

THE INTERNATIONAL LAW OBLIGATION FOR NUCLEAR AND GENERAL DISARMAMENT

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As an American speaking to you in Berlin, I find interesting connections between the German speaking world and the United States with respect to the theme of this conference, "Peace Through Law". The first and perhaps only book bearing this title was published in 1944 by Hans Kelsen, who, like me, started in Vienna and wound up in the United States. In it he speaks somewhat disapprovingly of Article 227 of the Versailles Treaty which describes the act of starting a war as an offense against international morality, when it should be more properly described as an offense against international law.

Another book with a similar title, "World Peace through World Law", was published in 1958 and also became a classic of international law. It was co-authored by Louis Sohn, born in Austria-Hungary in 1914 and later a very distinguished professor at Harvard Law School and legal adviser to the US State Department. The introduction to the book states that, had the United Nations Charter been drafted after the bombing of Hiroshima and Nagasaki rather than before, it would have turned out very differently and then lays out the design of an amended charter capable of preventing a repetition of the horrors of another nuclear catastrophe.

The third example is an article published last year in the Michigan Law Review entitled "Peace Through Law? The Failure of a Noble Experiment". Co-authored by John Yoo and taking as its point of departure Erich Maria Remarque's World War I novel "All Quiet on the Western Front", it comes to the conclusion that, while the interwar peace-through-law movement sought to prevent the carnage depicted in the book, it failed because of "unrealistic assumptions about the malleability of national self-interests and overconfidence in the efficacy of law." This is not particularly surprising, since John Yoo is the principal author of the Bush-era torture memos recently released by President Obama, which redefined torture and held that the Geneva Conventions did not apply to the Guantanamo detainees.

With these historical notes as background, we can now go to my assigned topic, "The International Law Obligation for Nuclear and General Disarmament." Article VI of the Treaty on the Non-Proliferation of Nuclear

Weapons states: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to the 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." Note that the two types of disarmament mentioned in Article VI, nuclear and general, are not interdependent. There is no reference to general and complete disarmament (hereafter GCD) in the title of the NPT, nor in any of its numerous provisions dealing with the implementation of nuclear disarmament. The US, furthermore, is on record as saying, at the time the NPT was negotiated, that, while GCD could obviously not be achieved without nuclear disarmament, GCD was not a condition precedent to nuclear disarmament.

The presence of GCD in Article VI is, in fact, an interloper, an uninvited guest. Nevertheless, it is there and, in a technical sense, is a continuing obligation to negotiate in good faith for GCD. There are, of course, a multitude of resolutions and recommendations (e.g. the Zorin-McCloy Agreement of 1961) dealing with GCD and there are some treaties dealing with individual weapons (e.g. chemical, biological, land mines, excessively injurious weapons) but the more or less accidental language of Article VI NPT seems to be the only one creating a GCD treaty obligation. In fact, the world community has turned its back on GCD after a brief flirtation with the concept in the nineteen sixties.

The situation is quite different with respect to nuclear weapons, which, one can assume, is due to the fact that these are by far the most brutal and lethal weapons ever invented. Here we have a great variety of treaties dealing with numerical (e.g. START, Treaty of Moscow) and geographic (e.g. Palindaba, Roratonga, Taltelolco, Outer Space, Arctic) aspects of nuclear weapons.

We also have the 1996 Advisory Opinion of the International Court of Justice, which contains the following important holdings:

A threat or use of nuclear weapons should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law (Unanimous – Par. 105[2]D)

The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and particularly the principles and rules of humanitarian law ... (but) the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which

the very survival of a state would be at stake (Seven votes to seven, by the President's casting vote – Par. 105[2]E)

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 (Unanimous – Par. 105[2]F)

Critics of the opinion point to the extreme circumstance language in par. 105(2)E as constituting an exception to the holding of general illegality. But this criticism is not justified. In the first place, the language in question is a *non liquet*, a deliberate failure to decide whether or not there is an exception. In the second place, the emphasis on “the principles and rules of humanitarian law”, both in this paragraph and in the preceding one, negates the possibility of an exception. The opinion was not a case of making new law by a group of so-called activist judges. It was based on principles and rules of humanitarian law, both customary and conventional, which long preceded the UN General Assembly's request for the opinion.

In essence, the relevant principles were the following:

It is prohibited to use weapons that are incapable of distinguishing between civilian and military targets;

It is prohibited to cause unnecessary suffering to combatants;

Civilians and combatants remain at all times 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 the public conscience (the Martens Clause).

The Court called these principles “intransgressible” and said that they were “scarcely reconcilable” with the use of nuclear weapons. This would be true even as applied to weapons with a throwweight no greater than the bombs dropped on Hiroshima and Nagasaki. It requires no feat of the imagination to realize how much more true it is of nuclear weapons in existence today, which have multiple times the force of those earlier ones.

Some commentators have sought to dismiss the ICJ Opinion as “merely advisory”. But this is a strange way of dealing with an authoritative interpretation of international law rendered by the highest court in the world qualified to do so. An advisory opinion may not be binding, in the sense that it cannot *per se* be the basis of enforcement action by the Security Council under Article 94 of the UN Charter. It is nevertheless controlling as an authoritative

interpretation of a question of international law, which can be the basis of a Security Council resolution, the violation of which can lead to enforcement action by the Council. There is, of course, a minor problem: Security Council resolutions may be vetoed by any of the five permanent members, which is what the United States did in the Nicaragua case. Thus, a contentious decision by the Court is not necessarily any more binding than an advisory opinion, and an advisory opinion can be made binding with the intermediate step of a Security Council resolution calling for compliance with its content.

To summarize, the obligation, incumbent on all states, to negotiate in good faith for total nuclear disarmament is unquestionable and intransgressible, but its enforcement can be blocked by the veto of one or more of the "Big Five", or simply by inaction. I will leave the elucidation of the nature of the good faith element to my colleague Phon van den Biesen and the other speakers at tomorrow afternoon's workshop on "Returning to the Court".

So much for the strictly legal aspects of the matter. It is, however, a fact of political life that, despite the protestations of undying obeisance to "the rule of law" which embellish many a politician's speech, the law by itself is incapable of securing the values which it reflects or the specific objectives which it proclaims. It is necessary, therefore, to examine the political will to "go to zero", to take, as it were, a reading of the world's anti-nuclear barometer.

In this respect, the news is not all bad. Since the appearance, in January 2007, of an article in the Wall Street Journal calling for a nuclear free world co-signed by two former Republican Secretaries of State and two elder Democratic statesmen, it has been possible, at least in my country, to speak of nuclear abolition as an issue transcending political battle lines, rather than as one owned only by liberals and progressives. Since then, hundreds of more or less prominent figures, from all corners of the political spectrum, have signed on to the call for "going to zero". Similar calls have come from many parts of the globe, not only the non-nuclear countries which have always been for a nuclear weapons free world, but also from other nuclear weapons countries and countries under the "nuclear umbrella", as well as from the Secretary General of the United Nations and the current President of the General Assembly. Add to this the Prague speech by President Obama, in which he affirmed his commitment to a nuclear free world and you will see that the climate concerning nuclear abolition has changed considerably in the recent past. This commitment has also been reaffirmed by all the 34 countries participating in the NPT Precon, the Preparatory Conference which met at the United Nations in New York from May 4 to 15 to prepare the agenda for the quinquennial NPT Review Conference

which will meet, also in New York, from May 5 to May 28 next year. The mood at the Prepcon was in sharp contrast to that of the 2005 Review Conference, which was successfully sabotaged by the Bush administration and accomplished only a good deal of backtracking from the 2000 Conference, if you can call that an accomplishment. This time President Obama sent a message to the conference and promised to take “concrete steps” toward a nuclear free world. Even Senator McCain made a statement to the US Senate on June 3 headed “A World Without Nuclear Weapons”. It remains to be seen, however, what will be the content of the Nuclear Posture Review, currently being prepared in Washington and due to be released in October.

All of this presents a serious challenge to civil society. During the cold war, the danger of a nuclear holocaust was taken seriously. We had books, movies, demonstrations; getting rid of nuclear weapons was, for several years, at or near the top of public concerns. But all this mass movement achieved was freezing the number of nuclear weapons at a level where they were sufficient to kill every man, woman and child in the world several times over. Today, paradoxically, a greater percentage of the public understands the uselessness of nuclear weapons and the fallacy of deterrence, but the number of people willing to do something about it is much smaller. Today’s mantra, intoned by many opponents of nuclear weapons, is “let’s go down to 1000” and that may indeed become the number agreed by the US and Russia at the negotiations for a renewal of the START Agreement, which is due to expire at the end of this year. As if 1000 nukes were a negligible number if used by either country under its current doctrine of extended deterrence. As if maintaining 1000 nukes in the arsenals of Russia and the US, and several hundred in each of the six other nuclear-armed states, were likely to persuade North Korea and Iran, and who knows how many other countries, not to build their own nuclear arsenals, rather than the other way around.

So, what is to be done? Most of the groundswell of anti-nuke talk takes the form of advocating a series of intermediate steps, the most important of which are ratification of the Comprehensive Test Ban Treaty and negotiation of a Fissile Material Cut-off Treaty and a follow-on treaty to START. These are important steps, to be sure, but they are not the beginning of a serious effort to bring about a nuclear weapons free world. An international meeting to start talking about a nuclear weapons convention would be such a beginning. That is what Ban Ki-moon has suggested and that is what civil society should be calling for.

One thousand is two zeros too many. One zero has to be our goal, and the sooner the better. The time is ripe. The moment is opportune. Let us determine to

seize it. The law can help us do that. In the words of President Kennedy, addressing the United Nations on September 25, 1961, "We prefer world law, in the age of self-determination, to world war, in the age of mass extermination."

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