NUCLEAR ABOLITION FORUM | ISSUE NO. 1, 2011

INTERNATIONAL HUMANITARIAN LAW AND NUCLEAR WEAPONS

Examining the humanitarian approach to nuclear disarmament

NUCLEAR ABOLITION FORUM

Nuclear Abolition Forum

Dialogue on the Process to Achieve and Sustain a Nuclear Weapons Free World

The Nuclear Abolition Forum strives to foster debate on key legal, technical, institutional and political elements for achieving the prohibition and elimination of nuclear weapons under a Nuclear Weapons Convention or package of agreements, as well as the process to achieving this. To this end, the Forum offers a dedicated website and a periodical to facilitate dialogue between academics, governments, disarmament experts and NGOs on such elements. The Forum is a joint project of eight leading organizations on disarmament and nonproliferation issues.

For more information about Nuclear Abolition Forum, visit **abolitionforum.org**.

Nuclear Abolition Forum
Dialogue on the Process to Achieve and Sustain a Nuclear Weapons Free World
C/o **World Future Council**
100 Pall Mall, SW1Y 5NQ
London, United Kingdom
Tel.: +44 (0) 20 7321 3810
Fax: +44 (0) 20 7321 3738
Email: rob.vanriet@worldfuturecouncil.org
abolitionforum.org

Cover photo: Statute of Hiroshima bombing-victim Sadako Sasaki holding a crane at the Hiroshima Peace Memorial, Japan. Photographer: Fidel Ramos, October 2010.
http://www.flickr.com/photos/fidelramos/5410339772/

INTERNATIONAL HUMANITARIAN LAW AND NUCLEAR WEAPONS:
Examining the humanitarian approach to nuclear disarmament

Nuclear Abolition Forum · Issue No. 1

CONTRIBUTORS

John Burroughs, Nicholas Grief, Peter Weiss, Sameer Kanal/Bruce Blair, Gro Nystuen, Randy Rydell, Malcolm Fraser, and Peter Giugni

GUEST EDITOR

John Burroughs

OPENING REMARKS

Sergio Duarte

Dialogue on the Process to Achieve and Sustain a Nuclear Weapons Free World

NUCLEAR ABOLITION FORUM

ISSUE NO. 1
2011

CONTENTS

INTRODUCTION TO THE NUCLEAR ABOLITION FORUM AND ITS INAUGURAL EDITION

Welcome to the **Nuclear Abolition Forum**: *Dialogue on the Process to Achieve and Sustain a Nuclear Weapons Free World*, a joint project of eight leading organizations in the disarmament field.*

The vision for a nuclear weapons free world has recently been advanced by leaders and high-level officials (current and former) of key states including those possessing nuclear weapons or covered by nuclear deterrence doctrines. The goal has been supported by legislators, academics, disarmament experts and other sectors of civil society. The path to achieving such a world however is still unclear.

States Parties to the 2010 nuclear Non-Proliferation Treaty Review Conference (NPT Review Conference) agreed that *"All States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons,"* and noted in this context *"the Five-Point Proposal for Nuclear Disarmament of the Secretary-General of the United Nations, which proposes inter alia the consideration of negotiations on a nuclear weapons convention or a framework of separate mutually reinforcing instruments backed by a strong system of verification."*

As such, States have collectively recognized that a focus solely on the next non-proliferation and disarmament steps is no longer sufficient or able to succeed. A comprehensive approach to nuclear disarmament must be developed alongside and complementary to the step-by-step process.

There are of course many challenges that need to be overcome and questions still to be addressed in order for governments to undertake the abolition and elimination of nuclear weapons. This independent forum aims to assist this process by exploring the legal, technical, institutional and political elements for achieving a nuclear weapons free world.

To this end, the Forum offers a dedicated website –**www.abolitionforum.org**– and a periodical to facilitate dialogue between academics, governments, disarmament experts and NGOs on key issues regarding the prohibition and elimination of nuclear weapons under a Nuclear Weapons Convention or package of agreements, as well as the process to achieving this. Noteworthy, the Forum seeks to include a variety of perspectives rather than advocating any particular approach to achieving a world free of nuclear weapons. This could include analysis and proposals from those who consider the time is right for a comprehensive approach, alongside contributions from those who do not yet believe that nuclear abolition is possible, or who are not yet convinced of the merits of a comprehensive approach, or who believe that there are pre-conditions to be met before undertaking a comprehensive approach.

The Nuclear Abolition Forum provides an extensive database of documents dealing with these elements, filed on the website under a variety of category headings. The website also offers users a variety of interactive features, including the possibility to post articles and comment and initiate and partake in discussions. You are invited to join the debate.

Each issue of the periodical will take on one of these elements, such as nuclear deterrence, verification, enforcement, political will, nuclear energy and related dual-use issues, individual and criminal responsibility, phases of implementation, the role of civil society, and national legislative measures to further nuclear abolition, to name a few. The rationale behind this approach is that edition-by-edition such key nuclear abolition aspects will be examined and critiqued, thereby paving the way for building the framework for achieving and sustaining a nuclear weapon-free world.

This inaugural edition has as its theme the **application of International Humanitarian Law to nuclear weapons and its implications**. Momentum for this "humanitarian approach" is currently building. The Final Document of the 2010 NPT Review Conference declared that 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."* More recently, the Vancouver Declaration, "Law's Imperative for the Urgent

* **Albert Schweitzer Institute**, **Global Security Institute** (GSI), **International Network of Engineers and Scientists Against Proliferation** (INESAP), **International Association of Lawyers Against Nuclear Arms** (IALANA), **International Physicians for the Prevention of Nuclear War** (IPPNW), **Middle Powers Initiative** (MPI), **Pugwash** (Canada and Denmark branches) and the **World Future Council** (WFC). The forum is hosted by the WFC's London Office.

Achievement of a Nuclear-Weapon-Free World" received high-level endorsements from former judges of the International Court of Justice, leading international law scholars, and former diplomats and officials.

The declaration, which you can find as an appendix to this issue, asserts that with their uncontrollable blast, heat, and radiation effects, nuclear weapons are indeed weapons of mass destruction that by their nature cannot comply with fundamental rules of international humanitarian law forbidding the infliction of indiscriminate and disproportionate harm.

Dr. John Burroughs, Executive Director of the Lawyers Committee on Nuclear Policy (LCNP), discusses the Vancouver Declaration and Conference in the first article in this issue. Examining the different purposes the declaration serves, he expresses the hope that it "will contribute to the growing understanding that the existence, let alone the use, of nuclear weapons is incompatible with law and human security."

Next, Prof. Nicholas Grief of Kent Law School explores the legal status of the use, threatened use and possession of nuclear weapons, in the context of the landmark advisory opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons and against the backdrop of the UK Government's policy of "continuous at sea deterrence."

In his article on how far we are in outlawing the possession of nuclear weapons, Peter Weiss, Co-President of the International Association of Lawyers Against Nuclear Arms, also draws on the findings of the ICJ in its opinion on the nuclear weapons case, noting how "tantalizingly" close the Court came to "closing the circle of absolute prohibition of threat or use," and examining their implications for developing the norm of non-possession. In addition, he turns to other –in this context less often examined– bodies of law and how they could inform the debate on banning the possession of nuclear weapons.

A report written by Sameer Kanal, a Research Associate with LCNP, on a particularly impressive yet unsettling presentation by Dr. Bruce Blair, co-founder of Global Zero, at the Vancouver Conference has also been included in this issue, even though it does not directly deal with the application of IHL to nuclear weapons. Dr. Blair's presentation, "Risks Arising from Peacetime Nuclear Operations," serves as a stark reminder of how slender the thread, by which the "nuclear sword of Damocles" that is hanging over us, really is. Drawing on his own experience as a former Minuteman ballistic-missile launch-control officer, Dr. Blair gave a harrowing account of the timeframe for determining a potential nuclear attack and deciding on possible nuclear retaliatory responses; a matter of minutes, if not seconds.

Prof. Gro Nystuen, Senior Partner at International Law and Policy Institute, describes in her article how the application of Ethical Guidelines to the Norwegian Pension Fund led to the exclusion from the Fund's portfolio of companies that "*develop and produce key components for nuclear weapons.*" Dr. Nystuen, who is Chair of the Council on Ethics, which makes exclusion recommendations to the Ministry of Finance, explains how humanitarian considerations were crucial to including nuclear weapons under the exclusion criterion. The Norwegian divestment scheme offers an interesting case in point of how the humanitarian approach to disarmament can be implemented on the national level.

Dr. Randy Rydell of the United Nations Office of Disarmament Affairs tackles a variety of issues related to achieving nuclear disarmament in his article "The United Nations and a Humanitarian Approach to Nuclear Disarmament." As the world's principal arena for advancing nuclear disarmament, he recognizes a central role for the UN in strengthening international humanitarian law against nuclear weapons and notes in this context the leadership of UN Secretary-General Ban Ki-moon in bringing the rule of law to disarmament, notably through his five-point proposal on nuclear disarmament.

In the next article, former Prime-Minister of Australia Malcolm Fraser highlights not only the illegality of nuclear weapons, stemming to a large extent from the unacceptable humanitarian harm their use would cause, but also the failure of the Nuclear Weapon States to fulfill their disarmament obligation as mandated by international law. He further notes the disquieting disparity between nuclear weapons-related expenditure and development spending.

The inaugural edition ends with an article by Peter Giugni, International Humanitarian Law Officer with Australian Red Cross, who presents an overview of the "Make Nuclear Weapons the Target" campaign that Australian Red Cross launched in August 2011. Intended to "raise awareness of the unacceptable humanitarian consequences of nuc-

lear weapons and the urgent imperative of clarification of the prohibition of their use," the campaign builds upon the leading role that the International Committee of the Red Cross has taken with regard to promoting humanitarian approaches to disarmament.

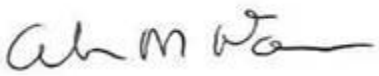
Achieving the global prohibition and elimination of nuclear weapons will come as a result of a concerted effort. As Dr. Randy Rydell notes, "When nuclear disarmament is finally achieved, it is unlikely that any one country, factor, variable, or political or legal tactic would deserve exclusive credit for producing such a result." Nevertheless, humanitarian approaches to disarmament, as part of a wider effort to bring the rule of law to disarmament, can play a decisive role in achieving nuclear abolition. Such approaches importantly shift the focus to an integral element of disarmament: human security and humanitarian considerations.

There are criticisms of the value of IHL in the nuclear abolition agenda. In the past such criticism was primarily advanced by those who believe that nuclear weapons could be used without violating IHL. That argument has all but disappeared, and is now replaced by the argument that IHL does not provide the answer to the complex state security issues involved in moving from nuclear deterrence to nuclear abolition. IHL might not answer those questions. But at the very least it necessitates an examination of possible answers rather than an acceptance of the increasingly dangerous status quo. Further editions of the Nuclear Abolition Forum will continue exploring what such answers might be.

Acknowledgements

We are thankful to the contributors to this first edition of the Nuclear Abolition Forum's periodical. Their articles offer a variety of perspectives on the important issue of the application of humanitarian law to nuclear weapons and its implications. They have set the bar high for future editions. In addition, we are particularly grateful to Dr. John Burroughs of the Lawyers Committee on Nuclear Policy for skillfully and thoroughly editing this inaugural edition as its Expert Editor.

Rob van Riet
Director, Nuclear Abolition Forum



Alyn Ware
Founder, Nuclear Abolition Forum

OPENING REMARKS AT THE LAUNCH OF THE NUCLEAR ABOLITION FORUM

SERGIO DUARTE*

21 OCTOBER 2011, BAHA'I UN OFFICE, NEW YORK

It is a great privilege for me to have this opportunity to participate in the launching of a new periodical and website – the Nuclear Abolition Forum.

During my service as the UN's High Representative for Disarmament Affairs—as indeed throughout my diplomatic career—I have become more and more convinced of the vital role of civil society in achieving great multilateral goals, and I must admit, I view disarmament as one of the greatest.

The advocacy efforts by civil society play a crucial role in sustaining the political will necessary to achieve concrete progress in this field. Individuals and groups contribute to a wider process of ensuring accountability for the performance of disarmament commitments. They help in educating both the general public and government officials. And they provide opportunities for dialogue and debate among people with at times widely different perspectives on how the challenges of disarmament can most effectively and efficiently be met.

So I look upon the Nuclear Abolition Forum as fully consistent with this noble tradition of active civil society engagement in the unfolding global process of moving the world to a world free of nuclear weapons and other weapons adaptable to mass destruction—a goal that appeared in the UN General Assembly's first resolution in January 1946.

It is highly appropriate that the inaugural issue of this periodical would focus on the application of international humanitarian law (IHL) to nuclear weapons. Victor Hugo once wrote that "You can resist an invading army; you cannot resist an idea whose time has come"—and IHL surely represents one of those ideas. While it has been long in the making—over several centuries in fact—IHL is increasingly a focus of deliberations in multilateral arenas dealing with disarmament.

This was certainly apparent at the 2010 NPT Review Conference, but it is also a recurring theme of statements made in all the key institutions of the UN disarmament machinery. There is underway today a new awareness of the importance of binding legal commitments in advancing disarmament goals. I believe we are witnessing today a new, unfolding process of bringing the rule of law to disarmament, and both IHL and multilateral disarmament conventions will have many indispensable contributions to make in this great cause.

I very much welcome the emphasis placed by the architects of the Nuclear Abolition Forum in rekindling and sustaining a dialogue over fundamental questions relating to the achievement of nuclear disarmament. While there are roughly 12 arguments that have repeatedly been invoked and recycled over many decades against nuclear disarmament, this Forum offers a superb opportunity for abolition advocates to challenge such glib assertions and expose their weaknesses, while affirming the concrete positive advantages of disarmament.

For this reason alone, I warmly welcome the launching of the Nuclear Abolition Forum and wish all who share its goals well in the years ahead. I commend it not just to all who already support abolition, but to all who still have an open mind to learning about what it has to offer, which is considerable.

Congratulations to all on Day One of the Nuclear Abolition Forum.

---

* Mr. Duarte is the United Nations High Representative for Disarmament Affairs at the Under-Secretary-General level.

The Vancouver Declaration and the Humanitarian Imperative for Nuclear Disarmament

John Burroughs[1]

The Vancouver Declaration, "Law's Imperative for a Nuclear-Weapon-Free World,"[2] is included as an appendix to this issue of the Nuclear Abolition Forum. It serves two main purposes. It places the imperatives of non-use and elimination of nuclear weapons in a broad humanitarian perspective, and it articulates the current state of the law applicable to nuclear weapons in light of developments since the 1996 International Court of Justice (ICJ) advisory opinion on nuclear weapons. Released on March 23, 2011, the declaration was endorsed by numerous eminent experts in international law and diplomacy, including former ICJ judges, international law scholars and lawyers, and former diplomats and officials, as well as by representatives of leading civil society organizations and by parliamentarians.[3]

The Simons Foundation and the International Association of Lawyers Against Nuclear Arms (IALANA) developed the declaration with the input of a conference convened by the two organizations in Vancouver, Canada, on February 10-11, 2011.[4] Entitled "Humanitarian Law, Human Security: The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons," the conference brought together some 30 experts in international law, diplomacy, and nuclear weapons, including representatives of the International Committee of the Red Cross (ICRC), the United Nations, and several governments, Austria, Switzerland, and Norway.

Dr. Jennifer Simons, President of The Simons Foundation, proposed a conference to IALANA in order to build upon the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference expression of "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons," and reaffirmation of "the need for all states at all times to comply with applicable international law, including international humanitarian law." As the Conference Statement of Intent declares, the "resurgence of international humanitarian law in the nuclear context presents an opportunity that must not be missed to demand that governments definitively rule out use and possession of nuclear weapons."[5]

The conference produced rich discussion on three themes of a humanitarian approach to nuclear disarmament: the risks to human security arising out of the possession as well as possible future use of nuclear weapons; the lessons to be learned from the disarmament processes on landmines and cluster munitions; and the current state of international law, especially international humanitarian law (IHL), applicable to nuclear weapons. The declaration reflects that discussion.

The *humanitarian perspective* informing the declaration is conveyed by its first sentence: "Nuclear weapons are incompatible with elementary considerations of humanity." The phrase "elementary considerations of humanity" was employed by the ICJ in its nuclear weapons advisory opinion. The Court stated that extensive state participation in the Hague and Geneva treaties is "undoubtedly" because "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'."[6] The ICJ had first used the phrase in the 1949 *Corfu Channel Case*, holding that "elementary considerations of humanity, *even more exacting in peace than in war*," obligated Albania

to notify British warships about the dangers posed by a minefield in its waters.[7]

The declaration indeed next outlines how nuclear weapons are contrary to elementary considerations of humanity in time of peace as well as war, referring to the risks and harms related to health, the environment, economy, and security arising out of the production, storage, transport, and deployment of nuclear weapons. On the security aspect, as is reported separately in this issue, Dr. Bruce Blair, President of the World Security Institute and Co-Coordinator, Global Zero, gave a riveting talk at the conference highlighting four risks associated with peacetime nuclear operations: unauthorized launch, mistaken launch on warning, terrorist theft of weapons, and inadvertent escalation. Blair observed that the United States and Russia have been "minutes away" from nuclear war involving hundreds or thousands of bombs numerous times already. Other countries are "following suit, shortening the fuses as well." Blair called it a "hydra-headed risk of unacceptable proportions" – one that he cannot quantify, but, he said, it is "reasonable to expect a nuclear disaster." Blair concluded his remarks by warning of nuclear weapons, "if we don't eliminate them in our lifetime, there's a very strong probability that they will be used in our lifetime."

The declaration also draws upon conference presentations regarding *the campaigns and negotiations to ban landmines and cluster munitions*. Involved experts and diplomats explained that a humanitarian approach citing but not limited to IHL was what worked to engage the public and a critical mass of governments. The focus moved from national security to human and environmental security, from military requirements and doctrines to effects on human beings, their societies, and their environments, and from controlling the weapons to abolishing them.

While military experts could make a case that in particular theoretical instances use of landmines or cluster munitions has military utility and does not harm or unduly harm non-combatants, this argument could not withstand the overwhelming evidence of "unacceptable harm" in actual situations, the emotional impact of testimony from victims, and the existence of military alternatives. Peter Herby, Head of the Arms Unit, Legal Division, ICRC, noted that while cluster munitions could be used in compliance with legal requirements, they were not being used, or likely to be used, in this way. John Borrie, Senior Researcher, UN Institute for Disarmament Research, explained that the concept of unacceptable harm encompasses weapons whose use is difficult to make consistent with IHL and whose effects in any case are morally and politically intolerable.

Though they are much weaker, arguments comparable to those made in defense of landmines and cluster munitions are made regarding the utility and lawfulness of particular uses of nuclear weapons in atypical scenarios, *e.g.* in remote areas, or in scenarios in which the military value of a target is extremely high. The declaration accordingly states: "Reasons advanced for the continuing existence of nuclear weapons, including military necessity and case-by-case analysis, were once used to justify other inhumane weapons. But elementary considerations of humanity persuaded the world community that such arguments were outweighed by the need to eliminate them. This principle must now be applied to nuclear weapons, which pose an infinitely greater risk to humanity." The declaration also quotes the hibakusha, survivors of the atomic bombings of Hiroshima and Nagasaki: "No one else should ever suffer as we did."

Regarding *the application of IHL to nuclear weapons*, the declaration observes that with their uncontrollable blast, heat, and radiation effects, nuclear weapons are indeed weapons of mass destruction that by their nature cannot comply with fundamental rules forbidding the infliction of indiscriminate harm and unnecessary suffering. In addition to the ICJ opinion, analyzed at the conference by Professor Nicholas Grief,[8] the law as formulated in the annex to the declaration draws on a major study first released by the ICRC in 2005, *Customary International Humanitarian Law*,[9] and on the work of Professor Charles J. Moxley, Jr., another conference speaker.

In many years of research and analysis, Moxley has concentrated on the assessment of US policy regarding use of nuclear weapons under the rules of IHL as stated in US military manuals on the law of armed conflict, notably the requirements of necessity, discrimination (or distinction), and proportionality.[10] For example, regarding necessity, a US Navy manual explains that the "goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective."[11] Regarding discrimination, a 2010 US Army manual states: "Distinction requires parties to a conflict to engage only in military operations the effects of which distinguish between the civilian population (or individual civilians not taking part in hostilities) and combatant forces, directing the application of force solely against the latter."[12] Regarding proportionality, a US Air Force manual states that it requires that "the anticipated loss of civilian life and damage to civilian property incidental to attack is not excessive in relation to the concrete and direct military advantage expected from striking the target."[13]

Moxley emphasizes that the effects of military operations must be controllable in order to meet the requirements of necessity, discrimination and proportionality, and notes that the US manuals recognize this implication. Thus a Joint Chiefs of Staff manual states: "Attackers are required to only use those means and methods of attack that are discriminate in effect and can be *controlled*, as well as take precautions to minimize collateral injury to civilians and protected objects or locations."[14] Moxley's assessment is that especially but not only due to radiation, the effects of a nuclear explosion cannot be controlled and use of nuclear weapons is therefore unlawful. This point also underlies the ICJ conclusion that the use of nuclear weapons is generally illegal, the Court having observed that the "destructive power of nuclear weapons cannot be contained in either space or time."[15] In line with this analysis, the declaration three times refers to the uncontrollability of the effects of nuclear weapons as the reason why the weapons cannot be used in compliance with IHL requirements.

The declaration also takes firm positions on several issues which the ICJ did not resolve:

1) The declaration states: "Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides *inter alia* that an attack directed against a civilian population is a crime against humanity." This recalls the position taken by Mexico before the ICJ in 1995: "Torture is not a permissible response to torture. Nor is mass rape acceptable retaliation to mass rape. Just as unacceptable is retaliatory deterrence—'You have burnt my city, I will burn yours.'"[16]

Protocol I to the Geneva Conventions, Article 51(6), prohibits reprisals against civilians, but the question remains whether this prohibition is a matter of customary law, binding states that are not

party to Protocol I. On this question, the ICRC study states that "there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals."[17] It notes decisions of the International Criminal Tribunal for the Former Yugoslavia finding that there was such a prohibition already in existence, based largely on the imperatives of humanity or public conscience. The declaration states the judgment that law can now join with conscience in condemning reprisals. The Martens Clause, quoted in the declaration, supports this judgment. In its modern form, it provides that in cases not covered by international agreements, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the *principles of humanity* and from the *dictates of public conscience*."[18]

2) The declaration holds that nuclear weapons are subject to the prohibition found in Protocol I, Article 35(3), of use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. The ICRC study found that this prohibition has now become part of universally binding customary law.[19] Obviously many if not all uses of nuclear weapons come under it.

3) And, the declaration states: "Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies ('deterrence') declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack." The ICJ had indeed clarified the law regarding threats of unlawful attack,[20] but declined to pass judgment on 'deterrence'.[21] The declaration draws the unavoidable implication.

Finally, the declaration addresses a question that the UN General Assembly had not posed to the ICJ: whether possession of nuclear weapons is lawful. Dr. Simons' view in planning the conference was that it is time to go beyond issues regarding the threat and use of nuclear weapons and examine their possession, both in terms of its consequences for human security (addressed at the beginning of the declaration) and in terms of its legal status. As she noted in opening the conference, the illegality of possession had been argued to the Court, by the then Australian Foreign Minister, Gareth Evans.

Evans told the Court that the NPT obligation of non-possession of nuclear weapons must now be regarded as customary international law applying to all states.[22] Further, he said: "If humanity and the dictates of the public conscience demand the prohibition of such weapons for some states, it must demand the same prohibition for all states."[23] For states still possessing such weapons, they "must within a reasonable timeframe take systematic action to eliminate completely all nuclear weapons," and are subject to a "duty to negotiate" to that end under customary international law.[24] The ICJ appears to have taken Evans' argument to heart. While the Court did not analyze the legality of possession as such, it did examine the nature of the disarmament obligation found in NPT Article VI and other international law, concluding unanimously: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[25]

In his remarks at the conference, included in this issue, Peter Weiss, Co-President of IALANA, took

on the challenge of analyzing possession. Their import is that since possession is closely linked to threat, and threatened use of nuclear weapons is unlawful, there is a case on that basis for the illegality of possession.

The declaration ties all of these elements together, stating: "The unlawfulness of threat and use of nuclear weapons reinforces the norm of non-possession. The NPT prohibits acquisition of nuclear weapons by the vast majority of states, and there is a universal obligation, declared by the ICJ and based in the NPT and other law, of achieving their elimination through good-faith negotiation. It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination."

It is the hope of the initiators of the Vancouver Declaration that it will contribute to the growing understanding that the existence, let alone the use, of nuclear weapons is incompatible with law and human security.

---

[1] **Dr. John Burroughs** *is Executive Director of the Lawyers Committee on Nuclear Policy, the UN Office of the International Association of Lawyers Against Nuclear Arms. He is author of The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice (1997). He was a drafter of the Vancouver Declaration and an organizer of the conference giving rise to the declaration.*

[2] Available at http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf.

[3] The many signatories include **Peter Weiss**, Co-President of the International Association of Lawyers Against Nuclear Arms (IALANA) and President of the Lawyers Committee on Nuclear Policy (drafter); **Jennifer Allen Simons**, C.M., Ph.D., LL.D., President, The Simons Foundation (drafter); **Nicholas Grief**, Professor, Kent Law School, and Doughty Street Chambers, London (drafter); **Alyn Ware**, Director, Pacific Office, IALANA (drafter); **Christopher G. Weeramantry**, former Vice President of the ICJ and Co-President of IALANA; **Mohammed Bedjaoui**, who was ICJ President when it handed down its advisory opinion on nuclear weapons; **Louise Doswald-Beck**, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and co-author of a major International Committee of the Red Cross study of IHL; **Charles J. Moxley, Jr.**, Professor of Law (Adjunct), Fordham University School of Law; **Ved Nanda**, Evans University Professor, Nanda Center for International and Comparative Law, University of Denver Sturm College of Law; **Burns H. Weston**, Bessie Dutton Murray Distinguished Professor of Law Emeritus and Senior Scholar, UI Center for Human Rights, The University of Iowa; **Roger S. Clark**, Board of Governors Professor, Rutgers Law School, Camden; **Richard Falk**, Albert G. Milibank Professor of International Law Emeritus, Princeton University; **Geoffrey Robertson**, QC, Founder and Head, Doughty Street Chambers; **Toshinori Yamada**, Lecturer, School of Law, Meiji University; **Siddharth Mallavarapu**, Assistant Professor, School of International Studies, Jawaharlal Nehru University; **James Stewart**, Assistant Professor, Faculty of Law, University of British Columbia; **Michael Byers**, Professor & Canada Research Chair in Global Politics and International Law, University of British Columbia; **Eric David**, Professor Emeritus, Université libre de Bruxelles; **Hugh Kindred**, Professor Emeritus, Dalhousie University; **Marcelo Kohen**, Professor of International Law, Graduate Institute of International and Developmental Studies, Geneva; Dr. **Dieter Deiseroth** (personal capacity), Judge, Federal Administration Court of Germany ("Bundesverwaltungsgericht"); **Kenji Urata**, Professor Emeritus, Waseda University; **Jayantha Dhanapala**, former UN Under-Secretary-General for Disarmament Affairs; **Gareth Evans**, QC, former Foreign Minister of Australia and Co-Chair of the International Commission on Nuclear Non-proliferation and Disarmament; **Nobuyasu Abe**, Professor and Director, Center for the Promotion of Disarmament and Nonproliferation, The Japan Institute of International Affairs, and former UN Under-Secretary-General for Disarmament Affairs; **Paul Meyer**, former Canadian Ambassador for Disarmament; **Robert T. Grey, Jr.**, former US Ambassador to the Conference on Disarmament; and **Lloyd Axworthy**, PC, OC, OM. A full list of signatories is available at http://www.lcnp.org/wcourt/Feb2011VancouverConference/signatories32211.pdf.

[4] For the conference agenda, statement of intent, participant profiles, and papers by participants, see www.lcnp.org.

[5] Available at http://www.lcnp.org/wcourt/Feb2011VancouverConference/statementofintent.pdf.

[6] *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226 (hereafter "Nuclear Weapons Advisory Opinion"), para. 79. Available at http://www.icj-cij.org/docket/files/95/7495.pdf.

[7] I.C.J. Reports 1949, p. 4, at p. 22. Emphasis supplied.

[8] A paper by Grief based on his remarks appears in this issue of the Nuclear Abolition Forum. He is a professor at Kent Law School, United Kingdom.

[9] Jean-Marie Henckaerts & Louise Doswald-Beck, International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. I, Rules (Cambridge University Press, 2009, first published 2005), available at http://www.icrc.org/eng/resources/documents/publication/pcustom.htm.

[10] His publications include *Nuclear Weapons and International Law in the Post Cold War World* (Austin & Winfield, 2000); and Charles J. Moxley, Jr., John Burroughs, and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," 34 Fordham International Law Journal (April 2011, no. 4), available at http://lcnp.org/wcourt/Fordhamfinaljoint.pdf. The quotations from US armed services manuals in the text are set forth and discussed in the Fordham International Law Journal article. Moxley is an adjunct professor at Fordham University School of Law, United States.

[11] US Department of the Navy, Naval War Pub. No. 1-14m, The Commander's Handbook On The Law Of Naval Operations (2007) § 5.3.1.

[12] International and Operational Law Department, US Army Judge Advocate Generals' Legal Center and School, Operational Law Handbook (2010) at 350 n.81 (citing Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Excessively Injurious or Have Indiscriminate Effects, art. 3).

[13] US Department of the Air Force, Doctrine Doc. No. 2-1.9, Targeting (2006) p. 89.

[14] US Joint Chiefs Of Staff, Joint Pub. No. 3-60, Joint Targeting (2007) E-2. Emphasis supplied.

[15] Nuclear Weapons Advisory Opinion, para. 34.

[16] Verbatim Record of Proceedings Before the ICJ, 3 November 1995, p. 64. Available at http://www.icj-cij.org/docket/files/95/5931.pdf.

[17] *Customary International Humanitarian Law*, vol. I, p. 523.

[18] Protocol I to the Geneva Conventions, Article 1(2). Emphasis supplied.

[19] *Customary International Humanitarian Law*, vol. I, pp. 151-155.

[20] Nuclear Weapons Advisory Opinion, paras. 47, 48, 78.

[21] *Id.*, paras. 67, 73, 96.

[22] Verbatim Record of Proceedings Before the ICJ, 30 October 1995, p. 51. Available at http://www.icj-cij.org/docket/files/95/5925.pdf.

[23] *Id.* at p. 52.

[24] *Id.* at pp. 53, 54.

[25] Nuclear Weapons Advisory Opinion, para. 105(2)F.

Nuclear Weapons: the Legal Status of Use, Threat and Possession

Nicholas Grief[1]

1 | Introduction

In April 2010 the President of the International Committee of the Red Cross (ICRC) declared: "the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law."[2] Just over a month later, the 2010 NPT Review Conference "expresse[d] its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirm[ed] the need for all States at all times to comply with applicable international law, including international humanitarian law." It also "reaffirm[ed] the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI."[3]

The links between possession, proliferation and use are self-evident. The probability of use increases as the number of nuclear-weapon States rises, and the probability of proliferation increases if the commitments of the Non-Proliferation Treaty are not honoured.

In these remarks on the legal status of the use, threatened use and possession of nuclear weapons, our focus will be upon United Kingdom practice. We begin with use because the legality of use determines the legality of threatened use and, in part, of possession.

2 | Use

The use of nuclear weapons in any realistic military scenario would violate international law, chiefly because their blast, heat and especially their radiation effects could not be limited as required by international humanitarian law (IHL).[4] As the ICJ observed in the *Nuclear Weapons Case,* their destructive power cannot be contained in either space or time.[5]

In its advisory opinion, the World Court explained the "cardinal principles contained in the texts constituting the fabric of humanitarian law" as follows:

> *"The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian [objects] and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."*[6]

In light of those fundamental rules of IHL, which it described as "intransgressible principles of international customary law,"[7] the Court clearly doubted whether nuclear weapons could ever be used lawfully. In view 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," it observed that the use of such weapons "seems scarcely reconcilable" with respect for the law of armed conflict, "at the heart of which is the overriding consideration of humanity."[8]

Nevertheless, the ICJ considered that it did not have "sufficient elements of fact or law to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with [IHL] in any circumstance."[9] Accordingly, whilst it held[10] that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law," it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[11]

As President Bedjaoui emphasised in his Declaration, however, the Court was not thereby recognising an *in extremis* exception to the general prohibition of threat or use:

> *"I cannot sufficiently emphasize that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons."*[12]

In contrast, the UK Government's response has been that the advisory opinion does not:

> *"require a change in the United Kingdom's entirely defensive deterrence policy. We would only ever consider the use of nuclear weapons in the extreme circumstance of self-defence which includes the defence of our NATO allies."*[13]

But this wrongly assumes that the ICJ acknowledged an *in extremis* exception to the prohibition of threat or use, whereas the Court did not say that nuclear weapons may be used *in extremis*.

The UK Government would probably contend that restrictions on the actions of States cannot be presumed.[14] In the advisory opinion proceedings it argued that "it is ... axiomatic that, in the absence of a prohibitive rule applicable to a particular State, the conduct of the State in question must be permissible."[15] However, there is no room for such an argument here. It is not 'good faith' interpretation of the advisory opinion, the text and tenor of which clearly indicate the Court's strong inclination towards illegality in all circumstances.[16] Furthermore, any insistence on a specific legal prohibition, which "can only be attributable to an extreme form of positivism,"[17] ignores the fact that States co-exist within a circumscribing boundary of norms or principles.[18] These include elementary considerations of humanity[19] and the fundamental rules of IHL which bind all States whether or not they are parties to the conventions that contain them and which are themselves infused with the overriding consideration of humanity.[20] Reference may also be made to the continuing constraints of the Martens Clause, named after the Russian delegate at the Hague Peace Conference 1899. As the ICJ observed, a modern version of that clause provides:

> *"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."*[21]

Similar objections apply to this comment on the advisory opinion by a former Deputy Legal Adviser of the Foreign and Commonwealth Office:

> *"The Court does not appear to have considered the, admittedly paradoxical, possibility that in certain exceptional situations the threat or even use of nuclear weapons might be done altruistically to support de-*

> *mands by it or the United Nations for the observance of fundamental human rights, such as the prohibitions on genocide or, indeed, the use of other weapons of mass destruction against a third State."*[22]

It would not be lawful for a State to use nuclear weapons to support such demands by the UN Security Council or the ICJ, which is the UN's principal judicial organ.[23] A weapon which cannot be used consistently with the fundamental rules of IHL and the principles of humanity does not become lawful because it is being used for a legitimate purpose under the Charter.[24] Any use of nuclear weapons would be inconsistent with the purposes and principles of the UN[25] and subvert the rule of law. Furthermore, attacks on civilians by way of reprisal can never be justified.[26]

The UK Government argues that nuclear weapons fall to be dealt with by the same general principles as apply to conventional weapons and that the legality of their use in a particular case would depend on all the circumstances.[27] On ratifying Additional Protocol I,[28] moreover, the Government stated:

> *"It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons."*[29]

But that statement, which is arguably a reservation,[30] applies only to "the rules introduced by the Protocol," such as the rule requiring protection of the environment.[31] It does not affect those provisions which were declaratory of customary international law, such as the prohibition against causing unnecessary suffering to combatants and the requirement to distinguish between civilian objects and military objectives. The ICJ emphasised that "all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law."[32]

3 | Threat

In the *Nuclear Weapons Case*, the ICJ observed that there is a symbiotic relationship between 'use' and 'threat':

> *"Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4.... The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal...."*[33]

In March 2001 a Scottish appeal court rejected the contention that the general deployment of Trident pursuant to a policy of deterrence constituted a 'threat' to use it.[34] Its assessment echoed that of a former Lord Advocate, Lord Murray, an opponent of Trident, who in a 1998 lecture said:

> *"to possess nuclear submarines supplied with weapons which it is illegal to use is not of itself unlawful; nor would it be unlawful for them to be put to sea in a general state of operational readiness. But to deploy them with definite targets in face of hostile confrontation could constitute a threat in law."*[35]

It is true that in 2005 the then Secretary of State for Defence, John Reid, told Parliament:

> *"All the UK's Trident missiles have been de-targeted since 1994, and the submarine on deterrent patrol is normally at several days' notice to fire. The missiles can be targeted in sufficient time to meet any foreseeable requirement."*[36]

This was consistent with the 1998 Strategic Defence Review's statement that the notice to fire had been relaxed from "a few minutes" to "days."[37] However, bearing in mind that this is unverifiable[38] and that in any event the system could be brought rapidly to readiness at a time of crisis,[39] the Scottish court's assessment is at odds with the ICJ's analysis. The deployment of Trident pursuant to the UK Government's policy of continuous at sea deterrence[40] signals an intention to use force if certain events occur, and that is surely a 'threat' within Article 2(4) if for any reason the envisaged use of force would be unlawful. According to the ICJ,

> *"Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence … necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter."*[41]

Although the ICJ declined to pronounce upon the practice known as 'the policy of deterrence' as such,[42] it seems to have accepted that the deployment of nuclear weapons pursuant to an effective policy of deterrence is a 'threat' to use them. Instead, it was concerned with legality. In that regard, the Court made it clear that the UN Charter is not the only reference point:

> *"The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances.*[43] *But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."*[44]

Since the use of nuclear weapons would violate IHL, especially because their destructive power cannot be contained in either space or time,[45] their threatened use is likewise illegal. Under Article 51(2) of Additional Protocol I, moreover, "[a]cts *or threats* of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[46]

4 | Possession

In view of the ICJ's description of the fundamental rules of IHL as "intransgressible principles of international customary law," and even though it decided that there was no need to pronounce on the rules' legal character,[47] it is appropriate to regard them as *jus cogens*: peremptory norms of general international law from which no derogation is permitted.[48] They are compelling law, norms that enjoy "a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules."[49] States must bring their practice into conformity with such rules.

The superior status of the fundamental rules of IHL in the hierarchy of international legal norms was confirmed in the *Wall Case* where the ICJ held that they "incorporate obligations which are essentially of an *erga omnes* character."[50] This means that

those obligations are the concern of all States and that all States have a legal interest in the protection of the rights involved.[51]

Such norms generate strong interpretative principles[52] which prevent the Nuclear Non-Proliferation Treaty (NPT) from being construed as legalising the possession of nuclear weapons. Yet the UK Government claims that the NPT allows the United Kingdom to have nuclear weapons since the treaty recognises it as "a nuclear-weapon State."[53] It is true that Article IX.3 of the NPT defines such a State as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." But that is purely a factual definition and strictly for the purposes of the NPT only.[54] It does not legalise the possession of nuclear weapons. To construe the NPT as if it did is not 'good faith' interpretation or performance as required by the law of treaties,[55] especially in view of the *jus cogens / erga omnes* character of the fundamental rules of IHL and the ICJ's interpretation of Article VI of the NPT.[56] The Court concluded its advisory opinion in the *Nuclear Weapons Case* by *unanimously* holding:

> *"There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control."*[57]

The Court also declared that fulfilling the obligation expressed in Article VI "remains without any doubt an objective of vital importance to the whole of the international community today."[58] This is tantamount to declaring that the twofold obligation to negotiate in good faith and conclude a nuclear disarmament treaty is an obligation *erga omnes*, complementing and reinforcing the *jus cogens / erga omnes* nature of the fundamental rules of IHL.[59] The logical legal consequence of this combination of *erga omnes* obligations and fundamental rules is that the use, the threatened use and arguably even the possession of nuclear weapons are illegal. Such weapons cannot lawfully be employed or deployed and there is a legal obligation to negotiate in good faith for, and ensure, their elimination.[60]

5 | Conclusion

Some people say that in trying to deal with such matters we are beyond the limits of law, but we are not. Law must play a decisive role as the embodiment of normative values. The rule of law is a fundamental principle of civilised society and respect for the rule of law is an essential prerequisite of international order. This is how the late Lord Bingham, one of the UK's greatest jurists, put it: "The rule of law requires compliance by the State with its obligations in international law as in national law."[61] In a lecture on the same theme he added: "I do not think this proposition is contentious."[62]

Either we have the rule of law or we do not. In reaching its conclusion about the illegality of nuclear weapons in the *Nuclear Weapons Case*, the ICJ felt that it could not ignore the "policy of deterrence" to which an appreciable section of the international community had adhered for many years.[63] As Judge Shi declared, however, the policy of nuclear deterrence should be an object of regulation by law, not vice versa.[64] International law is not simply whatever those with 'the say' (in practice, the nuclear-weapon States) say it is.

---

[1] **Prof. Nicholas Grief** *is a professor in Kent Law School and practices at the Bar from Doughty Street Chambers, London where he is a member of the International Law Group. He has appeared in several cases concerning the legality of Trident, sometimes as an expert witness. In 2007 he gave evidence to the House of Commons Defence Committee on the legal implications of the White Paper on the future of the UK's strategic nuclear deterrent. He also lectures on EU law at the National School of Government and is a visiting member of the Center of Theological Inquiry, Princeton.* This is a revised version of a paper given

at the conference on "Humanitarian Law, Human Security: The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons" in Vancouver, February 10-11, 2011.

[2] "Bringing the era of nuclear weapons to an end," statement by Jakob Kellenberger, 20 April 2010, http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm.

[3] 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume 1, Part 1, p 19, Conclusions and recommendations for follow-on actions, I.A.v and ii.(Doc NPT/CONF.2010/50 (Vol. I)).

[4] Cf the UK Government's submission to the ICJ: "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."

[5] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 226, para 35.

[6] Ibid, para 78.

[7] Ibid, para 79.

[8] Ibid, paras 36, 79 and 95.

[9] Ibid, para 95.

[10] By seven votes to seven, by the President's casting vote.

[11] *Nuclear Weapons Case*, para 105, point 2E of the dispositif.

[12] ICJ Reports 1996, p 270, para 11.

[13] Hansard, House of Lords Debates, 26 January 1998, Col 7. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, para 6.17.1.

[14] *The Lotus Case*, PCIJ, Series A, No 10, p 18.

[15] United Kingdom, Written Submission on the Opinion requested by the General Assembly, p 21.

[16] At para 104 of its opinion in the *Nuclear Weapons Case*, the ICJ emphasised that its reply to the General Assembly's question "rests on the totality of the legal grounds set forth by the Court, each of which has to be read in the light of the others."

[17] *Nuclear Weapons Case*, dissenting opinion of Judge Koroma, p 14.

[18] Cf Judge Weeramantry's dissenting opinion in the *Lockerbie Case (Provisional Measures)*, ICJ Reports, 1992, pp 3, 51.

[19] *Corfu Channel Case*, ICJ Reports 1949, pp 4, 22. The ICJ listed "elementary considerations of humanity, even more exacting in peace than in war" among "certain general and well-recognized principles" on which Albania's obligations to notify the existence of a minefield in its territorial waters and warn approaching British warships of the imminent dangers were based.

[20] *Nuclear Weapons Case*, paras 79 and 95.

[21] Ibid, para 78, referring to Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereafter Additional Protocol I). At para 87 the Court held that the Martens Clause's "continuing existence and applicability is not to be doubted."

[22] A Aust, *Handbook of International Law*, Cambridge University Press, 2nd edition, 2010, pp 239-240.

[23] Article 92 of the UN Charter and Article 1 of the Statute of the ICJ, which forms an integral part of the Charter.

[24] Cf para 39 of the *Nuclear Weapons Case*.

[25] Article 24(2) of the Charter provides that "the Security Council shall act in accordance with the Purposes and Principles of the United Nations." Article 1(1) refers to the peaceful settlement of disputes "in conformity with the principles of justice and international law" and Article 1(3) emphasises the UN's important role in promoting and encouraging respect for human rights.

[26] See e.g. Article 51(6) of Additional Protocol I; and ICTY, Trial Chamber, 14 January 2000, Case No IT-95-16, *Prosecutor v Kupreskić*, Part V, paras 520-533. Under Article 60(5) of the Vienna Convention on the Law of Treaties 1969, moreover, the doctrine of material breach does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

[27] UK Ministry of Defence, op cit, 6.17.

[28] See note 20.

[29] See The Geneva Conventions Act (First Protocol) Order 1998 (SI 1998 No 1754) and The International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 (SI 2001 No 2559).

[30] Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969 defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying…or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Under Article 19(c) of the Convention, a reservation which is incompatible with the object and purpose of the treaty is impermissible.

[31] Articles 35(3) and 55 of Additional Protocol I, in respect of which the UK statement is arguably an impermissible reservation.

[32] *Nuclear Weapons Case*, para 84. The UK has also reserved the right to take measures otherwise prohibited by Articles 51 and 55 of Additional Protocol I (concerning protection of the civilian population) "to the extent that it considers such measures necessary for the purpose of compelling the adverse party to cease committing violations under those Articles." Some argue that this would entitle the UK to use nuclear weapons as a form of legitimate reprisal against a State which used them against it. As explained above, however, attacks on civilians by way of reprisal can never be justified, so to that extent, at least, the reservation is impermissible.

[33] Ibid, para 47.

[34] Lord Advocate's Reference (No 1 of 2000), 2001 SCCR 296, para 98.

[35] Lord Murray, "Can Trident missiles be lawfully used in light of the decision of the International Court of Justice in the Nuclear Weapons Case?", May 1998.

[36] Hansard, House of Commons, 27 October 2005, Col 522W.
[37] Strategic Defence Review, July 1998, Supporting Essay Five: "Deterrence, Arms Control, and Proliferation," para 12: http://www.mod.uk/NR/rdonlyres/65F3D7AC-4340-4119-93A2-20825848E50E/0/sdr1998_complete.pdf.
[38] Commander Robert Green, *Security Without Nuclear Deterrence*, Astron Media and The Disarmament & Security Centre, 2010, p 226.
[39] House of Commons Library, Research Paper 06/53, "The Future of the British Nuclear Deterrent," 3 November 2006, p 22: http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=44160&lng=en.
[40] i.e. at least one nuclear-armed submarine is on patrol at any time.
[41] Ibid, para 48. Emphasis added.
[42] Ibid, para 67.
[43] In terms of the proportionality principle, the ICJ observed that the very nature of all nuclear weapons and the profound risks associated with them, including environmental considerations, would have to be borne in mind.
[44] *Nuclear Weapons Case*, para 42. See also para 105, point 2D: "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law..."
[45] Ibid, para 35.
[46] Emphasis added.
[47] Ibid, para 83. The Court considered that the General Assembly's request did not raise this question.
[48] See Article 53 of the Vienna Convention on the Law of Treaties 1969 and J Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, 2002, p 246.
[49] *Prosecutor v Furundzija*, ICTY, Case No IT-95-17/1-T, para 153. The ICTY continued: "The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force." (1999) 38 ILM 317.
[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 1994, para 157. In para 19 of her separate opinion, Judge Higgins emphasised that "the protection of civilians remains an intransgressible obligation of humanitarian law."
[51] Ibid, para 155 with a reference to the *Barcelona Traction Case*, ICJ Reports 1970, p 32, para 33.
[52] Crawford, op cit, p 187.
[53] See e.g. Hansard, House of Commons, 1 March 2005, Col 805.
[54] The relevant sentence of Article IX.3 begins: "For the purposes of this Treaty,..."
[55] See Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties 1969.
[56] Article VI provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control."
[57] *Nuclear Weapons Case*, para 105, point 2F of the dispositif.
[58] Ibid, para 103.
[59] Since it enshrines an obligation *erga omnes*, Article VI might also have *jus cogens* status. See Crawford, op cit, p 244: "Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them..."
[60] The link between illegality of use and illegality of possession is illustrated by the case of three Danish soldiers who in 2009 were sent home from Afghanistan and accused of possessing illegal ammunition. They were charged with having dum-dum bullets in their pistols. There was no indication that any of the soldiers had ever fired the bullets. See www.globalresearch.ca/PrintArticle.php?articleId=15490. Hague Declaration 3 of 1899 concerning Expanding Bullets, which reflects customary international law, prohibits the use of dum-dum bullets because they cause unnecessary suffering.
[61] T Bingham, *The Rule of Law*, Allen Lane, 2010, p 110.
[62] The Sixth Sir David Williams Lecture, "The Rule of Law," University of Cambridge, 16 November 2006.
[63] *Nuclear Weapons Case*, paras 95-96.
[64] ICJ Reports 1996, p 277.

How Many Points of the Law is Possession?

Peter Weiss[1]

Possession is nine points of the law,[2] say the skeptics. And well they might, when it comes to objects the legality of which is in dispute. Like nuclear weapons. But let us suppose that, in some not too distant future, the total illegality of the threat or use of nuclear weapons becomes generally accepted. Will it still be legal to own them?

Or can a case for the illegality of their possession be made even now? And should it be made?

The last question is not as farfetched as it may seem. In its opinion in the nuclear weapons case, the International Court of Justice said:

> *"Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those states possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations, or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter."*[3]

The Court has provided no guidance on how to predict, in advance of the event, whether a use of one or more nuclear weapons would be envisaged as directed against the territorial integrity or political independence of another State, or be contrary to the purposes of the United Nations, or, if used in defense, would violate the principles of necessity or proportionality. Indeed, this injection of something akin to a *mens rea* requirement, or an ability to see into the future, seems somewhat odd.

But we know that, in its conclusions, the court held unanimously that

> *"A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict…"*[4]

This cautious mandate seems to leave open the possibility that there may still be a minimal role for nuclear weapons. Yet in the body of the opinion leading up to the conclusions we find the Court saying:

> *"[T]he principles and rules of armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons seems scarcely reconcilable with respect for such requirements."*[5]

This brings us tantalizingly near to closing the circle of absolute prohibition of threat or use. All it would take is substituting "is not reconcilable" for "seems scarcely reconcilable." But if possession is

threat, and if threat is prohibited regardless of the conditions which make threat illegal, referred to above, then possession must be illegal.

"Are we there yet?", as children are wont to ask in the course of a long car ride. For the moment, all we can say is "Not yet. But soon." We can also point, with some satisfaction, to the fact that possession of nuclear weapons is already outlawed by the Nonproliferation Treaty in the vast majority of the world's states, i.e. all those which are parties to NPT except the five which had them in 1968 and which have an obligation, under Article VI of the Treaty, to negotiate in good faith for their elimination.

And we can bear in mind that the outlawing of the possession of weapons and other devices which are inherently dangerous to health and safety is a common practice in many legislatures. A New Jersey law, for instance, outlaws the unlicensed possession of all kinds of firearms as well as "any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have."[6] In the United States, federal law,[7] as well as the laws of many states,[8] prohibit the possession of weapons of mass destruction, usually defined as NBC, nuclear, biological and chemical.

A New York City law prohibits the carrying or possession in public of knives with a blade length of more than four inches. Like all such laws, it makes exceptions for lawful possession and lawful possessors. But for our present purposes, it is interesting to note that it begins with the following legislative findings:

> *"It is hereby declared and found that the possession in public places, streets and parks of the city, of large knives is a menace to the public health, peace, safety and welfare of the people …."*[9]

A similar finding, with no exceptions and of universal relevance, should be made about nuclear weapons, which the President of the Court, let us never forget it, called "the absolute evil."[10]

---

[1] **PETER WEISS** *is Co-President of the International Association of Lawyers Against Nuclear Arms (IALANA) and President of its US affiliate and UN Office, the Lawyers Committee on Nuclear Policy, and Vice-President, Center for Constitutional Rights. He was the principal author of the draft brief on the illegality of threat or use of nuclear weapons used by several countries in making written submissions to the International Court of Justice in the 1996 nuclear weapons advisory opinion and served as counsel to Malaysia at the hearings. He has published several articles on the ICJ opinion and is the author of "Taking the Law Seriously: The Imperative Need for a Nuclear Weapons Convention" which was published in the April 2011 issue of the Fordham International Law Journal.* This paper was presented at the Vancouver Conference, 10-11 February 2011, "Humanitarian Law, Human Security: The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons."

[2] A saying meaning that possession of a thing constitutes close to full ownership.

[3] *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, pp. 246-247, para. 48.

[4] *Id.*, p. 266, para. 105(2)D.

[5] *Id.*, p. 262, para. 95.

[6] N.J.S.A. 2C.39-4.1.

[7] *E.g.*, 18 USC 175, 229, 831, 2332A.

[8] *E.g.*, Florida Statutes 90.166, North Carolina General Statutes 14-288.21.

[9] New York City Administrative Code 10-133.

[10] Declaration of President Bedjaoui, ICJ Reports 1996, p. 272, para. 20.

Risks Arising from Peacetime Nuclear Operations: A Report on a Presentation by Bruce Blair[1]

Sameer Kanal[2]

At the Vancouver conference,[3] on February 10, 2011, Dr. Bruce Blair, Co-Founder of Global Zero along with Matt Brown, was introduced by Dr. Jennifer Simons to discuss "Risks Arising from Peacetime Nuclear Operations." Blair began by noting that that the term "peacetime nuclear operations" is "misleading" because of how close the world is at all times to nuclear war. Missile launch crews are constantly training to fight nuclear wars, even as the lunch session was happening. Blair had personally "fought hundreds of nuclear wars" in the training simulator, which had not changed for 30 years and were now being used for training by the "millennial" generation.

These simulations are designed, according to Blair, to give escalating notices of a crisis, in which "invariably and inevitably, you cross the nuclear threshold to wartime, culminating in the mass launch of every missile under your command […] in what they amusingly refer to as 'the crowd-pleaser'. All out nuclear war is the crowd pleaser. It's a rocket salvo that is likened to the finale of an Independence Day fireworks display. There's a lot of black humor in this business, as you can imagine."

Blair stated his belief that it is more difficult for the current generation of young members of the US military to be in these roles, because it is puzzling "why they are launching the crowd-pleaser at a country they don't quite understand as their enemy" – the target of these simulations is still Russia, long after the Cold War has ended. Blair said that it is not a plausible scenario for these people to consider engaging in nuclear war with Russia, because they do not have the Cold War experience, and because it is actually implausible today.

Commenting on his own experience in this role, Blair noted that he understood then that what he was practicing would, if implemented in real life, result in the death of tens of millions of people. He called the experience "something you reflect on as you get older […] it surely corrodes the soul. It's corroding the soul of these young men and women in our society today." Blair asserted that it was "morally corrosive" to American society at large to have this system of constant readiness and preparation to launch an all-out nuclear war which would kill millions. The preparation level was characterized by Blair as consisting of hundreds or even thousands of mobilized weapons, ready to launch "at a moment's notice," since the 1970s and through today. "Many, many of them, are aimed at cities," Blair added.

Blair spoke more broadly about the risks of the overall system, calling the young soldiers who would launch such weapons and start such wars "cogs in the larger war-making machinery." Blair cited these drills as a representative example of a system geared towards actual usage of nuclear weapons, in which mere "possession doesn't begin to capture what's going on." Blair said that while the common view was of weapons sitting around in stockpiles, the system is "dynamic […] it daily projects threat to any and all potential adversaries." And as a result of this readiness, and constant activity, there are numerous risks inherent in the nuclear weapons regime, including the risks of inadvertent launch, unauthorized launch, launch based on inaccurate information, and possible theft and acquisition by non-state actors. Blair also argued that the existence of deployed and readied nuclear wea-

pons, in interaction with non-nuclear conflicts such as the US engagement in Iraq, could create "nuclear tensions" and consequently, unintended conflicts. Blair warned that leaders can "play chicken" with nuclear weapons in a "game" designed to scare other countries, citing the 1973 Yom Kippur War as an example.

Blair drew from these examples the conclusion that the term "peacetime nuclear operations" was a misnomer: "we're really talking about preparing very seriously and intently to use nuclear weapons and running gigantic risks in the process." He also noted that these operations are highly secretive, despite the efforts of himself and others to bring knowledge to the broader population, and in part because of the secrecy commitments members of the Armed Forces involved in such activities make when leaving the service to avoid revealing information. He stated that it is difficult to discuss the broader system without revealing classified information, and that this prevents open discussion by former nuclear crews and commanders.

TIME LIMITS

3 Minutes
The amount of time a missile attack evaluation team has to "urgently assess" if detected information poses a threat to the United States.

30 Seconds
The amount of time a strategic force commander has to brief the President on possible launch responses if there is a missile attack threat to the US.

30 Seconds to 12 Minutes (varies)
The President's allowed response time, which would lead to the use of checklist-based decision making rather than judgment.

*"**Six minutes**, to decide how to respond to a blip on a radar scope and decide whether to release Armageddon! How could anyone apply reason at a time like that?"*

- Memoirs of US President Ronald Reagan

Blair went on to discuss in more detail four risks associated with peacetime nuclear operations: unauthorized launch, mistaken launch on warning, terrorist theft of weapons, and inadvertent escalation. He also mentioned a fifth risk – an accident occurring, leading to detonation – and said he would not discuss that possibility here, but that it is presented in Global Zero's film, "Countdown to Zero."

Beginning with mistaken launch, Blair noted that detected information was reviewed by U.S. and Russian teams whose job it is to "urgently assess" if the detected information "represent threats to their country." Blair highlighted that these detections usually occur multiple times in a given day. Recalling an example from roughly a decade previous when he was in a tracking center inside Cheyenne Mountain in Colorado, Blair noted that when a rocket exhaust plume was detected, the facility immediately began reviewing the detected plume to see if it was a threat to North America or not. A few minutes later, the staff labeled the plume a missile launched by Russia towards Chechnya and was thus no threat to the North Americans. Blair cited Japanese civilian satellite launches, Iranian or Chinese tests of missiles, Hamas rockets fired at Israel, or even wildfires in the Southwestern United States as other detectable incidents that are reviewed as possible threats.

Blair noted that only three minutes are allowed to determine if something was a threat or not and decide whether to recommend that an emergency teleconference involving the President and his top nuclear advisors be convened to consider launching nuclear weapons in response. Blair stated that similar approaches are taken by other countries with "less reliable early warning systems," increasing the

possibility of a mistaken perceived threat, and that these risks increase even more due to states increasing the alert level of their nuclear weapons. Finally, Blair noted that in the event of an emergency conference, the strategic commander in Omaha would be allowed as little as *thirty seconds* to brief the President on the threat and possible nuclear retaliatory responses. The President has between 30 seconds and 12 minutes to choose a response option, which means that it is all "checklist-driven." Blair said this is "the enactment of a prepared script … this isn't Presidential deliberation." Blair quoted the memoirs of President Reagan, who lamented, "six minutes, to decide how to respond to a blip on a radar scope and decide whether to release Armageddon! How could anyone apply reason at a time like that?" Blair highlighted repeatedly the relative difficulty of *preventing* a launch in contrast with *authorizing* one, for Reagan as well as for Mikhail Gorbachev and other leaders in that era as well as today.

Blair turned next to unauthorized launch, warning that he could "really depress you… to no end" discussing this possible risk. The Russian system of command and control has historically been more stringent than the American one, because top-down control is the core value of the political culture of Russia. In the United States, on the other hand, the system is "highly decentralized, and represents a high degree of trust in the military." As a result, Blair noted that the US has been slow to introduce physical safeguards on its weapons, and has delegated launch authority down the chain of command. Blair stated that in the event of the crisis in the United States, the delegation system in place from the Eisenhower administration until *at least* the end of the Reagan administration would have "overridden the constitution-mandated Presidential line of succession." The American system had "tightened up," Blair noted, but still is relatively relaxed.

THE RISK OF UNAUTHORIZED NUCLEAR LAUNCH

Command and Control Systems
"Many undiscovered vulnerabilities exist, and perhaps fatal weaknesses exist as well."

The American Experience
"The US has been very slow to introduce physical safeguards on its nuclear weapons […] And America has been much more apt to delegate launch authority down the chain of military command."

The Limited Security of Safeguards on Deployed, "Ready" Nuclear Weapons
"Preparing for authorized use inevitably undermines protections against unauthorized use."

While Blair stated that it is hard to guess at the odds that one of these risks would be realized, he noted that there are still extreme, possibly fatal, weaknesses in both the US and Russian systems. A 1990s study of the command and control system found numerous weaknesses in the US system, leading to locks being placed on the nuclear weapons deployed on Trident submarines in 1997, the first physical barrier to launch on a US Trident submarine missiles. The study also found an "electronic backdoor" into the Navy's internal communications system, which would allow terrorists or hackers to control the system used to broadcast launch authorization to Trident submarines. This study did lead to the retraining of Trident crews on how to respond to launch orders by the US Navy. All safeguards can be circumvented, Blair noted, but an attempt to circumvent can only be guaranteed success with "unlimited access." Blair noted that there varying degrees of safety associated with the arsenals of countries possessing nuclear weapons. Pakistan is the least secure due to governmental instability. The United States has spent $100 million to overcome these risks through

assisting in the improvement of safeguards on Pakistani weapons.

Regarding the risk of terrorist capture of nuclear material, Blair said that there are hundreds of nuclear weapons in transit at all times between various locations. Weapons move via numerous routes, including by land, sea and air. Transport is the "most vulnerable part of their operational life cycle." Additional risks are posed by the highly-enriched uranium and plutonium being produced today, which around the world would be sufficient to produce over one hundred thousand nuclear weapons. Some of this material has made it to the black market, where it was recaptured by police. Blair warned that we likely have not recaptured even a quarter of the black market nuclear material. Blair also warned that nuclear material cannot be fully protected, or "locked down," as has been pledged by nuclear weapon state leaders such as President Obama, while nuclear weapons continue to be operated and transported.

Finally, regarding inadvertent escalation, Blair mentioned that there are currently US spy planes all over the world, "provoking" by looking for holes in the air defenses of Russia, North Korea, or China through which another plane could eventually fly to deliver a nuclear bomb. US surface ships and submarines are tailing submarines, and Russian bombers near North America probably routinely find themselves with US or Canadian fighter jets "on their wings" as well. These interactions constantly increase the risk of a military escalation, which could possibly lead to the outbreak of nuclear conflict.

Blair closed by stating that the United States and Russia have been "minutes away" from nuclear war involving hundreds or thousands of bombs numerous times already. Other countries are "following suit, shortening the fuses as well." Blair called it a "hydra-headed risk of unacceptable proportions" – one that he cannot quantify, but, he said, it is "reasonable to expect a nuclear disaster" as a result of peacetime nuclear operations. Blair warned of nuclear weapons, "if we don't eliminate them in our lifetime, there's a very strong probability that they will be used in our lifetime."

Responding to a question regarding the impediments to reduction of alert status for the United States, Blair cited a lack of civilian knowledge of the risks of high-alert status, or even the existence of that status, and noted the inaccurate statements made by UN representatives or government officials. Most of the information related to the alert status requires certain security clearances. A study he himself had conducted on behalf of Congress on the risks of unauthorized launch was classified by the Joint Chiefs of Staff at a level *above the US Senate level*, copies were destroyed except those held by the Pentagon, and he was no longer authorized to read the report that he wrote. The current Nuclear Posture Review states that de-alerting would provoke preemptive attack against the United States; Blair stated that the Department of Defense didn't take the suggestion of de-alerting seriously enough to really respond to it as if it was in fact a serious possibility. Blair stated that the United States government does not even have a plan in place to eventually, possibly, get to zero nuclear weapons; it simply has not been called for because it is not considered a realistic possibility.

Another question focused upon the US ability to assess the lawfulness of a use of nuclear weapons given the incredibly short response times. Blair reiterated his understanding that the decision to launch nuclear weapons is essentially automated – if the box on the checklist is checked, the next level is reached, and this process continues until a nuc-

lear launch is authorized, without any time to evaluate what is being done in the big picture because of the speed of each step.

Yet another question concerned whether reliance on nuclear weapons has increased due to an increased risk of terrorist acquisition. Blair responded that this calculation is illogical: if terrorists have nuclear weapons, "what role do our weapons play?" Soon after 9/11, Blair co-wrote an op-ed with two nuclear officers, one of whom was in a missile launch center during the attacks. They pointed out that despite "having the most destructive weapons ever invented at its hands, our military was powerless to deter, disrupt, punish or destroy this new type of adversary."[4]

---

[1] **DR. BRUCE G. BLAIR** *is President of the World Security Institute, a non-profit organization he founded to promote independent research and journalism on global affairs, and an expert on U.S. and Russian security policies, specializing in nuclear forces and command-control systems. He is also Co-Founder and Co-Coordinator of Global Zero, an international group of 300 world leaders dedicated to achieving the phased, verified elimination of nuclear weapons by 2030, and Co-Executive Producer of Countdown to Zero, a documentary film concerned with the continuing dangers of nuclear weapons released in 2010.*

[2] **SAMEER KANAAL** *is a Research Associate with the Lawyers Committee on Nuclear Policy.*

[3] "Humanitarian Law, Human Security: The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons," convened by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms in Vancouver, Canada, February 10-11, 2011.

[4] Bruce Blair, Damon Bosetti, and Brian Weeden, "Bombs Away," New York Times, December 6, 2010, available at http://www.nytimes.com/2010/12/07/opinion/07blair.html.

The Implications of the Ethical Guidelines for the Norwegian Petroleum Fund for the Application of International Humanitarian Law to Nuclear Weapons

Gro Nystuen[1]

In 2005, seven international companies were excluded from the portfolio of the Norwegian Petroleum Fund, on the ground that they produced key components for nuclear weapons. The Ethical Guidelines on which the decision was based specify that the Fund should not be invested in companies producing weapons that may violate fundamental humanitarian principles. This article explains the background for the Guidelines and how they were implemented with regard to nuclear weapons.

The Fund

Norway has a long-standing and well-developed offshore petroleum industry. In 1990, the Norwegian government established the Government Petroleum Fund. The purpose of the Fund, now renamed the *Government Pension Fund – Global*, is to facilitate the government savings necessary to meet the rapid rise in public pension expenditures in the coming years, and to support the long-term management of petroleum revenues. The current value of the Fund is in excess of 3000 billion NOK, or 400 billion EUR, making it one of the world's largest publicly-owned funds. The Fund's asset classes are equities, bonds and real estate, and the Fund is invested in more than 8000 companies in over 50 states.

Background for the Ethical Guidelines

As the value of the Fund increased during the 1990s, a public debate arose about whether the Fund's management ought to be subject to ethical standards. One particular incident in 1999 gave momentum to this debate when it was revealed that the Fund was invested in a Singaporean company that produced anti-personnel landmines. Norway had been a keen supporter of the Ottawa process that resulted in the Mine Ban Convention, to which Norway became a party. The questions raised by this apparent inconsistency were among the political discussions leading to the establishment of an *Advisory Commission on International Law* for the Fund. The mandate of this commission was to determine the extent to which any of the Fund's investments could constitute a breach of Norway's international obligations.

The Advisory Commission concluded that it could not be excluded that even modest investments in a company that produced antipersonnel landmines might imply a violation of the prohibition against assistance in Article 1 (c) of the Mine Ban Convention. Based on this advice, the Ministry of Finance decided to exclude the relevant company from the Fund. This decision served as a precautionary measure; it was not considered an uncontested clear-cut legal obligation to disinvest, as it is not explicitly stated in Article 1 (c) that such investments actually do constitute a breach of the Convention.

Very few international treaties have provisions that ban purely financial investments in companies involved in prohibited activities. The mandate of the Advisory Commission on International Law was thus relatively narrow, and soon politicians, non-governmental organizations and other civil society actors in Norway began to demand guidelines for the Fund that would cover more than just invest-

ments constituting breaches of international law. It was argued that investments in questionable companies or activities should be scrutinized on ethical grounds, not just legal ones.

In 2002, a governmental commission (the Graver Commission) was established, with a mandate to propose a set of ethical guidelines for the Fund. Based on the Graver Commission's report and the ensuing discussions in Norway's Parliament, the Ethical Guidelines for the Fund were adopted by the Government in November 2004. This led to the establishment of the Council on Ethics for the Government Pension Fund ("the Council"), replacing the Advisory Commission on International Law.

THE CRITERIA IN THE ETHICAL GUIDELINES FOR EXCLUSION OF COMPANIES FROM THE FUND

The criteria contained in the Ethical Guidelines require that the Fund shall not be invested in companies which themselves or through entities they control produce certain kinds of weapons, produce tobacco, or sell weapons or military material to Burma. Moreover, the Ministry of Finance may, on the advice of the Council of Ethics, exclude companies from the Fund if there is an unacceptable risk that the company contributes to or is responsible for: a) serious or systematic human rights violations, b) serious violations of the rights of individuals in situations of war or conflict, c) severe environmental damage, d) gross corruption, or e) other particularly serious violations of fundamental ethical norms.

The Ministry of Finance makes the final decisions on exclusion of companies according to these criteria, based on Recommendations from the Council on Ethics. All of the Recommendations must be publicized, whether or not the Ministry follows the Council's advice.[2]

THE WEAPONS CRITERION

Among the provisions of the Guidelines is the provision that the Fund should not be invested in companies that produce certain weapons, more specifically; weapons that *through their normal use may violate fundamental humanitarian principles*. The Guidelines' preparatory work refers in this connection to, for example, the principle of proportionality and the principle of distinction.

These principles refer to *inter alia* weapons that through their intended use may lead to unnecessary suffering or superfluous injury, or weapons that do not distinguish between military objectives and civilians. Various types of weapons, munitions and means of warfare are prohibited under international law with reference to these principles.

The effects from the use of nuclear weapons are of a nature that makes it difficult to envisage that their use could discriminate between military targets and civilians. Use of such weapons will in any case cause long-term environmental damage, and it can also be argued that it will lead to unnecessary suffering and superfluous injury. It is not controversial, therefore, to argue that the use of nuclear weapons generally will violate fundamental humanitarian principles.

The preparatory work thus concluded that the Fund should not be invested in companies that "*develop and produce key components for nuclear weapons.*" In addition, the list of weapons under this criterion of the Guidelines encompasses: chemical and biological weapons, anti-personnel mines, cluster munitions, incendiary weapons, non-detectable fragments and blinding laser weapons. This approach to certain weapons as an exclusion criterion was

seconded by the Parliament in subsequent discussions, and hence the Fund's criterion regarding weapons pertains to the above-mentioned categories.

The preparatory work specifically pointed to the discussions in the US, during the G.W. Bush era, on possible future production of "*mini-nukes,*" stating that:

> "*The idea is to use such weapons in warfare and not only as a deterrent. Such a strategy will necessarily lead to the collapse of the non-proliferation regime, and rapid global use of nuclear weapons. If the proposal receives political and financial support, the production of such weapons could start in a few years. The […] Fund could therefore provide a signal effect by limiting its investment possibilities with regard to the development and production of such small nuclear weapons.*"

The preparatory work thus indicates clearly that the development and production of small tactical nuclear weapons, including "bunker busters," would fall within the criterion.

How the term "key components to nuclear weapons" was defined

In its interpretation of the Ethical Guidelines, the Council assumed that "*development and production*" of nuclear weapons encompasses more than just the actual production of nuclear warheads. The term includes, for example, the missile carrying the warhead. In the Council's view, certain forms of testing of new weapons and the maintenance of existing weapons also fall within the scope of the exclusion criterion. It was assumed that the production of material that can be used in warheads and the production of the warheads themselves would only take place at government-owned facilities, and would thus not be within the Fund's portfolio of companies. Such companies, however, may be directly involved in the development and testing of nuclear warheads. Companies that provide services related to the operation and maintenance of general infrastructure at facilities that may produce nuclear warheads, but take no other part in the actual production, were not considered for exclusion.

The Council moreover found that the development or production of products or materials or other activities that may be categorized as being of a "*dual use*" nature were, as a point of departure, not covered by the Guidelines. This could for example be the production or enrichment of uranium for other purposes than nuclear weapons. Likewise, the production and maintenance of delivery platforms (aircraft, surface ships, submarines, missiles) that could also be used to deliver conventional weapons would also fall outside of the scope. Moreover, nuclear-powered submarines were considered to fall outside the criterion. Although they are propelled by means of nuclear energy, such submarines can carry both conventional and nuclear weapons. The same applies to other naval vessels.

Missiles that serve no purpose other than to deliver nuclear warheads, however, were not considered to fall under the category of "*dual use.*" Such missiles would be intercontinental ballistic missiles launched from land or sea, and were regarded as key components to nuclear weapons. The Council also regarded upgrade- and renewal- programmes as a continuous production process and equaled this to the initial production of key components for nuclear weapons. Once the Council had arrived at a delimitation of what would be covered by the criterion on nuclear weapons, it started to collect information on which companies would be candidates for exclusion.

These discussions in the Council on Ethics resulted in a recommendation to the Ministry of Finance on September 19, 2005, on the exclusion of companies developing and producing nuclear weapons, in which the Council recommended that seven companies be excluded from the Fund. The Ministry followed the recommendation and the Fund's investments in those companies were sold. In the years following 2005, subsequent recommendations have been submitted on the same topic.

THE RECOMMENDATIONS ON NUCLEAR WEAPONS AND IHL

The transformation of the disinvestment instrument for the Fund from an Advisory Commission on *International Law* to the *Council on Ethics* entails that the exclusion of companies does not have to be based on international law considerations. On the contrary, it was seen as unnecessary restrictive to base exclusions only on violations of international law. The Council on Ethics –in its deliberations on nuclear weapons– referred to the assumption, shared by many, that it is difficult to envisage use of nuclear weapons that would not violate international humanitarian law. The Council has not, however, made any legal assumptions regarding for example the conclusions in the 1996 International Court of Justice advisory opinion on nuclear weapons of 1996. It is not necessary for the Council to assert that a weapon is subject to an international ban; it is sufficient that the weapon is listed as a weapon that through normal use may violate fundamental humanitarian principles.

CONCLUDING REMARKS

When assessing the potential effects of the Ethical Guidelines for investment policies, it seems important to also acknowledge the limitations of such policies. Public disinvestment policies hardly constitute very effective foreign policy instruments. At the same time, it seems clear that the publicity generated by a decision to disinvest on ethical grounds does have an impact. Although the Ethical Guidelines cannot take much of the credit for the stigmatization of, for example, nuclear weapons in the international public opinion, its criteria and concrete exclusions hopefully contribute to an increased awareness concerning these issues among investors, both private and public.

---

[1] **PROF. GRO NYSTUEN** *is Senior Partner at International Law and Policy Institute (ILPI) in Oslo, Associate Professor at the University of Oslo and at the Defence Staff University College in Oslo. She worked in the Norwegian Ministry for Foreign Affairs (MFA) from 1991 to 2005, on issues such as public international law, human rights, international humanitarian law and arms and disarmament issues, including the Mine Ban Convention and the Convention on Cluster Munitions. As from 2005, she has also been Chair of the Council on Ethics for the Norwegian Government Pension Fund – Global.*

[2] All recommendations, as well as other relevant documents, are available in Norwegian and English at the website: www.etikkradet.no.

The United Nations and a Humanitarian Approach to Nuclear Disarmament

Randy Rydell[1]

Do you imagine that political constitutions spring from a tree or rock and not from the disposition of citizens?
-- Plato[2]

One often hears that the "genie" of nuclear weapons is out of its bottle, never to be returned. One also often hears that nuclear weapons "cannot be disinvented." The great irony of these familiar *ipse dixits* is that they are closer to being true with respect to nuclear disarmament than to nuclear weapons.

Disarmament is not going away. Its legal, moral, and political foundations are becoming stronger, thanks in no small measure to the growing recognition in multilateral arenas of the humanitarian dimension of nuclear disarmament. The United Nations, including various parts of its multilateral disarmament machinery, has played key roles in this process and will likely continue to do so. How, and what roles, are discussed below.

The Old Game of Disarmament

First of all, nuclear disarmament is – and has long been – a goal officially recognized by all States. It was included in the UN General Assembly's first resolution on 24 January 1946 (Resolution 1(I)). The goal of zero was thus clear in 1946 – it has long since become a widely held public expectation in international relations, as demonstrated in many ways.

In 1959, the General Assembly included nuclear disarmament as part of the more comprehensive goal of "general and complete disarmament under effective international control" (GCD in Resolution 1378), which the Assembly later declared (at its first Special Session on Disarmament in 1978) was the world community's "ultimate goal," with nuclear disarmament described as the highest priority.[3]

References to GCD and nuclear disarmament are found in a dozen international treaties, including those creating five regional nuclear-weapon-free zones, and also the Nuclear Non-Proliferation Treaty (NPT).

Article VI of the NPT commits States Parties to "pursue negotiations in good faith" on nuclear disarmament (and on halting the nuclear arms race "at an early date"), a duty the International Court of Justice (ICJ) interpreted—in its landmark 1996 Advisory Opinion[4]—as extending to the responsibility to bring such negotiations to a conclusion. This commitment to nuclear disarmament has also been reflected in each of the consensus final documents adopted at NPT Review Conferences, and echoed further in countless General Assembly resolutions of several decades. Individuals and groups from civil society throughout the world have also registered their Platonic "disposition" in support of disarmament and in many ways[5] – perhaps best illustrated in the extensive networking underway among many such groups both inside and across national boundaries, a political role recognized by distinguished international commissions, including the WMD (Blix) Commission and the International (Evans/Kawaguchi) Commission on Nuclear Non-Proliferation and Disarmament. Some of these initiatives have resulted in international petitions containing millions of signatures.[6]

Nuclear disarmament is therefore far from being the will-o'-the-wisp that its critics have long been claiming. Yet despite this support, over 20,000 nuc-

lear weapons reportedly remain, with the exact number remaining unknown, which testifies to the limited transparency over existing arsenals. And while the idea of achieving nuclear disarmament has not been put back into its bottle, it has been reborn and, in some eyes, is in danger of mutating into a new species. It is often described today, especially by various officials and commentators in the media, and in research and academic communities, as a distant goal or vision, well over the horizon, or using another popular metaphor, the peak of a tall mountain, shrouded in mists.

The discourse on disarmament has also shifted in recent years to a chronic debate over what preconditions must be satisfied to make disarmament "possible." Some of these make sense and are not at all opposed by serious proponents of disarmament – there is little disagreement, for example, that nuclear disarmament commitments must be binding, irreversible, transparent, universal, and verified. Yet other preconditions – including world peace, "solving the problem of war," resolving all regional disputes, ending all proliferation and terrorist threats, and even achieving world government – clearly have the thinly-veiled purpose of simply postponing disarmament indefinitely, as other goals displace disarmament as a priority.

The dictum that "stability and order" are necessary preconditions for disarmament ignores the contribution that disarmament makes in strengthening international peace and security, through confidence-building, dispelling mistrust, lessening risks of conflict escalation, eliminating the danger of nuclear war, encouraging the peaceful settlement of disputes, strengthening the legitimacy (and effectiveness) of non-proliferation efforts, and discouraging the threat or use of force – all tied in various ways to the UN Charter. Indeed, the failure to achieve nuclear disarmament—or at least some tangible progress toward it—would surely jeopardize prospects for achieving international "stability and order."

For serious advocates of nuclear disarmament, the great challenges ahead relate to overcoming chronic political, institutional, and psychological obstacles in achieving this goal. Alva Myrdal used to decry what she called the "game of disarmament," which she viewed as being played more to advance national policy objectives rather than to achieve a goal shared by the world community overall.[7] This old game persists.

THE GAME CHANGERS

One of the most obvious potential "game changers" for disarmament would be the demonstration of some decisive leadership in this field by the nuclear-weapon States. While there have been no treaty negotiations on nuclear disarmament *per se*, the Soviet Union and the United States made nuclear disarmament proposals in the United Nations in 1946 – the Gromyko and Baruch Plans. They also agreed on the McCloy/Zorin joint statement of 1961, outlining steps for achieving general and complete disarmament. Since then, however, nuclear arms talks between the two States have consisted only of incremental steps in nuclear arms control, typically featuring reductions on deployments without international verification, leaving aside issues relating to the disposition of non-deployed weapons. Britain, China, and France have taken various disarmament-related steps, which have included (if not universally amongst them) halting nuclear tests, shutting down nuclear test sites and fissile material production facilities, eliminating certain delivery systems, declaring existing stockpiles of weapons and fissile materials, and other voluntary gestures short of negotiations on disarmament.

While leadership from the "top-down" has some potential, it is also inadequate as a foundation for progress in achieving nuclear disarmament, given that all States possessing such weapons are also modernizing their arsenals and pursuing long-term plans to develop new weapons or delivery systems. The doctrine of nuclear deterrence – which Secretary-General Ban Ki-moon has called "contagious"[8] – is now being implemented in various forms by nine States and many more if one includes States that are members of nuclear alliances. More people actually today live in States that have either the bomb or a nuclear umbrella than in States that are fully nuclear-weapon-free.

Possessor States also maintain that it is legal to use such weapons (China and India oppose first use but have not ruled out use in response to a nuclear attack) and most oppose the negotiation of a nuclear weapons convention, with the exceptions of China, India, Pakistan, and the Democratic People's Republic of Korea. Yet if such weapons are legal to use, effective in guaranteeing national security, and recognized symbols of power and status among a majority of the world's population, such claims are arguably more conducive to the evolution of an unwelcome norm of possession, than to the achievement of abolition. This is why efforts to achieve nuclear disarmament will have to rely upon more than the examples being set by the nuclear-weapon States.

Game-changing leadership will in all likelihood require sustained efforts at all three levels of international society – top-down involving the existing nuclear-weapon States, bottom-up from sustained pressure from civil society, and what might be called "outside-in" or diplomatic initiatives from non-nuclear-weapon States, specifically that part of the world diplomatic community that seeks to eliminate nuclear weapons. At all of these levels—it will take considerable political will to overcome political won't.

In the years ahead, the nuclear-weapon States will likely continue to consult amongst themselves in plurilateral meetings to discuss the implementation of their disarmament-related commitments made at the 2010 NPT Review Conference, and they have already met twice as of the time of this essay. They share an interest in gaining international recognition and legitimacy for their individual and collective efforts, and they also wish for disarmament and non-proliferation to be pursued by all States. For these reasons, they have a clear interest in cooperating with activities that are underway in the United Nations, the world's central meeting place, as well as at NPT Review Conferences (which are customarily held at UN headquarters).

The non-nuclear-weapon States have their own reasons for advancing disarmament goals both at the UN and throughout the NPT review process, with the latter being a potentially valuable tool for maintaining accountability in fulfilling disarmament commitments. Many of these States are small in size and lack large military establishments, and hence their security must rely upon globally-recognized legal and political restraints on the use of force. Individuals and groups in civil society also share an interest in building support for their initiatives at the United Nations. This interest was amply demonstrated by the efforts by civil society groups to draft (and update) a model nuclear weapons convention, which the Secretary-General has circulated to all Member States at the request of Malaysia and Costa Rica.[9]

Since the ICJ issued its Advisory Opinion in 1996, the General Assembly has adopted annual resolutions calling on all States to commence multilateral negotiations leading to the early conclusion of a

nuclear weapons convention; last year, Resolution 65/76 gained the support of 133 States, the most ever. The resolution draws heavily, but not exclusively, on the humanitarian theme, noting in its Preamble that the continuing existence of such weapons pose "a threat to humanity and all life on Earth." Last year, twelve General Assembly resolutions dealing mostly with nuclear weapons were adopted that identified "humanity" or "humanitarian" aims as their goals. The narrative summary of the 2010 NPT Review Conference and its consensus Action Plan also contained references to the "catastrophic humanitarian consequences" of any use of nuclear weapons, and the Action plan reaffirmed the need for all States at all times to comply with applicable international law, including international humanitarian law – a view that the General Assembly specifically welcomed in Resolution 65/59.[10]

The optimal configuration of game-changers – the "perfect storm" – would be a coordinated effort involving contributions from all three categories of players: some or all of the nuclear-weapon States (and other possessor States), geographically diverse members of the diplomatic community including middle-power States and States both with and without nuclear umbrellas, and civil society. For purposes of achieving universality and full legitimacy, such efforts should also be centred at the United Nations.

CHANGING THE GAME

Writing between the two World Wars, Salvador de Madariaga – who worked in the disarmament office of the League of Nations Secretariat – stated "the problem of disarmament is not the problem of disarmament. It really is the problem of the organization of the World Community."[11] States are increasingly recognizing that achieving humanitarian goals is part of the task of organizing the world community.

Indeed, there are many new trends in organizing the world community that have the potential to change the way the game of disarmament is played, if not to determine its outcome. Many, but not all, of these are centred in activities at the United Nations. They relate to the rule of law, the evolution of international humanitarian law, demands to respect human rights, growing international opposition to claims that nuclear weapons are legal to use, and the democratic revolution now sweeping not just across the Arab world, but throughout the world community.

While the term "rule of law" does not appear in the Charter, the General Assembly and several Secretaries-General have placed great emphasis on it as a key focus of the United Nations, if not part of its very *raison d'être*.[12] Speaking at Harvard on 22 October 2008, Secretary-General Ban Ki-moon said, "The United Nations has long stood for the rule of law and disarmament. Yet it also stands for the rule of law in disarmament, which we advance through our various statements, resolutions, and educational efforts."[13] Two days later, and referencing specifically the rule of law in disarmament, he announced his five-point nuclear disarmament proposal, which included an emphasis on the importance of pursuing a nuclear weapons convention.[14]

Though the term "rule of law" is not officially defined, for the purposes of this essay it refers to the conduct of international relations within a framework of norms that States recognize as binding.[15] At the international level, the fundamental principles of the UN Charter – including the obligations to solve disputes peacefully and not to engage in the threat or use of force – are essential parts of that rule of law. Respect for adhering to treaty

commitments (*pacta sunt servanda*) offers another illustration, as does the pursuit of universal membership in multilateral treaties. Customary international law and peremptory norms (*jus cogens*) make their own contributions to this overall legal architecture called the rule of law. Growing international recognition of the importance of international humanitarian law and human rights law, as germane to the challenge of achieving nuclear disarmament, are important parts of these evolving efforts to bring the rule of law to disarmament.

In recent years, the General Assembly has adopted (without votes) several resolutions on "The rule of law at the national and international levels."[16] The most recent, Resolution 65/32, reaffirmed the Assembly's commitment to the purposes and principles of the Charter and international law, which together are "indispensable foundations of a more peaceful, prosperous and just world." Earlier, the General Assembly adopted several resolutions addressing the "Consideration of principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations."[17] Resolution 1815 (1962) placed considerable emphasis on the importance of strengthening "the rule of law among nations," adding that it is "essential" that "the arms race be eliminated and general and complete disarmament achieved under effective international control." The resolution also recalled the General Assembly's authority under the Charter (Article 13) to make recommendations on the progressive development and codification of international law—roles performed at the General Assembly largely by the International Law Commission (ILC).[18] At the request of the General Assembly, the ILC could one day perform such functions with respect to the status of nuclear weapons in international humanitarian and human rights law.

There is little doubt that a large segment of the world community believes that any use of nuclear weapons would be contrary to international humanitarian law. The ICJ's 1996 Advisory Opinion reaffirmed that such law must be observed at all times, even in exercising the right of self defence. The International Committee of the Red Cross, which has a special responsibility in the field of international humanitarian law, has repeatedly voiced its concerns that the use of nuclear weapons would be incompatible with that law.[19]

In terms of the operational implications of that law, Nina Tannenwald has argued that there already exists in the United States a "nuclear taboo" against any use of such weapons, a taboo based on the horrific, indiscriminate effects resulting from any such use.[20] Charles Moxley has produced an exhaustive analysis of US military field manuals, which he found reflect an awareness of the legal obligation to comply with international humanitarian law, even in considering the use of nuclear weapons.[21] A number of distinguished judges, lawyers, law professors, officials and former diplomats, parliamentarians, civil society organizations and individuals have endorsed the 11 February 2011 Vancouver Declaration on "Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World."[22]

The General Assembly has a long history of declaring the use of nuclear weapons against international humanitarian law, starting most explicitly with the adoption of Resolution 1653 of 1961, which declared than any such use would be "contrary to the spirit, letter and aims of the United Nations, and, as such, a direct violation of the Charter" while also being "contrary to the rules of international law and to the laws of humanity."[23] Four General Assembly resolutions have declared any use of nuclear weapons as a crime against humanity,[24] and 35 ad-

ditional resolutions have re-affirmed or recalled previous non-use resolutions.

This persistent and growing interest worldwide in ensuring that nuclear weapons are subject to the rule of law, the constraints of international humanitarian law, and the fundamental norms of human rights, has not been due solely to the ICJ or the law profession.[25] It has occurred largely because of sustained work by civil society groups and individuals worldwide to advance these aims in a variety of international settings, including the United Nations, national parliaments, and regional organizations. As the role of these civil society groups continues to expand – assisted by technological innovations that have made international communications both easier and often cost-free – a "democratic revolution" has been occurring at the United Nations. The expansion of the UN membership in the 1950s and 1960s led to an expansion of the UN disarmament machinery, including the Conference on Disarmament in Geneva. Fully in accordance with the Charter's principle of sovereign equality, small and middle-power States have – individually and collectively – made their voices heard and have actively participated in the evolving process of developing and implementing global disarmament norms, with Switzerland, Norway, Malaysia, Indonesia, and Costa Rica often leading the way.

A key function of the United Nations is to establish international norms that are regarded as legitimate. This legitimacy is due both to procedural reasons – in ensuring that each State has a right to participate in the development of the relevant norms – and to the substantive fairness of such norms (e.g., in excluding double standards).[26] Legitimacy is, however, more than just a legal concept. Inis Claude long ago identified "collective legitimization" as a key political function of the United Nations, saying "the development of the United Nations as custodian of collective legitimacy is an important political phenomenon of our time."[27] More recently, the Swiss Government has funded an exceptional study on the subject of delegitimizing nuclear weapons, which relies heavily upon the constraints found in international humanitarian law.[28]

WINNING THE GAME

When nuclear disarmament is finally achieved, it is unlikely that any one country, factor, variable, or political or legal tactic would deserve exclusive credit for producing such a result.

Its achievement, however, will likely be substantially influenced by evolving trends in the international rule of law, including both international humanitarian and human rights law, and the outcome of efforts to outlaw nuclear weapons through the negotiation of a multilateral nuclear weapons convention (or a framework of separate, mutually reinforcing instruments) as Secretary-General Ban Ki-moon has proposed.

And as the rule of law grows at the international level, so too will it evolve at the level of national legal systems. Perhaps one of the greatest unknowns today about the future of international nuclear disarmament efforts are the persisting uncertainties over when, and how, agreed legal norms will become rooted in national legal and political systems. A mismatch persists between solemn international disarmament (negotiating) commitments and the paucity of national laws, institutions (e.g. disarmament agencies), legislative oversight committees with disarmament mandates, concrete national plans and timetables for achieving nuclear disarmament, and budget allocations and executive regulations – and there are no shortcuts to overcoming these gaps other than through the domestic political process within States.

To this extent, the goal for nuclear disarmament should not be the end of sovereign States and their subordination to some form of world government[29], but to rehabilitate the ends of States, by bringing those ends into harmony with international commitments. One possible avenue for progress in years ahead might be the growth of linkages, communication, and coordination between parallel parts of governments – what Anne-Marie Slaughter has called "transgovernmentalism,"[30] a term she has not applied to disarmament, but could one day become quite relevant to its achievement. Elsewhere, she has argued, "the future of international law lies in its ability to affect, influence, bolster, backstop, and even mandate specific actors, actions, and outcome[s] in domestic politics."[31]

Approaches to disarmament based on humanitarian themes can help in bridging this gap. The goal of such initiatives is to serve the common interest of humanity, rather than to advance the topical foreign or defence policy interests of specific States – or, more precisely, to advance State interests through advancing the common interest. Humanitarian approaches to disarmament work from the logic of positive sum games, offering benefits for everyone, in contrast to the alternative zero-sum game of competitive power politics in a world of nation-state winners and losers. Humanitarian approaches to disarmament thus offer the potential to appeal to a wider set of audiences throughout society, and as this political foundation continues to expand, so too will the possibilities for reforms in domestic legal and political organizations that will bring domestic laws and policies more into line with international commitments.

Remembering the Purpose of the Game

Yet there are problems with such approaches as well. The first consist of weaknesses in enforcement – who determines when the "norm of disarmament" is violated, and how will violators be held accountable in law?

The second is associated with the promotion of various "non-use" initiatives that shift the emphasis from eliminating weapons to one of simply reducing their risk of use. The Evans/Kawaguchi report and several non-governmental organizations, for example, have proposed a "sole purpose" criterion that would hold that the only function of nuclear weapons is to deter nuclear attacks. A problem with that approach is that if it is not implemented as inherent part of a disarmament process, it becomes yet another rationale for possession, for the legality of use, and for the military utility of use. Pledges of non-use against non-nuclear-weapons States and of no-first-use, when not part of an ongoing process of disarmament, offer as a goal not the peace and security of a world without nuclear weapons, but an illusory and highly precarious stability in a world with nuclear weapons. Possessor states and those covered by nuclear umbrellas—representing most of the world's population—would not likely join any non-use treaty.

A humanitarian approach based on non-use therefore would probably best be pursued not in isolation but as a clause in a nuclear weapons convention, as non-use was handled by the Chemical Weapons Convention and, indirectly, by the Biological Weapons Convention. The successful efforts to negotiate treaties (though still not universal in membership) on anti-personnel landmines and cluster munitions did not seek merely to limit the use of such weapons – non-use was explicitly incorporated as a part of a disarmament (or non-armament) commitment, and this seems a sensible approach for nuclear weapons as well. Based on humanitarian law principles, and the evolving rule of law in disarmament, the only legitimate "sole purpose" of nuclear weapons (and other WMD)

that merits global support is the purpose served by their elimination.

Finally, a humanitarian approach to nuclear disarmament should also recognize the need for parallel efforts – to eliminate other WMD, reduce military spending, limit conventional weapons arsenals and transfers, and strengthen mechanisms for promoting the peaceful settlement of disputes. These are all goals long associated with "general and complete disarmament under effective international control." A world plagued by large-scale wars involving conventional arms or the use of other WMD would not be a desirable legacy of achieving a "world free of nuclear weapons."

THE GAMES TO COME

It is clear that the United Nations has served as an indispensable arena for the world community to advance its common goals in disarmament, which in recent years have included the advancement of humanitarian norms against the use and possession of nuclear weapons.

In all likelihood, Member States will continue to pursue these goals in the key institutions of the UN disarmament machinery – the UN Disarmament Commission, the First Committee of the General Assembly, and the Conference on Disarmament. The Secretary-General and Secretariat will continue their efforts to assist this process, and additional contributions will come from the UN Institute for Disarmament Research and the Secretary-General's Advisory Board on Disarmament Matters.

In the years ahead, there may be additional contributions from other multilateral arenas, in addition to constructive regional initiatives such as the pursuit of a WMD-free zone in the Middle East, and the establishment of new nuclear-weapon-free zones (e.g. in the Arctic, Central Europe, East Asia or, one day, even South Asia). All of these would complement the common purposes shared by the existing regional nuclear-weapon-free zones in Latin America and the Caribbean, Africa, the South Pacific, Southeast Asia, and Central Asia.

Given some persisting disagreements in the world community over the extent that humanitarian law restricts the use of nuclear weapons, and the existence of various gaps in the law (as identified in the 1996 ICJ Advisory Opinion), there may well be a strong case for the General Assembly to consider exercising its mandate under Article 13 of the Charter with respect to the codification and progressive development of international law. It could ask the ILC to undertake a study, appoint a Special Rapporteur, or establish a working group on this issue, perhaps even with the aim of drafting a treaty to clarify the law.

Consistent with humanitarian objectives, the UN Security Council could, as Secretary-General Ban Ki-moon has proposed,[32] revive its Charter-based Military Staff Committee to consider plans for the maintenance of international peace and security in a world free of nuclear weapons. The Council has already adopted Resolution 1887 (2009), which called upon all States—not just those party to the NPT—to undertake negotiations in good faith on nuclear disarmament. It could follow-up on this resolution by holding annual high-level meetings or summits specifically on disarmament issues. It could consider adopting a declaration of a common intention to "seek to achieve" nuclear disarmament by a specific future date, which would respond at least in part to perennial calls from the Non-Aligned Movement for a time-bound plan for getting to zero. It could go beyond its past Presidential Statements and resolutions by declaring that weapons of mass destruction *per se*—not just their proliferation— constitute threats to international peace

and security.[33] And it could adopt new, unambiguous security assurances to non-nuclear-weapon States – preferably unconditional, to avoid making new nuclear threats that only create new incentives for proliferation.

With respect to the UN's efforts to advance human rights, these are centred on the work of the Economic and Social Council (ECOSOC), the Human Rights Council, the General Assembly's Third Committee, the Office of the High Commissioner for Human Rights, and nine treaty-based committees, in addition to the work of numerous other UN entities that directly or indirectly promote human rights.[34] Some of these institutions have shown interest in advancing disarmament goals. The Human Rights Committee (which oversees implementation of the international Covenant on Civil and Political Rights) reported in 1985 that threats posed by nuclear weapons were "among the greatest threats to the right to life which confront mankind today."[35] In 2002, the UN's former Sub-Commission on the Promotion and Protection of Human Rights produced a detailed working paper written by a Mauritian Supreme Court judge on the human rights impacts of WMD.[36] Yet it is also true that the UN human rights and disarmament communities work separately at the UN.[37]

There are many possible options available to deepen that cooperation. The Human Rights Council has a "think tank" Advisory Committee that could prepare recommendations for the Council on this issue, as could ECOSOC, possibly for the initiation of studies or the convening of special meetings to address disarmament-related issues. The First and Third Committees of the General Assembly could jointly consider a resolution—or parallel resolutions—on disarmament and human rights. In the Secretariat, the Office of the High Commissioner for Human Rights and the Office for Disarmament Affairs could also consider various joint initiatives—statements, editorials, symposia, publications, films, etc. Other efforts to explore the disarmament/human rights theme could be pursued within the treaty-based human rights committees, including the Committee on Economic, Social, and Cultural Rights or possibly even the Committee on Rights of the Child.

Other options could include efforts to advance international humanitarian law through new efforts by the International Committee of the Red Cross, which could adopt an official resolution, based on international humanitarian law, opposing both the existence and threat of use of nuclear weapons. There might be some merit in considering a fourth Protocol additional to the Geneva Convention of 1949, which would address the rights of citizens not to be subject to threats of use of nuclear weapons.

Non-governmental organizations can also be expected to continue their efforts to strengthen international humanitarian law against the use or threat of use of nuclear weapons. Such efforts might include the promotion of a nuclear weapons convention, the progressive integration of disarmament into national legal and political laws and institutions, encouragement of transgovernmental cooperation and Track Two initiatives to help raise disarmament as a priority in national bureaucracies, encouragement of initiatives from national law associations, and an expansion of education initiatives and engagement with the news and social media.

So while the United Nations will not be the only arena for advancing disarmament, and while international humanitarian law will not be the only substantive reason for pursuing this goal—morality and self-interest apply as well—the UN will likely re-

main the world's central arena for establishing global disarmament norms that are universally regarded as legitimate, both procedurally and substantively. To this extent, even diehard "realists" must acknowledge that the United Nations is both useful and is here to stay, and so is a humanitarian approach to nuclear disarmament.

The last word on this subject should come from Jayantha Dhanapala, who said,

> *Disarmament is pre-eminently a humanitarian endeavour for the protection of the human rights of people and their survival. We have to see the campaign for nuclear disarmament as analogous to the campaigns such as those against slavery, for gender equality and for the abolition of child labour. It will be a hard, uphill struggle but, eventually, we shall overcome!*[38]

[1] **Dr. Randy Rydell** *is the Senior Political Affairs Officer in the Office of Mr. Sergio Duarte, the High Representative for Disarmament Affairs at the United Nations and previously served as an adviser to Under-Secretary-General Jayantha Dhanapala and his successors. He was Secretary of the Secretary-General's Advisory Board on Disarmament Matters, Senior Counsellor and Report Director of the Weapons of Mass Destruction Commission, Senior Fellow at the Arms Control Association in Washington, D.C, and has been a Visiting Lecturer at Princeton University. He also worked at the Lawrence Livermore National Laboratory, as well as for United States Senator John Glenn on the Committee on Governmental Affairs, and was an international political analyst studying the global spread of nuclear weapons.* The views expressed in this article are the author's and do not necessarily reflect those of the United Nations.

[2] Inscription without reference, Alfred Zimmern, *The League of Nations and the Rule of Law* (London: Macmillan and Co., 1939), p. vi.

[3] The Final Document of the first Special Session on Disarmament is available at http://www.un.org/disarmament/HomePage/SSOD/GA10thSpSes1rstSpSeson%20Disarmament.pdf.

[4] The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, separate opinions, declarations, and related documents are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=unan&case=95&k=e1.

[5] For a comprehensive history of such efforts, see Lawrence S. Wittner, *The Struggle Against the Bomb*, three volumes (Stanford: Stanford University Press, 1993, 1997, and 2003).

[6] "Million-signature petition to end nuclear weapons goes on display at UN Headquarters," UN News Centre, 21 March 2011, http://www.un.org/apps/news/story.asp?NewsID=37883&Cr=nuclear&Cr1=weapon. Also, "International Coalition Delivers Seven Million Petition Signatures for Nuclear Abolition to UN Chair," Common Dreams press release, 4 May 2010, at http://www.commondreams.org/newswire/2010/05/04-2.

[7] Alva Myrdal, *The Game of Disarmament: How the United States and Russia Run the Arms Race* (New York: Pantheon Books, 1976).

[8] Statement at EastWest Institute nuclear disarmament meeting, SG/SM/11881, United Nations, 24 October 2008.

[9] The text was circulated as UN General Assembly document A/62/650, 18 January 2008.

[10] That resolution—co-sponsored by the seven-nation New Agenda Coalition—was adopted on 8 December 2010 by a vote of 173-5-5. The nuclear-weapon States were deeply split, with China and Russia voting in favour, France and the United States voting against, and the United Kingdom abstaining.

[11] Salvador de Madariaga, *Disarmament* (NY: Coward-McCann, 1929), p. 56.

[12] See José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005); and Frederic L. Kirgis, Jr., *International Organizations in their Legal Setting* (St. Paul, MN: West Publishing Co., 1993).

[13] Statement of Secretary-General Ban Ki-moon at Harvard University, SG/SM/11876, 22 October 2008; emphasis added. The UN's Institute for Disarmament Research has produced some pioneering studies on humanitarian aspects of disarmament. See "Disarmament as Humanitarian Action", UNIDIR/2001/23, 2001; Anita Blétry (ed.), Human Rights, Human Security, and Disarmament, Disarmament Forum, Issue 3, 2004; and J. Borrie and V. Martin Randin (eds.), "Disarmament as Humanitarian Action: From Perspective to Practice," UNIDIR, 2006.

[14] *Op. cit.*, note 7. On the role of the Secretaries-General and Secretariat in disarmament, see Randy Rydell, "The Secretary-General and the Secretariat," in Jane Boulden, Ramesh Thakur, and Thomas G. Weiss (eds), *The United Nations and Nuclear Orders* (New York: United Nations University Press, 2009), p. 73-108. On the relevance of the activities of the Secretary-General for the evolution of the rule of law, see Ian Johnstone, "The Role of the UN Secretary-General : The Power of Persuasion Based on Law," *Global Governance* 9 (2003), p. 441-458.

[15] Another dimension of the "rule of law" of great interest at the United Nations will not be discussed in this essay, namely, that pertaining to the maintenance or re-establishment of domestic legal systems of States, as for example following the end of civil conflicts.

[16] For some useful historical context, see Louis Henkin, "International Organization and the Rule of Law," International Organization, Summer 1969, p. 656-682.
[17] Resolution 1815 (XVII), 18 December 1962. Also see Resolution 1966 (XVIII) of 16 December 1963; Resolution 2103 (XX) of 20 December 1965; Resolution 2181 (XXI) of 12 December 1966; Resolution 2327 (XXII) of 18 December 1967; Resolution 2463 (XXIII) of 20 December 1968; and the Declaration of Principles in Resolution 2625 (XXV) of 24 October 1970.
[18] For further discussion of the General Assembly and the rule of law, see Stefan Barriga and Alejandro Alday, "The General Assembly and the Rule of Law: Daring to Succeed?", *Max Planck Yearbook of United Nations Law*, vol. 12 (2008), p. 381-408; and Thomas Fitschen, "Inventing the Rule of Law for the United Nations," *idem*, p. 347-380. For a useful introduction to the ILC, see UN Office of Legal Affairs, *The Work of the International Law Commission*, two volumes, seventh edition (New York: United Nations, 2007).
[19] Statement of ICRC President Jakob Kellenberger to Geneva Diplomatic Corps, Geneva, 20 April 2010.
[20] Nina Tannenwald, *The Nuclear Taboo* (New York: Cambridge University Press, 2007).
[21] Charles J. Moxley, Jr., *Nuclear Weapons and International Law in the Post Cold War World* (Lanham, MD: Austin & Winfield, 2000).
[22] See http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf; for a list of signatories, see http://www.lcnp.org/wcourt/Feb2011VancouverConference/signatories32211.pdf.
[23] Resolution 1653 (XVI), "Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons," 24 November 1961.
[24] Resolution 1653 of 1961, Resolution 33/71B of 1978, Resolution 35/152D of 1980, and Resolution 36/92I of 1981.
[25] This is not intended to minimize the importance of contributions from the legal profession, as exemplified by Charles J. Moxley, Jr., John Burroughs, and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," Fordham International Law Journal, vol. 34, no. 4 (April 2011), pp. 595-696, available at http://lcnp.org/wcourt/Fordhamfinaljoint.pdf.
[26] For further discussion of the legal concept of "legitimacy" see Thomas Franck, "Legitimacy in the International System", American Journal of International Law, vol. 82, p. 705-759.
[27] Inis L. Claude, Jr., "Collective Legitimization as a Political Function of the United Nations," International Organization, Summer 1966, p. 367-379.
[28] Ken Berry, Patricia Lewis, Benoit Pélopidas, Nikolai Sokov, and Ward Wilson, "Delegitimizing Nuclear Weapons" (Monterey, CA: James Martin Center for Nonproliferation Studies), 2010.
[29] See Grenville Clark and Louis B. Sohn, *Peace Through Disarmament and Charter Revision* (Dublin, NH: publisher not identified, February 1956).
[30] Anne-Marie Slaughter, "The Real New World Order," Foreign Affairs, September/October 1997, p. 185.
[31] Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law), in Andre Nolkaemper and Janne Nijman (eds.), *New Perspectives on the Divide Between International and Domestic Law* (Oxford: Oxford University Press, 2007), p. 131.
[32] *Op. cit.*, note 7.
[33] Presidential statement, S/23500, 31 January 1992, p. 4; and Resolution 1887, 24 September 2009.
[34] For further information, see http://www.un.org/en/rights/
[35] Report of the Human Rights Committee, Official Records of the General Assembly, 40th Session, no. 40, document A/40/40 of 1985; cited by Peter Weiss and John Burroughs, "Weapons of Mass Destruction and Human Rights," Disarmament Forum, vol. 3, 2004, p. 29.
[36] Y.K.J. Yeung Sik Yuen, "Human rights and weapons of mass destruction, or with indiscriminate effect, or of a nature to cause superfluous injury or unnecessary suffering," Working Paper, E/CN.4/Sub.2/2002/38, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (UN: ECOSOC, 27 June 2002).
[37] Peter Weiss and John Burroughs, *op. cit.*, note 34, p. 25.
[38] Jayantha Dhanapala, "Remarks upon Accepting the Alan Cranston Peace Award," 16 April 2002, available at http://www.un.org/disarmament/HomePage/HR/docs/2002/2002Apr16_NewYork.pdf.

The Illegality of Nuclear Weapons

Malcolm Fraser[1]

If international law as an institution is to have any relevance, it must apply to critical issues. Nuclear weapons do not fall beyond its scope – indeed they pose its most critical test. These instruments of terror, through their ordinary use, cause human suffering on an unimaginable scale. They violate fundamental principles of international humanitarian law, as well as treaties protecting human rights and the natural environment. Their continued existence in the thousands undermines the very notion of the rule of law, reinforcing instead a system of rule by force, whereby a small number of nations threaten to inflict mass destruction on others in order to achieve political objectives.

This is patently unacceptable – and unsustainable. Any government, organization or individual who values international law must work energetically to advance a world in which such weapons are no more. Nuclear disarmament should be among the highest priorities of all nations. But many seem complacent about this fundamental threat to our future. Nuclear weapons cast a shadow over us all, and must be abolished before they are ever used again.

In its landmark advisory opinion handed down in 1996, the International Court of Justice observed that "[t]he destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet."[2] It highlighted their unique characteristics:

> *"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."*[3]

Given these attributes, it is clear that nuclear weapons could not be used in conformity with international humanitarian law, which prohibits the use of weapons that cause unnecessary suffering and whose effects cannot be controlled. Radiation is inherently uncontrollable. Even the blast, heat and electromagnetic pulse effects of nuclear weapons are beyond the control of any state possessing these devices.[4] Because of their uncontrollability – and for other reasons as well – nuclear weapons violate the rules of distinction, proportionality and necessity.

The president of the International Committee of the Red Cross, Jakob Kellenberger, summed up the uniqueness of nuclear weapons in a speech delivered in April 2010 in advance of the five-yearly nuclear Non-Proliferation Treaty Review Conference:

> *"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."*[5]

Today there are more than 20,000 nuclear weapons in the arsenals of eight or nine countries.[6] (There is still some uncertainty as to whether North Korea has developed operational nuclear bombs.) The average nuclear weapon today has an explosive yield 20 to 30 times greater than that of the Hiroshima bomb. The combined destructive force of all

nuclear weapons in the world is equivalent to 150,000 Hiroshima bombs.[7] Almost 2000 nuclear weapons are maintained on high-alert status – ready to wreak havoc at any moment, either by accident or through an act of madness.

A single nuclear bomb, if detonated on a large city, could kill millions of people. No effective humanitarian response would be possible, with most medical infrastructure in the city destroyed and any outside relief efforts severely hampered by high levels of radioactivity – a silent, scentless, invisible and persistent killer. Any use of nuclear weapons would be a catastrophe beyond our imagination. The only sane path is to eliminate these monstrous weapons from all national arsenals – urgently.

Indeed, nuclear disarmament is mandated by international law. As the International Court of Justice affirmed in its advisory opinion, "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[8] This is best fulfilled through a nuclear weapons convention – a comprehensive treaty prohibiting the possession of nuclear weapons by any state, and establishing the legal mechanisms necessary to accomplish the elimination of all warheads within a defined period. More than two-thirds of United Nations member states support this approach,[9] but nuclear powers and their allies are resisting progress towards this end.

The International Campaign to Abolish Nuclear Weapons and its partner organizations are working to build popular and political support for negotiations on such a treaty at the earliest possible date. Similar agreements have been concluded to outlaw and eliminate other categories of weapons deemed by the international community to cause unacceptable humanitarian harm – from biological and chemical arms to anti-personnel land mines and cluster munitions. All of these treaties have changed state practice and resulted in meaningful disarmament. Nuclear weapons must not be the exception. A convention banning the nuclear bomb is long overdue.

It is a cause for great concern that, despite the existence of an international legal obligation to disarm and the continuing risk of nuclear weapons proliferation and use, there is no genuine multilateral process presently under way to eliminate nuclear weapons. The New START agreement recently concluded by Russia and the United States only skims off the surface of these nations' enormous arsenals, which account for 95% of the global stockpile. The three other Non-Proliferation Treaty nuclear-weapon states – Britain, France and China – are also failing miserably in their duty to disarm. Similarly, Israel, India and Pakistan – which are still legally obliged to disarm, despite being outside the NPT – are not engaged in disarmament efforts, and little has been done to bring them into a multilateral process.

In fact, in spite of the support declared by some nuclear-armed states for "the vision of a world free of nuclear weapons," all are investing billions of dollars in the modernisation of their nuclear forces – an activity that cannot be reconciled with the requirements of international law. It is estimated that in 2011 they will spend more than $100 billion between them bolstering their nuclear arsenals, including through the development of new nuclear weapon delivery vehicles.[10] This sum is equal to the UN regular budget for 50 years. According to the World Bank, an annual investment of just half that amount – between $40 and $60 billion – would be enough to meet the Millennium Development Goals to eliminate extreme poverty worldwide.

In the United States, $185 billion of funding has been allocated to the nuclear weapons complex over the next decade, on top of the regular nuclear weapons budget of more than $50 billion a year, despite US President Barack Obama being more supportive of disarmament than any of his predecessors. It has been reported that the Pentagon is pushing for the development of nuclear-armed drones. Meanwhile, Britain is poised to renew its fleet of aging nuclear-armed Trident submarines with a price tag of £76 billion – an obscene outlay considering that schools, hospitals and other social services are being starved of funding.

The nuclear-armed states are also flouting their obligations under international law by maintaining the doctrine of nuclear deterrence, which involves a threat to use nuclear weapons in certain circumstances. The International Court of Justice stated in its advisory opinion: "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to the law."[11] Indeed, the United States itself acknowledged this during the proceedings, arguing against the illegality of nuclear weapons on the basis that "it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence."[12] In other words, the lawfulness of the policy of nuclear deterrence depends upon the lawfulness of the underlying use. Given that nuclear weapons cannot lawfully be used, their use may not be lawfully threatened.[13]

This has implications for Australia and other US allies that subscribe to the doctrine of extended nuclear deterrence. The Australian Department of Defence stated in its White Paper of 2009 that:

> *"For so long as nuclear weapons exist, we are able to rely on the nuclear forces of the United States to deter nuclear attack on Australia. Australian defence policy under successive governments has acknowledged the value to Australia of the protection afforded by extended nuclear deterrence under the US alliance. That protection provides a stable and reliable sense of assurance."*[14]

Such protection, however, is incompatible with the requirements of international law. Involvement in extended nuclear deterrence gives legitimacy to these illegal weapons of mass destruction and sends a message to would-be proliferators that they are a source of great security, not insecurity. So long as any country purports to rely on nuclear weapons, its credibility as a disarmament advocate is greatly diminished. With a US president who is quite sympathetic to the cause of nuclear disarmament, the time would appear ideal for Australia and other "nuclear umbrella states" to adopt nuclear-weapon-free defence postures, and begin contributing meaningfully towards disarmament.

International law is a potentially powerful tool at our disposal to challenge nuclear weapons and advance their abolition. It has taken the dreadful nuclear crisis at Fukushima for many governments around the world to wake up to the inherent dangers of nuclear power for electricity production. It must not take another Hiroshima or Nagasaki – or an even greater tragedy – before they finally muster the will to outlaw and eliminate nuclear weapons.

---

[1] **THE RIGHT HONOURABLE MALCOLM FRASER AC, CH**, *is a former prime minister of Australia and supporter of the International Campaign to Abolish Nuclear Weapons (ICAN).*

[2] International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, para. 35 ('*ICJ Advisory Opinion*').

[3] Ibid.

[4] Charles J Moxley, John Burroughs and Jonathan Granoff, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," Fordham International Law Journal, vol. 34, no. 2 (2011) p. 642.

[5] "Brining the Era of Nuclear Weapons to an End," Geneva, 20 April 2011.
[6] SIPRI Yearbook 2011.
[7] International Commission on Nuclear Non-Proliferation and Disarmament, *Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers* (2009) p. 13.
[8] *ICJ Advisory Opinion*, para. 105.
[9] International Campaign to Abolish Nuclear Weapons, *Guide to Government Positions on a Nuclear Weapons Convention* (2010).
[10] Global Zero, "World Spending on Nuclear Weapons Surpasses $1 Trillion per Decade" (2011).
[11] *ICJ Advisory Opinion*, para. 78.
[12] Oral testimony by the United States on 15 November 1995.
[13] Moxley, Burroughs and Granoff, above, p. 676.
[14] *Defending Australia in the 21st Century: Force 2030* (2009) p. 50.

Make Nuclear Weapons the Target

Peter Giugni[1]

On 6 August 2011, Australian Red Cross launched its "Make Nuclear Weapons the Target" campaign to raise awareness of the unacceptable humanitarian consequences of nuclear weapons and the urgent imperative of clarification on the prohibition of their use. However, this is not the first time the International Red Cross and Red Crescent Movement (Movement) has called for a world without nuclear weapons. With its mandate for humanitarian activities enshrined in international humanitarian law (IHL), which aims to alleviate human suffering during times of armed conflict, the Movement, in particular the International Committee of the Red Cross (ICRC), has often voiced its grave concerns about these weapons of mass destruction. In the shocking aftermath of the 1945 Hiroshima and Nagasaki bombings, Dr Marcel Junod, a health delegate for the ICRC, was the first non-Japanese doctor to deliver assistance. Dr Junod described the scenes:

> *"We…witnessed a sight totally unlike anything we had ever seen before... The centre of the city was a sort of white patch, flattened and smooth like the palm of a hand. Nothing remained. The slightest trace of houses seemed to have disappeared. The white patch was about two kilometres in diameter. Around its edge was a red belt, marking the area where houses had burned, extending quite a long way further … covering almost all the rest of the city."*[2]

From their first and to date only use in the context of armed conflict in Japan in 1945, it was clear that nuclear weapons raised serious questions about States' responsibilities under IHL. In particular, key IHL principles which require parties to conflict to distinguish military targets from civilians, and which prohibit the use of weapons which cause superfluous injury and unnecessary suffering, are challenged by the inherently destructive nature of nuclear weapons.

In a public statement on 5 April 1950, the ICRC called on States to take "all steps to reach an agreement on the prohibition of atomic weapons" noting "[s]uch arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple…. [Their] effects, immediate and lasting, prevent access to the wounded and their treatment."[3]

In 1954 the ICRC convened a Conference of Experts to examine the legal question of the protection of the civilian population against the use of weapons of mass destruction, resulting in draft rules for the limitation of the dangers incurred by the civilian population in times of war. At the 20th International Conference of the Red Cross in 1965, a resolution was adopted which called on the ICRC to continue in its efforts to ensure parties to conflict uphold the basic IHL principle of sparing the civilian population as much as possible, and declared that the general principles of the law of war apply to nuclear weapons. The creation of the Additional Protocols to the Geneva Conventions in 1977 reaffirmed and strengthened the IHL principles of distinction and prohibition of superfluous suffering. It would be impossible to imagine circumstances in which nuclear weapons would abide by these principles.

Whilst the legal analysis is critical to this debate, the humanitarian imperative of the ICRC and indeed the Movement, demands a broader remit. To quote ICRC Vice President Christine Beerli in an address to the 19th World Congress of International Physi-

cians for the Prevention of Nuclear War in August 2010:

> *"the debate about nuclear weapons must be conducted not only on the basis of military doctrines and power politics but also on the basis of public health and human security. The existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity, the capacity of our species to master the technology it creates, the reach of international humanitarian law, and the extent of human suffering that people are willing to inflict, or to permit, in warfare."*[4]

Such sentiment echoes and reinforces that expressed by ICRC President Jakob Kellenberger a few months earlier in April 2010, when he appealed to all States to "bring the era of nuclear weapons to an end." Kellenberger stated that "the currency of this debate must ultimately be about human beings, about the fundamental rules of international humanitarian law, and about the collective future of humanity."[5]

Recent years have seen a growing interest among the global community in the vision of a nuclear weapon free world. The Model Nuclear Weapons Convention submitted to the United Nations General Assembly in 2007, the Five Point Proposal on Nuclear Disarmament put forward by the Secretary-General of the United Nations, the first-ever Security Council Summit on nuclear non-proliferation and disarmament in September 2009, and the joint reaffirmation by the United States, Russia, China, France and the United Kingdom in May 2010 of their 'responsibility to take concrete and credible steps towards irreversible [nuclear] disarmament' are encouraging signs

Inspired by the Movement's initiatives articulated by both the President of the ICRC and the President of the International Federation of Red Cross and Red Crescent Societies, as well as the increasing significance of the issue within the international community, Australian Red Cross has taken a leading role within the Movement towards the goal of a nuclear free world. In May 2011 Australian Red Cross, together with Japanese Red Cross and Norwegian Red Cross, co-hosted a meeting in Oslo of around thirty Red Cross and Red Crescent societies from every corner of the globe. The meeting brought together many prominent academics and practitioners in the fields of nuclear medicine and nuclear arms. Discussion focused on the human and societal costs of nuclear weapons, the international legal political context of nuclear weapons and the potential role of Red Cross national societies in this space. Development of a Movement position on nuclear weapons was also discussed, as was the inclusion of a proposed resolution on this topic on the agenda of the Council of Delegates, which is to meet in November this year.

In 2011, Australian Red Cross is raising public awareness about the horrific humanitarian and environmental consequences of using nuclear weapons and the real dangers inherent in their continued existence through an innovative and engaging public national campaign. By highlighting the uniquely destructive threats to humanity that these arms pose, Australian Red Cross is saying "Make Nuclear Weapons the Target," and calls for the prohibition of their use once and for all. The voice of this campaign will be carried by Australian Red Cross' volunteers and staff nationwide across various media. Several online forums such as a nuclear referendum[6] and an online vigil will seek to harness as much participation as possible. Australian Red Cross is also hosting many public events in all States and Territories, where experts in, and survi-

vors of, nuclear weapons share their concerns about these weapons of mass destruction.

Despite its overwhelming humanitarian appeal, convincing States to prohibit nuclear weapons will not be without its challenges. In no way, however, should this dissuade us in our efforts. In an era where the number of nuclear powers is growing, it is time for the international community to ensure that nuclear weapons are made a thing of the past rather than a threat to our future.

---

[1] **PETER GIUGNI** *is International Humanitarian Law Officer with the Australian Red Cross. In this capacity he has visited several war-torn countries like India and Afghanistan. Giugni did a Bachelor of Arts at Sydney University, majoring in Hindi/Urdu and Asian Studies. He's currently completing a masters in Human Rights Law at the University of New South Wales.*

[2] Available at http://www.icrc.org/eng/resources/documents/misc/hiroshima-junod-120905.htm

[3] Available at http://www.icrc.org/eng/resources/documents/misc/5kylur.htm

[4] Available at http://www.ippnw2010.org/fileadmin/user_upload/Plenary_presentations/Plen1_Beerli_Eliminating_Nuclear%20Weapons_a%20Humanitarian%20Imperative.pdf

[5] Available at http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm

[6] Available at http://www.redcross.org.au/make-nucelar-weapons-the-target.aspx

Vancouver Declaration, February 11, 2011†

LAW'S IMPERATIVE FOR THE URGENT ACHIEVEMENT OF A NUCLEAR-WEAPON-FREE WORLD

Nuclear weapons are incompatible with elementary considerations of humanity.

Human security today is jeopardized not only by the prospect of states' deliberate use of nuclear weapons, but also by the risks and harms arising from their production, storage, transport, and deployment. They include environmental degradation and damage to health; diversion of resources; risks of accidental or unauthorized detonation caused by the deployment of nuclear forces ready for quick launch and inadequate command/control and warning systems; and risks of acquisition and use by non-state actors caused by inadequate securing of fissile materials and warheads.

Despite New START there are more than enough nuclear weapons to destroy the world. They must be abolished and the law has a pivotal role to play in their elimination. In 1996 the International Court of Justice (ICJ) spoke of "the nascent *opinio juris"* of "a customary rule specifically prohibiting the use of nuclear weapons." Fifteen years later, following the establishment of the International Criminal Court, the entry into force of the Chemical Weapons Convention and the achievement of treaty bans on landmines and cluster munitions, the legal imperative for non-use and elimination of nuclear weapons is more evident than ever.

Reasons advanced for the continuing existence of nuclear weapons, including military necessity and case-by-case analysis, were once used to justify other inhumane weapons. But elementary considerations of humanity persuaded the world community that such arguments were outweighed by the need to eliminate them. This principle must now be applied to nuclear weapons, which pose an infinitely greater risk to humanity.

We cannot forget that hundreds of population centers in several countries continue to be included in the targeting plans for nuclear weapons possessing many times the yield of the bombs dropped on Hiroshima and Nagasaki. The hibakusha – survivors of those bombings – have told us plainly, "No one else should ever suffer as we did." The conventions banning chemical and biological weapons refer to them as "weapons of mass destruction." WMD are, by definition, contrary to the fundamental rules of international humanitarian law forbidding the infliction of indiscriminate harm and unnecessary suffering. As set out in the Annex to this Declaration, that label is best deserved by nuclear weapons with their uncontrollable blast, heat and radiation effects.

The ICJ's declaration that nuclear weapons are subject to international humanitarian law was affirmed by the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference. In its Final Document approved by all participating states, including the nuclear-weapon states, 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."

It is unconscionable that nuclear-weapon states acknowledge their obligation to achieve the elimination of nuclear weapons but at the same time refuse to commence and then "bring to a conclusion," as the ICJ unanimously mandated, "negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

In statements made during the 2010 NPT Review Conference, one hundred and thirty countries called for a convention prohibiting and eliminating nuclear weapons globally. And the Conference collectively affirmed in its Final Document "that all states need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons," and noted 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."

An "absolute evil," as the President of the ICJ called nuclear weapons, requires an absolute prohibition.

---

† Developed with the input of a conference convened February 10-11, 2011, in Vancouver, Canada, by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms, entitled "Humanitarian Law, Human Security: The Emerging Framework for the Non-Use and Elimination of Nuclear Weapons," in acknowledgement of the Simons Chairs in International Law and Human Security at Simon Fraser University.

ANNEX: THE LAW OF NUCLEAR WEAPONS

Well-established and universally accepted rules of humanitarian law are rooted in both treaty and custom; are founded, as the ICJ said, on "elementary considerations of humanity"; and bind all states. They are set forth in armed service manuals on the law of armed conflict, and guide conventional military operations. They include:

- The prohibition of use of methods or means of attack of a nature to strike military objectives and civilians or civilian objects without distinction. As put by the ICJ, "states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."
- The prohibition of use of methods or means of warfare of a nature to cause superfluous injury or unnecessary suffering.
- The Martens clause, which provides that in cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the *dictates of public conscience*.

Nuclear weapons cannot be employed in compliance with those rules because their blast, heat, and radiation effects, especially the latter, are uncontrollable in space and time. The ICJ found that "radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area" and that it "has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations." Moreover, as the International Committee of the Red Cross has observed, the suffering caused by the use of nuclear weapons in an urban area "is increased exponentially by devastation of the emergency and medical assistance infrastructure." Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides *inter alia* that an attack directed against a civilian population is a crime against humanity.

The uncontrollability of effects additionally means that states cannot ensure that the force applied in an attack is no more than is necessary to achieve a military objective and that its effects on civilians, civilian objects, and the environment are not excessive in relation to the concrete and direct military advantage anticipated. Other established rules of the law of armed conflict excluding use of nuclear weapons are the protection of neutral states from damage caused by warfare and the prohibition of use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Recent studies have demonstrated that the detonation of a small fraction of the global nuclear stockpile (*e.g.*, 100 warheads) in cities and the ensuing fire storms would generate smoke causing a plunge in average global temperatures lasting years. Agricultural production would plummet, resulting in extensive famine.

That nuclear weapons have not been detonated in war since World War II contributes to the formation of a customary prohibition on use. Further to this end, in 2010 the United States declared that "it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever," and President Obama and Prime Minister Singh jointly stated their support for "strengthening the six decade-old international norm of non-use of nuclear weapons."

Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies ("deterrence") declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack.

The unlawfulness of threat and use of nuclear weapons reinforces the norm of non-possession. The NPT prohibits acquisition of nuclear weapons by the vast majority of states, and there is a universal obligation, declared by the ICJ and based in the NPT and other law, of achieving their elimination through good-faith negotiation. It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.

Ongoing possession by a few countries of weapons whose threat or use is contrary to humanitarian law undermines that law, which is essential to limiting the effects of armed conflicts, large and small, around the world. Together with the two-tier systems of the NPT and the UN Security Council, such a discriminatory approach erodes international law more generally; its rules should apply equally to all states. And reliance on "deterrence" as an international security mechanism is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule.

Nuclear Abolition Forum

Dialogue on the Process to Achieve and Sustain a Nuclear Weapons Free World

Nuclear Abolition Forum would like to thank **Fuse Creative** for developing the website.
In addition, we are particularly grateful to the **International Association of Lawyers Against Nuclear Arms**, the **Albert Schweitzer Institute** and the **Right Livelihood Foundation** for their donations, which have made launching the Forum possible.