# NATURAL LAW, INTERNATIONAL LAW, AND NUCLEAR DISARMAMENT

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Natural law principles played an important role in the early development of international legal theory, but were subsequently displaced by positivist ideals. Within the past half-century, fundamental changes in international society have revealed the limitations of a purely positivist approach to contemporary global concerns, particularly in issues of international peace and security. This article reintroduces a natural law analysis into the framework of international legal theory, and considers as a case study the relevance of natural law principles in addressing the modern dilemma of nuclear disarmament. Recalling the work of early international law scholars, the author describes the dual natural law precepts of reason and the common good and their relation to the principle of the peaceful resolution of disputes. A review of the mixed success of international efforts towards nuclear disarmament indicates that many states continue to regard the right to wage war as a sacrosanct principle in international law, notwithstanding formal declarations to the contrary. Comprehensive nuclear disarmament will not be achieved unless the international community ceases to treat the sovereign will of states as the ultimate source of international norms, and admits the essential incompatibility of aggressive warfare with a just international regime oriented towards the integral fulfilment of individuals.

Les principes du droit naturel ont joué un rôle important initialement dans le développement de la théorie du droit international, mais ceux-ci ont subséquemment été remplacés par les idéaux positivistes. Durant le dernier demi-siècle, des changements fondamentaux dans la société internationale ont révélé les limites du modèle purement positiviste face aux préoccupations mondiales contemporaines, particulièrement en ce qui a trait à la paix et à la sécurité internationales. Cet article réintroduit l'analyse du droit naturel dans le cadre de la théorie du droit international et fait l'étude de cas de la pertinence des principes du droit naturel dans le traitement du dilemme moderne du désarmement nucléaire. Passant en revue le travail des premiers analystes du droit international, l'auteur décrit les deux préceptes du droit naturel, la raison et le bien commun, ainsi que leur relation avec le principe de la résolution pacifique de différends. Un survol des efforts internationaux, parfois fructueux parfois pas, en faveur du désarmement nucléaire révèle que nombre d'États continuent de considérer le droit de faire la guerre comme un principe sacro-saint du droit international, malgré leurs déclarations au contraire. Le désarmement nucléaire à large échelle ne sera pas acquis à moins que la communauté internationale ne cesse de voir la volonté souveraine des États comme la source suprême des normes internationales et reconnaisse l'incompatibilité essentielle entre les mesures de guerre agressives et un régime international juste orienté vers la pleine réalisation des individus.

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## I. INTRODUCTION

A long time ago, natural law was considered an essential source of guidance in the resolution of international disputes. This was because the doctrine of international law was itself first articulated by scholars who, living in an age of predominantly Christian thought, were themselves proponents of natural law theory and explicitly linked the natural law to international law in their writings.[1] The origins of modern international law principles such as the peaceful resolution of disputes, the right of self defence, and the right of humanitarian intervention have all been commonly attributed to eminent natural law scholars such as Francisco Suárez, Alberico Gentili and Hugo Grotius.[2] These writers, influenced by earlier philosophers such as Aristotle and Thomas Aquinas, laid out a framework that subjected the entire international order to the rule of law, such law reflecting natural law principles on reason and the common good.[3]

Early in the development of international legal theory, however, the tradition of natural law in international law was challenged and supplanted by the emergent school of positivism, a normative *coup d'etat* from which natural law never really recovered.[4] Bolstered by the existence of a decentralized international order following the Treaty of Westphalia, the positivist emphasis on tangible treaties and state custom as the supreme sources of international norms quickly overtook the natural law doctrines of Christendom that featured abstract principles on the nature of man, the state and the international community.[5] As a jurisprudential theory, however, positivism's ascendancy was increasingly challenged in the latter half of the twentieth century by writers who regarded it as providing an incomplete and often misguided explanation of normativity.[6] Within approximately the same period, fundamental changes in international society and state structures have likewise led to a reassessment of positivism's theoretical assumptions as they relate to the international system.[7]

In this atmosphere of healthy scepticism, it seems appropriate to engage in a

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[1] See generally A. Verdross & H.F. Koeck, "Natural Law: The Tradition of Universal Reason and Authority" in R. St. J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983) [hereinafter "Natural Law: The Tradition".

[2] See *e.g.* "Natural Law: The Tradition", *ibid.*; T. Meron, "Editorial Comments: Common Rights of Mankind in Gentili, Grotius and Suárez" (1991) 85 A.J.I.L. 110.

[3] See discussion under Part II.A, below.

[4] See "Natural Law: The Tradition", *supra* note 1 at 39ff.

[5] *Ibid.*

[6] See, for example, the classic Hart-Fuller dialogue on natural law and positive law: H.L.A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593; L.L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.

[7] Much of this scholarly inquiry is occurring in the context of debates over the reasons for state compliance with international norms: see *e.g.* J. Brunnée & S.J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19; H. H. Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale L.J. 2599.

fresh consideration of the natural law ideas espoused by the early international legal writers. It is suggested that the relevance and substantive merit of natural law principles in international law were never conclusively refuted; on the contrary, as some authors have already argued, a return to the principles of natural law appears essential for the successful resolution of current international dilemmas, particularly those concerning international peace and security.[8] A proper understanding of natural law's dual themes of reason and the common good reveals that the present structure of international law has suffered a deleterious shift towards protecting state sovereignty at the expense of safeguarding the basic well-being of individuals and communities, and that correcting this imbalance is vital to the continued flourishing of the international community as a whole.

This paper seeks to reintroduce a natural law analysis into the framework of international legal theory by focusing on a current subject of particular international concern, that of nuclear disarmament. In Part II, the basic natural law concepts of reason and the common good are recalled and explained, demonstrating their relevance in international law to the principle of the peaceful resolution of disputes. While the concepts are described in the historical context of their use by the early international law scholars, the overall approach taken is rooted in a Thomistic understanding of natural law and draws significant additional insights from the contemporary work of John Finnis. This section additionally outlines a theory on the manner in which natural law is actually implemented in international law. Part III prefaces the discussion on disarmament with a critique on nuclear weapons based on the natural law principles previously introduced. In Part IV, the current state of progress on international nuclear disarmament is reviewed, examining the roles of the traditional and emergent actors in this process. Finally, Part V considers the 'pathology' of disarmament from a natural law perspective, and suggests the core elements that should be present in future approaches to disarmament.

## II. NATURAL LAW AND THE PEACEFUL RESOLUTION OF INTERNATIONAL DISPUTES

### A. *Recalling Fundamental Principles: Reason & the Common Good*

The medieval philosopher Thomas Aquinas defined law as "a certain ordinance of *reason* for the *common good*, made by him who has care of the community, and promulgated".[9] While the latter two concepts contained within this definition (postulating the existence of a lawgiver and the promulgation of law by this entity) have traditionally had little direct application in the international law sphere, it should be noted that the crucial notions of reason and the common good were expressly emphasized by the natural law scholars who articulated the early doctrines of international law.

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[8] "Natural Law: The Tradition", *supra* note 1 at 42.

[9] T. Aquinas, "Summa Theologiae" in R.J. Regan, S.J. & W.P. Baumgarth eds., *Saint Thomas Aquinas: On Law, Morality, and Politics* (Indianapolis: Hackett, 1988) at I-II, q.90 a.4 [emphasis added].

1. *Reason*

In the 17th century, Francisco Suárez described the *jus gentium*[10] as having its moorings in a philosophy of reason, noting that "the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves *a certain unity*, not only as a species, but also *a moral and political unity*".[11] In referring to the unity of mankind and the consequent proposition that all people were the subjects of international law, Suárez was in fact affirming a fundamental tenet of natural law theory, namely, that the precepts of natural law are accessible to all through reason.[12] Several centuries before, Aquinas (who did not himself set out a theory of international law) had described the law of nations as being "natural to man insofar as he is a reasonable being", and suggested that this law was derived from the natural law "as conclusions from principles".[13] The widely acknowledged founder of modern international law, Hugo Grotius, was likewise convinced that the *jus gentium* was a function of man's rational nature, noting that "among the traits characteristic of man is an impelling desire for society ... not of any and every sort, but peaceful, and organized according to the measure of his intelligence."[14] This rational need for society not only led men to form communities at a domestic level, but also explained the emergence of a 'great society of states' in which states regulated their relations with each other by means of mutually agreed-upon laws.[15]

What is apparent from the writings of these early scholars is that the *jus gentium* is of *universal* application because it is *reasonable*. Notwithstanding the fact that individuals may live in different states governed by distinct domestic laws, the law

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[10] *Jus gentium* is here used to refer to the 'law of nations' that comprised the genesis of public international law. Its origins lie in Roman law, wherein *jus gentium* referred to the private law based on the legal customs of different nations and applied to non-Romans living under the Roman empire. See generally P. Vinogradoff, *Roman Law in Medieval Europe* (Cambridge: Spectrum Historiale, 1968); H.P. Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000).

[11] F. Suárez, "De Legibus, Ac Deo Legislatore" in F. Suárez, *Selections from Three Works of Franciso Suárez, S.J.* vol. II, trans. G. Williams, A. Brown & J. Waldron (Oxford: Clarendon Press, 1944) at II, c. XIX, 9 [emphasis added] [hereinafter "De Legibus"].

[12] According to Aquinas, the first principle of 'practical reason' – namely, that good is to be done and pursued, and evil avoided – was known by all men; furthermore, "[a]ll other precepts of the natural law are based upon this, so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided": Aquinas, *supra* note 9 at I-II, q.94 a.2.

[13] *Ibid.* at I-II, q.95 a.4. Suárez embellished upon this theory by explaining that while the *jus gentium* was in large measure accessible by natural reason, it could not be fully and directly known in this manner; in order to identify certain specific formulations of international law rules, one thus turned to the practice of states, which was itself a manifestation of the principles of reason being applied in the international sphere. See "De Legibus", *supra* note 11.

[14] See H. Grotius, *De jure belli ac bacis libri tres* in J.B. Scott, *The Classics of International Law*, no. 3, v. 2, trans. F. Kelsey (Washington: Oceana, 1964) [hereinafter *De Jure belli ac bacis libri tres*]; H. Grotious, *Prolegomena to the Law of War and Peace*, trans. F. W. Kelsey (Indianapolis: Liberal Arts Press, 1957) at 6 [hereinafter *Prolegomena*].

[15] *Ibid.* at para. 22.

of nations is commonly accepted by all reasonable persons because, being reasonable, they can understand its dictates when logically presented as 'conclusions from principles'.[16] This assertion is more explicit in the works of Aquinas and Suárez than that of Grotius; nevertheless, Grotius also uniquely reinforced this claim by asserting that the state was bound both by the law of nations (i.e., that law created through the mutual consent of states) *and* the law of nature, the latter being an expression of the rational, social characteristic of man common to all individuals.[17] As Hersch Lauterpacht observed, the practical implication of Grotius' suggestion was that the will of sovereign states could never be regarded as an exclusive source of international law: rather, the law of nature stood as "the ever-present source for supplementing the voluntary law of nations, [and] for judging its adequacy *in the light of ethics and reason.*"[18] These considerations, as shall later be seen, are of great relevance when considering the sources of normativity in modern international law and their relative legitimacy.[19]

### 2. *The Common Good*

In his *Summa Theologiae*, Aquinas expressed the view that "every law is ordained to the common good."[20] Suárez later transposed this notion into international law theory by asserting that safeguarding the "common good of mankind" (*bonum commune humanitatis*) was a paramount concern of the international legal system.[21] Writing outside the Catholic tradition of Suárez and Aquinas, Grotius did not refer directly to the common good as a goal, but did lend his own support to this view by suggesting that "kings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society."[22] In the modern era of international law, the natural law notion of the common good has enjoyed a veiled resurgence, finding expression for example in a number of resolutions and declarations

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[16] See J.V. Schall, S.J., "Natural Law and the Law of Nations: Some Theoretical Considerations" (1991-1992) 15 Fordham Int'l L. J. 997 at 999. According to Schall, the *jus gentium* encompasses "those things to be learned by reason and experience that are not merely unique to each particular polity. It presupposes the first principle of practical reason that all hold in common, and on this basis it can claim, by right, to engage in the discussion of the common foundations of morality and law": *ibid.* at 1004.

[17] See *De Jure belli ac bacis libres tres, supra* note 14, at I, ch. III, XVI/1.

[18] H. Lauterpacht, "The Grotian Tradition in International Law" in R. Falk, F. Kratochwil & S. Medlovitz, eds., *International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985)10 at 17 [emphasis added].

[19] See the discussion under Part V.A, below.

[20] Aquinas, *supra* note 9 at I-II, q.90 a.2. Aquinas explained this by affirming that the last end in human life was happiness, and that "since every part is ordained to the whole as imperfect to perfect, and since a single man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness": *ibid.*

[21] See "Natural Law: The Tradition", *supra* note 1 at 44, n. 43 and accompanying text. Prior to Suárez, Francisco de Vitoria had similarly noted that international law was created by consensus "for the common good of all men": F. de Vitoria, "On the American Indians" in A. Pagden & J. Lawrance eds., *F. de Vitoria: Political* Writings, (Cambridge: Cambridge University Press, 1991) 231 at q.3 a.1, proposition 3 [hereinafter *Political Writings*].

[22] *De Jure belli ac bacis libris tres, supra* note 14 at II, ch. XX, XLIV/1.

of the United Nations General Assembly ("General Assembly").[23]

Posited as the necessary goal of any rational system of law, the common good is crucial to understanding the continued relevance of natural law theory to international law. If it is true that the *jus gentium* is binding on all men because it is reasonable, it is even more true to say that the *jus gentium* is reasonable because it reflects and promotes pursuit of the common good. However, it must be made clear that the definition of the common good being adopted here cannot be equated to a theory favouring 'the greatest good for the greatest number', as commonly expressed in consequentialist modes of analysis.[24] Rather, the common good being referred to is understood as that set of conditions enabling members of a community to engage in the pursuit of integral human fulfilment.[25] This approach to the common good may be traced to the thought of Aristotle, who asserted that although the political community or 'state' was a perfect community, it was not an end in itself, but was rather a means for the achievement of the welfare of its citizens.[26] Building upon this, Grotius observed that states, like individuals, realize the need to enter into relations with each other and create an international community; the international community that is thus created, and the *jus gentium* that regulates it, exist in relation to these states as their common good, one that is at once to the advantage of all states.[27] This common good, however, is ultimately pursued because of the resulting international climate it fosters – one that enables states to co-exist in relative harmony, and thus to flourish in their own respective spheres. Finally, to return to the domestic level, this climate favouring the flourishing of states is important because these states themselves ultimately exist to enable the flourishing

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[23] See *e.g. Universal Declaration of Human Rights*, UNGA Res. 217 (III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948) 71 proclaimed by the General Assembly as a "common standard of achievement for all peoples and all nations"; *Stockholm Declaration on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1 (1973), describing the protection of the human environment as "a major issue which affects the well-being of peoples ... throughout the world".

[24] Contemporary natural law theorist John Finnis attacks consequentialism as irrational since it presupposes the ability to identify and then 'maximize' a homogenous and complete good encompassing all human pursuits, when in fact such an all-encompassing good is non-existent. On this doctrine of the 'incommensurability' of basic human goods, see J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 112ff [hereinafter *Natural Law*]; on the idea of 'basic human goods' generally, see *ibid.* at c. 3-4.

[25] See *ibid.* at c. 6, especially at 155-56. On its face, Finnis' articulation of the common good appears to depart from Aquinas' view that the good of individuals is not the last end but is rather ordained to the common good: see Aquinas, *supra* note 9 at I-II, q.90 a.2-3. As Finnis elsewhere explains, however, integral human fulfilment "does not refer to individualistic self-fulfilment, but to the good of all persons and communities": J. Finnis, J. Boyle & G. Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987) at 283 [hereinafter *Nuclear Deterrence*]. Pursuit of integral human fulfilment is central to what Finnis describes as the 'first principle of morality', and requires an attitude of appreciation of and respect for a number of 'basic human goods', one of which is the good of life itself: see *ibid.*

[26] See Aristotle, "Politics" in J. Barnes, ed., *The Complete Works of Aristotle*, vol II, rev. Oxford trans. (Princeton: Princeton University Press, 1984) at I, 1252b1, III, 1278b1.

[27] See *De Jure belli ac bacis libres tres, supra* note 14; *Prolegomena, supra* note 14 at paras. 17, 22.

of their citizens through their pursuit of multiple human goods.

### B. *Reason and the Common Good Applied: The Peaceful Resolution of Disputes*

The early international law scholars were virtually unanimous in the view that resort to war among states was justifiable as a means of responding to injury received.[28] Notably, however, they all defined the right of war in strictly circumscribed terms: Francisco de Vitoria stressed that measures of war could only be used as a proportionate response to a grave violation of law,[29] and Grotius maintained that resort to war presupposed the non-existence of a tribunal to which states could submit their disputes for settlement.[30] Indeed, Suárez was the first to contemplate that states could entirely renounce the settlement of conflicts through war and have recourse instead to arbitration.[31]

The cautious approach of these writers to articulating a doctrine of war may be attributed to war's essential incongruence with a system of international law based on reason and pursuit of the common good.[32] The destructiveness of war, in particular its physical and psychological impact on individuals and communities, cannot be easily reconciled with man's alleged orientation towards life in peaceful society "according to the measure of his intelligence".[33] Once recognized as being generally contrary to human well-being, it becomes *unreasonable* to describe resort to war (save as a means of 'self-defence' narrowly construed) as falling within the category of pursuits in which individuals may engage as a means of achieving integral human fulfilment and the common good.[34] On the contrary, if one accepts the goal of respecting and ensuring integral human fulfilment (and by implication, the common good) as being a fundamental guiding principle of morality,[35] it follows that as a matter of international law, resort to war should be avoided.

It may thus be seen that the prohibition in Article 2(4) of the *United Nations*

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[28] See F. de Vitoria, "On the Law of War" in *Political Writings*, *supra* note 21 at q. 1 a. 3; *De Jure belli ac bacis libres tres*, *supra* note 14 at II, ch. I, I/4; "Natural Law: The Tradition", *supra* note 1 at 22-23.

[29] See *Political Writings, ibid.*

[30] See *De Jure belli ac bacis libris tres*, *supra* note 14 at II, ch. I, II/1. Apart from judicial settlement, Grotius contemplated a number of non-violent mechanisms for dispute settlement, including arbitration. See *ibid.* at II, ch. XXIII, VIII; see also "Natural Law: The Tradition", *supra* note 1 at 28-30.

[31] See "De tripilci virtue theologica, fide, spe et charitate" in *Selections from Three works of Franciso Suárez, S.J.* vol. II, trans. G. Williams, A. Brown & J. Waldron (Oxford: Clarendon Press, 1944) Vol. II, III, Disputation 13 (on War), VI/5 [hereinafter "De triplici"]; see also "Natural Law: The Tradition", *supra* note 1 at 22-23.

[32] In Suárez' view, the notion that disputes could only be settled through war "would be contrary to prudence and to the general welfare of the human race ... and therefore it would be contrary to justice": "De Triplici", *ibid.*

[33] See *De Jure belli ac bacis libris tres*, *supra* note 14 and accompanying text. Nor can it be reconciled with a view of life itself as a basic human good that is to be respected; this argument is further developed in Part III, below.

[34] See *supra* note 25.

[35] *Ibid.*

*Charter*[36] against the threat or use of force among states is a human law that, although enacted through the consent of states, is simultaneously derived from the natural law as a conclusion logically derived from prior reasonable principles.[37] More precisely, the injunction of Article 2(4) derives its force both from its articulation in human law and – even *before* being so articulated – from natural law. This implies not only that this prohibition is universal in application,[38] but furthermore that even if the human law prohibition were violated by states, the essential validity and logical coherence of a prohibition against the use of force would remain unassailed as a matter of natural law.

### C. *From the General to the Particular: The Concept of Determinatio in International Law*

The natural law concept of *determinatio* refers to the activity of the practical intellect by which natural law precepts are concretized or implemented in specific forms in human law.[39] Central to the concept as it has traditionally been described is the existence of a legislator responsible not only for selecting and implementing laws specifically tailored to the ordinary issues faced by the particular community governed, but also for ensuring that these laws in their very creation reflect the application of general principles of natural law relevant to the issues being legislated upon. Thus understood, the *determinatio* is a means of ensuring that human laws, although deriving their force from legislative enactment, nonetheless conform to natural law precepts inasmuch as they are dictates of reason oriented towards ensuring the common good.[40]

To be sure, this conceptualisation of *determinatio* is ideally suited to explaining the operation of natural law within a domestic law framework. In international law, as is well known, no unitary 'legislator' exists to whom the responsibility of implementing natural law precepts could be attributed. Surely, though, the relevance of natural law principles as guides to human conduct is not lost simply by moving from the domestic into the international sphere. On the contrary, as Lauterpacht argued, it is precisely the special character of international society, featuring an absence of the overriding authority of either legislative or judicial organs, which mandates that the function of

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[36] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7. [hereinafter *UN Charter*]. Even before the *UN Charter*, the great majority of states had outlawed war as a means of resolving international disputes according to Art. 1 of the *General Treaty for the Renunciation of War As An Instrument of National Policy*, 27 August 1928, 94 L.N.T.S. 57, Can. T.S. 1929 No. 7 [hereinafter *Kellogg-Briand Pact*].

[37] As such, the prohibition against the use of force is here posited as being derived from the natural law "as a conclusion from premises": see Aquinas, *supra* note 9 at I-II, q.95 a.2.

[38] See *supra* note 16 and accompanying text.

[39] See Aquinas, *supra* note 9 at I-II, q. 95 a. 2; for a more elaborate description of the concept, see *Natural Law, supra* note 24 at 284-90; R. P. George, "Natural Law and Positive Law" in R.P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 321 at 328-30.

[40] *Ibid.*

natural law "must approximate more closely to that of a direct source of law."[41] If this view is accepted, then the relevant question to be asked is not whether natural law is actually implemented in international law, but rather by what means does this process occur.

It is suggested that the implementation of natural law precepts in international law is effected according to a modified version of *determinatio*, in which the role of a supreme legislator translating natural law principles into specific international norms is played instead by a plurality of actors.[42] Foremost among these are states: state consent to norms, manifested by means of state practice and the creation of treaties,[43] may be characterized as an act of 'choosing' which norms are to apply in the international sphere, thus fulfilling an essential aspect of the process of *determinatio*. These states, furthermore, are themselves influenced in their behaviour by a number of variables, including general principles of law,[44] the impact of international jurisprudence,[45] and increasingly by individuals and groups within the international community who are asserting themselves as the ultimate beneficiaries of the international legal system – the members of the body politic whose common good is supposed to be served.[46] This suggests that the international community as a whole (not merely 'the international community of states') is responsible for the creation of international law.[47] Inasmuch as the modern world is increasingly faced with unique normative issues that affect the well-being of the entire international community (such as the one considered in this paper), the natural law theory of *determinatio* thus offers a partial account for the perceived ongoing changes in the list of actors recognized to exert influence on the development of international law.

## III. A Natural Law Condemnation of Nuclear Weapons

Having outlined a theory against resort to war that finds its ultimate basis in natural law precepts, it remains to show how this theory is of immediate relevance to the problem of nuclear disarmament. To do this, it is first necessary to address briefly the

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[41] Lauterpacht, *supra* note 18 at 18. In this regard, it may be noted that Aquinas described the law of nations as "derived from the natural law by way of a conclusion that is not very remote from its premises": Aquinas, *supra* note 9, I-II, q. 95 a. 4.

[42] This is consistent with Aquinas' view that the making of law " belongs *either to the whole people* or to a public personage who has care of the whole people, since, in all matters, the directing of anything to the end concerns him to whom the end belongs": Aquinas, *supra* note 9, I-II, q. 90 a.3 [emphasis added].

[43] This corresponds with the first two 'sources' of international law identified in Art. 38(1)(a) & (b) of the *Statute of the International Court of Justice* which is contained in the *UN Charter*, *supra* note 36.

[44] See *ibid.* Art. 38(1)(c); see also the discussion of international humanitarian law under Parts III.B and IV.C, below.

[45] See *ibid.* Art. 38(1)(d); see also the discussion under Part IV.C, below.

[46] See discussion under Parts IV.C and V.1, below.

[47] This assertion notably corresponds with contemporary international relations literature heralding the emergence of a new 'global society': see *e.g.*, M.E. Keck & K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); see also *ibid.*

wider dilemma of nuclear weapons in the modern era, since this is the context that defines discussion of the disarmament issue. The multifaceted problems raised by the existence of nuclear weapons have been so extensively considered and catalogued over the past half-century that it is tempting to treat them as self-evident. Still, in keeping with the natural law approach adopted thus far, it is helpful to restate the case against nuclear weapons in its relation to the fundamental criteria of legitimacy under natural law theory, namely reason and the common good.

### A. *Nuclear Weapons: Against Reason*

As suggested earlier, both the prohibition of the use of force in international law, and the general renunciation of war in inter-state relations that preceded it, were decisions arrived at by the community of nations in a process of reasoning to conclusions based on prior principles concerning human nature and human fulfilment.[48] Apart from this, though, the *Kellogg-Briand Pact* and Article 2(4) of the *UN Charter* were formulated in the light of experience – in particular, the experience of two World Wars that revealed not only the essential fragility of the international community, but also the stark consequences of international conflagration.[49]

It may certainly be argued that the world order that emerged in the aftermath of these experiences (particularly World War II) was essentially forged out of fear of future annihilation and an universal desire to "save succeeding generations from the scourge of war".[50] It seems no less plausible, however, to suggest that the now widespread resort to dispute resolution mechanisms such as conciliation and mediation,[51] and the ever-increasing prominence of third-party adjudicative mechanisms,[52] have been steps towards realizing the sort of international society that Grotius envisioned as being natural to man.[53] Viewed as a whole, the evolution of international dispute resolution mechanisms within the past century supports the claim that human nature is capable of grasping the inherent appeal of the idea of international peace, and that the international community has indeed pursued this idea in the modern era with increasing success.

Against this background, it may be asserted that, although the growth of the

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[48] See discussion under Part II.B., above.

[49] This tends to support the assertion that "the leading principles of natural law are not only recognized by the inherent needs of human nature, but also proved by experience, namely, by the consequences arising from their violation": "Natural Law: The Tradition", *supra* note 1 at 22.

[50] *UN Charter*, *supra* note 36, Preamble.

[51] These mechanisms are recognized in several international instruments: see e.g., *Hague Convention for the Pacific Settlement of International Disputes*, 18 October 1907, Can. T.S. 1994 No. 14; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971) 121, reprinted in (1970) 9 I.L.M. 1292[hereinafter *Declaration of Principles Concerning Friendly Relations*].

[52] On this trend, see *e.g.*, J. Charney, "Third Party Dispute Settlement in International Law" (1997) 36 Colum. J. Transnat'l L. 65 at 69.

[53] See *supra* note 14 and accompanying text.

nuclear age ironically occurred alongside the growth of international society as it exists today, the former cannot be reasonably described as a regime that, like the current international dispute resolution regime, arose as the logical consequence of the pursuit of international peace. On the contrary, the continued belief of some nations that nuclear weapons are a viable option in warfare strongly suggests that, at least in the eyes of these states, the international community has not moved beyond the era preceding the formation of the *Kellogg-Briand Pact*. These states maintain, inconsistently, that at the pinnacle of a system promoting peaceful international dispute resolution is a right to wage war – not merely a right to self-defence, for the extreme character of resort to nuclear weapons implies that their deployment can hardly be regarded as anything else than an act of aggression.[54] Ultimately, then, the sheer existence of nuclear weapons arguably constitutes a rejection of the prohibition against the threat or use of force, and by extension, a denial of the principle of the peaceful resolution of disputes stated as an absolute norm.

### B. *Nuclear Weapons: Against the Common Good*

Even if it could be argued that a right of war continued to exist, nuclear weapons would still be condemned under a natural law analysis because they fail to meet the requirement of ensuring the common good. In the *Nuclear Weapons* case[55], a key factor underlying the cautious stance of the International Court of Justice regarding the legality of using nuclear weapons was, in the Court's words, the "unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come."[56] In this regard, it is evident that while the ultimate argument against any use of large-scale military weapons is that the *object* of their destruction (intended or otherwise) is human life, the condemnation of nuclear weapons rests

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[54] This argument may take a number of forms. To begin, one may note the significance of the *non-liquet* of the International Court of Justice ("the Court", "ICJ") in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226, 35 I.L.M. 809 & 1343 [hereinafter *Nuclear Weapons* cited to I.C.J. Rep.], where the Court in paragraph 2(E) of the *dispositif* states that it "cannot conclude definitively" whether a threat or use of nuclear weapons in "an extreme circumstance of self-defence" would be lawful. In his dissenting opinion, Judge Weeramantry forcefully argued that the use of nuclear weapons in self-defence was incompatible with the principles of humanitarian law applicable to armed conflict; he excluded from consideration even the potential legality of a state's nuclear response to a prior nuclear attack, noting the impossibbility of accurately assessing the nature of a proportionate nuclear response under such circumstances; see *ibid.* at 513-15. Additionally, it may be suggested that the unavoidable effects of nuclear weapons on non-belligerent states imply that, even when taken in self-defence, a decision to deploy nuclear weapons against a belligerent state amounts to an act of aggression against these other states prohibited by the 1974 *Resolution on the Definition of Aggression*, GA Res. 3314(XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974) 142, reprinted in (1974) 13 I.L.M. 710. Although this is not one of the types of aggressive acts listed in Art. 3 of the resolution, Art. 4 notes that the list of aggressive acts identified in Art. 3 is not exhaustive, thus leaving open the possibility for a broad reading of aggressive acts to include characterizations such as the one contemplated.

[55] *Nuclear Weapons, ibid.*

[56] *Ibid.* at para. 36.

additionally on the *extent* of their destructiveness in relation to the good of human life.

This argument merits further explanation. It may be recalled that at the core of the common good is not a quantitative assessment of the good of human lives, but rather a principle that life *per se* is a basic human good and that conditions favouring integral human fulfilment are accordingly to be encouraged.[57] In international law, acknowledgement of the fundamental dignity of the human person has long found forceful expression in the principles of international humanitarian law applicable to armed conflict, which prohibit the infliction of unnecessary suffering on opposing forces and stress that innocent civilians are not to be made the objects of warfare.[58] Yet the emergence of nuclear weapons has brought the 'just war' requirement of proportionality into even greater focus, since it is now realized that a use of force disproportionate to that needed to ward off the attack of an aggressor can have effects far beyond the immediate impact of killing 'too many' of the enemy's troops, and even beyond the impact of killing innocent civilians. Even if a modern nuclear war did not result in the total annihilation of human life, it would result in a severe diminishing of conditions essential to normal human functioning – in particular, bodily integrity and an environment that can sustain life.[59] Other conditions promoting human flourishing, such as trade, would in turn be dramatically affected by the loss of sustainability in any one region of the world, particularly given the highly interdependent character of the global community.[60] As such, the 'efficiency' of even limited-scale nuclear weapons is undermined by the fact that the effects of nuclear warfare, in thwarting the conditions needed for human well-being, would be impossible to contain.[61]

In this context, it seems clear that the advent of nuclear weapons took warfare into the realm of the absurd, since it is impossible for nuclear warfare to be waged without incurring *grave* violations of the sanctity of human life. 'Grave' here primarily signifies not the number of lives that would be lost, but rather the extent to which all the conditions necessary to promoting integral human fulfilment would be permanently damaged by the use of nuclear weapons. Any use of nuclear weapons would thus be

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[57] See discussion under Part II.A.2., above.

[58] These principles, representing well-established norms of customary international law, have also been codified in a number of conventions: see *e.g.*, *Hague Convention (No. IV) Regarding the Laws and Customs of Land Warfare*, 18 October 1907, (1908) 2 A.J.I.L. Supp. 90; *Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287. They are also considered by many to have acquired the status of *jus cogens*: see *e.g.*, R. Ago, "Droit des traités à la lumière de la Convention de Vienne, Introduction" (1971) 134 Hague Rec. des Cours (III) 297 at 324, n. 37.

[59] The dangers of radiation and the prospect of global environmental disruption figure prominently among the certain effects of a modern nuclear strike. See generally United Nations Department for Disarmament Affairs, "Study of the Climatic and Other Global Effects of Nuclear War", Report of the Secretary General (New York: United Nations, 1989); see also D. Roche, *The Ultimate Evil: The Fight to Ban Nuclear Weapons* (Toronto: Lorimer, 1997) at 10-13.

[60] See Roche, *ibid.*

[61] Judge Weeramantry is to be credited for highlighting the regular use of 'euphemistic language' by nuclear weapons proponents that masks the true potential devastation that nuclear war would cause; see *Nuclear Weapons*, *supra* note 54 at 451-52 (Dissenting Opinion of Judge Weeramantry).

fundamentally incompatible with the criteria of ensuring the common good, and as such would be morally unjust. By extension, any choice to threaten the use of nuclear weapons is also morally unjust, since it amounts to a claim that grave violations of the common good are theoretically permissible, even if undesirable.[62]

## IV. WHITHER NUCLEAR DISARMAMENT?

An affirmation that the existence of nuclear weapons is incompatible with a system of international law geared towards the peaceful settlement of disputes, such a system itself reflecting the implementation of natural law principles on reason and the common good, necessarily leads to the conclusion that the use of nuclear weapons should be utterly renounced as contrary to international law. It is thus unsurprising that the international community, since the earliest days of the nuclear age, has attempted to realize the goal of eliminating nuclear weapons. It is disturbingly evident, however, that disarmament remains the elusive nuclear weapons *determinatio* in international law; while pursuit of this goal has resulted in many positive achievements, progress has been slow and there have been continual setbacks. The history of disarmament thus calls into question the success of the international community in implementing the guiding criteria of reason and the common good to address one of its greatest challenges. The roles of the various actors involved in this process shall now be considered.

### A. *Nuclear Superpowers*

The United States and Russia (the former Soviet Union) have undeniably been essential and highly influential participants in the global disarmament process. It is worth recalling that the Baruch and Gromkyo plans, although perceived as partisan by the Soviet Union and the United States respectively, both aimed at the complete elimination of nuclear weapons.[63] Moreover, during the ensuing Cold War in which relations between the nuclear superpowers were extremely delicate and dramatic changes in mood were possible at any moment, both the United States and the Soviet Union took significant initial steps towards disarmament by agreeing to multilateral

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[62] In light of these assertions, there appears to be room for an argument that a prohibition on the use or threat of use of nuclear weapons would constitute a *jus cogens* norm. Clearly, however, no such norm has as yet been accepted in international law, although Judge Weeramantry in the *Nuclear Weapons* case did contemplate that nuclear warfare might be prohibited in *jus cogens* terms based on the rules of humanitarian law; see *Nuclear Weapons*, *supra* note 54 at 496 (Dissenting Opinion of Judge Weeramantry). The currently accepted definition of *jus cogens* in international law has been the subject of much criticism, examination of which is beyond the scope of this paper; for present purposes, it is sufficient to suggest that, barring a possible redefinition of *jus cogens*, the success of future disarmament efforts is not thought to hinge upon prior acceptance of the illegality of nuclear warfare as a *jus cogens* norm.

[63] These were the first disarmament plans submitted to the United Nations by the United States and the Soviet Union; both plans were proposed in 1946, following the American explosion of the first atomic bomb the year before. See H. Athanasopulos, *Nuclear Disarmament in International Law* (Jefferson, North Carolina: McFarland, 2000) at 11-12.

negotiations,[64] and further steps towards this goal by later agreeing to direct bilateral negotiations.[65]

The most tangible achievements in terms of actual disarmament by the nuclear superpowers have occurred within the past two decades, precipitated in large measure by the advent of the Gorbachev administration in the Soviet Union.[66] At a historic 1985 summit meeting in Geneva between Mikhail Gorbachev and United States president Ronald Reagan, the nuclear superpower leaders declared that "a nuclear war cannot be won and must never be fought" and agreed in principle to pursuing 50% reductions in their nuclear arsenals.[67] Subsequent meetings between the American and Soviet leaders led to the formation of treaties that for the first time enabled actual reductions of these countries' stockpiles of nuclear weapons in specific categories, a process that was further aided by the end of the Cold War.[68]

As is well known, however, the entire history of global nuclear disarmament has been crucially shaped by the behaviour of the superpower states during the Cold War. For decades, and in spite of declared commitments to do otherwise, the United States and the Soviet Union aggressively developed their nuclear technology and

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[64] This process began with the 1961 Soviet Union-United States Joint Statement of Agreed Principles for Disarmament Negotiations, that facilitated multilateral negotiations for disarmament within a United Nations framework following the first 15 years of Cold War deadlock: see United Nations Department for Disarmament Affairs, *The United Nations and Disarmament: 1945-1985* (New York: United Nations, 1985) at 19[hereinafter *The United Nations and Disarmament*].

[65] These negotiations began with the Strategic Arms Limitation Talks (SALT), which were conducted from 1969-72 and resulted in, *inter alia*, the *Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles*, 26 May 1972, 23 U.S.T. 3435, reprinted at (1972) 11 I.L.M. 784 (entered into force 3 October 1972) [hereinafter *ABM Treaty*]. See *ibid.* at 50.

[66] The personal charisma and dynamism of Soviet leader Mikhail Gorbachev, reflected in his progressive vision of universal nuclear disarmament and his willingness to make unilateral concessions, was without doubt a significant factor in the advancement of the superpower disarmament process. See Athanasopulos, *supra* note 63 at 85-87.

[67] On the Geneva summit, see generally D. Menos, *The Superpowers and Nuclear Arms Control: Rhetoric and Reality* (New York: Praeger, 1990).

[68] Most significant in this regard are the *Union of Soviet Socialist Republics - United States: Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles*, 8 December 1987, (1988) 27 I.L.M. 84 (entered into force 1 June 1988), which for the first time eliminated an entire class of the superpowers' nuclear weapons worldwide, and the *Treaty on the Reduction of Strategic Offensive Arms* (START I), 31 July 1991, S. Treaty Doc. No. 102-20, (entered into force 5 December 1984), U.S. Department of State, online: http://www.usinfo.state.gov/topical/pol/arms/start(date accessed: 8 April 2002). Under the terms of START I, the parties agreed inter alia to reduce their arsenals of strategic nuclear warheads by almost 50% to a level of 6,000 deployed warheads each; these reduction targets were met by the September 2–2 implementation deadline. See Athanasopulos, supra note 63 at 89-96, 97-100; "START Final Treaty Reductions Achieved, Powell Says" (5 December 2001) U.S. Department of State, online: http://www.usinfo.state.gov/topical/pol/arms/stories/01120523.htm (date accessed: 8 April 2002).

amassed nuclear weapons in pursuit of a policy of mutual deterrence.[69] By definition, the Cold War was antithetical to the process of nuclear disarmament; accordingly, the most successful agreements made during this period largely related to arms control rather than arms reduction.[70] Today, notwithstanding the end of the Cold War and the considerable progress already made, neither the United States nor Russia has suggested a plan for total disarmament.[71] Indeed, despite its purported ongoing commitment to nuclear arms control, the United States has recently decided to withdraw from the ABM treaty and appears to be proceeding with plans for a comprehensive missile defence system.[72]

### B. *The United Nations*

For a large portion of its history, the United Nations ("UN") has actively pursued an agenda of general and complete disarmament.[73] The political realities of the Cold War era, however, required the UN to take a pragmatic and comprehensive approach, pursuing short-term partial disarmament goals such as the non-proliferation of nuclear weapons and the prevention of nuclear testing.[74] With regard to the former, perhaps the most significant UN achievement during the Cold War era was the adoption of the *Treaty on the Non-Proliferation of Nuclear Weapons* by the General Assembly in 1968.[75] Not only did the treaty establish an international norm against the 'horizontal' proliferation of nuclear weapons (*i.e.*, the spread of nuclear weapons from the nuclear

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[69] On the historical development of the 'deterrence' policy, see generally L. Freedman, *The Evolution of Nuclear Strategy* (New York: St. Martin's Press, 1983).

[70] An example of this is the *ABM Treaty*, *supra* note 65.

[71] The *Treaty on Further Reduction and Limitation of Strategic Offensive Arms* (START II), 3 January 1993, S. Treaty Doc. No. 103-1, U.S. Department of State, online: http://www.usinfo.state.gov/topical/pol/arms/start (date accessed: 8 April 2002) envisions *inter alia* the reduction of American and Russian strategic nuclear weapons to a maximum of 3,500 per country . Although the treaty was signed and ratified by both countries, it has yet to come into force. In November 2001, U.S. President George Bush and Russian President Vladimir Putin announced plans for strategic weapons reductions outside the START II framework to between 1,700 and 2,200 warheads per country; at the time of writing, negotiations between the countries are in progress for the codification of a new and mor far-reaching agreement. See "U.S., Russia Hold Thrid Session of Arms Reduction Negotiations" (21 March 2002), U.S. Department of State, online: http://www.usinfo.state.gov/topical/pol/arms/02032102.htm (date accessed: 8 April 2002).

[72] The United States gave formal notice to Russia in December 2001 of its intention to withdraw from the ABM Treaty. See W. Walker, "U.S. warns Russia of ABM treaty exit" *The Toronto Star* (14 December 2001) A10.

[73] The General Assembly in 1959 declared 'general and complete disarmament' to be the ultimate aim of disarmament efforts. See the *United Nations and Disarmament*, *supra* note 64 at 19.

[74] *Ibid.* at 20-27.

[75] *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 U.N.T.S. 161 (entered into force 5 March 1970). [hereinafter *NPT*] There are currently over 180 states parties to the treaty; see *Status of Multilateral Arms Regulation and Disarmament Agreements*, online: UN & Disarmament <http://disarmament.un.org/treatystatus.nsf> (date accessed: 3 March 2002).

to non-nuclear states),[76] but it also explicitly called upon states to "pursue negotiations in good faith" on effective measures relating to disarmament.[77] In 1995, at the 25-year mark of the treaty's existence, a decision was taken to extend the *NPT* for an indefinite duration, and the five nuclear weapons states comprising the Security Council pledged to undertake "systematic and progressive efforts" to further global disarmament.[78]

The UN also facilitated nuclear non-proliferation during the Cold War through the creation of Nuclear Weapons Free Zones ("NWFZs"), the first of which was created in Latin America in 1967 under the Treaty of Tlateloco.[79] This treaty prohibited the adhering parties from all possession, testing or use of nuclear weapons for aggressive purposes; furthermore, by virtue of an Additional Protocol in 1979, the then-existing nuclear powers committed themselves not to violate the treaty, or to use nuclear weapons against any of the adhering parties to the treaty.[80] Several other NWFZs based on the Latin American model have subsequently come into existence in regions such as Southeast Asia, the South Pacific and Africa.[81]

While the UN has reiterated its condemnation of nuclear warfare throughout much of the nuclear era,[82] the changing political climate of the mid 1980s and the end of the Cold War enabled the UN and its principal disarmament organs, the Disarmament Commission and the Conference on Disarmament, to pursue the cause of global nuclear disarmament with renewed boldness and vigour.[83] By far the most dramatic accomplishment towards this end has been the conclusion of a Comprehensive Test Ban Treaty ("CTBT"), the terms of which were negotiated within the 61-member Conference

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[76] See *ibid.* Art. II.

[77] See *ibid.* Art. VI.

[78] See Athanasopulos, *supra* note 63 at 134; *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, UN Doc. NPT/CONF.1995/32/Dec.2. The 1995 pledge was reaffirmed by all the parties to the *NPT* in the 2000 *NPT* Review Conference. See *Review Conference of the Parties to the Treaty of the Non-Proliferation of Nuclear Weapons, Final Document*, 2000, UN Doc. NPT/CONF.2000/28 [hereinafter *Final Document*], online: United Nations Department for Disarmament Affairs <http://www.un.org/Depts/dda/WMD/final doc.html> (date accessed: 7 March 2002).

[79] *Treaty for the Prohibition of Nuclear Weapons in Latin America*, 14 February, 1967, 634 U.N.T.S. 281.

[80] See *The United Nations and Disarmament, supra* note 64 at 93.

[81] See Athanasopulos, *supra* note 63 at 72, 150-52.

[82] See *e.g., Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons,* GA Res.1653, UN GAOR, 16th Sess., Supp. No. 17, UN Doc. A/5100(1961) 4; *Resolution on Non-Use of Nuclear Weapons and Prevention of Nuclear War,* GA Res. 34/83G, UN GAOR, 34th Sess., Supp. No. 46, UN Doc.A/34/46 (1979)56; *Resolution on the Convention on the Prohibition of the Use of Nuclear Weapons*, GA Res. 45/59B, UN GAOR, 45th Sess., UN Doc. A/45/49 (1990)71.

[83] See *e.g. Resolution on Nuclear Disarmament*, GA Res.51/45, UN GAOR, 51st Sess., UN. Doc. A 51/49 (1996) 83, where the General Assembly asserts that "in view of the end of the Cold War and recent political developments, the time is now opportune for all nuclear-weapon States to undertake effective disarmament measures with a view to the total elimination of these weapons within a time-bound framework."

on Disarmament and which was adopted by the General Assembly in 1996.[84] This treaty, a longstanding goal of the UN, provides for the total cessation of all forms of nuclear weapons test explosions, thereby ensuring in the long term an end to both the proliferation of nuclear weapons and the development of nuclear weapons technology.[85] Once it enters into force, this treaty will become the flagship UN instrument for promoting global disarmament.

That the *CTBT* has not yet entered into force, however, is indicative of its pedigree as a UN creation. Throughout its existence, the efforts of the United Nations in promoting disarmament have been thwarted by the supervailing and contrary will of states. Following the Cuban Missile Crisis of 1962, the nuclear superpowers ceased the pursuit of multilateral negotiations through the UN forum and instead pursued direct bilateral negotiations, effectively making UN activities on disarmament a distant subplot to their own nuclear drama for the greater portion of the Cold War.[86] Their unrestrained arms race had a tremendous impact on other nations in their perception of the necessity and legitimacy of acquiring nuclear weapons, and by 1964 the three remaining permanent members of the UN Security Council ("Security Council") had also become nuclear powers.[87] This necessarily made it even more difficult for the UN to achieve concrete international legal norms conducive to disarmament, as evidenced by its failure to outlaw the use of nuclear weapons for war.[88]

Even where the UN has been successful in promoting norms in support of the disarmament goal, these have been undermined by apparent weaknesses in the treaty-based articulations of these norms, which have been exploited by states in their pursuit of nuclear arms. The *NPT*, as drafted, was singularly ineffective in preventing the increase in the stockpiles of Britain and the nuclear superpowers, all of which had signed the treaty.[89] Even more telling, however, was the fact that the much-vaunted prohibition of horizontal proliferation that formed the central feature of the treaty was also violated by contracting states.[90] The criticism that the *NPT* was defective in its

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[84] *Comprehensive Test Ban* Treaty, opened for signature 24 September 1996, UN Doc. A/50/1027/Annex, reprinted in 35 I.L.M. 1439 [hereinafter *CTBT*]. See Athanasopulos, *supra* note 63 at 142-43. This treaty had been preceded by the more limited *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water*, 5 August 1963, 480 U.N.T.S. 43 (entered into force 15 October 1963), originally concluded between the United States, the Soviet Union, and the United Kingdom.

[85] See Athanasopulos, *ibid.* at 143-44.

[86] See *ibid.* at 127.

[87] *The United Nations and Disarmament*, *supra* note 64 at 64.

[88] In 1967, the Soviet Union submitted a draft convention prohibiting the use of force in war to the General Assembly, which the latter adopted the same year; this was however rejected by the Western states, as were numerous subsequent resolutions adopted by the General Assembly proclaiming that the use of nuclear weapons would constitute a violation of the UN *Charter*. See *ibid.* at 39-40.

[89] The *NPT*, it may be noted, failed to impose an explicit restriction on the existing nuclear states concerning their continued 'vertical' proliferation of nuclear weapons: see Athnasopulos, *supra* note 63 at 48-49. France and China did not sign the *NPT* until 1992: *ibid.* at 135.

[90] Iraq and Libya, both parties to the *NPT*, directly contravened Article II of the treaty and developed nuclear weapons. Furthermore, India, Israel and Pakistan all acquired nuclear weapons within a few years of the *NPT's* entry into force. Although they were not parties to the

drafting and imposed unjustifiably unequal obligations on nuclear and non-nuclear states has similarly been levelled against the current *CTBT* by India, whose refusal to sign the treaty is now a major factor preventing its entry into force.[91] This setback was compounded in 1998 by India's resumption of underground nuclear weapons testing in the context of increased tensions with Pakistan,[92] and by the decision of the U.S. Senate in 1999 not to ratify the *CTBT*, notwithstanding President Bill Clinton's efforts to achieve this goal.[93]

### C. *The International Court of Justice and Global Civil Society*

The roles of these two actors may be considered simultaneously, since their recent influence in the promotion of the goal of disarmament has been significantly interrelated. The ICJ's historic advisory opinion in the *Nuclear Weapons* case[94] represented the first time in the fifty-year history of nuclear weapons that their legality was considered by an international adjudicative tribunal.[95] In the context of the present discussion, the most welcome holding of the Court is surely found in paragraph 2(F) of the *dispositif*, where the Court unanimously affirmed that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to disarmament ... under strict and effective international control."[96] In calling upon states to not only pursue but also *conclude* negotiations on disarmament, the Court went beyond the treaty obligation imposed upon states in Article VI of the NPT, which had already been in force for nearly three decades at the time of the Court's decision.[97] The holding has thus been described as providing states with the "highest-level legal push" on the subject of

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treaty, their development of nuclear capability clearly indicated that they were assisted by nuclear states. In this regard, it has been pointed out that the *NPT* failed to prohibit the nuclear powers from transferring nuclear technology to non-nuclear states, even though it prohibited the non-nuclear weapons states *that were parties to the treaty* from acquiring such weapons. See *ibid.* at 49; Roche, *supra* note 59 at 18-19.

[91] India faults the *CTBT* for failing to explicitly prohibit computer-simulated nuclear testing, which may provide more technologically advanced states with a loophole to the treaty; it also objects to the treaty's failure to pursue a time-bound strategy for total disarmament. India is one of the 44 'nuclear weapons-capable' states whose ratification of the treaty is required for the *CTBT* to enter into force. See Athnasopulos, *ibid.* at 144-45; see also A. Ghose, "Negotiating the CTBT: India's Security Concerns and Nuclear Disarmament" (1997) 51 J. Int'l Affairs 239.

[92] See J. Pastore, M.D. & P. Zheutlin, "India's Nuclear Tests Threaten Peace" *The Toronto Star* (12 May 1998) A16.

[93] See M. Reynolds, "World Condemns U.S. Vote to Reject Test-Ban Treaty" *The Los Angeles Times* (15 October 1999) A1.

[94] *Nuclear Weapons, supra* note 54. For a general review of the decision, see R. Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter" (1997) 91 A.J.I.L. 64[hereinafter "Nuclear Weapons, International Law and the World Court"].

[95] The only prior consideration of this issue had occurred in a domestic legal context, when the Tokyo District Court in the *Shimoda* case considered the legality of the atomic bombings of Hiroshima and Nagasaki. See R. Falk, "The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki" (1965) 59 A.J.I.L. 759.

[96] *Nuclear Weapons, supra* note 54 at 267.

[97] See Roche, *supra* note 59 at 51.

disarmament to date,[98] and additionally (given the unanimous nature of the holding in an otherwise highly divided judgement) as constituting a strong criticism of the nuclear weapons states in their half-hearted pursuit of disarmament goals thus far.[99]

The majority opinion of the Court draws attention to the "growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons", citing in its support the conclusion of an increasing number of treaties limiting these weapons in various aspects.[100] A key additional consideration in this regard, not mentioned by the majority, is the dramatic surge in activity within recent years among transnational advocacy networks that have sought to place the issue of disarmament more forcefully on the international agenda, and that represent but one example of the still-developing phenomena of "global civil society."[101] Indeed, the transnational nuclear disarmament network, most significantly embodied in the coalition effort known as the World Court Project,[102] was instrumental in getting the Court to render judgement on the legality of nuclear weapons.[103] No less remarkable was the number of submissions to the Court from a variety of non-governmental organisations and other groups, amounting to a total of over three million signatures.[104]

Notwithstanding the reticence of the majority in formally recognizing the increasing importance of these non-state actors' perspectives, the sheer magnitude of their effort in this instance reveals that the range of actors seeking to shape international law on the issue of nuclear warfare has decidedly and irreversibly expanded beyond the

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[98] *Ibid.*

[99] See "Nuclear Weapons, International Law and the World Court", *supra* note 94 at 66.

[100] *Nuclear Weapons*, *supra* note 54 at 253.

[101] See generally S. Mendlovitz & M. Datan, "Judge Weeramantry's Grotian Quest" (1997) 7 Transnat'l L. & Contemp. Probs. 401; R. Falk, "The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society" (1997) 7 Transnat'l L. & Contemp. Probs. 333 [hereinafter "Global Civil Society"]. Falk attributes the emergence of global civil society to the cumulative effect of "globalization-from-below", *i.e.*, the rise of transnational social forces concerned with issues such as human rights, environmental protection, and peace and human security: see *ibid* at 335-36. In relation to the nuclear weapons issue, these transnational groups have gained particular strength from their increasingly multidisciplinary composition, encompassing former military professionals, scientists, academics and religious leaders among others. See Roche, *supra* note 59 at 53-56.

[102] The World Court Project represented a joint effort by three principal groups, namely the International Peace Bureau, the International Physicians for Social Responsibility and the International Association of Lawyers Against Nuclear Arms. See "Global Civil Society", *ibid.* at 341-42.

[103] This was achieved through lobbying of UN state missions, resulting in a resolution being successfully introduced in the General Assembly asking the World Court to consider the issue of legality. It may be noted that the effort to get this resolution passed in the General Assembly was strongly resisted by the Western nuclear states: see Roche, *supra* note 59 at 42-43.

[104] These submissions and the relevance of world public opinion concerning disarmament are mentioned by Judge Weeramantry in his dissenting opinion. See *Nuclear Weapons*, *supra* note 54 at 438, 533-34.

exclusive sphere of sovereign states.[105] The inevitable impact of the Court's ruling, furthermore, is to bolster the legitimacy of international efforts for the abolition of nuclear weapons, thereby providing the various groups seeking this goal with added impetus.[106] In this regard, the Court's unanimous call for the conclusion of disarmament negotiations has been interpreted as an expression of solidarity with the sentiment of the anti-nuclear weapons groups.[107]

Nevertheless, the unanimity of the Court on the disarmament issue does not extend to the Court's ruling on the legality of nuclear weapons; on the latter issue, which is arguably inextricable from the former, the outcome of the *Nuclear Weapons* case is riddled with paradoxes. It has been persuasively argued that the judgement of the Court weighs strongly in favour of a finding that nuclear weapons are illegal, notwithstanding the Court's seven-to-seven split vote on the issue in paragraph 2(E) of the *dispositif*.[108] Indeed, then-President Bedjaoui, in a separate statement explaining his casting vote, explicitly declared that "the Court's inability to go beyond this statement of the situation can in no manner be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons."[109] Significantly, the Court bases its core arguments against the legality of nuclear weapons on the rules of international law applicable in armed conflict "at the heart of which is the overriding consideration of humanity".[110] Recalling the 'unique characteristics' of nuclear weapons and the strict requirements imposed upon the conduct of armed conflict by humanitarian law principles, the Court provides an appraisal of nuclear weapons that initially appears to treat human dignity as an absolute, declaring that "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements."[111]

Yet in the midst of this seemingly resounding intimation of illegality, the Court recognizes an extremely narrow exception for the use of nuclear weapons in self-defence, one that the Court is itself either unwilling or unable to define.[112] A key factor underlying the Court's ultimate *non liquet* is what it apparently perceives to be an irreconcilable tension between the requirements of humanitarian law and "the fundamental right of every State to survival, and thus its right to resort to self-defence ... when its survival is at stake."[113] In this regard, the Court suggests that the emergence

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[105] See W. Nagan, "Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium" (1999) Yale J. Int'l L. 485 at 521-22.

[106] "Nuclear Weapons, International Law and the World Court", *supra* note 94 at 66.

[107] "Global Civil Society", *supra* note 101 at 350.

[108] If the three dissenting judges who held that nuclear weapons are categorically illegal are included with the seven judges who held that such weapons may be legal under only the most restricted of conditions, what results is functionally a ten-to-four vote. See B. Weston, "Nuclear Weapons and the World Court: Ambiguity's Consensus" (1997) 7 Transnat'l L. and Contemp. Probs. 371 at 383-84 [hereinafter Ambiguity's Consensus"]; "Nuclear Weapons, International Law and the World Court", *supra* note 93 at 67.

[109] *Nuclear Weapons*, *supra* note 54 at 270 (Declaration of Judge Bedjaoui).

[110] *Ibid.* at 262.

[111] *Ibid.*

[112] "Ambiguity's Consensus", *supra* note 108 at 387; "Nuclear Weapons, International Law and the World Court", *supra* note 94 at 68-69.

[113] *Nuclear Weapons*, *supra* note 54 at 263.

of a customary rule prohibiting the use of nuclear weapons is hampered by "the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other."[114] The Court thus adopts what has been described as an essentially positivist, "soft *Lotus*" approach to the nuclear weapons phenomena: it derives a prohibition on the threat or use of nuclear weapons from international law principles despite the absence of an explicit and specific prohibition on such behaviour, but it recognizes a possible exception permitting the threat or use of nuclear weapons in extreme circumstances of self-defence since international law as it currently stands does not explicitly prohibit this.[115]

The paradoxes inherent in the Court's deliberations on nuclear weapons lead to a further paradox on the issue of nuclear disarmament. In effect, the Court asks the international community to pursue disarmament as a serious goal – as a conclusion derived from prior reasonable principles – in the absence of a clear and certain articulation of the prior principle (*i.e.*, that nuclear weapons are unlawful as a matter of international law). Put another way, the Court calls upon the international community to act *as though* a norm already exists, declaring that nuclear weapons are illegal; indeed, the Court's call for the conclusion of disarmament negotiations does not make sense otherwise. Notwithstanding the claims made by some scholars that the Court 'missed' a golden opportunity to once and for all confirm the illegality of nuclear weapons,[116] it is not here suggested that the Court is to be condemned for arriving at the admittedly frustrating *non liquet*. On the contrary, the Court's reasoning and approach are merely indicative of its reliance upon a system of international law that, as currently understood and structured, inadequately serves the needs of the international community in a crucial sphere. It is to consideration of this problem that this paper now turns.

## V. FUTURE NUCLEAR DISARMAMENT FROM A NATURAL LAW PERSPECTIVE

### A. *Reason and the Common Good Denied*

The *Nuclear Weapons* case, and indeed the entire tortured struggle for disarmament over the past half-century, effectively embody the inherent tensions of an international legal system that has evolved according to a structure promoting Westphalian state sovereignty. The functioning of the international legal order has traditionally been seen as being largely founded upon state consent to norms as evidenced by international practice, an assertion not inconsistent with classical natural law principles.[117] To this analysis, however, a natural law approach to international law adds that authentic consent to an international norm is itself an affirmation of the

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[114] *Ibid.* at 255.

[115] See in particular *ibid.* at 270-72 (Declaration of Judge Bedjaoui); see also "Nuclear Weapons, International Law and the World Court", *supra* note 94 at 66. The original 'Lotus' doctrine, *i.e.*, that 'everything is permitted to states that is not specifically prohibited', was first stated by the Permanent Court of International Justice in *S.S. "Lotus" (France* v.*Turkey),* (1927) P.C.I.J. (ser. A) No. 10.

[116] See *e.g.* Athanasopulos, *supra* note 63 at 157; "Ambiguity's Consensus", *supra* note 108 at 388.

[117] See *De Jure belli ac bacis libris tres*, *supra* note 14 and accompanying text.

inherent reasonableness of the norm that generates that consent.[118] In suggesting that the 'voluntary' law created by states was to be *judged* in the light of ethics and reason,[119] Grotius implicitly acknowledged the danger that a lack of state consent to an otherwise reasonable principle could obscure the superior reasonableness of the principle itself, and lead to a contrary international norm being created around the less reasonable but still authoritative practice of states. It was precisely this danger, as Grotius and his natural law predecessors well understood, that justified the need for a reference point of norm legitimacy beyond that of state practice.

For a long time, however, international law has treated the sovereign will of states as the ultimate source of international norms. The deleterious impact of this structure is most glaringly exposed in relation to issues such as the dilemma of nuclear warfare and disarmament. Since the nuclear weapons states have been unwilling to commit fully to the eminently reasonable principle that nuclear weapons violate the interests of all humanity and should be eliminated, the international community has for over fifty years been held hostage to the interests of a few states claiming a need for nuclear weapons for self-defence, to defend internal and external 'vital interests', to ensure continued state independence, or as a means of deterrence.[120] The practice of these states has created an authoritative but ultimately unreasonable norm, namely, that resort to warfare that will cause grave violations of human dignity, is a legitimate option for the resolution of disputes.

The primary basis for describing this norm as 'unreasonable', it must be stressed, is that it represents a compound disregard for the requirement of ensuring and respecting the common good. A tool of destruction that itself represents a denial of human dignity is being justified by means of an international order that subordinates human dignity to the interests of states. Constrained as it was by the current structure of international law, in which evidence of state practice in support of an unreasonable norm may nevertheless be considered potentially persuasive authority,[121] the ICJ in the *Nuclear Weapons* case was in some sense *required* to render a decision subordinating the argument against nuclear weapons based on humanitarian law principles to the argument in favour of nuclear weapons based on states' right of self-defence recognised in Article 51 of the *UN Charter*.[122] This affirmation of the international normative

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[118] In Lauterpacht's words, "the binding force of even that part of it [international law] that originates in consent is based on the law of nature": Lauterpacht, *supra* note 18 at 16; see also Finnis, *supra* note 24 at 289.

[119] See discussion under Part II.A.1, above.

[120] For an overview of the positions of the nuclear weapons states, see Roche, *supra* note 59 at 15-18.

[121] See *Nuclear Weapons*, *supra* note 54 at 263, where the Court states that it cannot "ignore" the policy of deterrence practiced by states for many years. Indeed, for the Court to ignore this longstanding element of state practice would have been to risk undermining its own legitimacy, especially in the eyes of the nuclear powers: see "Ambiguity's Consensus", *supra* note 108 at 372-73. Note, though, that the Court elects not to comment on the legality of the nuclear deterrence policy: *Nuclear Weapons*, *ibid.* at 254.

[122] As Falk has noted, the majority's approach in the case is directly contrasted with that taken by Judges Weeramantry, Higgins and Shahabuddeen in their dissents, who all treated the requirements of humanitarian war as unconditional even in the circumstances of extreme self-

*status quo* was clearly one that perplexed a majority of the judges, thus explaining the highly circumscribed and indeterminate self-defence exception that the Court recognised. Still, the very existence of the exception is precisely what has allowed the nuclear weapons states to justify their continued adherence to an unreasonable norm.[123] This norm, furthermore, continues to obscure and impede the international community's pursuit of disarmament, currently manifested in the obstacles encountered in the implementation of the *CTBT*.

In light of the critique of state practice here presented, it is useful to recall Suárez' unique assertion that states are obliged to conserve international peace and security because the *bonum commune humanitatis* is *paramount* to their individual interests.[124] The ultimate end of states, as argued earlier in this paper, is to further the welfare of citizens in their pursuit of multiple human goods.[125] Indeed, the very notion of 'state survival' is rendered vacuous unless it is crucially linked to safeguarding the well-being of the individuals found within the state's confines.[126] Since, furthermore, mankind possesses a 'certain unity',[127] a state cannot ignore the impact its actions will have on the dignity of individuals in other states, regardless of their citizenry. The doctrine of state sovereignty is thus limited both by a state's duty to ensure the common good of its citizens and by its 'general responsibility for human society',[128] both of these stemming from an affirmation of life as a basic human good and the consequent requirement that states not act in a way that directly frustrates integral human fulfilment.

It must thus be considered particularly significant that the ongoing impasse in

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defence, and who accordingly condemned the nuclear arms race since the mid-1940s as unlawful rather than factoring this practice into the consideration of legality: see "Nuclear Weapons, International Law and the World Court", *supra* note 94 at 71. Judge Weeramantry's dissent has received particular attention for its comprehensive and dynamic approach to determining legality: see Mendlovitz & Datan, *supra* note 101.

[123] In the wake of the ICJ decision, the United States' State Department spokesman, Nicholas Burns, announced that "the ruling would seem, from our perspective, to state that the use and the threat of use of nuclear weapons can be justified and can be legal under current international law.": U.S. Dep't of State, Daily Press Briefing (July 10, 1996) as cited by Menedlovitz & Datan, *supra* note 101 at 410; see also M.J. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons" (1997) 91 A.J.I.L. 417 (adopting a 'hard *Lotus*' approach to interpreting the judgment and arguing that the result reached does not require the United States to change any of its policies).

[124] See *supra* notes 21, 32 and accompanying text.

[125] See discussion under Part II.A.2., above.

[126] This could not be more true than in the case of nuclear warfare, as was underscored by President Bedjaoui in the *Nuclear Weapons* case: "[T]he use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind...It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.": *Nuclear Weapons*, *supra* note 54 at 273 (Declaration of President Bedjaoui). For a critical analysis of the Court's treatment of the concept of state survival as a 'fundamental right', see M. Cohen, "The Notion of 'State Survival' in International Law" in L. Boisson de Chazournes & P. Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 293.

[127] "De Legibus", *supra* note 11.

[128] *De Jure belli ac bacis libris tres*, *supra* note 14 and accompanying text.

worldwide disarmament negotiations, and the continued espousal of pro-nuclear weapons policies by a number of states, are occurring in the context of a changing global order in which non-state actors are increasingly taking up their proper role as participants in the process of *determinatio* in international law. The unreasonable nuclear warfare norm, representing an unparalleled violation of the common good, is being challenged by the individuals and communities who are supposed to be the ultimate beneficiaries of the international legal order rather than its victims. Their rising voices are bringing into focus a fact that has been obscured throughout much of the nuclear age: the primary international dispute created by the existence of nuclear weapons is not one between and among states, but rather one between states and the individuals comprising the international community.

### B. *'Principled' Requirements for Just Disarmament*

Natural law, being conceptually distinct from human law, cannot be used to determine the specific content of the nuclear weapons treaties and related mechanisms needed for effective nuclear disarmament to occur. It can, however, be used to determine the 'principled' requirements for a just disarmament scheme – that is, the guiding, reasoned prerequisites for disarmament that (as conclusions derived from prior principles on the peaceful settlement of disputes) should underlie any disarmament strategy purporting to further human well-being and integral human fulfilment. The final part of this paper suggests two main criteria.

#### 1. *Commitment to Total Nuclear Disarmament*

To be sure, what is most required to permanently end the nuclear age is not merely a comprehensive prohibition on all aspects of nuclear warfare; stated more positively, what is needed is a total commitment to the norm favouring the peaceful resolution of disputes. The exercise of reason (additionally illuminated by the experience of the nuclear age) and due regard for the common good require that future disarmament negotiations aim at nothing less than the complete, universal elimination of nuclear weapons. An integral part of a commitment to pursue total disarmament is a commitment to abandon current efforts towards the further development of nuclear wafare technology.[129]

In relation to this goal, it is apparent that the main obstacle to be overcome is the continued endorsement by states of a policy of deterrence, in particular the post-Cold War preference for so-called 'minimum deterrence'.[130] A manifest fallacy of deterrence

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[129] In the context of current disarmament efforts, this clearly requires that all actual or potential nuclear weapons states sign and give full effect to the *CTBT*. It may be noted that at the 2000 *NPT* Review Conference, the states party to the *NPT* called for a moratorium on nuclear test explosions pending the entry into force of the *CTBT*, and also emphasised the necessity of prompt negotiations on a fissile material production ban: see *Final Document*, *supra* note 78.

[130] This is an approach to nuclear deterrence that "threatens the lowest level of damage necessary to prevent attack, with the fewest number of weapons possible": P. Gizewski, "The Logic of Minimum Deterrence: Retrospect and Prospect" in P. Gizewski, ed., *Minimum Nuclear*

arguments, inasmuch as these are used to suggest that total nuclear disarmament is undesirable, lies in their implicit claim that ensuring the common good is best achieved through *subordination* of this end to that of ensuring state security. At the level of sheer principle, any decision to retain weapons that are capable of causing grave violations of human dignity is in itself an affront to the good of human life, even if the retention of such weapons is thought to further a 'good' end.[131] At a less abstract level, the continued adherence to a policy of deterrence is seen to create immediate impediments upon conditions favouring integral human fulfilment: for example, the pursuit of 'nuclear deterrent warfare' by developing states such as India and Pakistan is being carried out at an astronomical financial cost that these countries cannot support, and indeed ought not to be supporting while their citizens remain among the most malnourished, illiterate and poverty-stricken people in the world.[132] The injustice created by these governments' military policies effectively illustrates that promoting 'the common good' is not to be seen as a determinate, unitary goal, and that a state's policy of nuclear deterrence does not amount to 'choosing the lesser evil' as compared to a decision to forego nuclear weapons.[133]

Stripped of their untenable claim of furthering the common good, policies of nuclear deterrence must be considered as raw applications of state self-interest in the international sphere; as Douglas Roche has succinctly noted, "[p]ower is at the core of the proliferation dilemma."[134] Indeed, the substantial political appeal of nuclear weapons as a bargaining tool in international relations[135] makes it seem unlikely that the nuclear weapons states would ever agree to a plan for comprehensive and universal disarmament. Still, such a realist view of states as primarily self-interested actors in international relations[136] may be countered with the observation that some states have completely reversed their fledgling nuclear proliferation efforts, ceasing their development of nuclear warfare technology and dismantling their existing stockpiles.[137] This indicates that the norm of international peace *can* prevail over state self-interest,

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*Deterrence in a New World Order* (Aurora Papers 24) (Ottawa: Canadian Centre for Global Security, 1994) at 2. The perceived effectiveness of a deterrence-based policy in actually *preventing* the outbreak of nuclear war was early recognized as constituting a significant barrier to the regulation of these weapons under international law: see R. Falk, "Toward a Legal Regime for Nuclear Weapons" (1983) 28 McGill L.J. 519 at 533.

[131] This argument corresponds to the moral imperative that 'one cannot do evil that good may be achieved': see *Nuclear Deterrence*, *supra* note 25 at 327.

[132] See Roche, *supra* note 59 at 25-26.

[133] See *supra* note 24 and accompanying text.

[134] Roche, *supra* note 59 at 15.

[135] This problem has begun to attract the attention of some states. In Canada, for example, a Parliamentary committee has recommended that Canada should "work consistently to reduce the political legitimacy and value of nuclear weapons in order to contribute to the goal of their progressive reduction and eventual elimination.": see Canada, Standing Committee on Foreign Affiars and International Trade, *Canada and the Nuclear Challenge: Reducing the Political Value of Nuclear Weapons for the Twenty-First Century* (Ottawa: House of Commons, 1998) at 13.

[136] See *e.g.* H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1960).

[137] Examples of such countries include South Africa, Romania and Brazil. See Roche, *supra* note 59 at 20.

even though it has not yet occurred with any of the major nuclear powers where the stakes of total disarmament are much higher. For the latter countries, it is suggested, complete disarmament will only be realized if these states re-analyze their approach to international peace: understood as a set of positive conditions promoting full human flourishing, rather than an artificial calm resulting from a state of mutual military vulnerability, authentic international peace crucially requires the elimination of any possible threat of nuclear warfare.

### 2. *Good Faith*

The principle of good faith has had an intriguing connection with the nuclear age, being included as a central element of the obligation to pursue disarmament negotiations under Article VI of the *NPT*,[138] and subsequently receiving its first recognition by the ICJ in connection with a dispute over nuclear testing.[139] In the *Nuclear Weapons* case, the Court laid particular emphasis on the principle of good faith, drawing attention to its repeated appearance in international conventions and linking it to a forcefully articulated obligation to conclude negotiations aimed at disarmament in all its aspects.[140] Despite the seemingly symbiotic relationship between good faith and disarmament, however, violations of the good faith obligation to pursue disarmament have been a common occurrence throughout the nuclear era.[141]

Particularly in light of the subject being considered, it is suggested that a 'good faith' commitment to the goal of complete disarmament incorporates more than the principle of *pacta sunt servanda*. Under a natural law analysis, the possession of nuclear weapons represents an immediate violation of the common good, and there is accordingly a severe duty placed upon states to rectify this through *bona fide* pursuit of disarmament negotiations. Thus understood, the obligation of states to pursue disarmament is not merely one owed to states and deriving from their treaty obligation under Article VI of the *NPT*, but is additionally one owed to the international community as a whole and deriving from the fact that the possession of nuclear weapons is incompatible with conditions favouring integral human fulfilment.[142]

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[138] See *supra* note 77 and accompanying text.

[139] *Nuclear Tests Case (Australia* v. *France)*, [1974] I.C.J. Rep. 253.

[140] *Nuclear Weapons, supra* note 54 at 264, 267. Among the international instruments in which the principle of good faith is mentioned is the *UN Charter, supra* note 36, Art. 2(2); the *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 33, Art. 26; and the *Declaration on Principles of International Law Concerning Friendly Relations, supra* note 51.

[141] Among the most blatant examples are Russia's decision to withdraw its pledge not to engage in the first use of nuclear weapons (only China currently maintains such a pledge), and the equipping of non-nuclear states by nuclear weapons states that are party to the *NPT*. See Roche, *supra* note 59 at 17, 60; see also *supra* note 90.

[142] The good faith obligation here described is thus similar to an obligation *erga omnes*: see generally M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Clarendon Press, 1997). Unlike most recognized *erga omnes* obligations, the good faith obligation on disarmament is here considered to be a positive obligation rather than a prohibition, and the object of the obligation (the 'international community as a whole') is held to include all individuals, since these are the ultimate beneficiaries of international law whose common good

Giving effect to the requirement of good faith in disarmament negotiations for the sake of the common good requires a higher standard of behaviour from states than that exhibited to date. Simply put, states must comply with the principle of fairness, negotiating with other states in a manner that they would likewise desire for themselves.[143] There can be no reneging on commitments made in relation to disarmament, whether these were made unilaterally or by means of treaties. Flexibility, a key characteristic of effective dispute resolution, must be exercised on the part of all states. Finally, because of the uniquely grave and ongoing violation of the common good involved, states should commit to a time-bound framework for the complete universal elimination of nuclear weapons.[144] Pursuit of a time-bound disarmament scheme would in itself require states to exhibit exceptional levels of good faith, manifest in key gestures such as the provision of international financial assistance to poorer nuclear weapons states to offset disarmament costs[145] and the submission by states to disarmament verification schemes.[146] These elements of international co-operation would not only be crucial to the success of a time-bound strategy, but would also demonstrate that the international community of states is genuinely committed to achieving the disarmament goal.

## VI. CONCLUSION

For several centuries, 'international law' has indeed served the interests of humanity, not merely those of states. The doctrine of sovereignty, in seeking to protect the integrity of states, is itself a principle that vitally facilitates individual human flourishing. Over time, however, fundamental weaknesses in the international legal system have become apparent: the doctrine of sovereignty has enabled states to thrive as never before, but has simultaneously been pushed to an extreme that has resulted in states becoming disconnected from their universal constituents. The advent of new global challenges in areas such as nuclear warfare has brought the defects of the international order into sharp focus; still, as evidenced by the ongoing struggle for nuclear disarmament, Richard Falk's observation that "[t]he statist logic has not yet been seriously challenged by an alternative logic that conceives the *whole* as necessarily prior to the *part*"[147] remains true.

This paper has argued that the alternative logic needed to successfully resolve

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is being violated by the existence of nuclear weapons.

[143] This principle is derived from the 'Golden Rule' *i.e.* 'Do unto others as you would have them do unto you': see *Nuclear Deterrence*, *supra* note 25 at 264-66.

[144] Such time-bound strategies have been long advocated by India, and Gorbachev also proposed a schedule for total global disarmament during his time as Soviet leader; the Western nuclear weapons states, however, have consistently resisted this approach. See Ghose, *supra* note 91 at 244; Athanasopulos, *supra* note 63 at 87.

[145] An example of this is the *Cooperative Threat Reduction with States of Former Soviet Union*, 22 U.S.C.A. § 5951 (West. Supp. 2001), by which the United States since 1993 has been partially financing Russia's nuclear disarmament efforts. See Roche, *supra* note 59 at 25.

[146] Comprehensive verification measures are a key feature of the current CTBT: see *CTBT*, *supra* note 84, Art. IV; see also Athanasopulos, *supra* note 63 at 146-48.

[147] R. Falk, "The Grotian Quest" in R. Falk, F. Kratochwil & S.H. Mendlovitz, eds., *International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985) 36 at 41.

the lurking crisis of nuclear disarmament is to be found in the natural law principles that were integral components of the earliest articulations of international law. These principles advocate that states adhere to a standard of reason that is higher than that suggested by state practice alone – a standard that is attuned to promoting integral human fulfilment for each and every member of the international community. A natural law approach to nuclear disarmament corrects the currently blurred vision of the nuclear and would-be nuclear weapons states on the ultimate purpose of the international order; without this, it is suggested, the real urgency of nuclear disarmament will never be perceived.