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Open-ended Working Group taking forward multilateral nuclear disarmament negotiations¹

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Taking forward multilateral nuclear disarmament negotiations

Imperatives for arms control and disarmament

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1. A commonly accepted relationship exists between arms control and disarmament on the one hand, and national and international security on the other. It is based on fundamental rules of international law, which authorize States to use force in cases of self-defense or when there is a mandate from the United Nations Security Council. For these ends, States may possess arms; under international law, there are no inherent limitations to this right. That means any prohibitions, bans, reductions, or caps on any type of weapons must be based on their acceptance by individual States.
2. Such rules differ from international humanitarian law in the sense that the latter governs the use of armed force and does, as a rule, not address specific individual types of weapons. The application of humanitarian rules, as opposed to arms control or disarmament treaties, takes place on a case-by-case basis. Unless expressly agreed by States in treaties binding upon them in this respect, there are no rules which declare a whole class of weapons to be intrinsically contrary to international law.
3. Nevertheless, humanitarian considerations clearly play a role in the creation of treaties limiting or prohibiting certain weapons. This working paper describes the different roles that humanitarian, military, security-related and other considerations have historically played in these processes. By doing so it aims to stimulate and deepen the dialogue of the Open-ended Working Group, as well as generate useful insights that may underpin the activities of the Open-ended Working Group in identifying effective legal measures to attain and maintain a world without nuclear weapons. In particular, this working paper helps elaborate criteria for measuring the effectiveness of disarmament efforts, and takes a closer look at processes leading to existing prohibitions of certain weapons as a starting point for identifying lessons learnt.

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Pre-First World War prohibitive norms

4. One of the oldest norms in relation to warfare is that against the use of poison or poisonous weapons – mostly envisaged as the poisoning of wells or other types of water supplies. There is a historical dimension to this norm that we would now refer to as ‘humanitarian’: the imperative to limit combat operations to military objectives. In addition, however, other factors played a role. For even to a party that emerged victorious from a conflict, a lack of drinkable water could prove disastrous. In addition, poison was considered dishonorable, as it enabled the weak to overcome well-trained and well-equipped warriors. Thus, humanitarian imperatives were partly driven by self-interest and socio-economic organizing principles.

5. In modern times, too, humanitarian considerations have motivated attempts to limit the possession or use of certain types of weapons. The St. Petersburg declaration of 1868, for example, states that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”, and that “this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.” A similar wording was used in the Hague Conventions of 1899 and 1907, which prohibited their signatories from using arms, projectiles or materials of a nature to cause superfluous injuries.

6. The words uselessly and superfluous, however, indicate that the parties looked to the effectiveness of the weapon first; methods of warfare were only considered illegitimate if the suffering they caused was deemed superfluous to their tactical impact. Other reasons for limiting the use of arms were technological, as some states feared they would not be able to keep up with the development of armaments at an industrial scale.

Chemical and biological weapons

7. Although they may originate from the same norm, chemical and biological weapons were not considered the same as poisonous weapons when they were first conceived. The Hague Conventions prohibited the use of poison or poisonous weapons, but chemical and biological weapons were considered a different matter. Still, 33 States ratified a separate declaration promising to abstain from the use of “projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases” in conflicts between each other.

8. Again, humanitarian considerations played an important role. The use of asphyxiating gases was generally abhorred and considered as a violation of the principles of warfare. Yet this norm was neither universal nor absolute. Some States considered it subservient to the principle of necessity, i.e.: the use of chemical weapons to them was acceptable if circumstances demanded. In addition, there were questions on whether the use of gas really was worse than other methods of warfare, or whether chemical warfare could perhaps even have beneficial effects (for example, by using non-lethal gases to incapacitate enemies, thus removing the need to kill them).

9. In the end, the First World War proved that the existence of a general norm against the use of a certain type of weapon was not sufficient to prevent its use in extraordinary circumstances. Interestingly enough, however, the use of chemical weapons during the First World War did not mean they were considered any less horrific than before; instead, military necessity was simply considered a more urgent imperative. The warring parties considered them either necessary for attaining a certain military advantage or as reprisals in order to stop the other side from using them.

10. The First World War experiences reinforced the norm against the use of chemical weapons after the war. This was not only due to their humanitarian impact, but also to their

– as it turned out – comparatively limited tactical value, especially in contrast with other new technologies such as the machine gun or the tank. Even so, a complete ban was not attainable, as States were not prepared to leave themselves unprepared for the possible use of chemical and biological weapons by enemies; in addition, they considered that assistance with chemical weapons or the transfer of relevant technology could contribute to their own safety, and were reluctant about the impact a ban may have on their dual-use industries. Instead of a ban on chemical and biological weapons, the 1925 Geneva Protocol therefore contained a prohibition of their use. However, many states reserved the right to use chemical and biological weapons in response to an attack in kind, thereby turning it effectively into a no-first-use declaration.

11. In 1969, a report on the consequences of the use of chemical and biological weapons led to the start of negotiations in Geneva on a legal instrument banning these weapons altogether. Although the key States (most notably USA and USSR) reached agreement on the Biological Weapons Convention relatively quickly in 1972, the negotiation and the entry into force of the Chemical Weapons Convention did not happen for over two more decades. There were several reasons for this, including the different roles envisaged for biological weapons and chemical weapons, issues with verification and the dual-use problem, disagreements on certain substances falling under the purview of a convention, and discussions on institutional aspects of the future OPCW.

Conventional arms

12. The Convention on Certain Conventional Weapons (CCW)—a derivative of the 1977 Additional Protocols to the 1949 Geneva Conventions—was adopted, along with three protocols, in 1980. The CCW and its protocols regulate specific types of conventional weapons that may be deemed to be excessively injurious or to have indiscriminate effects and the employment of which is prohibited under the general rule in Article 35 of the 1977 Additional Protocol I. Again, the use of the word “excessively” suggests an assessment in light of tactical usefulness. Indeed, the CCW comprehensively bans only one type of weapon: blinding laser weapons, which have never been under development by States. The CCW protocols regulate but do not ban entirely the use of other types of weapons such as mines and incendiary weapons.

13. This suggests that although the CCW is an instrument with a strong humanitarian dimension, it recognizes the role of the military advantage to be gained by the use of arms and has shaped its protocols accordingly. This is also true for both anti-personnel mines and cluster munitions, two types of armaments that are partially regulated under the CCW but have now been the subject of comprehensive prohibitions.

14. As with chemical weapons, the norm against the use of anti-personnel mines has never been absolute and universal. Mines, too, have been used for reprisals. The relevant CCW protocols regulated their use, for example by prohibiting their deployment in towns or cities where no combat is taking place or imminent. Building on these partial norms, states negotiated a complete ban that includes a prohibition of use, acquisition, stockpiling, retention or transfer of anti-personnel mines, rules on victim assistance, demining, and transparency measures. These norms are comprehensive but not universal, as over 40 States have not signed or ratified it yet.

15. The Convention on Cluster Munitions (CCM) also built on norms that are reflected partially in the CCW. Opponents of the use of cluster ammunition criticize its indiscriminate character and the post-conflict effects of unexploded ordnance on civilian populations. When discussions in the context of the CCW did not lead to the adoption of a new instrument, an alternative route was sought, resulting in the entry into force in 2010 of the CCM. The CCM bans the use, development, acquisition, stockpiling, retention or

transfer of cluster munitions; like the Ottawa Convention, it legislates on victim assistance and international cooperation. Yet, also like the Ottawa Convention, its norms have not acquired universal or near-universal status. States have refused to accede to the CCM and continue to use cluster munitions based on grounds of military imperative. Again, these decisions are ultimately made in a national capacity, after a careful balance of interest including operational and humanitarian concerns.

Humanitarian and security-related aspects of disarmament

16. This survey is, of course, far from exhaustive. Nevertheless, it clearly shows that although humanitarian considerations have historically formed a crucial impetus for the development of these instruments, comprehensive legal rules or norms can only be effectively established if they gain the support of key States.

17. This support depends on a balance of interests that States make. Humanitarian considerations are, in this way, balanced with other interests, for example of a more strategic (retention for reprisals), tactical (retention based on military necessity), technical (dual-use industries or expected further development of the weapon), political (prestige gained or lost), economic (costs of arms races) or other nature. Past experiences with banning certain classes of weapons teach us that the outcome of this analysis may contribute in defining states' attitudes towards specific disarmament initiatives.

18. A key criterion, as the examples in this paper show, is what impact a State feels accepting a certain disarmament rule will have on its security outlook. Naturally, this outlook is for a large part defined by the international security situation States find themselves in. However, that security environment is still shaped by individual States or groups of States. National and international security considerations are, in this way, two sides of the same coin that must both be addressed if a disarmament instrument is to be successful. The precise role that these considerations play, however, are an important parameter which distinguishes disarmament and arms control treaties from legally binding agreements in the field of international humanitarian law (even though their regulatory object may be weapon systems). This is reflected, for example, in the fact that the former, as a rule, involve measures reassuring that they are complied with, such as safeguards, verification or monitoring regimes.

Nuclear disarmament and the Open-ended Working Group

19. Nuclear weapons form no exception to the rule that their limitation and eventual prohibition is contingent on security-related factors. The NPT, in its preamble, clearly combines humanitarian and security-related imperatives by considering "the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples". Yet the NPT could only be negotiated once various strategic (nuclear sharing arrangements), technological (verification) and economical (peaceful use of nuclear energy) issues were sorted out to the satisfaction of key States. Later nuclear-related disarmament or arms control instruments built on this foundation of strategic stability laid out by the NPT.

20. Thus, when we assess the effectiveness of effective measures for attaining and maintaining a world free of nuclear weapons in this Open-ended Working Group, we must take into account the various considerations put forward in this working paper – and how they influenced decision-making processes in relation to disarmament initiatives.

21. This role of security considerations does not mean that there can be no progress towards the elaboration of comprehensive and universal norms on nuclear disarmament absent any changes to the current international security situation. This paper illustrates that there are valuable lessons to be learned from past experiences if we pay closer attention. There are several intermediate steps on the road to prohibition that were taken in the case of other types of weapons. In the nuclear context, there have been attempts at limiting the use of nuclear weapons, reducing their numbers, or abolishing certain types of weapons. Examples are limited and comprehensive bans on testing, arms reductions, prohibitions of certain types of nuclear weapons and delivery systems, and the ongoing attempt to codify the policy of many nuclear –weapon-States to cease the production of fissile material for military purposes. This Open-ended Working Group should explore what further steps could be taken, at which point, and under what conditions.
