

A Legal Path to a Nuclear Weapons Free World

*Peter Weiss**

Sometimes satire brings you closer to the truth than bare facts. In 1964 a film was launched which few who have seen it will ever forget. It was called 'Dr. Strangelove – How I Learned to Stop Worrying and Love the Bomb' and dealt with a hypothetical nuclear war between the Soviet Union and the United States, set off as a first strike by an American general. Forty six years later, opinion in the nuclear weapons countries and their allies is still divided between those who believe that 'the bomb' has kept the peace between old and new enemies and those who fear that the longer nuclear weapons remain in the world's arsenals the greater is the possibility, if not of a full-fledged nuclear war, at least of a nuclear explosion with dreadful consequences. But *grosso modo* the horror is gone. What was once called omnicide or nuclear winter has become another equation to be solved in the complex math of world governance.

This article will briefly trace the role which law has played in attempts to hold the bomb at bay and will then focus on a legal instrument through which this objective can be achieved, the Model Nuclear Weapons Convention (MNWC)¹.

* J.D. Yale 1952, President, Lawyers Committee on Nuclear Policy; Vice President and former President, International Association of Lawyers Against Nuclear Arms; Counsel to the Government of Malaysia in the ICJ Nuclear Weapons Case, 1995. This article is based in part on an earlier article by the same author, 'Taking the Law Seriously: The Imperative Need for a Nuclear Weapons Convention', 34 *Fordham Journal of International Law* 776 (2011). I have also greatly benefited from consulting an article to be published in the same issue, C. J. Moxley Jr./J. Burroughs/J. Granoff, 'Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty'.

¹ Model Nuclear Weapons Conventions (revised version, 2007), UN Doc. A/62/650 (Annex), also available at <http://www.icanw.org/files/NWC-english.pdf> (last visited 15 August 2011).

I. Early History

The first atomic explosion occurred at the US Army White Sands Proving Ground in the New Mexico desert on 16 July 1945. Its appalling enormity prompted Robert Oppenheimer, the scientist in charge of the atomic bomb project, to utter these words from the *Baghavat Gita*: ‘Now I am become death, the destroyer of worlds.’² A fission bomb was dropped on Hiroshima on 6 August 1945 and a thermonuclear bomb on Nagasaki on August 9. It is estimated that within five years at least 200,000 people died from the effect of the bombing of Hiroshima³ and about 150,000 died within five years in Nagasaki. The official version is that both drops were necessary to bring Japan to its knees, but this has been disputed by a number of historians.⁴

The very first resolution adopted by the UN General Assembly on 24 January 1946 called for ‘The Establishment of a Commission to Deal with the Problem Raised by the Discovery of Atomic Energy’.⁵ It instructed the commission to make specific proposals for

- a. extending between all nations the exchange of scientific information for peaceful ends;
- b. the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;
- c. the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction;
- d. effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions.

The Faustian bargain between the first of these four elements – universal access to nuclear technology for peaceful ends – and the other three – ensuring that this new source of energy would not repeat the dreadful

² See <http://www.youtube.com/watch?v=n8H7Jibx-c0&NR=1> (last visited 15 August 2011).

³ US Department of Energy, ‘Atomic Bombing of Hiroshima’, The Manhattan Project, 13 May 2008.

⁴ See, e.g., G. Alperovitz, ‘Hiroshima: Historians Reassess’, 99 *Foreign Policy* (1995), 15.

⁵ UNGA – Res. 1 (I), The Establishment of a Commission to Deal with the Problem Raised by the Discovery of Atomic Energy, 24 January 1946, 1 UN – GAOR, 9, UN Doc. A/RES/1 (I).

history of Hiroshima and Nagasaki – to this day has never ceased to plague international and domestic lawgivers.

On 16 June 1946, Bernard Baruch, the US representative to the newly created United Nations Atomic Energy Commission, presented his plan for implementing the mandate of the General Assembly resolution to the commission.⁶ He began by saying:

We are here to make a choice between the quick and the dead. [...] Behind the black portent of the new atomic age lies a hope which, seized upon with faith, can work our salvation. If we fail, then we have damned every man to be the slave of Fear. Let us not deceive ourselves: We must elect World Peace or World Destruction.⁷

The Baruch Plan proposed the establishment of an International Atomic Development Authority, which was to control all aspects of atomic activity, including cessation of the manufacture of atomic bombs and disposal of existing weapons. But there was a catch, expressed as follows:

[b]efore a country is ready to relinquish any winning weapons it must have more than words to reassure it. It must have a guarantee of safety, not only against the offenders in the atomic area, but against the illegal users of other weapons - bacteriological, biological, gas - perhaps - why not! - against war itself.⁸

The Soviet Union was not willing to accept this reservation. It offered a counter-proposal, simply banning the use and possession of all nuclear weapons, which the United States, in turn, rejected. As a result, what could have been a convention creating a nuclear weapons free world wound up on the scrap heap of history and the nuclear arms race, fueled by the cold war, was on (the first Soviet nuclear device was detonated on 29 August 1949).

⁶ 'The Baruch Plan', presented to the UN Atomic Energy Commission, 14 June 1946, available at <http://www.atomicarchive.com/Docs/Deterrence/BaruchPlan.shtml> (last visited August 15, 2011).

⁷ *Ibid.*

⁸ *Ibid.*

II. Taming the Dog of Nuclear War

In the next six decades treaty after treaty has been enacted or proposed in an effort to reduce the risk of nuclear war.⁹ Some of these treaties are multilateral, others are only between the United States and Russia. Most have some damage control value – who could, for instance, object to keeping nuclear weapons out of outer space or the seabed? – but, with one exception, none provide a legal tool for ‘going to zero’. That exception is

⁹ 1959 Antarctic Treaty, 402 UNTS 71; 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty), 480 UNTS 43; 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 610 UNTS 205; 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), 634 UNTS 281; 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161; 1971 Seabed Arms Control Treaty, 955 UNTS 115; 1972 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 944 UNTS 13 (terminated by US withdrawal in 2002); 1972 Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (Strategic Arms Limitation Talks – Salt I), 944 UNTS 3 (1979 SALT II, reprinted in 18 ILM 1138 (1979)); 1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 124; 1985 South Pacific Nuclear-Free Zone Treaty, 1455 UNTS 177; 1987 Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (Intermediate-Range Nuclear Forces Treaty), 1657 UNTS 2; 1991 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitations of Strategic Offensive Arms (Strategic Arms Reduction Treaty – START I), 31 ILM 246 (1992), (1993 START II, S-Treaty Doc. 102-20); 1995 Southeast Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Bangkok), 35 ILM 635 (1996); 1996 African Nuclear-Weapon-Free Zone (Treaty of Pelindaba), 35 ILM 698 (1996); 2002 Treaty Between the United States of America and the Russian Federation on *Strategic Offensive Reductions* (SORT), 2350 UNTS 415; 1996 Comprehensive Nuclear-Test-Ban Treaty (not yet in force), UN Doc. A/50/1027; 2010 Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START), available at <http://www.state.gov/documents/organization/140035.pdf> (last visited 15 October 2011); Treaty Banning the Production of Fissile Materials for Nuclear Weapons or Other Nuclear Explosive Devices (Fissile Material (Cut-Off) Treaty (in negotiation), available at http://www.fissilematerials.org/ipfm/site_down/fmct-ipfm-sep2009.pdf (last visited 15 October 2011).

the Treaty on the Non-Proliferation of Nuclear Weapons, known as the Nonproliferation Treaty or NPT.¹⁰

In force since 1968, the NPT currently has 190 members, including the five original nuclear weapons powers – US, Russia, China, UK and France – but not including four additional countries – Israel, India, North Korea¹¹ and Pakistan – known to possess nuclear weapons. When diplomats speak about the NPT, as many did at the quinquennial NPT Review Conference in May 2010, they invariably hark back to the Baruch Plan by declaring that the NPT rests on three pillars: making civilian energy available to all members, nonproliferation of nuclear weapons and their eventual abolition. The last of these derives from Article VI, which states

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to 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.¹²

As is evident from the Final Document of the 2010 Review Conference, adopted by consensus of all the parties, ‘nuclear disarmament’ in this context means total nuclear disarmament and ‘general and complete disarmament’ is not a condition precedent to nuclear disarmament. Article 79 of the Final Document reads as follows:

The Conference notes the reaffirmation by the nuclear-weapon states of their unequivocal undertaking to accomplish, in accordance with the principle of irreversibility, the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty.¹³

¹⁰ For text and status see <http://disarmament.un.org/TreatyStatus.nsf> (last visited 15 August 2011).

¹¹ North Korea joined the NPT in 1985 but withdrew in 2003.

¹² 1968 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161.

¹³ 2010 Final Document of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Doc. NPT/CONF.2010/50 (Vol. I).

III. The ICJ Advisory Opinion

The overwhelming demand for a world free of nuclear weapons is not simply an expression of the abhorrence of the most brutal weapons in history and the desire of people everywhere never to be subjected to the fate that befell the citizens of Hiroshima and Nagasaki in August 1945. It is also an affirmation of the elementary principles of international humanitarian law (IHL). In its landmark opinion of 8 July 1996, the International Court of Justice held, by a divided court,

that the threat and use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the rules of humanitarian law,

and unanimously declared that ‘there exists a general 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.’¹⁴

In his separate opinion, Mohamed Bedjaoui, then the President of ICJ, who cast the deciding vote for the majority, said the following:

By its very nature the nuclear weapon, a blind weapon, therefore has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons. Nuclear weapons, the ultimate evil, destabilize humanitarian law, which is the law of the lesser evil. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law.¹⁵

Judge Christopher Gregory Weeramantry agreed with much of the majority opinion but felt obliged to dissent because it did not go far enough. Toward the end of his magisterial 125 page dissenting opinion he said:

Equipped with the necessary array of principles with which to respond, international law could contribute significantly toward rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age. No issue could be fraught with deeper implications for

¹⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226.

¹⁵ *Ibid.*, at 272.

the human future, and the pulse of the future beats strong in the body of international law.¹⁶

By adding the words ‘bring to a conclusion’ and ‘in all its aspects’ to the language of Article VI NPT, the ICJ Opinion removed any lingering doubt that international law requires the complete elimination of nuclear weapons and not simply disarmament negotiations which may or may not lead to this result. It also retains the NPT reference to ‘good faith’, which strongly suggests that the result may not be achieved within a framework of indefinite duration.¹⁷

But how is this result to be achieved? There are two answers, totally at odds with each other. Slowly, say the biggest nuclear weapons powers, gradually, step by cumbersome step. Urgently, say most of civil society and the great majority of non-nuclear weapons countries, before it is too late. A resolution introduced in the First Committee of the UN General Assembly on 15 October 2010, stressing

the importance of the commitment made by the nuclear-weapon States at the 2010 Review Conference to accelerate concrete progress on the steps leading to nuclear disarmament contained in the Final Document of the 2000 Review Conference¹⁸

was adopted by a vote of 158 for, 5 against and 4 abstentions. France and the United States cast two of the no votes.¹⁹ Russia and China voted yes, the UK abstained.

¹⁶ *Ibid.*, at 554.

¹⁷ For a detailed scholarly discussion of the good faith requirement in international law see the speech by Mohamed Bedjaoui, President of the ICJ at the time of the nuclear weapons case, available at <http://icnp.org/disarmament/2008May01eventBedjaoui.pdf> (last visited 15 August 2011).

¹⁸ UNGA, Towards a Nuclear-Weapon-Free World: Accelerating the Implementation of Nuclear Disarmament Commitments, 15 October 2010, 65 UN – GAOR, UN Doc. A/C.1/65/L.25.

¹⁹ <http://www.reachingcriticalwill.org/political/1com/1com10/votechartSC.html> (last visited 15 August 2011).

IV. The Model Nuclear Weapons Convention

In 1996, prompted by the ICJ's Advisory Opinion, the Lawyers Committee on Nuclear Policy (LCNP)²⁰, in collaboration with the International Association of Lawyers Against Nuclear Arms (IALANA)²¹, International Physicians for the Prevention of Nuclear War (IPPNW)²² and the International Network of Engineers and Scientists Against Proliferation (INESAP)²³ convened a working group charged with drafting a Model Nuclear Weapons Convention (MNWC). The lawyers, doctors, scientists and others comprising the group met repeatedly over a period of several months. Their purpose was not to produce a document which could per se become a treaty, but to demonstrate that, despite the complexity of the subject, a treaty was feasible.

The result of these labors was released in April 1997 and, at the request of Costa Rica, became UN Document A/C.1/52/7.²⁴ As such, it was made available to all UN members in the six official languages of the United Nations. It stirred a great deal of interest, not only among UN member countries, but also throughout civil society. From this point onward it generated a constant and swelling flow of calls for the enactment of a nuclear weapons convention by high-ranking government and military officials (mostly retired), diplomats, academics, Nobel laureates, mayors and parliamentarians and ordinary citizens and civil society organizations.²⁵

²⁰ <http://www.lcnp.org> (last visited 15 August 2011).

²¹ <http://www.ialana.net> (last visited 15 August 2011).

²² <http://www.ippnw.org> (last visited 15 August 2011).

²³ <http://www.inesap.org> (last visited 15 August 2011).

²⁴ Letter from Costa Rica requesting the UN Secretary-General to circulate attached Model Nuclear Weapons Convention, 17 November 1997, UN Doc. A/C.1/52/7.

²⁵ Thus in 2007 and 2008, the Model Nuclear Weapons Convention received support from around the world including from conservative former Prime Ministers Malcolm Fraser (Australia) and Jim Bolger (New Zealand); United Nations officials including Sergio Duarte, UN High Representative on Disarmament; military leaders including Romeo Dallaire, former Commander of UN Forces in Rwanda; Tadatoshi Akiba, Mayor of Hiroshima and President of Mayors for Peace; members of the European Parliament including Michel Rocard (former Prime Minister of France) and Jena Luc Dehaene (former Prime Minister of Belgium). Regarding the European parliament, see report of Parliamentarians for Nuclear Non-Proliferation and Disarmament available at http://www.gsinstitute.org/pnnd/archives/07_01_08_PR_EP.html (last visited 15 August 2011); Regarding national parliaments, see Parliamentary Resolutions Supporting a Nuclear Weapons Convention, undated, available at <http://www.gsinstitute.org/>

A revised version of MNWC was released in 2007 and endorsed by UN Secretary General Ban Ki-moon in 2008 in the following statement:

I urge all NPT [Treaty on the Non-Proliferation of Nuclear Weapons] parties, in particular the nuclear-weapon States, to fulfill their obligation under the Treaty to undertake negotiations on effective measures leading to nuclear disarmament. They could pursue this goal by agreement on a framework of separate, mutually reinforcing instruments. Or they could consider negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations. Upon the request of Costa Rica and Malaysia, I have circulated to all United Nations Member States a draft of such a convention, which offers a good point of departure.²⁶

On the occasion of the 2010 NPT Review Conference, 28 countries specifically referred to a nuclear weapons convention, and the Non-Aligned Movement, representing 116 countries, strongly supported a timebound framework for abolition including a convention.

The crux of the MNWC is Article I, General Obligations, which prohibits development, testing, production, stockpiling, transfer, funding, use and threat of use of nuclear weapons. Subsequent articles require states parties to the Convention to declare all nuclear weapons, nuclear material, nuclear

pnnd/docs/NWC_parliamentary_resolutions.pdf (last visited 15 August 2011) Mayors for Peace is an association of more than 4000 cities around the world which calls for abolition of nuclear weapons through a global agreement. For a statement of Nobel peace laureates supporting negotiation of a convention, see 10th World Summit of Nobel Peace Laureates, Berlin, Germany, Summit Final Statement, November 11, 2009, available online at <http://www.nobelpeace-summits.org/final-conference-statement-10th-world-summit-2/> (last visited 15 August 2011); Many high-level former governmental officials and military officers are supporters of Global Zero, which calls for achievement of a global agreement on elimination of nuclear weapons. See www.globalzero.org (last visited August 15, 2011); See also 'Statement by civil leaders calling for negotiations on the elimination of nuclear weapons', August 6, 1998, with signatories including Jimmy Carter, Mikhail Gorbachev, Admiral Noel Gayler, Oscar Arias and others, available at <http://www.gsinsitute.org/pnnd/CivilLeadersStatement.htm> (last visited August 15 2011) Civil society initiatives in support of a nuclear weapons convention include, among others, the Abolition 2000 Global Network to Eliminate Nuclear Weapons, the International Campaign to Abolish Nuclear Weapons, and the Middle Powers Initiative.

²⁶ 'The United Nations and Security in a Nuclear-Weapon-Free World' (Address delivered at the East-West Institute, New York, US, 24 October 2008), UN Doc. SG/SM/11881, DC/3135.

facilities and nuclear weapons delivery vehicles they possess or control, and their locations,²⁷ and require the elimination of all nuclear weapons, nuclear weapons components and nuclear weapons delivery vehicles in five phases, ending no later than fifteen years from the coming into force of the convention.²⁸

The MNWC provides for an elaborate system of verification, including data sharing agreements, open skies, a registry, international monitoring, on-site inspections and, as a novel contribution to disarmament practice, 'citizen reporting and protection'.²⁹ It calls for national implementation procedures, including the enactment of necessary legislation³⁰ and, importantly, for the criminal prosecution of violators.³¹ It foresees the establishment of an 'Agency for the Prohibition of Nuclear Weapons', with a Conference of states parties, an Executive Council and a Technical Secretariat.³² There is an Optional Protocol Concerning the Compulsory Settlement of Disputes and an Optional Protocol Concerning Energy Assistance.

Entry into force would occur 180 days after at least all nuclear weapons states, all states outside the NPT with nuclear weapons programs, and at least 40 other states with nuclear reactors or nuclear programs have deposited their instruments of ratification;³³ once it enters into force, the duration of the convention would be indefinite and withdrawal would not be permitted.³⁴

The above is merely a bare bones summary of the MNWC's highlights. The full text, covering nineteen sections, each with multiple paragraphs and subparagraphs, is available at the online version of *Securing Our Survival: The Case for a Nuclear Weapons Convention*, International Physicians for the Prevention of Nuclear War, International Association of Lawyers Against Nuclear Arms, International Network of Engineers and Scientists Against Proliferation.³⁵ Any document of this complexity is bound to raise many questions of legal sufficiency and political reality. The drafters of the current version have recognized this by placing certain elements in brackets, as an

²⁷ Article III, Declarations.

²⁸ Article IV, Phases for Implementation.

²⁹ Article V, Verification.

³⁰ Article VI, National Implementation Measures.

³¹ Article VII, Rights and Obligations of Persons.

³² Article VIII, Agency.

³³ Article X V, Entry into Force.

³⁴ Article XVIII, Scope and Application of Convention.

³⁵ Available at <http://www.icanw.org/files/sos.pdf> (last visited 15 October 2011).

indication that they themselves had difficulty agreeing on definite numbers or clauses. In the remainder of this article, I raise, by reference to articles in the MNWC, a number of issues which seem to me worth debating in the context of preparatory work for a nuclear weapons convention.

V. Discussion Points Concerning the Model Nuclear Weapons Convention

Article IV – Phases for Implementation. While affirming and reaffirming their commitment to an ultimate nuclear weapon free world, the nuclear weapon states, and the United States in particular, have maintained their staunch opposition to a time-bound approach to achieving this objective. Ellen Tauscher, the US Undersecretary for Arms Control and International Security Affairs has gone so far as to say

Nuclear disarmament is not the Holy Grail. It's only worth pursuing in so far as it increases our national security. I believe that the journey on the road to zero is perhaps more important – than the goal itself. It's those concrete steps that we take that will enhance the national security of the United States and make the world a more stable place.³⁶

The MNWC prescribes a maximum of fifteen years for reaching a nuclear weapons free world in five phases, but each of these poses certain problems.

In phase 1, all nuclear weapons and nuclear weapons delivery systems are to be de-alerted and disabled within one year of ratification. But this would still leave all nuclear weapons and delivery systems in existence; it has been estimated that the time required for their re-assembly could be as little as a few hours.³⁷

In phase 2, all nuclear weapons are to be removed from deployment sites and all delivery systems are to be placed in storage or dismantled within two years from ratification. But this would merely extend the time needed to make them operational. Why not require the destruction of a certain proportion of both weapons and delivery systems, in both phase 1 and phase 2?

³⁶ Speech to Global Zero Summit, Paris, 20 February 2010, available at <http://www.state.gov/t/us/136425.htm> (last visited 15 August 2011).

³⁷ B. Blair *et al.*, 'Smaller and Safer: A New Plan for Nuclear Postures', Foreign Affairs (September/October 2010), at 13.

Five years from ratification, according to phase 3, all nuclear weapons are to be destroyed, except for up to 1000 each which are to remain in the arsenals of Russia and the United States and 100 each in those of China, the UK and France, with nothing said about the arsenals of the four unofficial nuclear weapons powers. The 1000 number is a nod to a kind of mantra that has developed among ‘realist’ abolitionists who see it as a giant step toward the total elimination of nuclear weapons. But the fact is that even the use of a tiny portion of these remaining arsenals could cause death and destruction on a scale that beggars the imagination.

Phase 4 would leave no more than 50 warheads each in the arsenals of the United States and Russia ten years from ratification and no more than 10 each in the arsenals of China, France and the UK. Putting aside the fact that by the time this phase was reached China would, in all likelihood, no longer consider a one fifth ratio as compatible with its superpower status – nor, for that matter the one tenth ratio in phase 3 – why leave 50 warheads each to the US and Russia for another five years?

The zero point would finally be reached in phase 5, fifteen years after ratification. But when these periods are added to the time it is likely to take to negotiate and bring about the entry into force of the convention, one is looking at a very long stretch of time indeed, in the course of which proliferation may add to the arsenals of non-NPT member states and may bring new states into the charmed circle of the nuclear-armed. Needless to say, realpolitik teaches that it may take that long, but should the planning for a nuclear-weapon-free world contemplate living in a nuclear-weapon-full world for fifteen, fifty or a hundred years? Such a drawn out step-by-step progression may turn out to be a progression to infinity, even if total abolition is called for in principle.

Article VI – National Implementation Measures. Article 26 of the Vienna Convention on the Law of Treaties enshrines the bedrock principle of the law of treaties: ‘Pacta sunt servanda – Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’³⁸ This would seem to make the enactment of national implementation measures unnecessary. However this principle, bedrock or not, runs up against the division of the world into three broad categories of states, according to their varying conceptions and practices concerning the relationship between international and domestic or municipal law: the so-called monist states, like France, Germany or the Netherlands, in which international law is self-executing ipso facto; the so-called dualist states, like the United Kingdom and other members of the Commonwealth of Nations, in which treaties, conventions and

³⁸ Art. 26, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

other multistate agreements have no force in domestic law in the absence of enabling legislation; and hybrid states like the United States, in which some such agreements are considered self-executing and others not, depending on their specificity or, some would say, on the composition of the Supreme Court at a given moment. Thus, the requirement in para. VI(1) that each party ‘shall adopt...the necessary legislative measures to implement its obligations under this Convention’ may be going too far, although the universal enactment of such legislation would be desirable if it could be accomplished without imposing further delays on the achievement of the convention’s goal.

Article VII – Rights and Obligations of Persons. Under I.A.1.a and I.B.5.a it would be a crime to use or threaten to use nuclear weapons, presumably from the coming into force of the convention. But would this not be difficult to enforce in a state party in which nuclear weapons may continue to exist for another fifteen years? As for VII.A.1 and 2, these clauses provide for surrendering persons accused of committing crimes to the International Criminal Court if the crime alleged is within the jurisdiction of such court and the state or states concerned are unwilling or unable to undertake criminal procedures. But the ICC is not obliged to accept a ‘surrender’. This lacuna could be remedied by writing an extended principle of universal jurisdiction into the convention, so that a person accused of a crime under I.B. would be subject to the jurisdiction of any state party to the convention, subject to the principle of complementarity.

Article VIII – Agency. Quaere whether it is a good idea to call for the establishment of a new agency ‘to achieve the object and purpose of this convention’ at a time when public opinion throughout the world is sick of over-regulation and when there is an agency already in place, the charter of which could be expanded to include the function of overseeing the path to nuclear zero. Granted, the IAEA, the International Atomic Energy Agency, has the dual purpose of preventing the proliferation of nuclear weapons and providing NPT member states with technology for peaceful uses of nuclear energy. But the first of these would overlap with the functions of the new agency and the second would not necessarily interfere with the first.

VI. Conclusion

The Model Nuclear Weapons Convention is a bold, imaginative initiative, designed to show that if diplomats and bureaucrats will not tackle the job

civil society will, as it has done with the Mine Ban Treaty³⁹ and the Cluster Bomb Treaty⁴⁰. The flaws in the model convention, if that is what they are, are all the more reason to begin, not 'in due course', but in the immediate present, the task of raising the preparation of a convention from the level of civil society to that of diplomacy. It is a task which cannot be completed without the eventual participation of the nuclear weapon states. But it can be commenced without them. Those states willing to undertake it would be well advised to bear in mind the words which President Kennedy addressed to the General Assembly of the United Nations on 25 September 1961, which are as true today as they were then:

Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident, or miscalculation, or by madness. The weapons of war must be abolished before they abolish us.⁴¹

³⁹ 1997 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211.

⁴⁰ 2008 Convention on Cluster Munitions, Doc. CCM/77.

⁴¹ This and other quotes from President Kennedy about nuclear weapons are available at <http://carnegieendowment.org/publications/index.cfm?fa=view&id=14652> (last visited 25 August 2011).