



# General Assembly

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## **Open-ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons**

**Geneva 2013**

Item 5 of the agenda

**Develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons**

### **Summary<sup>1</sup>**

### **Discussions by the Moderator<sup>2</sup> of Panel V entitled “a conversation on international law relevant to the use of nuclear weapons”**

#### **Submitted by the Chairperson**

1. Mr. Andrew Clapham, Professor and among other things Director of the Geneva Academy of International Humanitarian Law and Human Rights; and Ms. Louise Doswald-Beck, among other things the former Head of the ICRC's Legal Division and Professor of International Law at the Graduate Institute were the panellists.
2. The panellists presented succinct overviews of the two branches of international law most directly related to the use of nuclear weapons: first, the law relating to the use of force (and the discussion in this context focussed on the rules applicable to the exercise of the right of self-defence) and, secondly, the law of armed conflict – also referred to as international humanitarian law. On both topics the two panellists addressed in some detail the 1996 Advisory Opinion of the International Court of Justice (ICJ).
3. Mr. Clapham emphasized the point that, whatever might have been the relationship between these two branches of law (*jus ad bellum* and *jus in bello*) in the past, the Court

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<sup>1</sup> These reflections are offered in a personal capacity and have no official status.

<sup>2</sup> Ms. Dell Higgin, Ambassador and Permanent Representative of New Zealand to the Conference on Disarmament.

made it very clear that the test for legality is a cumulative one: both the rules on the use of force as well as the rules of armed conflict must be complied with.

4. As to the laws relating to the **use of force**, Mr. Clapham noted the conclusion of the Court that it could not conclude definitively whether the use or “threat of use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.

5. If, however a State did seek to justify its actions relying on the right of self-defence, the Court made it very clear that there were two conditions that needed to be satisfied: the dual conditions of necessity and proportionality. Mr. Clapham explained that necessity means that a State may only use force in self-defence if all other means have been exhausted and only to the extent necessary to end an attack or avert another imminent one (it cannot be simply retaliatory). Proportionality relates not to symmetry between the damage done in attack and the damage under self-defence in response, rather it is a question of using only sufficient force as is needed to repel the attack.

6. Mr. Clapham pointed out that over and above these dual conditions for the exercise of self-defence the ICJ referred to a further – third - condition: the Court was unanimous that in all cases the requirements of Article 51 of the Charter of the United Nations (including the requirement to report immediately to the Security Council) apply whatever the means of force used in self-defence.

7. As to the law of armed conflict, Ms. Doswald-Beck noted that the Court had advised that any use of nuclear weapons must be compatible with international humanitarian law (IHL). She outlined the test for legality under IHL and in particular the two main rules (which the Court referred to as “cardinal principles”). The first is the rule of distinction – the obligation to distinguish between combatants and non-combatants. The two aspects to this rule are that weapons which are inherently indiscriminate must not be used (weapons that are inherently indiscriminate are those that cannot be directed at a specific military target or whose effects cannot be limited) and that any expected collateral damage to civilians or civilian objects must be proportionate to the anticipated military advantage of an attack. Ms. Doswald-Beck underlined the point that collateral damage can only be justified if it can be determined in advance that it will not be disproportionate, and this requires knowledge of what kind of damage there will be and where or when it will take place.

8. The second cardinal principle prohibits the infliction of unnecessary suffering or superfluous injury to combatants: it was this principle which had led to the prohibition on the use of poison gases.

9. Ms. Doswald-Beck noted her view that nuclear weapons could neither discriminate between military objectives and civilians or civilian objects and she recalled the Court’s comment (in paragraph 35 of its Opinion) on this point: “The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.” Nor, further, could they be said to satisfy the requirement not to inflict unnecessary suffering or superfluous injury on combatants given the dramatic and long-term radiation effects of nuclear weapons.

10. While observing that nuclear weapons were uniquely destructive, Ms. Doswald-Beck went on to refer to the view that they were not especially useful in a military sense: a number of experts, including from the nuclear-weapon States, had privately acknowledged to her that non-nuclear weapons were capable of pursuing all conceivable military objectives and that there was accordingly no military need for nuclear weapons.

10. The interactive segment of our panel discussion usefully extended the analyses of the two panellists by exploring in particular the question of whether the ICJ would take a

different course if it considered the same question today. The experts noted that in a number of areas, such as human rights, the environment, the consequences of the establishment of the International Criminal Court (ICC) (and the ICC Statute's articulation of certain war crimes and the crime of aggression), as well as the evolution of the law of internal armed conflict (something entirely put aside by the ICJ) there has been an important evolution in international law since 1996. This would have to be taken account of by the Court.

11. The Group also heard, however, that much would depend on the evidence placed before the Court – and while the nuclear-armed States would certainly acknowledge that they must comply with both the rules on the use of force as well as the rules of armed conflict they would certainly have disagreements with the actual application of these rules to nuclear weapons. And it would be unlikely, for example, that they would admit that nuclear weapons were unsuitable for the pursuit of military objectives.

12. The panellists also received questions concerning the consequences of assessments of nuclear weapons' military utility for a ban on use — and whether, for instance, a convention on the prohibition of use would be a viable way forward, the potential for IHL to provide a point of departure to move nuclear disarmament forward, and a number of other questions — but unfortunately had no time to address them all.

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