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Open-ended Working Group taking forward multilateral nuclear disarmament negotiations¹

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Taking forward multilateral nuclear disarmament negotiations

The existence of a “legal gap”

Submitted by the Netherlands

1. This paper evaluates the existence and consequences of the so-called “legal gap” in respect to the prohibition and elimination of nuclear weapons in light of generally applicable principles of international law. The existence of this “legal gap” was referenced, most recently, in resolution 70/48 of the General Assembly of the United Nations dated 7 December 2015, better known as the “Humanitarian Pledge”.

2. It is generally recognized, and affirmed by the International Court of Justice, that under international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited. This means there is no “intrinsic” legal rule that prohibits nuclear weapons absent a specific permission. Nor is there any form of “default” or imperative to prohibit nuclear weapons, based on the nature of such weapons.

3. In its 1996 Advisory Opinion, the Court analyzed various applicable regimes of international law in order to assess whether the threat or use of nuclear weapons are illegal *per se* under any of them. It found no such rule. The regimes that were examined included human rights instruments, the Genocide Convention, environmental rules, rules on the use of force, and international humanitarian law. Especially the latter two merit closer attention in this context.

4. The Charter of the United Nations allows for the use of force by states in case of (collective) self-defense or a Security Council mandate under Chapter VII. Focusing on the former, the International Court of Justice found that the right to self-defense as set out in the Charter of the United Nations does not to exclude the possibility of the use of nuclear weapons *per se*. Moreover, the mere possession of nuclear weapons, or the signaling of preparedness to use them under extreme circumstances, does not automatically entail a threat of force in the sense of article 2.4 of the Charter.

¹ Established pursuant to resolution 70/33 of the General Assembly of the United Nations.



5. The question of the use of nuclear weapons in situations of armed conflict must be assessed on the basis of international humanitarian law. In this context, too, the illegality of certain weapons is formulated in terms of prohibition, not authorization. In other words, the threat and the use of weapons is subjected to the strict rules on the conduct of hostilities and may as such be prohibited, but is not intrinsically unlawful under international humanitarian law.

6. Taking into account the specific nature and consequences of nuclear weapons, the Court could not conclude definitely whether it would be lawful or unlawful to use nuclear weapons in an extreme circumstance of self-defense. Again, this reflects that the law of armed conflict does not contain any rule prohibiting nuclear weapons as such.

7. For any rule prohibiting nuclear weapons as such, we must turn to specific instruments of arms control. In practice, the international community has given preference to regulate or prohibit certain types of weapons, especially weapons of mass destruction, through multilateral conventions. In the case of nuclear weapons, the most important instrument is the Treaty on Non-Proliferation of Nuclear Weapons.

8. As is well-known, and in contrast to the Chemical and Biological Weapons Conventions, the Treaty on Non-Proliferation of Nuclear Weapons (NPT) does not contain a prohibition of nuclear weapons as such. Instead, Article VI obliges NPT States 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 [...]”. Other instruments such as nuclear-weapon-free zone treaties contain norms on nuclear disarmament that, while more extensive in terms of scope, are more limited in terms of geographical application.

9. States have consistently viewed the rule of Article VI of the Treaty on Non-Proliferation of Nuclear Weapons as containing not only an obligation of conduct but also of **result**, as reflected in numerous consensus NPT Review Conference final documents and unilateral statements, and confirmed by the International Court of Justice in its Nuclear Weapons Opinion. Additionally, there have been numerous deliberations on the modalities of nuclear disarmament that, while not necessarily legally binding, may still form a useful foundation for the work of this Open-ended Working Group.

10. As such, there is a clear collective obligation to achieve and maintain a world without nuclear weapons. Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons therefore does not contain a legal gap. Not uncommon to multilateral instruments, it instead simply relies on further measures, national or international, for its implementation. Its drafters were well aware of the fact that this would require multiple steps, and that these would have to be decided on by States in reaction to changing circumstances and challenges.

11. The Treaty on the Non-Proliferation of Nuclear Weapons insists that these steps are to be **effective**. Beyond that, it is up to us to define them. In this context, various Review Conference documents identified different elements for the implementation of Article VI. Examples include, but are not limited to, bilateral agreements between the Russian Federation and the United States of America, partial and comprehensive test bans, a cutoff for the production of fissile material, and nuclear-weapon-free zone treaties. Such elements are reflected, for example, in the Thirteen Steps and the 2010 Action Plan.

12. To conclude, the Treaty on the Non-Proliferation of Nuclear Weapons contains the only generally applicable international legal rule obliging us to strive for, and achieve, the complete elimination of all nuclear weapons. It is clear that this objective has not been met at this point. This does not, however, amount to the existence of a legal gap that would in any way dictate the principles and modalities of, or the sequencing of steps towards, achieving a nuclear-weapon-free world. Instead, these factors are determined by applicable

international law, most notably the implementation, in good faith, of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. In this context, the **effectiveness** of the measures taken are of overarching importance. It is on this understanding that the Open-ended Working Group must conduct its deliberations.
