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TAKING THE LAW SERIOUSLY: THE IMPERATIVE NEED FOR A NUCLEAR WEAPONS CONVENTION

By

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Why a Nuclear Weapons Convention?

The main article in this issue² makes a strong case for the illegality of nuclear weapons under international humanitarian law and under the rules governing the conduct of the armed forces of the United States. Indeed, one may say that the case is compelling, but then the question arises, whom does it compel? Evidently not the governments of the five “official” nuclear weapons powers³, the United States, United Kingdom, France, China and Russia, nor the four

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² Charles J. Moxley Jr., John Burroughs and Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-proliferation Treaty*

³ Information Circular, International Atomic Energy Agency, INFCIRC/140, 22 April 1970

“unofficial” ones,⁴ Israel, India, Pakistan and probably North Korea, not to mention others which may be working on acquiring or developing nuclear weapons, e.g. Iran.

Jonathan Swift famously said "Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through."⁵ Dean Swift was no doubt referring to the propensity of the law to shrink from prosecuting the lords of the realm, while going vigorously after smaller fry. But his aphorism applies equally to issues: The more portentous the issue, the less likely it is to yield to legal restraints. This is evidenced by such law-less pronouncements as “international law is not a suicide pact”⁶ or, more recently, “I believe that all nations – strong and weak alike – must adhere to standards that govern the use of force. I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation.”⁷ It follows that a compilation of a large volume of laws, treaties, regulations and resolutions, no matter how thorough and exhaustive, from which the illegality of the threat and use of nuclear weapons can be deduced, will not necessarily bring about a nuclear weapons free world.

⁴ *Nuclear Weapons: Who Has What*, Arms Control Association, last updated June 17, 2010, <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat> 5Bartlett’s Familiar Quotations (1968: 388b)

⁶ Attributed to Jeane Kirkpatrick when she was US ambassador to the United Nations, 1981-1985

⁷ President Obama, on receiving the Nobel Peace Prize, 10 December 2009, Nobelprize.org.. In accordance with current US policy the President was presumably also referring to preemptive war, which is of highly doubtful legality under international law.

Indeed, the main article recognizes this dilemma by describing the negative position of the United States, which may be characterized as “desperately seeking *Lotus*.⁸” What is needed, therefore, is a clear, absolute and enforceable mandate, akin to the Biological⁹ and Chemical¹⁰ Weapons Conventions. It is this logic which has led to the movement for a nuclear weapons convention.

A brief history of the movement for a nuclear weapons convention

In 1996, prompted by the ICJ’s Advisory Opinion in the nuclear weapons case¹¹, the Lawyers Committee on Nuclear Policy (LCNP)¹², in collaboration with the International Association of Lawyers Against Nuclear Arms (IALANA)¹³, International Physicians for the Prevention of Nuclear War (IPPNW)¹⁴ and the International Network of Engineers and Scientists

⁸ The *Lotus* case is a much cited and much criticized decision of the Permanent Court of International Justice, holding that “The rules of law binding upon states ...emanate from their own free will as expressed in conventions or by usages *generally accepted* (emphasis added-PW) as expressing principles of law.” 1927, PCIJ, series A, no. 10, p.18

⁹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 26 U.S.T.S. 583, 1015 U.N.T.S. 163.

¹⁰ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 U.N.T.S. 317.

¹¹ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226.

¹² www.lcnp.org

¹³ www.ialana.net

¹⁴ www.ippnw.org

Against Proliferation (INESAP)¹⁵ convened a working group charged with drafting a Model Nuclear Weapons Convention (MNWC). The lawyers, doctors, scientists and others comprising the group met repeatedly over a period of several months. Their purpose was not to produce a document which could *per se* become a treaty, but to demonstrate that, despite the complexity of the subject, a treaty was feasible. Hence the discussions were not simply focused on optimal outcomes, but included sometimes heated game playing between advocates and others taking the roles of skeptics and naysayers.

The product of this exercise was released in April 1997 and, at the request of Costa Rica, became UN Document A/C.1/52/7.¹⁶ As such, it was made available to all UN members in the six official languages of the United Nations. It stirred a great deal of interest, not only among UN member countries, but also throughout civil society. From this point onward it generated a constant and swelling flow of calls for the enactment of a nuclear weapons convention by high government and military officials (mostly retired), diplomats, academics, Nobel laureates, mayors and parliamentarians and ordinary citizens and civil society organizations.¹⁷ UN Secretary General Ban Ki-moon

¹⁵ www.inesap.org

¹⁶ Letter from Costa Rica requesting the UN Secretary-General to circulate attached Model Nuclear Weapons Convention, A/C.1/52/7, 17 November 1997.

¹⁷ Thus in 2007 and 2008, the Model Nuclear Weapons Convention received support from around the world including from conservative former Prime Ministers Malcolm Fraser (Australia) and Jim Bolger (New Zealand); United Nations officials including Sergio Duarte, UN

endorsed the MNWC in 2008.¹⁸ On the occasion of the quinquennial Nuclear Non-Proliferation Treaty¹⁹ (NPT)

High Representative on Disarmament; military leaders including Romeo Dallaire, former Commander of UN Forces in Rwanda; Tadatoshi Akiba, Mayor of Hiroshima and President of Mayors for Peace; members of the European Parliament including Michel Rocard (former Prime Minister of France) and Jena Luc Dehaene (former Prime Minister of Belgium). Regarding the European parliament, see report of Parliamentarians for Nuclear Non-Proliferation and Disarmament *available at*

http://www.gsinstitute.org/pnnd/archives/07_01_08_PR_EP.html.

Regarding national parliaments, see Parliamentary Resolutions Supporting a Nuclear Weapons Convention, undated, *available at* http://www.gsinstitute.org/pnnd/docs/NWC_parliamentary_resolutions.pdf. Mayors for Peace is an association of more than 4000 cities

around the world which calls for abolition of nuclear weapons through a global agreement. For a statement of Nobel peace laureates supporting negotiation of a convention, see 10th World Summit of Nobel Peace Laureates, Berlin, Germany, Summit Final Statement, November 11, 2009, *available online at* <http://www.nobelpeace-summits.org/final-conference-statement-10th-world-summit-2/>.

Many high-level former governmental officials and military officers are supporters of Global Zero, which calls for achievement of a global agreement on elimination of nuclear weapons. See

www.globalzero.org. See also "Statement by civil leaders calling for negotiations on the elimination of nuclear weapons," August 6, 1998, with signatories including Jimmy Carter, Mikhail Gorbachev, Admiral Noel Gayler, Oscar Arias and others, *available at*

<http://www.gsinstitute.org/pnnd/CivilLeadersStatement.htm>. Civil society initiatives in support of a nuclear weapons convention include, among others, the Abolition 2000 Global Network to Eliminate Nuclear Weapons, the International Campaign to Abolish Nuclear Weapons, and the Middle Powers Initiative.

¹⁸ First, I urge all NPT [Treaty on the Non-Proliferation of Nuclear Weapons] parties, in particular the nuclear-weapon States, to fulfil their obligation under the Treaty to undertake negotiations on effective measures leading to nuclear disarmament. They could pursue this goal by agreement on a framework of separate, mutually reinforcing instruments. Or they could consider negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations. Upon the request of Costa Rica and Malaysia, I have circulated to all United Nations Member States a draft of such a convention, which offers a good point of departure.

Review Conference in May 2010, 28 countries specifically referred to a nuclear weapons convention, and the Non-Aligned Movement, representing 116 countries, strongly supported a timebound framework for abolition including a convention.²⁰ Altogether, more than 130 states supported a convention at the conference.²¹ In December 2009, 124 governments, including China, India and Pakistan, voted for a resolution in the United Nations General Assembly calling on states to immediately commence “multilateral negotiations leading to an early conclusion of a *nuclear weapons convention* prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination”.²²

The Model Nuclear Weapons Convention

<http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.

¹⁹ Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 U.S.T.S. 483, 720 U.N.T.S. 161.

²⁰ Tim Wright, *Non-Proliferation Treaty Review Conference 2010: Toward Nuclear Abolition, A Report by the International Campaign to Abolish Nuclear Weapons*, June 2010, p. 2, available online at http://icanw.org/files/RevCon2010_1.pdf.

²¹ Tim Wright, “Growing Support for a Nuclear Abolition Treaty,” *Disarmament Times*, Summer 2010, p. 6, access online at <http://disarm.igc.org>.

²² Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. GAOR 64/55, UN Doc. A/RES/64/55 (December 2, 2009) (emphasis supplied).

A revised version of the model nuclear weapons convention was published in 2007. In launching it as a UN Document²³, the two sponsoring countries, Costa Rica and Malaysia, stated: "This revised model takes into account relevant technical, legal and political developments since 1997. ... It is submitted as a work in progress setting forth legal, technical and political elements for the establishment and maintenance of a nuclear-weapon-free world."

The crux of the current version is Article I, General Obligations, which prohibits development, testing, production, stockpiling, transfer, funding, use and threat of use of nuclear weapons. Subsequent articles require States parties to the Convention to declare all nuclear weapons, nuclear material, nuclear facilities and nuclear weapons delivery vehicles they possess or control, and their locations,²⁴ and require the elimination of all nuclear weapons, nuclear weapons components and nuclear weapons delivery vehicles in five phases, ending no later than fifteen years from the coming into force of the convention.²⁵

The MNWC provides for an elaborate system of verification, including data sharing agreements, open skies, a registry, international monitoring, on site inspections and, as a novel contribution to disarmament practice, "citizen reporting and

²³ Letter from Costa Rica and Malaysia attaching Model Nuclear Weapons Convention, A/62/650, 18 January 2008.

²⁴ Article III, Declarations.

²⁵ Article IV, Phases for Implementation

protection.”²⁶ The model convention calls for national implementation procedures, including the enactment of necessary legislation²⁷ and, importantly, for the criminal prosecution of violators.²⁸ The MNWC foresees the establishment of an “Agency for the Prohibition of Nuclear Weapons”, with a Conference of States Parties, an Executive Council and a Technical Secretariat.²⁹ There is an Optional Protocol Concerning the Compulsory Settlement of Disputes and an Optional Protocol Concerning Energy Assistance.

Entry into force would occur 180 days after at least all nuclear weapons states, all states outside the NPT with nuclear weapons programs, and at least 40 other states with nuclear reactors or nuclear programs have deposited their instruments of ratification;³⁰ once it enters into force, the duration of the convention would be indefinite and withdrawal would not be permitted.³¹

The above is merely a bare bones summary of the MNWC’s highlights. The full text, covering nineteen sections, each with multiple paragraphs and subparagraphs, is available at <http://www.icanw.org/files/sos.pdf>.³² Any document

²⁶ Article V, Verification

²⁷ Article VI, National Implementation Measures

²⁸ Article VII, Rights and Obligations of Persons

²⁹ Article VIII, Agency

³⁰ Article X V, Entry into Force

³¹ Article XVIII, Scope and Application of Convention

³² This is the online version of *Securing Our Survival: The Case for a Nuclear Weapons Convention*, International Physicians for the Prevention of Nuclear War, International Association of Lawyers

of this complexity is bound to raise many questions of legal sufficiency and political reality. The drafters of the current version have recognized this by placing certain elements in brackets, as an indication that they themselves had difficulty agreeing on definite numbers or clauses. But, commendably, they have done more: They have accompanied the text with discussions of issues raised by the entire text, as well as specifically by this or that section or paragraph. Some of these will be discussed below.³³

Article IV-Phases for Implementation. While affirming and reaffirming their commitment to an “ultimate” nuclear weapon free world, the nuclear weapon states, and the United States in particular, have maintained their staunch opposition to a time-bound approach to achieving this objective. Ellen Tauscher, the US Undersecretary for Arms Control and International Security Affairs has gone so far as to say

Nuclear disarmament is not the Holy Grail. It’s only worth pursuing in so far as it increases our national security. I believe that the journey on the road to zero is perhaps more important – than the goal itself. It’s those concrete steps that we take that will enhance the national security of the United States and make the world a more stable place.³⁴

Against Nuclear Arms, International Network of Engineers and Scientists Against Proliferation, 2007.

³³ The author of this article was one of the drafters of the original version. He considers self-criticism a worthy endeavor.

³⁴ Speech to Global Zero Summit, Paris, February 20, 2010
<http://www.state.gov/t/us/136425.htm>

Not everyone in the administration is prepared to disavow the goal completely. President Obama, in his Prague speech, said it might not happen in his lifetime.³⁵ Secretary Clinton, perhaps in an ill advised attempt at humor, said the following in addressing the State Department staffers who had worked on the New START agreement and the 2010 Nuclear Posture Review:

I am personally very grateful for everything you've done to move us toward our goal of a world someday, in some century, free of nuclear weapons, but along the way, making that world safer and safer and safer for our children and grandchildren.³⁶

The MNWC posits a maximum of fifteen years for reaching the holy grail of a nuclear weapons free world, but the five phase approach poses a number of problems. Each phase contains a number of specific mandates, including the following:

Phase 1: All nuclear weapons and nuclear weapons delivery systems are to be de-alerted and disabled within one year after ratification. Good, but this could still leave all nuclear weapons and delivery systems in existence; it has been estimated that the time required for their re-assembly could be as little as a few

³⁵ The White House, Office of the Press Secretary, Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic, April 5, 2009, *available online* at http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered.

³⁶ July 13, 2010, <http://www.state.gov/secretary/rm/2010/07/144577.htm>

hours.³⁷

Phase 2: All nuclear weapons to be removed from deployment sites and delivery systems to be placed in storage or dismantled within two years from ratification. Fine, but this would merely extend the time needed to make them operational.

Phase 3: Five years from ratification, all nuclear weapons to be destroyed except up to 1000 each to remain in the arsenals of Russia and the United States and 100 each in those of China, the UK and France. This is a nod to a kind of mantra that has developed among “realist” abolitionists who see these numbers as a giant step toward the total elimination of nuclear weapons. But the fact is that even the use of a tiny portion of these remaining arsenals could cause death and destruction on a scale that beggars the imagination.

Phase 4: No more than 50 warheads each for the US and Russia and 10 each for China, France and the UK, ten years from ratification. See comment on phase 3 above.

Phase 5: All nuclear weapons finally to be destroyed, fifteen years from ratification.

When these periods are added to the time it is likely to take to negotiate and bring about the entry into force of the convention, one is looking at a very long stretch of time indeed, in the course of which proliferation may add to the arsenals of non-NPT member states and may bring new states into the charmed circle of the nuclear-armed. Needless to say, realpolitik teaches that it

³⁷ *Smaller and Safer: A New Plan for Nuclear Postures*, Foreign Affairs, September/October 2010, p. 13

may take that long, but should the planning for a nuclear weapon free world contemplate living in a nuclear weapon full world for fifteen, fifty or a hundred years? Such a drawn out step-by-step progression may turn out to be a progression to infinity, even if total abolition is called for at some point.

Article VI-National Implementation Measures. Article 26 of the Vienna Convention on the Law of Treaties enshrines the bedrock principle of the law of treaties: “*Pacta sunt servanda* – Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”³⁸ This would seem to make the enactment of national implementation measures unnecessary. However this principle, bedrock or not, runs up against the division of the world into three broad categories of states according to their varying conceptions and practices concerning the relationship between international and domestic or municipal law: The so-called monist states, like France, Germany or the Netherlands, in which international law is self-executing *ipso facto*; the so-called dualist states, like the United Kingdom and other members of the Commonwealth of Nations, in which treaties, conventions and other multistate agreements have no force in domestic law in the absence of enabling legislation; and hybrid states like the United States, in which some such agreements are considered self-executing and others not, depending on their specificity or, some would say, on the composition of the Supreme Court at a given moment. Thus, the requirement in par. VI(1) that each party “shall adopt...the necessary legislative measures to implement its obligations under this Convention” may be going too far, although the universal

³⁸ Article 26, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M 679.

enactment of such legislation would be desirable if it could be accomplished without imposing further delays on the achievement of the convention's goal.

Article VII – Rights and Obligations of Persons. Read together with I.A.1.a and I.B.5.a. it would be a crime to use or threaten to use nuclear weapons. But as of when? If from the coming into force of the convention, why leave some of them in the possession of nuclear weapon states for another fifteen years, or whatever number is agreed for phase 5? As for VII.A.1 and 2, these clauses provide for surrendering persons accused of committing crimes to the International Criminal Court under certain circumstances. But what if the ICC is not willing to accept them, or if the crime, as defined in Section I, is not within its jurisdiction? Do they go scot free? This lacuna could be remedied by writing an extended principle of universal jurisdiction into the convention, i.e. a person accused of a crime under I.B. should be subject to the jurisdiction of any state party to the convention if he/she is not tried in the state in which the crime was committed or in a state in which the person is found, provided the latter state is willing to extradite the person to the third party state willing and able to undertake the prosecution. Finally, par. VII.13 authorizes “the agency” to exempt from prosecution a person who admits a violation before being notified thereof by the agency. This would invest the agency with judicial, or at least prosecutorial, power, which would be rather unusual.

Article VIII – Agency. *Quaere* whether it is a good idea to call for the establishment of a new agency “to achieve the object and purpose of this convention” at a time when public opinion throughout the world is sick of over-regulation and when there is an agency already in place, the charter of which could be

expanded to include the function of overseeing the path to nuclear zero. Granted that IAEA, the International Atomic Energy Agency, has the dual purpose of preventing the proliferation of nuclear weapons and providing NPT member states with technology for peaceful uses of nuclear energy. But the first of these would overlap with the functions of the new agency and the second would not necessarily interfere with the first. Granted also that a nuclear weapons free world would be easier to reach if “peaceful” nuclear energy were also consigned to the wastebasket of history, but the other side of this coin is that if this were made a condition for a nuclear weapons convention, it would make agreement on a convention infinitely more difficult to achieve.

Conclusion

The preceding discussion may lead some readers to the conclusion that the governments which pay lip service to a vision but do precious little to implement it have a point: it’s too complicated, it will take too long, conditions are not ripe etc. etc. But this author’s purpose is just the opposite: The Model Nuclear Weapons Convention is a bold, imaginative initiative designed to show that if diplomats and bureaucrats will not tackle the job civil society will, as it has done with the mine ban treaty³⁹ and the cluster bomb treaty⁴⁰. The flaws in the model convention, if that is what they are, are all the more reason to begin, not in due course, but in the immediate present, the serious work of creating a document that, in the words of President Kennedy, will lift the sword of Damocles from the entire human race.

³⁹ Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 U.N.T.S. 211, 36 I.L.M. 1507

⁴⁰ Convention on Cluster Munitions, 30 May 2008, CCM/77.