Concept Paper for Session IV

What would be the processes, conditions, and stages for a humanitarian approach “to achieve and to maintain a world free of nuclear weapons?”

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Having been established on the ruins of World War II, the United Nations—both the Secretariat and its Member States—not surprisingly took an early and active interest in the restoration and development of the rule of law in relations between its Member States.

The Charter’s preamble stated, though somewhat ambiguously, that the “peoples of the United Nations” were seeking (inter alia) “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. Article 13(1) provided a mandate for the General assembly to “initiate studies and make recommendations for the purpose of: […] (a.) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification” (emphasis added).

Through the work of the UN disarmament machinery—whose present structure and mandates date back to the first special session of the General Assembly on disarmament (SSOD-I) in 1978—the UN has in many ways assisted in bringing the rule of law to disarmament.¹ Preliminary deliberation of norms is a primary function of the UN Disarmament Commission, which meets for a three week substantive plenary session each year. The last year it was able to reach a consensus on new Guidelines was in 1999, on issues relating to the establishment of nuclear-weapon-free zones and to conventional arms control. The General Assembly’s First Committee considers disarmament resolutions that, over time and while not binding, can provide a political foundation for the eventual emergence of new legal norms. It is the job of the Geneva-based Conference on Disarmament (CD)—the “single multilateral disarmament negotiations forum”—to negotiate new multilateral disarmament treaties.

Yet the universe of legal norms relating to disarmament is not limited to the emergence of “treaty law” as embodied in multilateral treaties formally adopted by the CD. Article 38 of the ICJ Statute, for example, identifies the following sources of the law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The evolution of international humanitarian law (IHL) has profound implications for the establishment and strengthening of the rule of law in disarmament. The fundamental prohibitions of indiscriminate attacks on civilians, the need to respect the rights of neutrals, the rule of proportionality, the rule of necessity, the legal limits on reprisals, and the need to respect the environment, all create a web of legal obligations that make it virtually inconceivable that any use of nuclear weapons could be regarded as permissible under IHL, as emphasized by the ICJ in its Advisory Opinion in 1996. Charles

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¹ For purposes of this note, the “rule of law” in disarmament may be defined as the establishment and implementation of standards, norms, and rules of conduct between sovereign Member States with the ultimate objectives (as agreed at SSOD-I) of the elimination of nuclear weapons and other weapons of mass destruction, and the limitation or regulation of conventional armaments. In short, it is the legal process for achieving the agreed “ultimate objective” of “general and complete disarmament under effective international control.”
Moxley has written an exhaustive legal treatise on this point, which he documents as well-recognized even in US military field manuals.²

Yet notwithstanding such language expressed by the ICJ, by legal scholars and nuclear weapons experts³, by the International Committee of the Red Cross⁴, by countless resolutions of the UN General Assembly⁵, by the obligation in Article VI of the NPT to “pursue negotiations in good faith” on nuclear disarmament (as interpreted by the ICJ to include bringing such negotiations to a conclusion), and by language adopted at the 2010 NPT Review Conference expressing deep concern over the humanitarian consequences of any use of nuclear weapons and reaffirming the need for all states to comply at all times with applicable international law, including IHL—and many other affirmations of the duty to enter into negotiations on nuclear disarmament or the prohibition on the use of nuclear weapons—there is still no international consensus on the per se illegality of either the existence or use of nuclear weapons.

Today, over half of humanity is governed by States that either possess nuclear weapons or base their security policies on the doctrine of nuclear deterrence. This perspective is illustrated by the annual votes in the General Assembly on the resolution introduced by Malaysia on “Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”,⁶ which typically result in over 50 votes either in opposition or in abstention, largely from the NATO region and most nuclear-weapon states. The resolution annually calls upon all States immediately to fulfill their obligation to pursue negotiations on nuclear disarmament “leading to an early conclusion of a nuclear weapons convention …”:

In light of the deep attachment that remains in over 40 countries to security based on nuclear deterrence, the challenges of establishing a “universal norm” against the use of nuclear weapons, or by derivation, against the existence of such weapons are formidable. This situation has dangerous implications for the future of nuclear weapons proliferation, as additional States could well echo claims made by existing possessors as to the legality of possession and use of such weapons. If “nuclear deterrence” has in fact become an accepted, even customary practice of States, the world may well be witnessing the emergence of a pernicious new norm or “general principle” of possession and acceptable use, thereby overturning longstanding efforts to limit the use of force by IHL.

Efforts to strengthen the application of IHL to nuclear weapons have involved many processes, as briefly suggested above, largely involving sustained efforts by groups in civil society and like-minded States. However necessary in promoting a global taboo on nuclear weapons, such efforts alone will not likely be sufficient to achieve this goal. If IHL were alone sufficient to outlaw the possession and use of

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⁵ On 24 November 1961, the General Assembly adopted Resolution 1653(XVI), which held that the “use of nuclear … weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter … that the use of nuclear … weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity” …[and] that “any State using nuclear … weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.” The General Assembly has reaffirmed this resolution at least 29 times.
⁶ The last such resolution adopted by the General Assembly was Resolution 65/76, 8 December 1010, by a vote of 133-28-23, with China being the only nuclear-weapon State voting in favour (while non-NPT States India and Pakistan voted in favour).
nuclear weapons, there would be no use or point in seeking to negotiate a nuclear weapons convention. The ambiguities and lack of consensus about the scope of applicability of IHL to nuclear weapons is one of the key reasons why a nuclear weapons convention is necessary—at a minimum, to clarify the law, and more broadly, to stipulate precisely the requirements to guide the implementation of disarmament. A convention simply banning the “use” of nuclear weapons—due to the constraints if IHL—would be very problematic because of the certainty that none of the possessor states, nor their “umbrella” States, would be willing to join such a convention. In effect, such an approach would conflate the twin historic mandates of the UN of “eliminating” WMD while “regulating” conventional arms. It would legitimize incremental “nuclear arms control” while not requiring the elimination of a single nuclear weapon. To some States, it could well be viewed as even legitimizing possession, with a proviso allowing use in the extreme case of necessity to ensure national survival.

While premature, one possible way ahead might be worth further analysis and consideration—namely, the General Assembly could refer a proposal to the International Law Commission to apply its existing mandates of promoting the progressive development and codification of international law to the challenge of stating the status of nuclear weapons under IHL. This would be consistent with the ILC Statute and the mandate of the General Assembly under Charter Article 13(1). It is not entirely clear, however, if the ILC’s function here would be to advance the “progressive development”—or instead the “codification” of IHL—vis-à-vis nuclear weapons, or both. The Commission could study the issue and make recommendations to the General Assembly. But the ILC is not a “legislature” nor is the General Assembly.

Such an initiative, however, would not obviate the need for a nuclear weapons convention, which has now been proposed by Secretary-General Ban Ki-moon in his five-point proposal of 24 October 2008 and which has enjoyed strong support throughout the world community. Support for the convention is perhaps best illustrated by the large majorities voting for Malaysia’s annual ICJ resolution in the General Assembly, as well as by the support this initiative has earned from civil society and like-minded States.

In all likelihood, the great superstructure of global nuclear disarmament will not likely be built upon one foundation—IHL—but upon many foundations, both legal and political. Undoubtedly, IHL offers powerful arguments against the use of nuclear weapons, the preparation to use such weapons, and indeed the very existence of such weapons. But until such arguments are more widely acknowledged by possessor states, efforts to strengthen the other foundations will also be needed, all focused on the progressive “delegitimization” of nuclear weapons, a goal that the United Nations has worked to advance for decades. There is no shortcut for achieving this other than through the exasperating and often unpredictable political process of engagement in a variety of arenas—the UN disarmament machinery, efforts by regional organizations, civil society initiatives, leadership by concerned States including enlightened initiatives by possessor States, and an ever-growing constituency of interests throughout society.

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