Moving Beyond Deterrence to a Nuclear Weapons Free World
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Nuclear Deterrence and International Law
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I. How nuclear deterrence erodes and distorts a global public good – international order structured by international law.

Sometimes the most basic and simple truths are the ones that escape notice.

So let me start by comparing the security supposed provided by nuclear deterrence with the security system envisaged by the UN Charter.

Consider these basic Charter provisions:

Article 2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The only exceptions to prohibition on the threat or use of force is Security Council authorization of force to maintain international peace and security, in Chapter VII, and self-defense against an armed attack under Article 51.

Reliance on "deterrence" as an international security mechanism for prevention of major war is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule. International security allegedly provided by nuclear deterrence, with the permanent, ongoing threat of force, is the inverse of that world; it turns the UN Charter on its head.

Another major point relating to the UN Charter: Nuclear deterrence as now practiced is understood to involve major powers; other states are excluded and cannot acquire nuclear weapons. However, a just and therefore sustainable legal order requires that the same rules apply to all. One manifestation of the instability caused by the possession of nuclear weapons by some states but not others is the doctrine of preventive war. That doctrine was put into practice in the Iraq invasion and the recent Israeli strike on Syria and is raised with respect to Iran. Preventive war is contrary to the UN Charter.

Considering the subsequent rise of preventive war, the International Court of Justice was prophetic in its 1996 opinion when it said:

> *In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons.*

So nuclear deterrence, and its corollary, preventive war to prevent proliferation, is profoundly corrosive of the UN Charter.

We can also see distorting effects with respect to major instruments of international criminal law and the international law of armed conflict.

As to the Rome Statute of the International Criminal Court, there was a very good case for inclusion of biological and chemical weapons, along with poison and expanding bullets which were included, as weapons whose use is per se a war crime. That is because there are widely ratified conventions prohibiting use as well as possession of biological and chemical weapons. However, the Non-Aligned Movement states did not want to see biological and chemical weapons included if nuclear weapons were not, and the nuclear-dependent countries of course absolutely refused to include nuclear weapons. So we now have the absurd situation in which use of poison and expanding bullets is per se a war crime, but not biological, chemical, or nuclear weapons!

The failure to specifically name nuclear weapons in the Rome Statute does not mean the Statute is inapplicable to use of those weapons. Under the general definitions of war crimes, crimes against humanity, and genocide, typical uses of nuclear weapons would be international crimes for which responsible individuals could be prosecuted.

In view of this, France purported upon ratification to say that the Statutes does not apply to nuclear weapons. This is a wholly implausible position. The UK has attempted to apply certain understandings it had claimed, for example regarding reprisals, with respect to the preceding major law of armed conflict instrument, the 1977 Protocol I to the Geneva Conventions.

Other states possessing nuclear weapons have not become parties to the Rome Statute: Russia, China, India, Pakistan, United States, Israel. There are multiple reasons why these states, so reliant upon potential use of military power, are cautious about the Rome Statute. But one of them, certainly for the United States, I think is the incompatibility of the Rome Statute with nuclear deterrence.

A similar story can be told about Protocol I. It's a complicated story, but in brief: the UK, France and US made statements or reservations purporting to limit or rule out (France) the application of Protocol I to nuclear weapons. It has not been ratified by the US, India, Pakistan, and Israel. For the US at least, nuclear weapons have played a role in non-ratification. So as with the Rome Statute, the existence of nuclear weapons has impeded development of rules of international humanitarian law (IHL) whose universal application is accepted by key states.

II. How developing international law and institutions can contribute to the establishment of a world free of nuclear weapons.

I have so far talked about how nuclear deterrence has eroded and distorted the UN Charter, the Rome Statute, and the development of IHL.

But now let me turn that around, and consider how international law and institutions erode nuclear deterrence and facilitate a transition to a nuclear weapons-free world. This is a large terrain, and I'll just touch on some aspects; others will come up in the next panel.

One well understood point is this: as the regime of prohibition and elimination of chemical weapons works and becomes entrenched, an example is set for nuclear disarmament. And of course the bans – though not yet universal – for cluster munitions and landmines pose the question, why not nukes.

It is also the case that the increasing centrality of IHL – and its principle of individual responsibility - is fundamentally contrary to ongoing reliance on nuclear weapons. In the course of explaining the application of international humanitarian law to nuclear weapons, the ICJ pointedly mentioned the decision of the Nuremberg International Military Tribunal. That tribunal famously observed, "the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." Pursuant to the principle of individual responsibility, leaders who planned and committed or were complicit in atrocities can be prosecuted for international crimes, regardless of whether their acts were done pursuant to national law or superior's order; ordinary soldiers who carried out obviously unlawful order are also liable.

Since the ICJ opinion, the principle of individual responsibility has been definitively embedded in international law by the Rome Statute of the International Criminal Court. IHL is also becoming more and more integral in national militaries, certainly in the United States.

Given the increasing solidification of IHL at both the national and international levels, we can now say that understanding of the application of IHL to nuclear weapons has advanced beyond the ICJ opinion of 1996, which had certain gaps. The ICJ did not squarely address the lawfulness of reprisals. But as a major 2005 International Committee of the Red Cross (ICRC) study of IHL shows, it is increasingly established, in Protocol I, in decisions of tribunals, that reprisals against civilian populations are not permissible as a matter of law applicable to all states. The ICJ also did not address the status of the rule set forth in Protocol I forbidding the foreseeable severe and long-term devastation of the environment. But international practice has established the customary status of that rule.

The Vancouver Declaration articulates the current understanding of the law of armed conflict, in particular IHL, in relation to nuclear weapons. It states that that due to their uncontrollable effects nuclear weapons cannot be used in compliance with rules protecting civilians, neutral states, and the environment against the effects of warfare. It also reflects the advances in understanding the law I just mentioned regarding the environment and reprisals.

Released in March 2011, the declaration was developed by IALANA and The Simons Foundation with the input of a conference held earlier that year with involvement by international lawyers, Red Cross representatives, and diplomats involved in cluster munition and landmine negotiations. It was endorsed by many eminent international lawyers, including Louise Doswald-Beck, co-author of the major ICRC study of IHL, as well as leading former diplomats and officials.

The increasing entrenchment of IHL, including in international courts, is paralleled by the broader movement towards not only recognition, but institutionalization, of human rights law, as through the Human Rights Council.

In short, the utter incompatibility of IHL with nuclear weapons in increasingly widely recognized. This is good foundation for building the legal framework of a NWFW that is universal in its approach.

What about prospects for the UN system? The system is under great strain due to the Iraq invasion with Security Council approval, in violation of the UN Charter, and the disregard by the DPRK and Iran, over years, of UNSC directives. "Threat diplomacy" re Iran is contrary to the Charter.

In general, the more there is a legitimate, representative, and accountable system of international governance, the more robust will be both voluntary adherence to and enforcement of basic rules of international order. There is an increasing recognition that respect of the existing UN system and its further development is key to preserving the non-proliferation regime and achieving a world without nuclear weapons. Such a world, with one rule of non-possession for all, will in turn make a workable international system more feasible.