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Middle Powers Initiative Briefing Paper

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A Global Law to Ban Nuclear Weapons

Briefing Paper

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THE MIDDLE POWERS INITIATIVE
A program of the Global Security Institute
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Through the Middle Powers Initiative, eight international non-governmental organizations (the Albert Schweitzer Foundation, the Global Security Institute, the International Association of Lawyers against Nuclear Arms, the International Network of Engineers and Scientists for Global Responsibility, the International Peace Bureau, the International Physicians for the Prevention of Nuclear War, the Nuclear Age Peace Foundation and the Women's International League for Peace and Freedom), work with middle power governments to advance nuclear disarmament and non-proliferation through immediate practical steps that reduce nuclear dangers and the commencement of negotiations to eliminate nuclear weapons. MPI is guided by an International Steering Committee.

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The Middle Powers Initiative is solely responsible for this Briefing Paper. It was prepared by Dr. John Burroughs, Executive Director of the New York-based Lawyers Committee on Nuclear Policy (LCNP), the UN office of the International Association of Lawyers Against Nuclear Arms.

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March 23, 2011 Release: Vancouver Declaration Affirms the
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Summary

The goal of establishing a world free of nuclear weapons is now widely accepted, due to the leadership of Secretary-General Ban Ki-moon, President Barack Obama, and other world figures, as well as civil society efforts and the long-standing and persistent demands of middle power governments.

A window of opportunity is open at present for action to attain this goal, but this may not last. The achievement of nuclear disarmament will require continuing relative cooperation amongst major powers. Progress toward such disarmament will be undermined should there be further proliferation.

Thus, it is urgent to seize the present opportunity, and to begin, soon, collective preparatory work leading to enactment of a universal, verifiable, irreversible and enforceable legal ban on nuclear weapons. Such a ban would put an end to the grim spectacle of some states' reliance on weapons whose use is palpably inhumane and also contrary to law governing the conduct of warfare.

Nuclear disarmament is not the sole property of states holding nuclear weapons; it is a matter of profound concern and interest for the entire world. Further, by pursuing a comprehensive rather than piecemeal solution to the problems posed by the continuing existence of nuclear weapons, efforts to restrain individual attempts to acquire those weapons would be placed in universal context and thus strengthened. It continues to be a matter of great urgency in the Middle East and Northeast Asia to succeed in those efforts.

The Middle Powers Initiative (MPI) accordingly urges the convening of meetings of interested states, whether possessing nuclear weapons or not, to work on building the framework for a nuclear-weapons-free world, including preparations for negotiation of a convention or framework of instruments for the global elimination of nuclear weapons. MPI could facilitate a series of such meetings, as it did in the Article VI Forum meetings leading up to the 2010 NPT Review Conference. MPI also strongly supports efforts within the General Assembly to put in motion a process that would enable deliberations and negotiations on comprehensive nuclear disarmament.

It is also essential to implement all commitments made at the 2010 nuclear Non-Proliferation Treaty (NPT) Review Conference, on peaceful uses, non-proliferation and disarmament. Vigorous implementation of Action 5 of the action plan on disarmament is of particular importance. Key steps include the following:

- meetings among the five NPT nuclear weapon states should address multilateral reduction of the global stockpile of all types of nuclear weapons;
- US nuclear bombs should be withdrawn from Europe and nuclear-sharing arrangements terminated;
- additional measures of transparency should be implemented regarding all nuclear weapons, strategic and non-strategic, and a standard reporting form for nuclear weapon states should be adopted soon in the interest of transparency and accountability;
- doctrine should move toward a policy of non-use.

Finally, it is vital to make the 2012 conference on a Middle East Zone Free of Nuclear Weapons and other Weapons of Mass Destruction productive in building trust in the region now as well as in building toward a future zone. One positive outcome would be a commitment for all regional states to sign and ratify the Comprehensive Nuclear Test-Ban Treaty.

A. Implementation of the Secretary-General's Proposal for Nuclear Disarmament

1. The action plan on nuclear disarmament set forth in the Final Document adopted by the 2010 NPT Review Conference contains this new and potentially historic provision: "The Conference calls on all nuclear weapon states to undertake concrete disarmament efforts and affirms that all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons. The Conference notes 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."

2. As the Final Document acknowledges, UN Secretary-General Ban Ki-moon has repeatedly called for multilateral negotiations on the global elimination of nuclear weapons. In referencing a convention or framework of instruments, the Secretary-General drew on two key General Assembly resolutions. The first is the resolution adopted every year beginning in 1996 calling upon all states immediately to fulfill the disarmament obligation unanimously affirmed by the International Court of Justice by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention. In 2010, the resolution was adopted by a vote of 133 to 28, with 23 abstentions. China, India and Pakistan, all possessors of nuclear weapons, supported the resolution. The second is the resolution adopted in 2000 entitled "Towards a Nuclear Weapon-Free World: The Need for a New Agenda." Among many other provisions, it affirms "that a nuclear weapon-free world will ultimately require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments." The resolution was adopted by a vote of 154 in favor, including China, the United Kingdom and the United States, to three opposed, with eight abstentions, including France and Russia.

3. The Middle Powers Initiative holds that the time has come to act on these commitments and to launch collective preparatory work for negotiations on a convention or framework of instruments for the sustainable, verifiable, irreversible and enforceable global elimination of nuclear weapons. That was a recommendation made by MPI in the run-up to the 2010 Review Conference based upon a January 2010 consultation held at the Carter Center in Atlanta. MPI accordingly urges the convening of meetings of interested states to undertake preliminary work on the institutional, political, and legal architecture of a world free of nuclear weapons. Such meetings would help stimulate and lay the groundwork for multilateral negotiations. They would also complement deliberations and negotiations within the Conference on Disarmament or a General Assembly-initiated process if either materialize, as discussed below. MPI could facilitate a series of such meetings, as it did in the Article VI Forum meetings leading up to the 2010 NPT Review Conference.¹

4. Early this year, MPI proposed that the General Assembly request the Secretary-General to convene a preparatory conference that would discuss the establishment of a diplomatic conference to reach agreement on a convention or framework of Instruments providing for universal, verifiable and irreversible nuclear disarmament. MPI's proposal was the subject of a number of informal meetings in New York and key capitals at which governments expressed considerable interest. It also gained considerable support from former leaders including the members of the Inter-Action Council,² parliamentarians including those involved in meetings of the Inter-Parliamentary Union, and civil society organizations. While governments did not decide at this time to pursue a General Assembly resolution along the lines suggested by MPI, the proposal helped expand the horizons of the possible, and may feed in to a General Assembly revitalization of disarmament machinery.

5. Such a revitalization is now squarely on the General Assembly's agenda. In October of this year, the First Committee adopted unanimously a resolution put forward by the Netherlands, South Africa, and Switzerland, entitled "Revitalizing the work of the Conference on Disarmament and taking forward multilateral disarmament negotiations." The resolution responds to the 15-year deadlock in the Conference on Disarmament, which, stymied by an absolute rule of consensus, has conducted no negotiations since producing the text of the Comprehensive Nuclear Test-Ban Treaty in 1996. The resolution invites states "to explore, consider and consolidate options, proposals and elements for a revitalization of the United Nations disarmament machinery as a whole, including the Conference on Disarmament." It also provides that in a year, if necessary, the General Assembly will "further explore options for taking forward multilateral disarmament negotiations." A Canada-sponsored resolution on a Fissile Materials Cut-off Treaty (FMCT), approved by an overwhelming majority, similarly points toward action by next year's General Assembly. It states that the General Assembly will "consider options for the negotiation of a treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices ... should the Conference on Disarmament fail to agree on and implement a comprehensive programme of work by the end of its 2012 session."

6. A resolution tabled in the First Committee indicates that approaches comparable to the

¹ From 2005 through 2009, MPI facilitated the Article VI Forum which included a number of meetings of governments and disarmament experts organized by MPI and hosted by middle power governments. The meetings focused primarily on implementation of the NPT Article VI disarmament obligation.

² On 31 May 2011, the Inter-Action Council adopted a resolution consistent with MPI's overall approach. It recommends "Implementing the UN Secretary General's Five-Point Proposal on Nuclear Disarmament as well as the decisions of the 2010 Review Conference on the Nuclear Non-proliferation Treaty," and "Concluding a convention prohibiting nuclear weapons, in the same manner as conventions prohibiting biological and chemical weapons." The resolution also calls for "Initiating discussions on a framework of mutually reinforcing agreements or a convention on nuclear weapons, in order to develop without further delay a comprehensive nuclear treaty architecture aiming at the elimination of nuclear weapons". The Council is comprised of 20 former Heads of State including Jean Chrétien (former Prime Minister of Canada), Franz Vranitzky, former Chancellor of Austria), Helmut Schmidt (former Chancellor of Germany), Oscar Arias (former President of Costa Rica), Tun Abdullah Ahmad Badawi (former Prime Minister of Malaysia), James Bolger (former Prime Minister of New Zealand), Gro Brundtland (former Prime Minister of Norway), William Jefferson Clinton (former President of the United States of America), Fernando de la Rúa (former President of Argentina), Vicente Fox (former President of Mexico), Yasuo Fukuda (former Prime Minister of Japan), Goh Chok Tong (former Prime Minister of Singapore), Abdel Salam Majali (former Prime Minister of Jordan), James Fitz-Allen Mitchell (former Prime Minister of Saint Vincent and

one proposed by MPI are within reach. Sponsored by Austria, Mexico, and Norway, it provided that next year's General Assembly would consider establishment of a process not subject to the rule of consensus outside the Conference on Disarmament until the latter can deliver results. Working groups would address nuclear disarmament and the achievement of a world without nuclear weapons; guarantees of non-use of nuclear weapons against countries not possessing them; negotiation of an FMCT; and prevention of an arms race in outer space. The resolution attracted substantial support, insufficient, however, for the sponsors to allow it to be put to a vote. It remains on the actual, if not formal, agenda of the General Assembly for next year. MPI strongly supports efforts to have the General Assembly put in motion a process that would enable deliberations and negotiations on the global elimination of nuclear weapons.

7. However a preparatory process is structured and launched, one of its important tasks would be to clarify and make recommendations regarding a "framework," four times referred to in the NPT 2010 Final Document, as well as "convention."³ Another area needing work concerns the design of an effective regime for inducing compliance and ensuring enforcement. Also warranting attention are a verification regime which will be robust enough to instill confidence in compliance without revealing sensitive information, and the procedures for dealing adequately with dual use materials, nuclear facilities and delivery systems including missiles. On those and other issues, there is much to do in a preparatory process. Such a process would not undermine work on the FMCT, post-New START US-Russian negotiations, regulation of nuclear fuel production and supply or other measures on the existing agenda. On the contrary, it would stimulate and reinforce progress. Measures now apparently within reach may in fact remain unattainable while any uncertainty remains as to the fundamental goal being sought, namely a nuclear weapon-free world. In those circumstances, they may be perceived as primarily aimed at preserving the advantage of powerful states and thus deemed unacceptable.

B. Implementation of the 2010 NPT Review Conference Outcome

8. Throughout the first decade of this century, the Middle Powers Initiative worked assiduously, in dark times for disarmament, to uphold the commitments made by the 2000 NPT Review Conference and to call for their reaffirmation in 2010. The thrust of MPI's work can be seen in a document available at www.middlepowers.org, "Comparison of the Middle Powers Initiative Recommendations and the Final Document of the 2010 NPT Review Conference." Now that the 2010 Review Conference has reaffirmed previous commitments and made significant new ones, high priority must be given to their implementation and to holding all states party accountable for doing so. This applies to all commitments, on peaceful uses, non-proliferation, regional issues and disarmament.

the Grenadines), Andrés Pastrana (former President of Colombia), Percival Noel James Patterson (former Prime Minister of Jamaica), Abdul-Aziz Al-Quraishi (former Governor of Saudi Arabia), Tung Chee Hwa (former Chief Executive of Hong Kong), Vaira Vī'e-Freiberga (former President of Latvia) and Ernesto Zedillo Ponce de León (former President of Mexico).

³ Regarding the concepts of "framework of instruments," "framework agreement," and "convention," see the September 2010 Middle Powers Initiative Briefing Paper, "The Humanitarian Imperative for Nuclear Disarmament," available at http://www.middlepowers.org/pubs/Geneva_2010_Briefing_Paper.pdf.

9. Regarding disarmament, Action 5 is of particular importance. The nuclear weapon states are to report on undertakings made in Action 5 to the 2014 preparatory meeting for the 2015 NPT Review. The Review Conference “will take stock and consider the next steps for the full implementation of article VI.” Action 5 calls upon the nuclear weapon states “to promptly engage” on the following matters, among others:

- rapidly moving towards an overall reduction in the global stockpile of all types of nuclear weapons;
- addressing the question of all nuclear weapons regardless of their type or their location as an integral part of the general nuclear disarmament process;
- further diminishing the role and significance of nuclear weapons in military and security doctrines and policies;
- discussing policies that could prevent the use of nuclear weapons and eventually lead to their elimination;
- further enhancing transparency and increasing mutual confidence.

10. As to *overall reduction in the global stockpile*, it is of great importance that the United States and Russia energetically move forward on post-New START negotiations on the reduction of all nuclear weapons held by the two countries, strategic and non-strategic, deployed and non-deployed, with verified dismantlement of warheads, not only delivery systems as has been the case to date. But completion of those negotiations must not be seen as a precondition for the participation of other states in concerted action to reduce and eliminate nuclear weapons. Bilateral negotiations can proceed in a track parallel to other processes.

11. The five NPT nuclear weapon states met in Paris in late June 2011 and discussed, they said, confidence-building, transparency, and verification. Future meetings are planned. The agenda should be broadened to encompass the role of all states possessing nuclear arsenals in reduction and elimination of the global stockpile. It is highly desirable that representatives of the international community take part in the discussions. Further, those discussions cannot serve as a substitute for a preparatory process for negotiation of a convention or framework of instruments. Nuclear disarmament is not the sole property of states possessing nuclear weapons; it is a matter of urgent and profound concern and interest for the entire world. Indeed, for many reasons, not least the protection of their own citizens, non-nuclear weapon states have both the right and responsibility to work for the elimination of nuclear weapons.

12. The commitment to *address all nuclear weapons regardless of their type or location* refers in part to US nuclear bombs deployed under nuclear-sharing arrangements in five NATO countries: Belgium, Germany, Italy, Netherlands and Turkey. They are the only nuclear weapons deployed on the territory of non-owner states. There is now considerable momentum for the removal of those bombs emanating in particular from several of those countries. Once intended to deter a Soviet invasion, the bombs are widely seen as a militarily useless and burdensome legacy of the Cold War that is impeding progress on disarmament, as documented by the IKV Pax Christi report, *Withdrawal Issues*. Indeed, according to that report, among NATO countries 14 advocate an end to deployment, 10 would not block withdrawal and only three (France, Hungary, Latvia) oppose withdrawal. A serious effort was made to insert a commitment to withdrawal in the 2010 NPT Final Document, resulting in the end, however, in the vague language of Action 5 on this point. The question of withdrawal is now under consideration

in the NATO Defense and Deterrence Posture Review, to be completed for the 2012 NATO Summit to be held in Chicago. A key issue is whether and how withdrawal should be linked to transparency and reduction measures for Russia's non-strategic nuclear warheads.

13. The Middle Powers Initiative has long held that the US nuclear bombs should be withdrawn from Europe and nuclear-sharing arrangements terminated. US deployment on non-possessor territories sets an emphatically undesirable precedent for other states possessing nuclear weapons and elevates the political value of the weapons. It also is contrary to at least the spirit of the NPT, Articles I and II. How can it be squared with the NPT for a "non-nuclear weapon state" to have nuclear weapons deployed on its soil and even to prepare for operation of the aircraft that would deliver them? The benefits of withdrawal would be substantial. It would be a positive signal to Russia, which stresses that nuclear forces were removed from Ukraine, Belarus and Kazakhstan when they become independent states. It would reassure the world that the Western states are indeed serious about moving toward disarmament and thus strengthen the non-proliferation regime. It is undoubtedly important that Russian non-strategic nuclear forces be part of bilateral and multilateral disarmament negotiations, with transparency regarding those forces a first step. Withdrawal of the bombs might encourage the Russians to be more forthcoming. But withdrawal cannot and should not be used as a bargaining chip; the bombs have no military utility and the arguments are powerful for their removal.

14. The Middle Powers Initiative has highlighted the need for *further diminishing the role of nuclear weapons*, as illustrated by the recommendations made by MPI to the 2010 Review Conference. Among other things, picking up language from the US Nuclear Posture Review, MPI urged affirmation "that the record of non-use of nuclear weapons since World War II should be extended forever." Doctrine should now move toward a policy of non-use.

15. As to *further enhancing transparency*, MPI recommended establishment of a UN-based, comprehensive accounting system covering size of nuclear arsenals, delivery systems, fissile materials, and spending on nuclear forces. The Review Conference was able to agree on Action 21, which encourages the nuclear weapon states to agree as soon as possible on a standard reporting form and invites the Secretary-General to establish a publicly accessible repository of information. In this regard, MPI welcomes Proposal III of the April 30, 2011 Berlin Statement by the foreign ministers of ten middle power governments (Australia, Canada, Chile, Germany, Japan, Mexico, the Netherlands, Poland, Turkey and the United Arab Emirates). Pursuant to that provision, the group developed a draft standard reporting form which was provided to the nuclear weapon states in advance of their Paris meeting. The Berlin Statement correctly observes that it is "essential to increase transparency and accountability in the nuclear disarmament process." In general, MPI appreciates the initiative shown by the ten governments in calling, concretely, for implementation of key 2010 NPT commitments.

16. Finally, rising tensions in the Middle East demonstrate the vital importance of making the 2012 conference on a Middle East Zone Free of Nuclear Weapons and other WMD productive in building trust in the region now as well as building toward a future zone. It is to the good that steps are now being taken to implement this key 2010 NPT Review Conference commitment, including the identification of a host country, Finland. But it will not be enough simply to hold a conference. Serious attention must be paid to concrete outcomes. One could be a commitment for all regional states to sign and ratify the Comprehensive Nuclear Test-Ban Treaty. This would

be reassuring in particular regarding the intentions of both Iran and Israel to forswear testing and to accept robust international monitoring of non-proliferation and disarmament obligations.

C. The Centrality of Law

17. In the debate about nuclear weapons, the tide has turned, distinctly, toward disarmament. Some, however, still persist in arguing that, despite their inhumanity and the profound, universal dangers they pose, nuclear weapons on balance should be retained because they provide security and international stability. It must not be forgotten that law has a central role in this debate. It is now beyond dispute that there is a legal obligation to negotiate nuclear disarmament and that a nuclear weapon, like any weapon, is subject to rules governing the conduct of warfare. And a principal basis for the legitimacy and therefore the rightful defense of any state is that power is exercised, not arbitrarily, but subject to the rule of law.

18. An innovation of the 2010 NPT Review was that in its Final Document, the Conference “expresses its deep concern at the catastrophic 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.” This raised, again, a truth understood since the beginning of the nuclear age and effectively explained by the International Committee of the Red Cross (ICRC) prior to the Review Conference: the essential incompatibility of nuclear weapons with humanitarian law and values. The ICRC drew the inexorable conclusion, stating that “preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty.” A similar logic is found in the 1996 advisory opinion of the International Court of Justice (ICJ) on the legality of threat or use of nuclear weapons. On the question before it, the Court observed, among other things, that use of nuclear weapons is “scarcely reconcilable” with the requirements of international humanitarian law. Going beyond the scope of the question, the Court unanimously concluded that 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.”

19. In light of the Review Conference provision, the International Association of Lawyers Against Nuclear Arms, one of MPI’s sponsoring organizations, joined with The Simons Foundation to develop a declaration assessing the current state of law applicable to nuclear weapons. Entitled “Law’s Imperative for a Nuclear Weapon-Free World” (see Appendix) and released in March 2011, it has been endorsed by former ICJ judges, leading international law scholars, former diplomats and officials, legislators and civil society organizations, including all MPI sponsoring organizations. The declaration observes that with their uncontrollable blast, heat and radiation effects, nuclear weapons are weapons of mass destruction that by their nature cannot comply with fundamental rules forbidding the infliction of indiscriminate and disproportionate harm.

20. The declaration builds upon developments since the ICJ opinion, among them 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.

In connection with weapons already banned, the declaration observes: “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.” (Emphasis supplied.) The ICJ had made clear the link between illegality and humanitarian values, stating that the broad participation in 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’.”

21. The declaration also squarely addresses “deterrence” and possession, stating regarding the latter: “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.”

Conclusion

22. In short, ongoing reliance on nuclear weapons is antithetical to the preservation and further development of a law-governed world. The world faces a stark choice: one path leads to a risky and lawless world of proliferation and entrenchment of nuclear weapons; the second leads to fulfillment of a purpose of the United Nations and of the NPT disarmament obligation through good-faith negotiation of nuclear disarmament in accordance with law. The choice must be for disarmament and law. The appropriate means are initiation of a preparatory process for negotiation of a convention or framework of instruments for elimination of nuclear weapons and vigorous implementation of the 2010 NPT commitments.

APPENDIX

Vancouver Declaration: Law's Imperative for the Urgent Achievement of a Nuclear
Weapon-Free World

March 23, 2011 Release: Vancouver Declaration Affirms the
Incompatibility of Nuclear Weapons with International Humanitarian Law

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.

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.

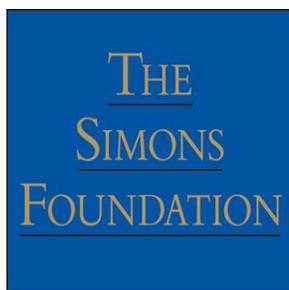
That nuclear weapons have not been detonated in war since World War II contributes to the formation of a customary prohibition on use. Further to this end, in 2010 the United States declared that “it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use 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.

** 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.*



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Vancouver Declaration Affirms the Incompatibility of Nuclear Weapons with International Humanitarian Law

Released today by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms (IALANA) and signed by eminent experts in international law and diplomacy, the Vancouver Declaration affirms that nuclear weapons are incompatible with international humanitarian law, the law stating what is universally prohibited in warfare. 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 and disproportionate harm.

Entitled “Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World,” the declaration concludes by calling on states to commence and conclude negotiations on the global prohibition and elimination of nuclear weapons as mandated by the legal obligation unanimously proclaimed by the International Court of Justice (ICJ) in 1996. An annex to the declaration specifying the applicable law states: “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.”

The many signatories include Christopher G. Weeramantry, former Vice President of the ICJ and current 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 international humanitarian law; Ved Nanda, Evans University Professor, Nanda Center for International and Comparative Law, University of Denver Sturm College of Law; Geoffrey Robertson, QC, founder and head, Doughty Street Chambers; Jayantha Dhanapala, former UN Under-Secretary-General for Disarmament Affairs; and Gareth Evans, QC, former Foreign Minister of Australia who recently served as Co-Chair of the International Commission on Nuclear Non-proliferation and Disarmament.

The Simons Foundation and IALANA developed the declaration with the input of a conference convened by the two organizations in Vancouver, Canada, on February 10-11, 2011, that brought together some 30 experts in international law, diplomacy, and nuclear weapons.

Dr. Jennifer Simons, President of The Simons Foundation, said: “It is my hope, shared by IALANA, that in the debate about the road to zero, the Vancouver Declaration will serve to underline the essential element - the inhumanity and illegality of nuclear weapons - and hasten their elimination. The possession of nuclear weapons should be an international crime.”

Peter Weiss, IALANA Vice President, who has litigated international human rights cases in U.S. and other courts and advised governments on their submissions to the ICJ in the nuclear weapons case, commented: “Overwhelming problems, like ensuring the survival of the planet, cannot be resolved by law alone. But nor can they be dealt with by ignoring the law altogether. The drafters of the declaration, and those who have signed and will sign it, offer it to governments and civil society as a contribution to the debate. The horrific events occurring in Japan serve to accentuate the danger of continuing to live with the risk of exposing humanity to nuclear radiation, whether emanating from nuclear meltdown or nuclear bombs.”

Dr. John Burroughs, Executive Director of the New York-based Lawyers Committee on Nuclear Policy, the UN Office of IALANA, said: “President Obama and Prime Minister Singh last year jointly stated their support for ‘strengthening the six decade-old international norm of non-use of nuclear weapons.’ The Vancouver Declaration demonstrates that the non-use of nuclear weapons is not only wise policy; it is required by law.”

The declaration and a list of initial signatories are online at <http://www.thesimonsfoundation.ca> and <http://www.lcnp.org>.

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The International Association of Lawyers Against Nuclear Arms works to prevent nuclear war, abolish nuclear weapons, strengthen international law and encourage the peaceful resolution of international conflicts. For more information, visit <http://www.ialana.net> and <http://www.lcnp.org>.

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MIDDLE POWERS INITIATIVE

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A program of the Global Security Institute

Through the Middle Powers Initiative, eight international non-governmental organizations (the Albert Schweitzer Foundation, Global Security Institute, International Association of Lawyers Against Nuclear Arms, International Network of Engineers and Scientists for Global Responsibility, International Peace Bureau, International Physicians for the Prevention of Nuclear War, Nuclear Age Peace Foundation, and the Women's International League for Peace and Freedom) work primarily with "middle power" governments to advance nuclear disarmament and non-proliferation through immediate practical steps that reduce nuclear dangers and the commencement of negotiations to eliminate nuclear weapons. MPI is guided by an International Steering Committee.

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- a) **Delegations** to educate and influence high-level policy makers such as Foreign, Defense and Prime Ministers, and Presidents. Delegations focus on leaders who have great impact on nuclear weapon policy making, both domestically and internationally. MPI Delegations are planned to coincide with significant political events such as the NPT Review Conferences and their preparatory meetings, NATO and other summits;
- b) **Strategy Consultations**, which serve as the "off the record" interventions designed to provide a working environment in which ambassadors, diplomats, experts, and policy makers can come together in an informal setting at pivotal opportunities, in order to complement the ongoing treaty negotiations at various forums such as the United Nations or the European Parliament; and
- c) **Publications**, such as Briefing Papers, that examine whether or not the nuclear abolition agenda is progressing and make corresponding recommendations to governments and activists. MPI Briefing Papers serve as intellectual catalysts for the MPI Delegations and MPI Strategy Consultations, and are widely read.



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