

Nuclear Weapons and the Rule of Law

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Keynote Address

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I wish first of all to thank Ali Shariat, the Symposium Editor of the *Fordham International Law Journal*, for having invited me to speak with you today. As many of you may know, the UN's Office for Disarmament Affairs attaches great importance to disarmament and non-proliferation education, and this makes me all the more grateful to receive this invitation.

I also want to express my appreciation to the Fordham University School of Law—and the Nonproliferation, Arms Control and Disarmament Interest Group of the American Society of International Law—for recognizing the importance of the subject of this conference, and the important role of the United Nations in advancing multilateral disarmament efforts.

This subject is both timely and profoundly important to the future of international peace and security. In many respects, this year has the potential to mark a turning point in the history of global efforts to achieve nuclear disarmament. After all, the Presidents of the countries with the largest nuclear arsenals—the Russian Federation and the United States—have both jointly and individually voiced their support for the goal of eliminating nuclear weapons. The two countries are now finalizing a treaty to replace the expired START treaty, one that will further reduce deployments of strategic nuclear weapons and their delivery vehicles. Other nuclear-weapon States Parties to the Nuclear Non-Proliferation Treaty (NPT) have taken various steps to limit their own nuclear weapons capabilities—including such actions as closing down nuclear test sites, halting production of fissile material for use in weapons, and eliminating entire classes of nuclear weapons and delivery vehicles. Overall, declared global nuclear-weapon stockpiles have dropped considerably since the height of the Cold War.

Reinforcing these activities by governments is a groundswell of new initiatives from individuals and groups in civil society to achieve a nuclear-weapon-free world. Former senior statesmen now in at least ten countries have authored opinion-editorials voicing their support for nuclear disarmament, following the first of a series of such op-eds originally published in the *Wall Street Journal* by George Shultz, William Perry, Henry Kissinger, and Sam Nunn. Another major initiative, the International Commission on Nuclear Non-Proliferation and Disarmament—jointly organized by Australia and Japan—has just issued a massive study containing a detailed step-by-step proposal for achieving global nuclear disarmament. Earlier this month in Paris, over 200 international political, military, business, and faith leaders gathered in Paris for the Global Zero Summit, to launch the next phase of the Global Zero Campaign focused on the phased elimination of all nuclear weapons. Countless additional civil society initiatives are underway around the world today, and nuclear disarmament is also a goal that is increasingly cited as a priority by world leaders attending the plenary sessions of the UN General Assembly.

With all of these activities going on, one is tempted to follow the advice of the great reggae singers, Bobby McFerrin and Bob Marley, who famously urged, “Don't worry, be happy.”

Yet unfortunately there are some legitimate grounds for worrying, both about the future of nuclear disarmament and the role of international law in achieving it.

First, let's look at some numbers. Here we are in the year 2010—64 years after the UN General Assembly first identified the goal of eliminating nuclear weapons, 48 years after the Soviet Union and the United States agreed at the UN on a joint proposal for “general and complete disarmament” (the McCloy-Zorin joint statement), 40 years after the NPT entered into force which committed its parties to “pursue negotiations in good faith” on nuclear disarmament, and 10 years after the nuclear-weapon States at the 2000 NPT Review Conference made their “unequivocal undertaking” to accomplish the total elimination of their nuclear arsenals—after all these years, and there are still reportedly over 20,000 nuclear weapons in the world today, with many still on high-alert status. The fact that we do not know the exact number only testifies to another problem—the extremely limited transparency over these arsenals and their associated stocks of fissile materials.

Second, let's consider the problem of the double standard. Critics of the NPT have often termed the treaty “discriminatory” because it establishes a legal distinction between nuclear have's and have-not States. Though nuclear disarmament has obviously not been achieved, the nuclear-weapon States have been asking the non-nuclear-weapon States to agree to increased, more intrusive controls over their own peaceful nuclear activities. This certainly contrasts with UN General Assembly resolution 2028—which in 1965 endorsed the negotiation of the NPT, saying that “the treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers”.

Furthermore, in 1995, the States Parties agreed to extend the NPT indefinitely, as part of a “package deal” that contained several important elements—including efforts to establish a nuclear-weapon-free zone in the Middle East, a “programme of action” to achieve the “full realization” of Article VI of the treaty dealing with disarmament, and a strengthened review process. Yet today, there been no efforts whatsoever to establish the Middle East zone, large nuclear stockpiles remain, and the treaty review process continues to face difficulties in eliciting hard facts about the status of existing nuclear arsenals. These are just some of the difficult issues that will no doubt be taken up at the 2010 NPT Review Conference which opens next May.

Third, let's consider what is often called “modernization” of the nuclear arsenals. In the face of numerous political and legal commitments to eliminate nuclear weapons, all of the nuclear-weapon States have various programmes to improve, modernize, or refurbish their nuclear arsenals and their associated delivery systems. Experts often refer to this as the phenomenon of “vertical proliferation”—involving the continued qualitative improvement of existing arsenals. Some nuclear-weapon States have tried to reconcile these goals with disarmament by claiming that modernization will allow the retirement of older, less safe weapon systems, or by asserting that a more reliable nuclear arsenal will discourage allies covered by the nuclear umbrella from acquiring their own nuclear weapons.

Fourth, let's consider what is happening with the nuclear deterrence doctrine governing the use of such weapons. While there are some differences among the nuclear-weapon States in the

specific circumstances that they have declared would lead to the use of such weapons, the great common denominator of all of these doctrines is the claim that nuclear weapons are both an effective and legitimate means for these states to deter nuclear attacks upon them. Secretary-General Ban Ki-moon has referred to this doctrine as “contagious” because of the historical tendency of the deterrence doctrine to proliferate along with their associated weapons.

Fifth, let’s consider just some of the formidable challenges facing the “rule of law” today in the field of disarmament. Though opened for signature in 1996, the Comprehensive Nuclear-Test-Ban Treaty has still not entered into force. And though the 1995 NPT Review and Extension Conference agreed to “the immediate commencement and early conclusion of negotiations” on a fissile material treaty, such negotiations have still not taken place despite strong support for such a treaty worldwide. In other areas, the nuclear-weapon States have still not ratified all the Protocols to four of the five treaties establishing regional nuclear-weapon-free zones—and none has ratified the Protocols to the treaties establishing such zones in Central Asia and Southeast Asia. There are also no multilateral treaties governing missiles or other nuclear-weapon delivery systems, and—with the abrogation of the ABM treaty—no international treaties regulating missile defences.

With respect to non-proliferation, the UN Security Council adopted resolution 1540 in 2004, which obliged all States to enact legislation to prevent the proliferation of weapons of mass destruction or their acquisition by non-state actors—yet many States outside the Council later voiced their concerns, arguing that the Security Council was never intended to serve as a de facto legislature for promulgating binding legal obligations of general applicability to all Member States. Other non-proliferation concerns have arisen over reports in recent years of actual or possible non-compliance with the NPT or its safeguards agreements by Iraq (before the last war), Iran, and Syria. In 2003, North Korea announced its withdrawal from the NPT, and then conducted nuclear tests in 2006 and 2009. Also, many non-nuclear-weapon States have still not concluded their NPT safeguards agreements with the International Atomic Energy Agency.

So yes, there is a lot to be concerned about when it comes to the future of nuclear disarmament—and if suspicions persist about the willingness of the nuclear-weapon States to fulfil their disarmament commitments, there will no doubt be ramifications that will take the form of nuclear-weapon proliferation, as more and more countries will come to conclude that they too must have this highly valued, ultimate deterrent that will guarantee national survival and protect against nuclear attacks. And as this process unfolds, more and more weapon-usable fissile materials will be produced, stored, and transported around the world, which will only raise the risks of such materials being acquired by non-state actors, and then the world would be facing yet another nuclear nightmare.

I do not wish to be misunderstood here—I am not arguing that the dangers I have just reviewed will in fact transpire. A risk of something occurring is not the same as the occurrence itself, and this brings me to the key message I wish to voice today—namely, the persisting, even growing importance of law in the overall process of achieving global nuclear disarmament. It is almost as

important as political will and enlightened leadership among the nuclear-weapon States, which together are indispensable in achieving a world without such weapons. Let me explain.

The world community—through such means as UN General Assembly resolutions and Final Documents at NPT Review Conferences—has over the years identified at least five criteria to use in assessing progress in disarmament. Verification is one of these—it is not sufficient for States simply to declare unilaterally that they do not have nuclear weapons, and this must be confirmed by highly reliable and objective means. Another criterion is irreversibility—confidence in compliance grows if controls are sufficient to make it extremely difficult if not impossible for a State to abandon a disarmament commitment and build or reconstruct a nuclear arsenal. Transparency is also essential in gauging progress in disarmament, for nuclear disarmament will never be achieved if the world does not have hard facts about the size of nuclear arsenals and concrete progress being made in eliminating them. Another criterion is universality—any agreement to achieve global nuclear disarmament must be fully “global” in geographic scope, with no exceptions. Lastly, the world community expects disarmament commitments to be legally binding.

Of these, the last actually also applies to the other criteria, for how can one realistically expect verification or irreversibility to be reliably achieved if they are purely discretionary or optional? Is universality simply to be achieved as a result of a straw poll, or must it be registered in a somewhat more binding form? Similarly, the world should not have to rely upon voluntary declarations by states about their nuclear weapons—this is not the way that nuclear non-proliferation policy is enforced, so why should it be any different for disarmament?

In this sense, law is a vital ingredient in any scheme for achieving a world free of nuclear weapons. If the international community were viewed as on a boat heading to a world without nuclear weapons, political will and politics would constitute its sail, and law its anchor—and both are essential in reaching that destination.

It is precisely because of this indispensability of law that Secretary-General Ban Ki-moon included the goal of negotiating a nuclear weapon convention, or a framework of mutually reinforcing agreements with the same goal, as the first of his five-part nuclear disarmament proposal, which he announced on 28 October 2008. Speaking just days earlier at Harvard University, he reminded his audience that “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.”

In some respects, the entire ensemble of institutions that comprise the “UN disarmament machinery” is involved, in one way or another, in the development or strengthening of multilateral norms for disarmament. The UN Disarmament Commission and the General Assembly’s First Committee are deliberative bodies, and although neither the General Assembly’s resolutions nor the Disarmament Commission’s agreed “guidelines” are binding, they do contribute to the overall process of defining and articulating multilateral norms for disarmament.

The Conference on Disarmament in Geneva is the world's single forum for negotiating multilateral disarmament treaties. Last month, Secretary-General Ban Ki-moon called upon the Conference, as it opened its current session, to "demonstrate to the world its continuing relevance, especially in strengthening the rule of law in the field of disarmament." His words of encouragement are certainly necessary, given that the Conference has been locked in a stalemate for well over a decade due to its inability to reach a consensus that would allow the commencement of negotiations. It has faced such political difficulties before, yet it—and its predecessor bodies—have been involved in the conclusion of all the key multilateral treaties dealing with weapons of mass destruction, though the NPT itself was negotiated primarily by the Soviet Union and the United States. The Conference was able to reach agreement on a substantive programme of work last year, but was unable to implement it due to differences amongst some of its members over some key issues and priorities. Virtually all members want to proceed immediately with negotiations on a fissile material treaty, but there is still no consensus among its 65 members on this. Other items on the Conference's agenda for substantive discussions—but not negotiations—are nuclear disarmament, negative security assurances, and the prevention of an arms race in outer space.

Let me say that I do not believe that the obstacles to negotiations encountered in the Conference on Disarmament are due to any fundamental flaw in the CD as an institution. These obstacles are due rather to differences in the policies of its Member States. Some want a treaty to cut-off production of fissile material for weapons, while others want such a treaty to include stocks of previously produced material—and at least one member has voiced its concern that, as proposed, the fissile material cut-off treaty would seriously threaten its security. There are persisting differences in priorities as well. Some want negotiations dealing with nuclear disarmament and security assurances, while others want to commence negotiations on a treaty banning the deployment or use of weapons in space. Progress in these areas will require some changes in state policies.

It is of course true that there can be incremental progress in nuclear disarmament and non-proliferation without the need for new multilateral treaties. States can voluntarily decide on their own—as did Libya and South Africa—to abandon nuclear-weapon programmes. In 1991, the Russian Federation and the United States undertook a series of unilateral actions that resulted in a substantial reduction in deployments of certain types of short-range nuclear weapons. The many difficulties of treaty negotiation and ratification—such as we are now seeing with respect to the CTBT—have prompted some commentators to dismiss the need for treaties in the field of arms control, or have inspired the negotiation of extremely brief agreements, like the Strategic Offensive Reductions Treaty of 2002, which was about one page in length.

Yet despite the difficulty of negotiating arms control and disarmament treaties, the world community still recognizes their value, as illustrated by the very fact that the Russian Federation and the United States chose to negotiate a treaty to succeed the START treaty and they have also announced they intend to negotiate additional reductions by means of future treaties.

In his famous speech to the General Assembly in September 1961 announcing a detailed US proposal for “general and complete disarmament,” President Kennedy stressed the importance to disarmament of both verification and of international law. He said, “For disarmament without checks is but a shadow, and a community without law is but a shell.”

As for the next logical steps forward in filling in the “shell” of disarmament, I would of course point to the large unfinished agenda of bringing the CTBT into force, negotiating a fissile material treaty, completing ratifications of the Protocols to the regional nuclear weapon-free zone treaties, and starting the process of developing multilateral legal norms for controlling missiles and outlawing space weapons.

But looking further down the road, I think Secretary-General Ban Ki-moon got it quite right by drawing attention to the need for a nuclear-weapon convention or framework of agreements with a similar objective. Long-term planning should be a near-term priority, not a long-term goal, and I think there is much indeed to be gained just by doing some serious thinking about what exactly would have to be included in such a convention. The mere act of identifying these elements would help in clarifying the work that needs to be done to conclude and implement such a treaty. This is why I believe the “model nuclear weapon convention” being circulated by the Governments of Malaysia and Costa Rica—which was drafted by non-governmental experts—is a good step in the right direction. In my opinion, it is never “too early” to start thinking about the architecture and legal obligations that will be needed to achieve global nuclear disarmament—it is far better to do this work early, than too late.

So let me conclude not only by thanking you for having invited me, but also by challenging all of you here today to use your skills to contribute in some way to the great cause of nuclear disarmament. You can conduct in-depth research. You can investigate. You can advocate. You can educate others. And you can establish networks for exchanging ideas on how to advance disarmament and the rule of law together. This is my call to action today, for there are few things more rewarding than in contributing to a truly great cause, and nuclear disarmament is one of the greatest.