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Beyond the Security Debate: The Moral and Legal Dimensions of Abolition

The greatest strengths of *Abolishing Nuclear Weapons* are the determined willingness of the authors to map out many of the myriad challenges to abolishing nuclear weapons; their insistence that these challenges can be considered seriously; and their exploration of how to overcome them and achieve the goal.

Among its notable weaknesses are the almost exclusive focus on nuclear weapons abolition as an issue of international security and the need to better secure the current global order; the primacy of state interests; and the reliance on a balance of power ethic in making arguments. These failings are all perfectly understandable, given that the intended audience for the paper is the security policy community, which for the most part shares all of these perspectives. The closed nature of the dialogue is apparent in the report's primary recommendation: that analysts from elite think tanks in both nuclear-armed states and non-nuclear-weapon states, with support of governments and foundations, should meet and talk seriously about abolishing nuclear weapons.

To understand more fully the possibilities and challenges of such abolition, and to achieve the goal, it would be useful to expand the traditional security policy debate over nuclear weapons by considering moral and normative arguments for abolition; the role of international law and institutions as well as civil society and social movements in securing and enforcing nuclear weapons abolition; and the relevance of nuclear secrecy in a disarmed world.

Some reflections on these themes inspired by the Adelphi Paper follow. For reasons of space and time, I do not take up the vexed question of the future of nuclear energy in a disarmed world (the focus of chapter 3 in the paper). Suffice it to say that a strong case can be made that an expansion of nuclear energy is neither feasible nor desirable and that, as the preeminent U.S. nuclear weapons designer Theodore B. Taylor (1925–2004) argued, a nuclear-weapon-free world would be far more sustainable as part of a double abolition: an end to nuclear weapons *and* to nuclear energy.¹

Nuclear Abolition as Policy and as Politics

The paper lists five general national security-based reasons that nuclear weapons should be abolished (curiously, these are laid out in the conclusion). The paper also outlines in chapter 1 some steps that nuclear-armed states would have to take on the path to zero, concerns that might arise, and ways to resolve some of them. It does not, however, analyze the implications of how policy makers in nuclear-armed states, as part of their internal policy debates, might argue for or justify abolition to domestic public audiences, to rival states and allies, and to the broader international community. Nuclear abolition as a policy problem needs to be situated in the politics of nuclear disarmament.

Nuclear weapons, first and foremost, are weapons. They are instruments of violence and the threat of violence. The strategies and policies for their development, deployment, and use are not contained within them—they are given meaning and purpose by politics.

All of the nuclear-armed states have told themselves, their people, and the world that their weapons are necessary for their national defense. Moreover, these states all have a nuclear-weapon complex that will resist efforts at abolition. The British historian and peace activist E. P. Thompson described this complex as comprising “the [nuclear] weapons system, and the entire economic, scientific, political, and ideological support system to that weapons system—the social system which researches it, ‘chooses’ it, produces it, polices it, justifies it, and maintains it in being.”² Together, these will make it politically difficult—impossible, some might say—for leaders in these states to make a case for abolition that does not in some way rest on arguments that getting rid of nuclear weapons would make their respective country more secure.

Some arguments that policy makers may advance for abolition will certainly conflict with long-standing official narratives of national security that have served to justify a role for nuclear weapons. These arguments may trigger debates about what, if anything, could fill the nuclear-weapon-

shaped hole that would result from the abolition of nuclear weapons. The pursuit of disarmament may become tied to the search for reassurance through technological, strategic, and political substitutes for nuclear weapons. Other arguments for abolition may claim that eliminating nuclear weapons would not actually undermine the security calculation of a nuclear-armed state, but would in fact strengthen its position relative to rivals and in the international system. Such an argument could complicate efforts by some other states to make a case for disarming.

A simple example may help illustrate the point. In 1999, Secretary of State Madeleine Albright sought to promote ratification of the Comprehensive Test Ban Treaty (CTBT) by the U.S. Senate by arguing that the CTBT served to create a major U.S. advantage: "Under the CTBT, America would gain the security benefits of outlawing nuclear tests by others, while locking in a technological status quo that is highly favorable to us. We have conducted more than 1,000 nuclear tests—hundreds more than anyone else. We do not need more tests to protect our security. Would-be proliferators or modernizers, however, must test if they are to develop the kind of advanced, compact nuclear weapons that are most threatening."³ At the same time, to preserve an apparent U.S. advantage and to maintain and placate the nuclear-weapon complex, the Clinton administration established the Stockpile Stewardship Program, which aimed to continue U.S. nuclear-weapon design and development capabilities without the need for testing. Together, the "we win" argument, and the pursuit of a technical back door out of the CTBT have inspired lasting doubt about the value of U.S. accession to the treaty.

It is easy to imagine that domestic debates about nuclear-weapon abolition, especially in the United States, would involve similar arguments and compromises and would raise concerns in other states. Other states would have their own domestic arguments and compromises, but not all of these would be as open to international scrutiny or as important to others as the U.S. debate. It is possible to imagine that the arguments in all these states about how to maintain balances of power and pursue relative advantage (while keeping a nuclear option) might lead to agreement on abolition. But it is just as likely, if not more likely, that these policy debates, all of which would be based on power, mistrust, threat, fear, and violence, could combine to derail the whole process.

It is possible to overcome some of the potential problems over nuclear-weapon abolition that result from arguments based purely on national security and national interest by broadening the frame to include normative, moral, and legal considerations.⁴ These considerations, in fact, should

be the center of the debate rather than at the margins, because public justifications offered for nuclear weapons are always rooted in claims about the responsibility of states to protect citizens, territory, sovereignty, and “national interests.”

Apart from their intrinsic merit, arguments for abolition that are normative, moral, and legal have the added benefit of being available equally to all states: They are universal in application and can be used consistently both at home and abroad. They also serve both to expand the elite policy process and to mobilize domestic constituencies for a policy of abolition that can help counter opposition from the nuclear complex. Finally, these arguments serve to strengthen a way of thinking, a set of values, and national self-images that can create a particular kind of community that would help restrain states from building nuclear weapons and taking other kinds of hostile action, including resorting to war.

It is possible, for example, to imagine nuclear-armed states justifying their move toward abolition by recalling that the very first United Nations General Assembly resolution, in January 1946, called for “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction” and the 1961 UN General Assembly resolution that “any state using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.” Making the case for nuclear weapons abolition in terms of a widely shared vision of an international community and the sense that such weapons are intrinsically a crime against humanity—and should be seen and treated as immoral, illegal, and illegitimate—would take nuclear weapons away from questions of national security, the balance of power, and the possible loss of relative military or political advantage, while not creating insecurities in other societies. It would put the onus on any nuclear-armed state wishing to keep its weapons to explain why its security interests or those of its allies require the capability and intention to commit a crime against humanity.

Framing abolition in moral terms would also enable greater public participation in many if not all countries in challenging efforts to acquire and threaten to use nuclear weapons. The power of social movements, civil society, and public opinion in confronting and restraining nuclear weapons policies in their respective states, and globally through their practice of a politics of affirmative internationalism—supported by many non-nuclear-weapon states and international organizations—has been well documented by historian Lawrence Wittner in his history of the anti-nuclear movement

since 1945 and in Nina Tannenwald's study of the origin and power of the nuclear taboo that has helped prevent the use and even limit explicit threats of use of nuclear weapons for over sixty years.⁵ The role of such citizen action is not limited to protest or to the creation and maintenance of broad norms of state conduct. It is often built on challenging and overturning specific nuclear weapons policies, programs, and institutions, and appears not be restricted to formally democratic societies.⁶

In sum, the stories that nuclear-armed states tell themselves, tell each other, and tell the world at large about why they are giving up nuclear weapons will matter. In most cases, there will be more than one audience for these stories and, depending on the story, the responses of the various audiences may differ in important ways. The framing and possible conflicts between the domestic and the international arguments for abolition that various countries present may determine how (and even whether) disarmament goes ahead, the nature and viability of the process, and the perceived legitimacy and stability of the end result.

It would be useful as a next step for the authors and others to consider how policy makers in nuclear-armed states could frame arguments for abolition in ways other than managing national and international security. Arguments that are not located in calculations of how to preserve the status quo, and the utility of power and violence may contribute better to mobilize support for abolition, build confidence in the good faith, inevitability, and irreversibility of the disarmament process and the global security benefits that it would bring.

Abolition as a Management Strategy

The Adelphi Paper presents nuclear-weapon abolition fundamentally as a way to reduce various proliferation and terrorism risks now facing the international system and to avoid future risks if there is a worldwide expansion of nuclear energy.

The first reason the paper offers for abolition is the need for nuclear-weapon states to be seen as keeping the promises they have made in the Non-Proliferation Treaty (NPT) and thus to preserve a "rules-based international system," without which there would "be a breakdown of nuclear order," resulting in proliferation, arms racing, and perhaps war. Nuclear weapons, in other words, are to be traded for greater stability of the current international system.

The idea of giving up nuclear weapons in exchange for securing the increasingly threatening current international order is at the core of the argument for abolition put forth by Shultz, Kissinger, Perry, and Nunn. Their 2007

op-ed argued “the world is now on the precipice of a new and dangerous nuclear era ... unless urgent new actions are taken, the United States soon will be compelled to enter a new nuclear era that will be more precarious, psychologically disorienting, and economically even more costly than was Cold War deterrence. It is far from certain that we can successfully replicate the old Soviet-American ‘mutually assured destruction’ with an increasing number of potential nuclear enemies worldwide without dramatically increasing the risk that nuclear weapons will be used.”

The authors of the Adelphi Paper, like Shultz and his cohorts, recognize that for 60 years nuclear weapons have played a role in efforts both to maintain and to overturn the global order. For the United States, as one of the earliest studies argued, the fear was that not only might “regular rivals on the same level” acquire these “absolute weapons” but that “possibly some of the nations lower down in the power scale might get hold of atomic weapons and change the whole relationship of great and small states.”⁷⁷ A Bush administration official more crudely made the same point about nuclear weapons, noting that, “It is a real equalizer if you’re a pissant little country with no hope of matching the U.S. militarily.”⁷⁸ It is clear that if this moment has not already arrived, it may be imminent. Abolition is offered now as a way to forestall this development as much as possible. In this sense, nuclear disarmament, once seen as a hallmark of progressive politics, has now become a conservative goal.

The Adelphi Paper refers to nuclear abolition as part of a “renovation project” for the “global nuclear order.” The emphasis on preserving the current order also comes through in the various arguments for what nuclear-armed states’ next steps could be. It also shapes the discussion of enforcement. The paper does not ask, however, whether the global nuclear order, or the larger order of which it is part, should be preserved, let alone whether it deserves renovation.

Regardless of the interests of the nuclear-armed states in maintaining some key aspects of the current order, it is worth considering whether and how the abolition of nuclear weapons could benefit from being explicitly integrated into a larger set of ideas and initiatives aimed at creating a more egalitarian, cooperative, and democratic international community. Such integration may encourage support for abolition by limiting the capability of one or a few states to determine events, create confidence in structures of adjudication of disputes, reduce fears of reversal, promote compliance, and support enforcement actions should they ever be needed.

Abolition need not, however, wait on such a broad global reordering, which may take a long time to achieve. Policies and the politics to

achieve abolition, however, could usefully build upon the larger principles and considerable detail of a widely agreed upon possible reordering of the international system toward greater equity and participation that are already available in many United Nations conventions and resolutions that command the support of the vast majority of states and much of global public opinion.

Power and Law

The Adelphi Paper takes up the important, difficult, and largely neglected question of the enforcement of a worldwide ban on nuclear weapons. It notes, rightly, that determinations of compliance and the application of enforcement mechanisms must emerge from and work through “decision-making avenues and procedures that enjoy international legitimacy.” This is particularly important because “[t]he room for ambiguity and disagreement over enforcing compliance is great.” More important is that given the nature of nuclear weapons, enforcement may well take place in the shadow of war.

The paper focuses on the nuclear-armed states and the UN Security Council as the agents of enforcement of a nuclear-weapon-free world. It recognizes that domestic politics as well as collusion and rivalry among nuclear-armed states will render such enforcement difficult, but it sees no viable alternative. A bigger problem than the Security Council’s many weaknesses is its lack of legitimacy, other than the formal status granted it by the UN Charter. The council’s great freedom of action is made possible by a lack of formal principles other than procedure. Historically, it has been little more than a forum where the practice of great power politics stands in for due process. It lacks fairness, a fundamental basis for legitimacy, because not all members—including the permanent members—are equal in being able to use the Security Council. Given that the Security Council’s nuclear-armed permanent members are protected by the veto, many non-nuclear-weapon states see it as an egregious instance of inequity in the international system. It can offer at best rough justice.

Rather than relying on the Security Council, the cause of nuclear-weapon abolition would be well served by considering how international law and international courts might be the means by which issues of compliance and enforcement are determined. In a noteworthy omission, the paper misses out on a possible role for international law in considering the politics of nuclear abolition and enforcement, except for the suggestion of “making the illicit proliferation of nuclear weapons an international crime” as a transitional measure toward abolition. The paper does not cite

the 1996 International Court of Justice unanimous advisory opinion that under the NPT, nuclear-weapon states have “an obligation to pursue in good faith *and bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects”⁹ [emphasis added].

Nuclear-armed states have traditionally refused to take international law and international courts seriously. The United States itself, which was responsible in large measure for creating the UN system and hence the International Court of Justice, accepted the authority of the court for many years—until the court ruled against it.¹⁰ The 1996 advisory opinion, in fact, has had little effect on the United States or, for that matter, on any of the other nuclear-weapon states that are parties to the NPT.

The recourse to international law and international courts for determining if, when, and how to enforce a nuclear-weapon-free world would bring significant benefits for all. Law has its own characteristics, its own history, its own logic, and if it is to function effectively, a certain autonomy and form are required. In particular, law by and large orients itself toward standards of universality and equity. When law is used as part of an effort to codify an inequality or an injustice, it is usually subject to challenge. Law also must be seen to be applied systematically to the situations where it is meant to apply, which is to say, it treats like cases alike. It also must fit properly within the broader principles and expectations shared by a community rather than being simply an ad hoc response to a particular situation. These characteristics, the very foundation of law, would help create a legitimate international response to nuclear proliferation in a disarmed world.

It is possible, for instance, to imagine that as part of the transition to a disarmed world the International Court of Justice, rather than the Security Council, could serve as the body that adjudicates disputes over compliance involving nonproliferation, arms control, and abolition agreements. Under Article 36 of the Statute of the International Court of Justice, states can choose to accept as binding the court’s findings regarding the interpretation of treaties and the determination of a breach of an obligation.¹¹ Alternatively, the International Criminal Court could serve as the appropriate body, given that it already has responsibility for crimes of genocide, crimes against humanity, and war crimes.¹² It will also have jurisdiction over cases involving the crime of aggression, once state parties establish a definition of “aggression” and the conditions under which the court could exercise its jurisdiction. Were this definition of aggression to include the development of a nuclear weapon, then proliferation could fall under the Court’s jurisdiction. Rather than a role as self-serving judge, jury, and

executioner, the Security Council then could act as the legally mandated enforcer of the decisions of an independent international court.

What's the Big Secret?

Secrecy has always been a central feature of the politics of nuclear weapons, despite the recognition as early as June 1945 by some of the scientists working on the Manhattan Project that it would be “foolish to hope that this [secrecy] can protect us for more than a few years” from other states developing nuclear weapons.¹³ This understanding was crystallized most famously in the 1947 statement by the atomic scientists, issued by Albert Einstein: “For there is no secret and there is no defense; there is no possibility of control except through the aroused understanding and insistence of the peoples of the world.”¹⁴

Nuclear-armed states have sought to protect what they regard as critical information about such matters as nuclear-weapon arsenals, weapon designs, and the properties of weapon materials on the grounds that secrecy conceals their military capabilities from adversaries and prevents nuclear-weapon proliferation. Recently, the threat of nuclear terrorism has been added as a justification for wide-ranging secrecy.

The Adelphi Paper recognizes the current importance of secrecy about nuclear weapons. It mentions, among others, “sensitive design information,” “classified design details,” “sensitive information,” and “sensitive details.” The authors recognize that this secrecy would make verification of the dismantlement of nuclear weapons and the disposition of weapon materials both more difficult and more costly.

The authors do not ask, however, how much of this secrecy, if any, would be required in the transition to a nuclear-weapon-free world and in a world that is free of such weapons. A great deal of information that nuclear-armed states currently treat as a national security secret—a result of nuclear-weapon laboratories and military forces tasked with using nuclear weapons—could be released because nuclear weapons would no longer play a role in national military policy. Furthermore, states could no longer claim that this secrecy was critical to prevent enemies from learning nuclear-weapon information. Why, for instance, should the mass, shape, composition, or isotopics of highly enriched uranium or plutonium in a nuclear weapon continue to be secret in a world that prohibits nuclear weapons? The real challenge in building a nuclear weapon is to produce these materials in sufficient quantity, rather than the issue of bomb design.¹⁵

More generally, it would be useful to clarify what nuclear-weapon-related information should be released to make it easier to detect violations

of an international prohibition on the production of nuclear-weapon materials. From the viewpoint of securing abolition, it would be best to make public as much information as possible about nuclear-weapon design. Doing so would make it much easier for citizens to recognize and blow the whistle on a covert program.

Nuclear weapons complexes may resist efforts at such openness. Secrecy has been a way for the nuclear-weapons complex to protect itself from proper governmental and public oversight.¹⁶ More broadly, secrecy is an obstacle to democracy and accountability. It is noteworthy that all nuclear-armed states launched their weapons programs without the knowledge of their own people.

Notes

- 1 Theodore B. Taylor, *Nuclear Power and Nuclear Weapons*, Nuclear Age Peace Foundation, July 1996, http://www.wagingpeace.org/articles/1996/07/00_taylor_nuclear-power.htm. For an extended discussion of Taylor's views on the link between nuclear energy and weapons and the dangers this poses, see John McPhee, *The Curve of Binding Energy: A Journey into the Awesome and Alarming World of Theodore B. Taylor* (New York: Farrar, Straus and Giroux, 1974).
- 2 Edward Thompson, "Exterminism and Cold War," in *New Left Review*, *Exterminism and Cold War* (London: Verso Editions, 1982), p. 20.
- 3 Madeleine Albright, "A Call for American Consensus," *Time*, November 22, 1999.
- 4 The interweaving of security calculus arguments for abolition with those based on normative, moral, and legal ones are evident in the contributions to Jonathan Schell, *The Gift of Time: The Case for Abolishing Nuclear Weapons Now* (New York: Henry Holt, 1998). Normative and moral and legal arguments for abolition are made even by leading U.S. security policy makers, see e.g., Paul H. Nitze, "A Threat Mostly to Ourselves," *New York Times*, October 28, 1999; Lee Butler, "The False God of Nuclear Deterrence," *Global Dialogue*, vol. 1, no. 2, Autumn 1999, pp. 74–81; Robert S. McNamara, "Apocalypse Soon," *Foreign Policy*, May/June 2005, pp. 28–35; Max H. Kampelman, "Bombs Away," *New York Times*, April 24, 2006.
- 5 Lawrence Wittner, *The Struggle Against the Bomb: A History of the World Nuclear Disarmament Movement*, 3 volumes, (Stanford: Stanford University Press, 1993, 1997, and 2003); Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945* (New York: Cambridge University Press, 2007).
- 6 See for instance David Cortright, *Peace Works: The Citizen's Role in Ending the Cold War* (Boulder, CO: Westview Press, 1993); Matthew Evangelista, *Unarmed Forces: The Transnational Movement to End the Cold War* (Ithaca, NY: Cornell University Press, 1999).
- 7 Frederick S. Dunn, Bernard Brodie, Arnold Wolfers, Percy E. Corbett and William T. R. Fox, *The Absolute Weapon: Atomic Power and World Order* (New York: Harcourt Brace & Company, 1946), p. 5.
- 8 Bill Keller, "The Thinkable," *New York Times*, May 4, 2003.
- 9 John Burroughs, *The (Il)legality of Threat or Use of Nuclear Weapons*, International Association of Lawyers Against Nuclear Arms (Münster: Lit Verlag, 1997).
- 10 Nicaragua v. the United States of America, 1984. In 1986, the United States withdrew from the compulsory jurisdiction of the court.
- 11 Statute of the International Court of Justice, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.
- 12 International Criminal Court, www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. Note that among the nuclear-armed states, only the United Kingdom and France are parties to the International Criminal Court. The United States, China, and Israel all voted against the Rome Statute establishing the court.
- 13 *Report of the Committee on Political and Social Problems* (The Franck Report), Manhattan Project "Metallurgical Laboratory," University of Chicago, June 11, 1945.
- 14 Albert Einstein, letter on behalf of the Emergency Committee of Atomic Scientists, June 22, 1947, <http://www.fas.org/sgp/eprint/einstein.html>.
- 15 It is often overlooked that the demands of nuclear-weapon design are very small in comparison to the production of fissile materials. The special status given to the physicists at Los Alamos during the Manhattan Project may be responsible for this impression. Far greater effort, resources, and expertise were spent on the production of kilogram quantities of highly enriched uranium and plutonium.
- 16 See e.g., Stephen I. Schwartz, ed. *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940* (Washington, D.C.: Brookings Institution Press, 1998).