisition, stockpiling and transfer of nuclear weapons and nuclear weapon technologies and components. If for convenience and consistency with biological and chemical weapons this objective is called a nuclear weapons convention, it is not to be confused with the 'model nuclear weapons convention' developed by NGOs in the 1990s and circulated through the United Nations. That served its purpose of demonstrating that technical, verification and legal issues could be responsibly dealt with in a multilateral legal instrument, but governments now need to embark fresh on the task of negotiating an effective treaty for themselves.

Arms control advocates that insist that the major possessors would have to reduce their arsenals down to zero or near zero first or establish peaceful secure relations with each other (regionally and internationally) are getting the process the wrong way round and setting up unnecessary hostages and obstacles. As with the 1993 Chemical Weapons Convention, a nuclear

weapons convention would either establish a target dates for the nuclear-armed states or would negotiate and set out realistic benchmarks, timetables and conditions for the verified dismantlement and elimination of existing nuclear forces – warheads, and where required, delivery vehicles. As with the chemical and biological weapons regimes, a nuclear prohibition treaty would build on and eventually incorporate and supersede previous legal instruments. In practical terms it would do all the things that UNSC resolution 1887 called for, enhancing nuclear security, reinforcing the nonproliferation regime and implementing a host of UN Security Council resolutions dealing with weapons of mass destruction, nuclear safety and security and terrorism. As the 1963 Partial Test Ban Treaty remains valid but is superseded by the far more comprehensive CTBT, which drew in key hold-out states such as China and France and provided a multi-faceted verification regime to oversee implementation of a ban on testing in all environments, the NPT would remain valid and important until its security role had been fully covered by a comprehensive and internationally verifiable nuclear weapon prohibition treaty.

One of the major incentives for pursuing a nuclear ban and treaty is to draw states that have remained outside the NPT – most notably India, Israel and Pakistan – into accepting increasing levels of restraints and controls on their weapons programmes. The NPT cannot realistically be amended to admit additional countries to join as nuclear weapon states; and the obligatory calls on these states to join the NPT as non-nuclear weapon states are now just ritual, carrying little expectation and even less likelihood of being acted on. To be effective, a nuclear weapon abolition treaty would need to go beyond the NPT to restructure the international nuclear security regime and establish much more effective mechanisms and controls to prevent the further proliferation, development and acquisition of nuclear weapons technologies and materials. It would need stringent enforcement provisions to roll back proliferation and monitor implementation of the phases and conditions under which all nuclear weapons and facilities would be decommissioned, dismantled and their materials rendered safe and secure. The process of negotiations would itself contribute to strengthening the barriers to proliferation, establishing targets, stages and verification for the elimination of existing arsenals and closure of nuclear weapon research and production bases, converting remaining facilities to serve the purposes of verification, disarmament and nuclear security. As the quote above from the WMD Commission chaired by Hans Blix underscored, the technical, political, compliance, verification and enforcement challenges can all be resolved, with requisite will and determination. Instead of getting

hung up on the details, the humanitarian challenge is to convince enough people to start the nuclear abolition process rolling.

VI. Conclusions

Deciding to pursue nuclear disarmament through humanitarian action rather than arms control will require a change in priorities, perspectives and processes, but is likely to yield significant results far more quickly than thought possible in the arms control and non-proliferation paradigms. In the aftermath of the 2010 Review Conference, the direct, compelling objective of a nuclear weapons convention will mobilise far more effectively than a menu of incremental measures, however laudable. If the weapons holders are not ready to join a nuclear abolition process at the beginning their reluctance no longer means that nothing can be done. Unlike arms control, the humanitarian imperative puts the onus for action on everyone. Leadership needs to come from a representative group of cross-regional non-nuclear weapon states, in partnership with civil society. For this to happen, civil society around the world – in nuclear and non-nuclear countries alike – needs to connect with humanitarian, human rights and development advocates and build broader public and political movements. We've tried to make the frameworks and processes of arms control and non-proliferation work for many years, and must now accept that disarmament in the 21st century requires more than these are capable of delivering.

International humanitarian law provides us with tools for taking a new, transformative approach that can lift the damoclean sword of nuclear annihilation from our lives once and for all. Our challenge is not to get thousands into the streets, as occurred during the 1960s and 1980s, but to target arguments and demands for political and diplomatic action to abolish nuclear weapons and create irresistible pressure on parliamentarians and governments to deliver.