Remarks by Randy Rydell

Bringing Democracy and the Rule of Law to Disarmament

Humanitarian Law, Human Security:
The Emerging Paradigm for Non-Use and Elimination of Nuclear Weapons

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I wish at the outset to thank Jennifer Simons, Elaine Hynes, Peter Weiss, John Burroughs, Alyn Ware—and all of the staff at the Simons Foundation and the International Association of Lawyers Against Nuclear Arms—for organizing this event, for selecting such a beautiful city as its venue, and for choosing such a timely and challenging subject for our deliberations.

After decades of having been handled as a low policy priority or a summarily dismissed as a utopian dream, global nuclear disarmament has been making somewhat of a comeback in recent years. In the United States, credit for the resurrection of the concept of nuclear disarmament has often been traced back to a series of opinion-editorials by former US statesmen George Shultz, William Perry, Henry Kissinger, and Sam Nunn, underscoring the merits of pursuing a nuclear-weapon-free world. These have since been followed by similar so-called "gangs-of-four" commentaries in a dozen countries.

Yet the resurgence of interest in disarmament cannot be attributed just to a few op-eds. Official statements by Presidents Obama and Medvedev, and several other Heads of State, contributed to this renewed interest in disarmament. Reports by the Weapons of Mass Destruction Commission—chaired by Hans Blix—and the International Commission on Nuclear Non-Proliferation and Disarmament—chaired by Gareth Evans and Yoriko Kawaguchi, added fuel to this fire.

Meanwhile, countless civil society initiatives surfaced, both reflecting new public interest in disarmament, while also helping to increase such interest. Last May, the States Parties to the Nuclear Non-Proliferation held their first successful Review Conference in a decade, which included a 22-point Action Plan to advance nuclear disarmament, and 42 additional steps relating to nuclear non-proliferation and the peaceful uses of nuclear energy.

In October 2008, Secretary-General Ban Ki-moon launched his five-point nuclear disarmament proposal, which included strong support for negotiating a nuclear weapons convention or a framework of separate mutually-reinforcing instruments with the same goal. That initiative has now been supported by the Inter-Parliamentary Union, a world conference of speakers of parliament, Mayors for Peace (representing over 4000 cities worldwide), and the Nobel Peace Laureates—to mention only a few.

Of course, the obstacles ahead are formidable. Over 20,000 nuclear weapons remain in 2011. This is 41 years after the Nuclear Non-Proliferation Treaty entered into force, which required its Parties to enter into good faith negotiations on nuclear disarmament. As of now, not one nuclear warhead has been physically destroyed as a result of a treaty commitment and disarmament negotiations are still not underway at the Conference on Disarmament in Geneva.

Meanwhile, long-term plans are underway to modernize or improve nuclear warheads or their delivery systems, in all countries that possess such weapons, while there are no concrete plans to achieve nuclear disarmament, nor are there national disarmament agencies or legislation to implement this goal in such countries, yet there are enormous infrastructures for the maintenance and improvement of existing arsenals. The doctrine of nuclear deterrence—which the Secretary-General has called "contagious"—has now spread to about nine countries and many more when

alliance commitments are considered. Several states still maintain the specific doctrine preserving the option of the first-use of nuclear weapons. All possessors still claim that the use of nuclear weapons would be lawful. And possessors continue to cite such weapons as vital or essential in maintaining their security interests.

Of course, such arguments about the lawfulness of use and effectiveness of such weapons in enhancing security interests, cannot help but weaken global nuclear non-proliferation efforts, which—when pursued separately from disarmament—are widely perceived as discriminatory.

While the prospect of achieving nuclear disarmament remains a daunting challenge, I would like today to address two important dimensions of this challenge that I believe will have a profound effect the future evolution of these efforts and their prospects for success. One is political and the other is legal.

The first involves what might be called, "bringing democracy to disarmament." But to explain this theme, I will have to draw upon some ancient history.

In the years after World War II, the UN was a focal point for international efforts to achieve the elimination of nuclear weapons. Though nuclear weapons had not even been tested when the Charter was signed in June 1945, the first resolution of the General Assembly adopted in January 1946 identified the goal of eliminating nuclear weapons and other weapons adaptable to mass destruction. Subsequent resolutions also identified the goal of regulating conventional armaments. These mandates of *eliminating* WMD while *regulating* conventional weapons thus had their original origin in the Charter, as later interpreted by the General Assembly.

In 1959, the General Assembly adopted Resolution 1378, which combined these goals into the term "general and complete disarmament under effective international control" and placed this subject on its agenda, where it has been ever since. In 1978, this became the UN's "ultimate objective" in this field.

While it is true that only States can join the United Nations and that only States can conclude treaties, it is also true that public awareness of the horrific effects of nuclear weapons have provided a powerful stimulus to action by States for over six decades. Public concerns over the health and environmental effects of atmospheric nuclear testing in the 1950s contributed to the conclusion of the Partial Test Ban Treaty of 1963. Similar patterns of public action led to the Mine Ban Convention and the convention on cluster munitions. Civil society efforts also played a significant role in the establishment of the International Criminal Court.

The role of civil society in advocating nuclear disarmament has been meticulously chronicled by Professor Lawrence Wittner, whose three-volume study *The Struggle Against the Bomb*, underscored "the degree to which progress in controlling nuclear weapons was dependent upon mobilizing public opposition to them."

Yet despite evidence of past successes from such popular movements, the view remains widespread that States are the only major actors when it comes to disarmament. According to this view, it is the security of States, not individual human beings, that remains the

overwhelming preoccupation of policy. A contrary view, embodied in the concept of "human security" has been gaining support worldwide, but has encountered difficulties in implementation.

The democratic challenge here is not to achieve the end of the nation-state, but to rehabilitate the ends of the nation-state. As phrased in the UN Intellectual History Project's book, Human Security and the UN (2006), "human security is not about transcending or marginalizing the state. It is about ensuring that states protect their people." This can only be achieved through a fusion of popular will and enlightened leadership—a union of political efforts not just inside states, but among all states in the democratic process of achieving disarmament.

In other words, the democratic process at work here has three dimensions—top-down, bottom-up, and outside-in. It is a process that recognizes the legitimate interests both of each citizen and of each state in the outcome of key decisions about the future of nuclear weapons. It is a process that recognizes that disarmament is the most effective way to ensure against the use of nuclear weapons—a theme agreed at the 2000 NPT Review Conference.

Historically, nuclear disarmament efforts have long recognized that human beings are its ultimate beneficiaries. The 1955 Russell-Einstein Manifesto called upon its readers to "Remember your humanity, and forget the rest." Consider also General Assembly resolution 1653, which declared in 1961that the use of nuclear weapons would be "contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter", and added that any such use would be "contrary to the rules of international law and to the laws of humanity." This resolution has been subsequently endorsed by 29 General Assembly resolutions.

Consider also the following words from the Preamble of the Treaty of Tlatelolco (1967), which stated that its parties were convinced:

> *That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable…*

In 1996, the International Court of Justice issued its famous Advisory Opinion on the threat and use of nuclear weapons. The Court found that international humanitarian law applied at all times with respect to any use of nuclear weapons, even in self defence. Several Justices questioned the implications of nuclear weapons for international humanitarian law, including Judge Weeramantry and the Court's President, Judge Bedjaoui, who stated in his Declaration:

> *By its very nature the nuclear weapon, a blind weapon, […] 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, not to mention their long-term harmful effects on the human environment, in respecting which the right to life may be exercised.*

The Final Document of the 2010 NPT Review Conference also included references to the catastrophic humanitarian consequences from any use of nuclear weapons and the applicability of international law, including international humanitarian law, to any such use.

Democracy is therefore coming to disarmament in several ways—by affirming the role of citizens and non-governmental organizations in advancing disarmament; by affirming the legitimate interest of non-nuclear-weapon States in this process; and by affirming that the grounds for such participation rest on the indiscriminate effects of nuclear weapons on civilians.

Yet there is another dimension of the challenge of achieving nuclear disarmament that I would like to discuss today—the challenge of consolidating this democratic political process into permanent structures and institutions, and the reaching of consensus on fundamental norms that are regarded as authoritative and obligatory throughout international society. This is a challenge relating to the rule of law.

In a speech at Harvard on 21 October 2008, Secretary-General Ban Ki-moon stated 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 …". Much of his five-point disarmament proposal, launched three days later, focused on strengthening international legal obligations with respect to nuclear weapons. In addition to calling for work on a nuclear weapons convention or related framework of agreements, he also called for entry into force of the Comprehensive Nuclear Test Ban Treaty, the negotiation of a fissile material treaty, the entry into force of all the Protocols to regional nuclear-weapon-free zones, and efforts to establish such a WMD-free zone in the Middle East, as well as the development of new legal norms for space weapons, missiles, and conventional arms.

Unfortunately, the rule of law in disarmament is still largely in its infancy and has evolved very unevenly. It is perhaps most developed with respect to weapons of mass destruction, given that there are multilateral treaties that ban biological and chemical weapons, and that outlaw nuclear weapons proliferation while requiring negotiations on nuclear disarmament. It is far weaker in conventional arms control, where there are some legal norms outlawing the use of certain types of inhumane weapons, but not yet any multilateral arms trade treaty, which will be the focus of a international conference next year to negotiate such a treaty. And it is virtually non-existent with respect to certain types of weaponry—including space weapons, missiles, and missile defence.

With respect to nuclear weapons, the fundamental multilateral norms that help us in defining what really constitutes "disarmament" are fairly clear, as elaborated in such arenas as the General Assembly and in the NPT review process. There are at least five such norms that constitute the building blocks of the rule of law in nuclear disarmament.

The first is verification—it is inconceivable that nuclear disarmament will occur on blind faith alone. It will have to be accompanied by confidence-building measures that only intrusive verification systems can provide. Such measures are also a practical necessity in the treaty ratification process, in alleviating concerns over the risks of cheating or non-compliance.

The second is irreversibility—this involves measures to ensure that parties to a disarmament instrument do not reverse their commitments and "break out" from the relevant treaty regime.

This will include measures to ban or to severely limit access to weapon-usable fissile material—highly enriched uranium and plutonium—and to eliminate relevant delivery systems.

The third fundamental norm concerns transparency—another confidence-building measure that is indispensable in measuring progress in achieving agreed disarmament objectives. Without accurate facts and figures about nuclear arsenals, production and stocks of fissile material, and delivery systems, the world cannot confirm that disarmament is actually occurring.

The fourth norm relates to universality—namely, that the norm against possession applies to all states, not just some of them.

Finally, and by definition, the rule of law requires disarmament obligations to be binding—though disarmament can occur through unilateral actions, it is certain that no state will simply accept an oral pledge as a sufficient proof of another state's commitment to implement its disarmament commitments. The limited benefits of "tacit agreements" have been aptly questioned by American legal scholar, Louis Henkin, who once wrote that "one is not always sure that they exist". This helps to understand why treaties are so important, and why a nuclear weapons convention in particular is worth taking very seriously as a legal foundation for achieving nuclear disarmament.

So, in conclusion, I can only say here that the achievement of nuclear disarmament will require both the sail of a dynamic political process with a significant democratic component, and the anchor of legal commitments that will provide the necessary permanence and stability. The concept of "human security" and the incrementally expanding province of international humanitarian law will both help to promote this wider process of bringing both democracy and the rule of law to disarmament.

With the mere convening of this conference, we have already taken a step in the right direction, the most reliable and prudent way to achieve a world free of nuclear weapons. Democracy and the rule of law are coming to disarmament—because they can, and because they must.