

The Legal Framework for Non-Use and Elimination of Nuclear Weapons

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John Burroughs, J.D., Ph.D.
Executive Director, Lawyers' Committee on Nuclear Policy
211 E. 43d St., Suite 1204, New York, NY 10017 USA
tel +1 212 818 1861; johnburroughs@lcnp.org; www.lcnp.org

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Executive Summary

I. The Obligation of Good Faith Negotiation of the Elimination of Nuclear Weapons

The 1996 advisory opinion of the International Court of Justice on nuclear weapons was provided in response to the United Nations General Assembly, which asked the Court to address the question: “Is the threat or use of nuclear weapons permitted in any circumstance under international law?” As part of its reply, the Court unanimously held: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

The International Court of Justice (ICJ) is the judicial branch of the UN, and the highest court in the world on general questions of international law. Endorsed by every judge on the Court, its statement of the disarmament obligation is now the authoritative interpretation of Article VI of the Nuclear Non-Proliferation Treaty (NPT). Article VI obligates all states “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”

- Of special significance is the Court’s holding that Article VI requires states to *achieve* nuclear disarmament through good faith negotiation. Talking is not enough; the talk must lead to action.
- Also important is that the Court delinked the obligation to achieve nuclear disarmament from the objective of comprehensive demilitarization (“general and complete disarmament”).
- Also significant is the clear implication that the obligation applies to all states, not only those who are party to the NPT, thus binding the nuclear-armed, non-NPT party states India, Israel, and Pakistan.

International law in general with respect to good faith negotiation requires that you enter into the negotiations; that you consider proposals of the other side; that you re-examine your own position; and that you refrain from taking actions that undermine prospects for reaching agreement. In the case of Article VI, the Court relied on a distinction drawn in international law between two kinds of obligations. There is an obligation of **conduct**, which refers to performing or refraining from a specific action. The second kind of obligation is an obligation of **result**; a state by some means of its choice is required to bring about a certain outcome. The ICJ said Article VI involves both kinds of obligation, stating:

The legal import of that obligation goes beyond that of a mere obligation of *conduct*; the obligation involved here is an obligation to achieve a precise *result*, nuclear disarmament in all its aspects, by adopting a particular course of *conduct*, namely the pursuit of negotiations on the matter in good faith. (emphasis supplied)

The disarmament obligation stated by the ICJ and Article VI must be interpreted also in light of commitments to disarmament made in the 2000 NPT Review Conference. Key general criteria and principles for compliance include:

- 1) The reduction and elimination of nuclear arsenals are to be accomplished pursuant to principles of verification, transparency, and irreversibility.
- 2) Implementation of the disarmament obligation is facilitated by a diminishing role of nuclear weapons in security policies and reduction of their operational status.
- 3) The process of nuclear disarmament must involve all nuclear weapon states as soon as appropriate in the reduction and elimination of nuclear arsenals and related measures as well as multilateral deliberations and negotiations involving non-nuclear weapon states.
- 4) The obligation is to achieve the complete elimination of nuclear weapons, without any precondition of comprehensive demilitarization.

Since the Court released its opinion in 1996, there has been very little progress on nuclear disarmament. That same year, negotiations on the Comprehensive Test Ban Treaty (CTBT) were completed. Otherwise, the picture is so dismal that a reasonable conclusion is that all states possessing nuclear weapons are in breach of their disarmament obligation as stated by the International Court of Justice, and the NPT declared nuclear weapon states are in breach of their Article VI obligations.

- The CTBT has not yet attained sufficient ratifications to enter into force.
- Contrary to commitments made at the 1995 and 2000 NPT Review Conferences, no negotiations have commenced on a treaty barring production of fissile materials usable in nuclear weapons.
- No deliberations or negotiations have begun in the Conference on Disarmament or elsewhere on the overall process of nuclear disarmament.
- In the 2002 Moscow Treaty, the United States abandoned, with Russian acquiescence, application of the principles of verification, transparency, and irreversibility in bilateral reductions.
- No further U.S.-Russian negotiations on reductions are planned, nor are any other nuclear-armed states involved in any negotiations concerning reductions or related matters like transparency.
- Modernization of nuclear forces in all nuclear-armed states is ongoing, contrary to the cessation of the nuclear arms race element of Article VI, the requirement of good faith negotiation of disarmament, and the commitment to a diminishing role of nuclear weapons in security policies.
- There has been little progress on reduction of the operational status of nuclear forces. The United States and Russia together now have about 3,000 warheads on high alert, ready for launch within minutes of an order to do so.
- Contrary to the commitment to a diminishing role for nuclear weapons in security policies, nuclear-armed states have maintained or even expanded doctrines of possible use of nuclear weapons in a wide range of circumstances.

II. The Illegality of Threat or Use of Nuclear Weapons

In its advisory opinion, the International Court of Justice also concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." This conclusion is powerfully supported by key elements of the Court's analysis, including:

- Nuclear weapons have "unique characteristics," including "their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come;" their "destructive power ... cannot be contained in either space or time;" a nuclear explosion "releases not only immense quantities of heat and energy, but also powerful and prolonged radiation," which "would affect health, agriculture, natural resources and demography over a very wide area," and "has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations;"
- "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."
- Under humanitarian law, "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements;"
- Self-defense warrants "only measures which are proportional to the armed attack and necessary to respond to it";
- The environment "represents the living space, the quality of life and the very health of human beings, including generations unborn," and "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives";
- The nuclear weapon states failed to demonstrate that any use of nuclear weapons, including a "clean" use involving "low yield" weapons, could comply with legal requirements or avoid catastrophic escalation;
- "[I]f the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal."

The force of the holding that threat or use is generally illegal is thus overwhelming when viewed in the context of the entire opinion. It was qualified by the statement that "the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." In explanation, the Court referred to the right of self-defense, the policy of deterrence, whose legality the Court declined directly to assess, and the elements of fact and law at its disposal. However, threat or use in such a circumstance remains subject to the requirements of humanitarian law. As the Court stated, a "fundamental" and "intransgressible" rule is that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." The Court also stated that "a use of force that is proportionate ... must, in order to be lawful, also meet the requirements of ... humanitarian law."

That taken as a whole the Court's opinion supports the illegality of threat or use of nuclear weapons was explained by a body very knowledgeable regarding the realities of nuclear weapons, the Committee on International Security and Arms Control of the U.S. National Academy of Sciences. The Committee stated:

[T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force. Accordingly, any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives. In the committee's view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.

In addition to violating the general legal requirements set forth in the ICJ opinion, use of nuclear weapons against non-nuclear weapon states party to the NPT and to regional nuclear weapon free zone treaties would violate requirements of non-use against states which have forsworn the option of acquiring nuclear weapons. Those requirements are set forth in declarations made by nuclear weapon states in connection with the NPT and in protocols to the treaties establishing NWFZs.

III. The Role of Regional Nuclear Weapon Free Zones

Regional nuclear weapon free zones (NWFZs) are in effect in Latin America and the Caribbean (Treaty of Tlatelolco), the South Pacific (Treaty of Raratonga), and Southeast Asia (Treaty of Bangkok). A treaty establishing an NWFZ has been negotiated for Africa

(Treaty of Pelindaba), but has not yet entered into force because the required number of ratifications is lacking. Efforts continue to complete negotiations on an NWFZ for Central Asia.

The NWFZs in general prohibit the manufacture, production, possession, testing, acquisition, receipt, and deployment of nuclear weapons within the zone. They therefore stand as an important reinforcement to the NPT, applying to most of the Global South, further entrenching the norm of non-possession of nuclear weapons. The NWFZs also have the important effect of barring deployment by the nuclear weapon states. They also contribute to confidence-building and consensus in the region.

NWFZs have the potential to be strengthened in various ways, for example by extending the prohibition of deployment and transport to international waters within a zone, and by increasing coordination among zones. Perhaps taking a different form than the existing ones, NWFZs may also have an important role to play in advancing disarmament in the currently troubled regions of Northeast Asia, South Asia, and the Middle East.

IV. Nuclear Sharing

“Nuclear sharing” refers to deployment of U.S. nuclear bombs in several NATO countries on the basis of possible NATO-directed and U.S.-authorized use *by non-U.S. personnel* from the cooperating states. Five non-nuclear weapon states, Belgium, Germany, Italy, The Netherlands, and Turkey, are involved. On the order of 480 nuclear bombs are deployed in the cooperating states and the United Kingdom.

NATO nuclear sharing appears contrary to the terms of Articles I and II of the NPT. Article I provides:

Each nuclear-weapon State Party to the Treaty *undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.*” (emphasis supplied)

Article II imposes the corollary obligation on non-nuclear weapons states not to receive the transfer of nuclear weapons or control thereof. But under the nuclear sharing arrangement, the United States is *transferring* to non-nuclear weapon states *control* over nuclear weapons *directly or indirectly*. First of all, the bombs are on the territory of other, non-nuclear weapon, states. Additionally, while the bombs would be in U.S. hands until implementation of a decision to use them, the delivery to targets would be accomplished by personnel from the cooperating state.

While NATO nuclear sharing was in place at the time of negotiation of the NPT, it is nowhere acknowledged in the treaty, unlike the (temporary) possession of nuclear weapons by the five states which had tested prior to 1968 (US, UK, France, Russia, China). Also, most states had little reason to know the U.S./NATO legal position defending nuclear sharing. A primary objective of the NPT is to prevent the acquisition of nuclear weapons by additional states. Elimination of NATO nuclear sharing would contribute to fulfillment of that objective and bring the United States and cooperating NATO states into full compliance with Articles I and II. It would also end a terrible precedent for other nuclear-armed states to deploy nuclear weapons outside their territory and to share them with non-nuclear weapon possessing states.

The Legal Framework for Non-Use and Elimination of Nuclear Weapons

I. The Obligation of Good Faith Negotiation of the Elimination of Nuclear Weapons

A. Key Texts

1) 1996 Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, dispositif, para. 105(2)(F), adopted unanimously: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

2) Article VI, 1970 Nuclear Non-Proliferation Treaty (NPT): “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

3) “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” adopted in connection with the 1995 decision to extend indefinitely the NPT, para. 4: “The achievement of the following measures is important in the full realization and effective implementation of article VI, including the program of action as reflected below: (a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test Ban Treaty no later than 1996. Pending the entry into force of a Comprehensive Test-Ban Treaty, the nuclear weapon States should exercise utmost restraint; (b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices, in accordance with the statement of the Special Coordinator of the Conference on Disarmament and the mandate contained therein; (c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of elimination those weapons, and by all States of general and complete disarmament under strict and effective international control.”

4) “Practical Steps for the Systematic and Progressive Efforts to Implement Article VI,” adopted by the 2000 NPT Review Conference (selected, emphasis supplied):

1. The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the **early entry into force of the Comprehensive Nuclear-Test-Ban Treaty**.

2. The necessity of negotiations in the Conference on Disarmament on a **non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons** or other nuclear explosive devices in accordance with the statement of the Special Coordinator in 1995 and the mandate contained therein, taking into consideration both nuclear disarmament and nuclear non-proliferation objectives....

4. The necessity of establishing in the **Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament....**
5. The **principle of irreversibility** to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.
6. An **unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals** leading to nuclear disarmament to which all States parties are committed under Article VI.
7. The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.
9. Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all:
 - [a] Further efforts by the nuclear-weapon States to **reduce their nuclear arsenals unilaterally**.
 - [b] **Increased transparency** by the nuclear-weapon States with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to Article VI and as a voluntary confidence-building measure to support further progress on nuclear disarmament.
 - [c] The further **reduction of non-strategic nuclear weapons**, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process.
 - [d] Concrete agreed measures to further **reduce the operational status** of nuclear weapons systems.
 - [e] A **diminishing role for nuclear weapons in security policies** to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination.
 - [f] The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to **the total elimination** of their nuclear weapons.
11. Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.
13. The **further development of the verification capabilities** that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.

5) "Towards a Nuclear-Weapon-Free World: The Need for a New Agenda," 2000 UN General Assembly resolution, A/RES/55/33C, adopted by a vote of 154 in support (including China, Britain, United States) to three opposed (India, Israel, Pakistan) with eight abstentions (including France and Russia). The resolution affirms the Practical Steps for disarmament adopted at the 2000 NPT Review Conference (above) and additionally affirms (para. 18) "that a nuclear-weapon-free world will ultimately require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments."

6) "Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons," 2005 General Assembly resolution, A/RES/60/76,

adopted by a vote of 126 to 29 with 24 abstentions. The resolution is one of a series going back to 1996 (A/RES/51/45). Its first operative paragraph “underlines once again the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” In a separate vote, that paragraph was approved by a vote of 165 to three (United States, Russia, Israel) with four abstentions (including France and Britain). The second paragraph “calls once again on all states to immediately fulfill that obligation by commencing negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.”

B. Analysis

1) The International Court of Justice advisory opinion

The 1996 advisory opinion of the International Court of Justice on nuclear weapons¹ was provided in response to the United Nations General Assembly, which asked the Court to address the question: “*Is the threat or use of nuclear weapons permitted in any circumstance under international law?*” In paragraph 2F of the “dispositif” setting forth its answers to the General Assembly, the Court unanimously held: “*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*”

The International Court of Justice (ICJ) is the judicial branch of the UN, and the highest court in the world on general questions of international law. Endorsed by every judge on the Court, its statement of the disarmament obligation is now the authoritative interpretation of Article VI of the NPT, and is perhaps the most important result of the case. Its importance is underlined by the fact that it was not required by the request of the General Assembly for clarification of the legal status of threat or use of nuclear weapons, but rather was produced on the Court's own initiative. In the Court's view, elimination of nuclear weapons is the only adequate response to the dilemmas and risks posed by the nuclear age.

Of special significance is the holding that Article VI requires states to *achieve* nuclear disarmament through good faith negotiation. Talking is not enough; the talk must lead to action.

Also important is that the Court delinked the obligation to achieve nuclear disarmament from the objective of comprehensive demilitarization (“general and complete disarmament”). Nuclear weapon states can no longer plausibly rely on the rationale that elimination of nuclear weapons must await comprehensive global disarmament.

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, July 8, 1996, *ICJ Reports* (1996) 226. Access at <http://www.icj-cij.org/icjwww/icses/iunan/iunanframe.htm>. References in this briefing paper are to paragraphs of the opinion.

Also significant is the clear implication that the obligation applies to all states, not only those who are party to the NPT, thus binding the nuclear-armed, non-NPT party states India, Israel, and Pakistan.² While not expressly stated, this follows from the Court's reasoning, including its statements that "virtually the whole of [the international] community" has been involved in the adoption of unanimous General Assembly resolutions regarding nuclear disarmament,³ and that fulfilling the Article VI obligation is "an objective of vital importance to the whole of the international community today."⁴

The Court's interpretation of Article VI was strongly reinforced by the 2000 NPT Review Conference. Among the practical disarmament steps the Conference approved with no objection from any state was an "*unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI.*" Both the Court and NPT states parties acting collectively are now on record that Article VI requires the elimination of nuclear weapons. Also, the "unequivocal undertaking" (step 6) was separated from the reaffirmation (step 11) of the ultimate objective of "general and complete disarmament" in the 2000 document, fully supporting the Court's analysis that elimination of nuclear weapons is not contingent upon comprehensive demilitarization.

The Court's interpretation has also been endorsed by nearly all states. In the most recent General Assembly vote on the resolution following up on the ICJ opinion (see key text 6, above), 165 states voted for the paragraph containing the Court's statement of the obligation, and only three states voted against it, the United States, Russia, and Israel. These few states are increasingly in the position of South Africa when it was completely isolated in its votes against General Assembly resolutions condemning apartheid.

What does the obligation of good-faith negotiation of elimination of nuclear weapons require of states? **International law in general with respect to good faith negotiation clearly requires that you enter into the negotiations, that you consider proposals of the other side, and that you re-examine your own position, all in order to reach the objective of the negotiations.** For example, in the ICJ case involving a treaty commitment between Hungary and Slovakia to build a dam and carry out related environmental remediation, the Court directed the parties to go back and negotiate some more. The Court stated that the "*principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized*".⁵ In the *North Sea Continental Shelf Cases*, the Court said that the parties must conduct themselves so as to make the negotiations "*meaningful, which will not be the case when either insists upon its own position without contemplating any modification of it*".⁶ A World

² North Korea could be added to this list. It might have nuclear weapons, and it has announced its withdrawal from the NPT. However, other states have as yet to acknowledge the withdrawal, preferring to see whether the six-nation talks now sporadically underway have the result of recommitting North Korea to the NPT as a non-nuclear weapon state.

³ Para. 100.

⁴ Para. 103.

⁵ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep. 1997, para. 142.

⁶ I.C.J. Reports 1969, p. 47.

Trade Organization panel has stated that good faith *“implies a continuity of efforts It is this continuity of efforts that matters, not a particular move at a given time, followed by inaction.”*⁷ According to eminent international lawyer Antonio Cassese, when there is an obligation of good faith negotiation, even when the exact objective of negotiations has not been specified or its achievement mandated: *“both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty.”*⁸ The latter requirement is especially important in the nuclear context. It would seem to bar nuclear weapon states from taking steps like resumption of testing or development and deployment of modified or new-design warheads with increased military capabilities.

In the case of Article VI, the Court relied on a distinction drawn in international law between two kinds of obligations. There is an obligation of conduct, which refers to performing or refraining from a specific action. The second kind of obligation is an obligation of result; a state by some means of its choice is required to bring about a certain outcome. The ICJ said Article VI involves both kinds of obligation, stating:

The legal import of that obligation goes beyond that of a mere obligation of *conduct*; the obligation involved here is an obligation to achieve a precise *result*, nuclear disarmament in all its aspects, by adopting a particular course of *conduct*, namely the pursuit of negotiations on the matter in good faith.⁹

Where did the ICJ find these two obligations? In Article VI itself, there is some reference to a result – it refers to nuclear disarmament - as well as to the required conduct, that is good-faith negotiation. In addition, one of the Treaty's preambular paragraphs refers to "the liquidation of all [States'] existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control."

The Court's statement of the obligation of good-faith negotiation in the context of nuclear weapons was unusually strong. The far-reaching nature of the Court's analysis is based on three factors. As we have already seen, one is the text of the Article VI and the preamble. The second is that there is already an agreement – the NPT – requiring non-possession of nuclear weapons by most states. In the hearings before the Court in 1995, Gareth Evans, then Foreign Minister of Australia, argued that a norm of non-possession of nuclear weapons is embedded in the NPT that “must now be regarded as reflective of

⁷ Panel Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to article 21.5 of the DSU by Malaysia, GATT Doc. WT/DS58/RW (June 15, 2001), para. 5.60. The Panel Report was upheld by the Appellate Body Report dated October 22, 2001.

⁸ Antonio Cassese, "The Israel-PLO Agreement and Self-Determination," *European Journal of International Law*, vol. 4, no. 4, 1993, p. 567, access at <http://www.ejil.org/journal/Vol4/No4/>.

⁹ Para. 99 (emphasis supplied).

customary international law”¹⁰ and that in conformity with that norm all states possessing nuclear arsenals must negotiate their dismantlement. In its statement of the disarmament obligation, the Court essentially accepted Australia’s argument. The third is that the disarmament obligation is bound in a reciprocal and mutually reinforcing relationship with the illegality and illegitimacy of nuclear weapons and their threat or use (see below, Part II).

All this is not to say that the Court is enjoining the achievement of a particular outcome; it need only be one that accomplishes “nuclear disarmament in all its aspects.” For example, the Court undoubtedly would accept either a nuclear weapons convention¹¹ prohibiting and eliminating nuclear weapons (see key text 6), or a “nuclear-weapon-free world [underpinned] by a universal and multilaterally negotiated ... framework encompassing a mutually reinforcing set of instruments” (see key text 5). But it certainly is possible to identify nuclear weapons-specific criteria and measures relevant to assessing whether the disarmament obligation is being met. For that, we turn to examination of Article VI and its application by NPT Review Conferences.

2) Article VI of the NPT

Article VI must be understood in the context of the entire treaty. The NPT is the only security treaty that permits two classes of members: states acknowledged to possess nuclear weapons and states barred from acquiring them. One hundred and eighty-eight states are members. Only three countries are outside the regime, all nuclear-armed, India, Pakistan, and Israel. In addition, North Korea’s status is in limbo; it has announced its withdrawal, and may have a few nuclear weapons. The NPT strikes a bargain between non-nuclear weapon states, which are prohibited from acquiring nuclear arms and are guaranteed access to peaceful nuclear technology, and nuclear weapons states, which are committed to the goal of disarmament. The International Atomic Energy Agency (IAEA) monitors operation of nuclear reactors and other facilities by non-nuclear weapon states with the aim of detecting and preventing diversion of fissile materials (plutonium and highly enriched uranium) for use in weapons. In Article VI, states parties, including nuclear-armed Britain, China, France, Russia, and the United States, agree to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The nuclear weapons states have long viewed the NPT as an asymmetrical bargain, imposing specific, enforceable obligations in the present on non-nuclear weapon states, while requiring of nuclear weapon states only a general and vague commitment to good faith negotiation of nuclear disarmament, as set forth in Article

¹⁰ Customary international law is universally binding law derived from a general and consistent practice of states accompanied by a sense of legal obligation.

¹¹ For a model nuclear weapons convention with accompanying analysis, see Merav Datan and Alyn Ware, *Security and Survival: The Case for a Nuclear Weapons Convention* (Cambridge, MA: International Physicians for the Prevention of Nuclear War, 1999), available online at www.ippnw.org/IPPNWBooks.html#NWC. The model is based in part on the existing convention on chemical weapons, the most far-reaching disarmament measure ever adopted.

VI, to be brought to fruition in the distant future if ever. The 1995 and 2000 NPT Review Conferences, and the 1996 International Court of Justice opinion discussed above, decisively rejected that view. It is now established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to eliminate their arsenals.

In 1995, the year that the NPT was due to expire, the United States and other nuclear weapon states pressed for the treaty to be extended indefinitely. That objective was achieved as part of a larger package that included a set of commitments known as the “Principles and Objectives for Nuclear Non-Proliferation and Disarmament” (key text 3). The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They include negotiation of a Comprehensive Test Ban Treaty (CTBT) by 1996, commencement of negotiations on a treaty banning production of fissile materials for use in weapons, and the “determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons.”

The 2000 NPT Review Conference further specified what the Article VI disarmament obligation requires. Its Final Document sets forth “practical steps for the systematic and progressive efforts to achieve nuclear disarmament” (key text 4). Implementation of this comprehensive and in-depth agenda would result in the achievement of a nuclear-weapon-free world. Among its crucial elements:

- As already noted, the inclusion of the “unequivocal undertaking” (step 6) to eliminate nuclear arsenals leaves no ambiguity about the intent of Article VI.
- Also of supreme importance, the Practical Steps contain criteria for the implementation of disarmament: the reduction and elimination of nuclear arsenals are to be accomplished pursuant to principles of transparency (step 9b), verification (employed in the START process, step 7, and referred to in step 13), and irreversibility (step 5). This means that delivery systems are to be destroyed, and warheads dismantled, in a monitored process leaving no possibility for reconstitution of the systems or warheads.
- Also critical is that the role of nuclear weapons is to be systematically marginalized. The readiness of nuclear forces for use is to be reduced (step 9d). This can be accomplished by a range of measures, from taking launch keys away from missile control officers to removing missiles from silos and submarines. And reliance on nuclear forces in security policies is to be reduced (step 9e), to minimize the risk of use and to facilitate their elimination.
- Multilateral treaties long recognized to be central to implementation of article VI are to be negotiated (the treaty on fissile materials, step 2) and brought into force (the CTBT, step 1).
- Finally, a forum is to be created for deliberation on the entire process of reduction and elimination of nuclear arsenals, in the Conference on Disarmament (step 4).

This history decisively informs the proper interpretation of Article VI and the obligation “to bring to a conclusion negotiations on nuclear disarmament in all its aspects”

as stated by the International Court of Justice. **Indeed, under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 2000 Practical Steps together with the 1995 Principles and Objectives constitute agreement and practice subsequent to the adoption of the NPT authoritatively applying and interpreting Article VI.**¹²

Article 31(3) of the Vienna Convention, entitled “General Rule of Interpretation,” provides that in addition to the text and preamble of a treaty, “*there shall be taken into account ... (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*” The 2000 NPT Review Conference Final Document states that the “Conference agrees” on the Practical Steps. Further, the agreement was reached in the context of a proceeding authorized by Article VIII of the NPT “to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.” This is the most natural setting for states to make authoritative applications and interpretations of the NPT. Further, the 2000 Practical Steps concern implementation of the Principles and Objectives adopted in connection with the legal decision pursuant to the treaty’s terms to extend the treaty indefinitely. Consequently, the Practical Steps have added weight because they are inextricably bound up with a decision that is both legally binding and of supreme practical importance.

In addition to constituting an *agreement*, the Principles and Objectives and Practical Steps also are part of a *practice* of the parties to the NPT that has been consistent over the course of the treaty’s life, dating back to its inception. After the treaty was opened for signature on July 1, 1968, the Soviet Union and the United States placed specific measures before the predecessor to today’s Conference on Disarmament, the Eighteen Nation Disarmament Committee, where the NPT had been negotiated. Under a heading taken from Article VI, they proposed an agenda including “*the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles ...*”¹³ Disarmament measures have been the subject of discussion at every Review Conference since then. Notably, in addition to committing to “systematic and progressive efforts to reduce nuclear weapons globally,” the 1995 Principles and Objectives echoed the 1968 agenda in identifying the CTBT and a convention banning the production of fissile materials for nuclear weapons as important measures for the “full realization and effective implementation of Article VI.”

In short, the Practical Steps, as an application of Article VI, are an essential guide to its interpretation. They identify criteria and principles that are so tightly connected to the core meaning of Article VI as to constitute requirements for compliance with the NPT and more generally the disarmament obligation stated by the ICJ. That is not to say that every step is necessary to compliance; in some cases a

¹² See Peter Weiss, John Burroughs, and Michael Spies, “The Thirteen Practical Steps: Legal or Political?” (May 2005), <http://www.icnp.org/disarmament/npt/13stepspaper.htm>.

¹³ ENDC/PV. 390, 15 August 1968, para. 93.

step is a reasonable but not unique means of implementing the obligation. And in the case of the ABM Treaty and the START process (step 7), U.S. actions have rendered the references moot in name, though not in substance.

The “Renewed Determination” resolution (A/RES/60/65) sponsored by Japan in the 2005 General Assembly and adopted by a vote of 168 to two (United States, India), with seven abstentions, is an excellent guide to the elements of the Practical Steps that are essential to moving forward in implementation of Article VI. Its adoption means that nearly all governments in the world, including close allies of the nuclear weapon states, are now on record as favoring application of the principles of transparency, irreversibility, and verification “in the process of working towards the elimination of nuclear weapons”. While those principles are embedded in the 2000 NPT Review Conference outcome, the resolution clearly and unambiguously declares that the principles, together, are inherent in effective reduction and elimination. The resolution also acutely singles out two other general commitments from 2000 whose fulfillment would greatly facilitate progress towards abolition (and make for a safer world now): “the necessity of a diminishing role for nuclear weapons in security policies”; and reduction of “the operational status of nuclear weapons systems”. In addition to reiterating these and other commitments (e.g. the CTBT and a fissile materials treaty) made in 2000, the resolution acknowledges the changes in U.S.-Russian relations since 2000, omitting references to START and the ABM Treaty and instead calling for full implementation of the 2002 Moscow Treaty and for further reductions. In addition, in a provision applicable to all nuclear-armed states, it calls for “deeper reductions in all types of nuclear weapons”.

Drawing on the “Renewed Determination” resolution and other sources, including contributions of civil society groups like the Middle Powers Initiative, it can be said that at a minimum, **the key general criteria and principles for compliance with Article VI contained in the Practical Steps include (but are not necessarily limited to):**

- 1) The reduction and elimination of nuclear arsenals are to be accomplished pursuant to principles of verification, transparency, and irreversibility.**
- 2) Implementation of the disarmament obligation is facilitated by a diminishing role of nuclear weapons in security policies and reduction of their operational status.**
- 3) The process of nuclear disarmament must involve all nuclear weapon states as soon as appropriate in the reduction and elimination of nuclear arsenals and related measures as well as multilateral deliberations and negotiations involving non-nuclear weapon states.**
- 4) The obligation is to achieve the complete elimination of nuclear weapons, without any precondition of comprehensive demilitarization.**

Finally, in delineating the requirements of Article VI in light of the history of the NPT outlined above, it is also important to focus on the three elements that article contains: 1) negotiation in good faith of effective measures relating to cessation of the nuclear arms

race at an early date; 2) negotiation in good faith of effective measures relating to nuclear disarmament; and 3) negotiation in good faith on a treaty on general and complete disarmament under strict and effective international control.

Cessation of the nuclear arms race at an early date: This element has both quantitative and qualitative components, applying to increases in the number of nuclear weapons systems and well as improvements in military capabilities. It refers also to treaty-based constraints affecting the ability to produce the weapons, namely the Comprehensive Test Ban Treaty (referred to in the NPT preamble) and the fissile materials treaty (included on the agenda of the Eighteen Nation Disarmament Committee, described above). Both measures were envisioned at the time of the NPT's negotiation as means of capping the arms race. Indeed, they would have done so if they had been agreed as intended "at an early date." Even today, they could contribute to preventing arms racing.

Nuclear disarmament: The burst of governmental and civil society activity since the end of the Cold War culminating in the adoption of the Practical Steps, has made clear, as already discussed, that reduction and elimination of nuclear arsenals must be conducted in accordance with the principles of verification, transparency, and irreversibility. They are essential to participation of affected states in reduction of nuclear forces to low levels and certainly to their elimination. The process also will be greatly facilitated by reduction of the operational readiness of nuclear forces and of the reliance on nuclear weapons in the security postures of nuclear weapon and allied states.

A treaty on general and complete disarmament: It is often assumed that this refers to a treaty on comprehensive demilitarization, including major conventional weapons (tanks, aircraft, etc.). It is true that the objective of general and complete disarmament (GCD) does have this meaning. But that does not mean that a treaty on GCD would embrace all major weapons. Indeed, the preamble of the NPT points towards the treaty referenced in Article VI as a treaty on *nuclear* disarmament. The preamble would seem to answer this question, referring to "the cessation of the manufacture of nuclear weapons, the liquidation of all their [States'] existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control." That is, the preamble seems to refer to a treaty on elimination of nuclear forces as an instance of a type of treaty, the type being treaties on general and complete disarmament, or GCD.

Similarly, the Biological Weapons Convention and the Chemical Weapons Convention each is a treaty on GCD. As the preamble to the CWC says, they represent "effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction." Following this logic, a treaty on the prohibition and elimination of nuclear weapons would be a treaty on GCD that would represent progress towards the achievement of general and complete disarmament.

This is consistent with how the International Court of Justice read Article VI of the NPT in its statement of the disarmament obligation. In setting forth an obligation to conclude negotiations on nuclear disarmament in all its aspects under strict and effective international control, the Court combined the first clause referring to effective measures relating to nuclear disarmament, and the second clause referring to a treaty on GCD under strict and effective international control. The reference to "strict and effective international control" comes directly from the second clause of Article VI, and the phrase "in all its aspects" could refer to related matters like the delivery systems referred to in the NPT preamble. As previously noted, the Practical Steps support this view of Article VI. The unequivocal undertaking to eliminate nuclear arsenals (step 6) is clearly separated from the reaffirmation of the "ultimate objective" of "general and complete disarmament under effective international control" (step 11).

3) The State of Compliance

Since the 1996 completion of negotiations on a Comprehensive Test Ban Treaty, there has been very little progress on nuclear disarmament. Indeed, the picture is so dismal that a reasonable conclusion is that all states possessing nuclear weapons are in breach of their disarmament obligation as stated by the International Court of Justice, and the NPT declared nuclear weapon states are in breach of their Article VI obligations.

As to the CTBT, contrary to the spirit of the 1995 Principles and Objectives and the letter of the 2000 Practical Steps, it has yet to enter into force. In order to do so, it must be signed and ratified by 44 listed countries that have commercial or research nuclear reactors. Eleven of the 44 states have yet to ratify the treaty. Of the 11, three nuclear-armed states, the United States, China, and Israel, have signed but not ratified the treaty; India and Pakistan, both nuclear-armed, as well as North Korea, have not taken the first step of signing it.

As to a treaty on fissile materials that can be used in nuclear weapons, contrary to the Principles and Objectives and the Practical Steps, no negotiations have commenced. The failure to start on a fissile materials treaty was initially primarily due to the insistence of China and a handful of other states that negotiations also begin in the consensus-governed Conference on Disarmament on prevention of weaponization of outer space and on nuclear disarmament. In 2003, China moved to break the years-long deadlock by accepting a widely agreed proposal to structure the Conference on Disarmament to *negotiate* a fissile materials treaty while only *discussing* nuclear disarmament and prevention of space weaponization. However, the Bush administration has yet to accept the proposal. Further complicating the picture is that, reversing longstanding policy, the administration now insists on negotiating a fissile materials treaty "without verification provisions." Other states reply that issues of verification can be taken up in the negotiations.

Contrary to the Practical Steps and to the thrust of the ICJ statement of the disarmament obligation, **no deliberations or negotiations have begun in the**

Conference on Disarmament or elsewhere on the overall process of nuclear disarmament, how to achieve a nuclear weapons convention or the framework for a nuclear-weapons-free world. As explained above, there has been a stalemate in agreeing a CD program of work which would have included deliberations on nuclear disarmament.

Perhaps most importantly, **the United States has abandoned, with Russian acquiescence, application of the principles of verification, transparency, and irreversibility in bilateral reductions.** Those principles were not only endorsed in the Practical Steps, they were also inherent in the decades-old history of arms control between the two countries. The 2000 U.S.-Russian Moscow requires only that at a single point in time, December 31, 2012, deployed strategic warheads not exceed a certain number on each side, 2200. That date is also when the treaty expires. The day after, barring an extension of the treaty or a new agreement, the United States and Russia would be free to increase the number of deployed warheads. The treaty does not require destruction of delivery systems or dismantlement of warheads. In contrast, START I required, and START II would have required had it entered into force, the destruction of delivery systems, and the 1997 Helsinki commitment to START III additionally envisaged accounting for and dismantling of warheads. Beyond the deployed strategic forces, and based in part on the retention of reduced delivery systems and warheads, the United States plans to retain large numbers of warheads in a "responsive force" capable of redeployment within weeks or months. Closely related to the abandonment of irreversible reductions is the lack of treaty-required mechanisms for transparency and verification. Confirmed destruction of delivery systems is the primary method of verification under START I. Absent such destruction or monitored dismantlement of warheads, how any verification or transparency measures will be effectively implemented with respect to the Moscow Treaty reductions is uncertain. Monitoring mechanisms under START I may provide a means, but that treaty expires in 2009.

No further U.S.-Russians negotiations on reductions are planned, nor are any other nuclear-armed states involved in any negotiations concerning reductions or related matters like transparency.

In summary, since the completion of CTBT negotiations in 1996, there have been no bilateral or multilateral negotiations that meet the requirements of the disarmament obligation and Article VI. Nor is the picture any better so far as initiatives and restraint that would support the disarmament process.

Modernization of nuclear forces seems contrary to the *cessation of the nuclear arms race* element of Article VI ; the principle of good faith barring actions that undermine achievement of the objective of the negotiation process, that is, the elimination of nuclear forces; and the 2000 commitment to a diminishing role of nuclear weapons in security policies. In 1995, the world was told that "the nuclear arms race has ceased," in a declaration at the Conference on Disarmament by France, Russia, Britain and the United States in anticipation of the 1995 Review and Extension

Conference.¹⁴ Unfortunately, this statement is not true. The nuclear weapon states may contend that modernization is the inevitable byproduct of replacement of existing systems that have reached the end of their service lives. But if true that defense points to the lack of intention to fulfill the obligation of elimination for decades to come. Moreover, in some cases the arms racing aspect of modernization is unmistakable. Nor so far as is publicly known have the NPT-declared nuclear weapon states undertaken any initiatives to stop modernization of nuclear forces, formal or informal, discussions or negotiations, among themselves or in a wider setting. Nor have there been efforts to achieve related objectives like increasing transparency.

Extensive modernization of nuclear forces of the NPT-declared nuclear weapon states is described in an NGO presentation to the 2005 Review Conference.¹⁵ Some examples: Britain is considering and preparing for replacement of its submarine launched Trident missile equipped with three to four warheads. France is developing a missile for its submarine fleet, which will eventually be equipped with a new warhead. China is developing a new mobile intermediate-range ICBM. Russia is scheduled to deploy a mobile, multi-warhead variant of its existing silo-based missiles in 2006. The United States is modernizing land and submarine-based missiles; researching new delivery systems like an improved cruise missile; researching “reliable replacement warheads,” for which improved military capabilities are not foreclosed; and upgrading its command and control systems.

So far as *reduction of the operational status of nuclear forces*, there has been little progress since 2000 when this commitment was made. The United States and Russia together now have about 3,000 warheads on high alert, ready for launch within minutes of an order to do so.¹⁶ The Moscow Treaty arguably represents a form of dealerting. By the year 2012 it requires the number of deployed strategic warheads to be brought down from estimated current levels of about 3500 for Russia and 5200 for the United States¹⁷ to no more than 2200 on each side. However, the achievement of that level will not fundamentally alter the readiness of each state to initiate immediately a large-scale attack.

The 2000 commitment to a *diminishing role for nuclear weapons in security policies* has been thoroughly ignored, aside from China's long-standing policy of no first use, which predates 2000.¹⁸

¹⁴ CD 1308, April 6, 1995, later issued as a document of the 1995 Review and Extension Conference (NPT/CONF.1995/20).

¹⁵ Compliance Assessment: The NPT Declared Nuclear Weapon States, part of NGO Statements to the States Party to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, May 11, 2005, United Nations, New York, online at <http://icnp.org/disarmament/npt/ArtVI/compliance.pdf>.

¹⁶ See John Burroughs, “The Man Who Averted Nuclear War,” DisarmamentActivist.org, January 19, 2006, citing estimate by Bruce Blair.

¹⁷ Hans Kristensen, “Status of World Nuclear Forces,” The Nuclear Information Project, <http://nukestrat.com/nukestatus.htm> (accessed February 20, 2006).

¹⁸ For details and citations, see Compliance Assessment, *supra* note 15.

Britain continues to retain the option of first use, including in "substrategic" settings, to defend "vital interests," as announced in 1998 and reaffirmed since then.

France retains the option, which it designates as "strategic," for first use of nuclear weapons in defense of its (vaguely defined) vital interests, which include the "free exercise of our sovereignty." Jacques Chirac recently went further, signaling that nuclear weapons could be used against a state responsible for a large-scale terrorist attack on France.¹⁹

Russia's stance remains that set forth in its 2000 Security Concept, which states that nuclear weapons can be used "to repulse armed aggression, if all other means of resolving the crisis have been exhausted." The 2000 Concept itself regresses from the 1997 policy, which identified the scenario for possible use of nuclear weapons "a threat to the very existence of the Russian Federation as an independent sovereign state." In 1993, Russian had abandoned its policy of renouncing first use.

The United States has enlarged the range of circumstances in which nuclear weapons might be used. The 2002 National Security Strategy to Combat Weapons of Mass Destruction Strategy, carrying the imprimatur of President Bush, removed ambiguity from previous U.S. policy. It states that "overwhelming force" - a reference to the nuclear option - would be used against chemical and biological attacks. The Defense Department's 2001 Nuclear Posture Review states that nuclear weapons "could be employed against targets able to withstand nonnuclear attack, (for example, deep underground bunkers or bio-weapon facilities)," and refers to use of nuclear weapons in response to "surprising military developments" and "unexpected contingencies." The classified but leaked Defense Department document is not exceptional in its identification of a pervasive role for nuclear weapons, whether actually detonated or not, in U.S. military operations, as shown by this excerpt from the Defense Department's February 2004 *Strategic Deterrence Joint Operating Concept*:

Nuclear weapons threaten destruction of an adversary's most highly valued assets, including adversary WMD/E [weapons of mass destruction/effect] capabilities, critical industries, key resources, and means of political organization and control (including the adversary leadership itself). This includes destruction of targets otherwise invulnerable to conventional attack, e.g., hard and deeply buried facilities, "location uncertainty" targets, etc. Nuclear weapons reduce an adversary's confidence in their ability to control wartime escalation.... [N]uclear weapons can constrain an adversary's WMD employment through U.S. counterforce strikes aimed at destroying adversary escalatory options....²⁰

¹⁹ In a January 19, 2006 speech, Chirac said: "[N]uclear deterrence is not intended to deter fanatical terrorists. Yet, the leaders of States who would use terrorist means against us, as well as those who would consider using, in one way or another, weapons of mass destruction, must understand that they would lay themselves open to a firm and adapted response on our part. And this response could be a conventional one. It could also be of a different kind." Online at <http://www.acronym.org.uk/docs/0601/doc06.htm>.

²⁰ U.S. Department of Defense, *Strategic Deterrence Joint Operating Concept*, February 2004, pp. 32-33, http://www.dtic.mil/jointvision/sd_joc_v1.doc. "Joint Operating Concepts" are part of a set of planning documents intended "to assist in the development of enhanced joint military capabilities needed to protect

4) Summary

Under the NPT and other international law, all states are obligated to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects, in accordance with the principles of verification, transparency, and irreversibility. They are obligated to enter into negotiations and to conduct them in a reasonable manner that yields the objective of elimination of nuclear weapons. Good faith requires that they not take actions that undermine achievement of that objective. To facilitate the negotiations as well as to lower the present-day risks posed by nuclear weapons, states are to reduce the operational readiness of nuclear forces and to diminish the role they play in security policies.

Since the conclusion of negotiations on the CTBT in 1996, across the board states possessing nuclear weapons are failing to meet these requirements. No multilateral, plurilateral, or bilateral negotiations on any aspect of nuclear disarmament are now underway. The CTBT has not been brought into force, and no negotiations have begun on a fissile materials treaty. The principles of verification, transparency, and irreversibility have been abandoned in U.S.-Russian reductions. Modernization of nuclear forces by all nuclear armed states is ongoing. Large numbers of U.S. and Russian warheads remain ready for nearly instantaneous launch, and reliance on nuclear weapons in declared security postures has not diminished, and in some cases, has expanded.

II. The Illegality of Threat or Use of Nuclear Weapons

A. Key Texts

1) Dispositif, Advisory Opinion of the International Court of Justice (selected):

105(2) [The Court] *Replies* in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

and advance U.S. interests." The goal is "to realize the [Joint Chiefs] Chairman's vision of achieving Full Spectrum Dominance by the Joint Force." *Id.* at p. 1.

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake; ...

2) Rome Statute of the International Criminal Court

War Crimes, Article 8(2)(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; ...

B. Analysis

1) Overview

In a formal conclusion set forth in the dispositif, the International Court of Justice held that "***the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the***

principles and rules of humanitarian law.²¹ This conclusion is powerfully supported by key elements of the Court's analysis, including:

- Nuclear weapons have "unique characteristics," including "their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come;" their "destructive power ... cannot be contained in either space or time;" a nuclear explosion "releases not only immense quantities of heat and energy, but also powerful and prolonged radiation," which "would affect health, agriculture, natural resources and demography over a very wide area," and "has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations;"²²
- "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."²³
- Under humanitarian law, "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements;"²⁴
- Self-defense warrants "only measures which are proportional to the armed attack and necessary to respond to it," and "a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law;"²⁵
- The environment "represents the living space, the quality of life and the very health of human beings, including generations unborn," and "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives" and in implementation of the law applicable in armed conflict;²⁶
- The nuclear weapon states failed to demonstrate that any use of nuclear weapons, including a "clean" use involving "low yield" weapons, could comply with legal requirements or avoid catastrophic escalation;²⁷

²¹ Para. 105(2)(F)

²² Paras. 35, 36.

²³ Para. 78.

²⁴ Para. 95.

²⁵ Paras. 41, 42.

²⁶ Paras. 29, 30, 33.

²⁷ Para. 94.

- "[I]f the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal."²⁸

The force of the holding that threat or use is generally illegal is thus overwhelming when viewed in the context of the entire opinion. It was qualified by the statement that "the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."²⁹ In explanation, the Court referred to the right of self-defence, the policy of deterrence, whose legality the Court declined directly to assess, and the elements of fact and law at its disposal. However, **threat or use in such a circumstance remains subject to the requirements of humanitarian law. As the Court stated, a "fundamental" and "intransgressible" rule is that "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."**³⁰ The Court also stated that "a use of force that is proportionate ... must, in order to be lawful, also meet the requirements of ... humanitarian law."³¹

The strength of the general illegality conclusion is further revealed by the voting pattern. Both that conclusion and the extreme circumstance/survival of the state provision are set forth in paragraph 2E of the dispositif, which records the Court's formal conclusions. The entire paragraph was voted for by seven of the fourteen judges then serving on the Court, and was adopted as the Court's opinion based on the casting vote of the President, Mohammed Bedjaoui. But, the judges' separate statements show that while the extreme circumstance/survival of the state provision was intensely controversial, support for general or categorical illegality was broad and deep. Three judges declined to vote for paragraph 2E because it did not definitively hold threat or use of nuclear weapons to be categorically illegal, that is, illegal in every circumstance. **Thus ten judges supported at least a holding of general illegality.**

The extreme circumstance provision was undoubtedly shaped by the fact that by the terms of the General Assembly request, the Court was considering whether *both* threat and use are illegal. This meant that the Court was considering whether a nuclear *threat* is forbidden as a means of seeking to ensure the survival of a state faced with an actual or imminent attack by nuclear weapons or similarly catastrophic means. In the only instances of *use* of nuclear weapons in time of war, the United States' atomic bombings of Hiroshima and Nagasaki, the survival of the United States was not threatened in any way. Those bombings were unquestionably illegal because they violated the prohibitions of attacking civilians and inflicting indiscriminate harm which the Court expressly stated existed prior to the commencement of the nuclear age.³²

²⁸ Para. 47.

²⁹ Para. 105(2)(E).

³⁰ Paras. 78, 79.

³¹ Para. 99.

³² The Court stated that "nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence". Para. 86; see also para. 78.

That taken as a whole the Court's opinion supports the illegality of threat or use of nuclear weapons was authoritatively explained by a body very knowledgeable regarding the realities of nuclear weapons, the Committee on International Security and Arms Control of the U.S. National Academy of Sciences. The Committee stated:

[T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force. Accordingly, any threat or use of nuclear weapons must be limited to, and necessary for, self defense; it must not be targeted at civilians, and be capable of distinguishing between civilian and military targets; and it must not cause unnecessary suffering to combatants, or harm greater than that unavoidable to achieve military objectives. **In the committee's view, the inherent destructiveness of nuclear weapons, combined with the unavoidable risk that even the most restricted use of such weapons would escalate to broader attacks, makes it extremely unlikely that any contemplated threat or use of nuclear weapons would meet these criteria.**³³

2) Reprisals

The force of the opinion in its entirety is shown by its implications for the threat or use of nuclear weapons in response to a threatened or actual nuclear attack. This is the scenario most centrally relied upon to justify the possession of nuclear weapons. The scenario raises (though not exclusively) the issue of whether second nuclear uses can be justified as reprisals. A reprisal has classically been defined as an otherwise illegal act, taken in response to an enemy's prior illegal act, executed with the intent of causing the enemy to cease such acts. Noting that "[c]ertain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful," the Court stated that it does not "have to pronounce on the question of belligerent reprisals [*i.e.*, reprisals in time of war] save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality".³⁴ A U.S. State Department lawyer has contended that the Court's refusal directly to address the legality of nuclear reprisals leaves retaliatory deterrence unchallenged.³⁵ However, this view overlooks both the Court's holding that the risk of escalation and environmental considerations must be taken into account in assessing proportionality³⁶ and its analysis of humanitarian law.

Protocol I to the Geneva Conventions includes comprehensive prohibitions on reprisals against civilians and objects indispensable to the survival of civilians (*e.g.*, crops,

³³ Committee on International Security and Arms Control, National Academy of Sciences, *The Future of U.S. Nuclear Weapons Policy* (Washington, D.C.: National Academy Press, 1997), p. 87 (emphasis supplied).

³⁴ Para. 46.

³⁵ See Michael J. Matheson, "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons," 91 *American Journal of International Law* (No. 3, July 1997), p. 432. Matheson was one of the US advocates appearing before the ICJ at the November 1995 hearings.

³⁶ Paras. 30, 43.

water installations) as well as the environment.³⁷ The nuclear weapon states had argued that the use of nuclear weapons is not governed by those provisions, which they characterized as “new” law understood in negotiating Protocol I not to apply to nuclear weapons. The Court did not specifically address this contention, but its rejection is inherent in its description of the principle protecting civilians and the principle barring the infliction of unnecessary suffering on combatants as “fundamental”, “intransgressible”, and applicable “to all kinds of weapons, those of the past, those of the present and those of the future”.³⁸ The Court formulated the former principle in a way further clarifying that it applies in all circumstances: States “must *never* make civilians the object of attack and must consequently *never* use weapons that are incapable of distinguishing between civilian and military targets.”³⁹

The categorical nature of the principle protecting civilians was affirmed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in a decision reconfirming Milan Martić's indictment for ordering rocket attacks on Zagreb which killed and wounded civilians.⁴⁰ Applying humanitarian law including Article I Common to all Geneva Conventions, which sets forth minimum standards of customary international law, the Trial Chamber stated that “no circumstances would legitimize an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party”.⁴¹ **It follows from the ICJ opinion, the *Martić* decision, and other authorities that nuclear reprisals are forbidden, beginning but not ending with the reprisals contemplated by the strategy of massive retaliation that target or indiscriminately kill and injure civilian populations on a vast scale.**

3) The Rome Statute of the International Criminal Court

It is now almost 10 years since the ICJ issued its nuclear weapons opinion. In applying its holdings regarding the legality of nuclear threat or use, it is important to take account of developments in the law since then. Chief among these is the entry into force of the treaty, the Rome Statute, establishing the International Criminal Court. The Rome Statute codifies presently binding law on war crimes, crimes against humanity, and genocide. In large part due to the resistance of the nuclear weapon states, the Statute directly includes the prohibitions of inflicting indiscriminate harm and unnecessary suffering only in the form of criteria for the addition by amendment of specific prohibited weapons to a rather restricted list that appears in the Statute.⁴² The list includes expanding bullets, poison weapons, and poisonous gases and analogous materials (capturing chemical weapons and arguably biological weapons), but not nuclear weapons or landmines. **Use of nuclear weapons is therefore governed by the general provisions of the Rome Statute. Their use would constitute war crimes, and depending upon the**

³⁷ Arts. 51(6), 54(c), 55(2).

³⁸ Paras. 79, 86.

³⁹ Para. 78 (emphasis supplies).

⁴⁰ *Prosecutor v. Milan Martić (Rule 61 Proceeding)*, Case No. IT-95-11-1 (8 March 1996), paras. 8-17.

⁴¹ *Id.* at para. 15; see also paras. 16 and 17.

⁴² See John Burroughs and Jacqueline Cabasso, “Confronting the Nuclear-Armed States in International Negotiating Forums: Lessons for NGOs,” 4 *International Negotiation* (No. 3, 1999), pp. 471-472.

circumstances, crimes against humanity and even genocide, as defined in the Statute.⁴³

One relationship between the ICJ opinion and the Rome Statute is particularly worth noting. This involves the ICJ's statement, previously noted, that a "cardinal" and "intransgressible" principle of humanitarian law "is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets." As the International Committee of the Red Cross has pointed out, by identifying the prohibition of use of inherently indiscriminate weapons as a consequence of civilian immunity against deliberate attack, the Court "*equated the use of indiscriminate weapons with a deliberate attack upon civilians*".⁴⁴ Accordingly, the war crime included in the Rome Statute forbidding "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities"⁴⁵ encompasses the rule stated by the ICJ and bars the use of nuclear weapons insofar as they are inherently indiscriminate – that is, always.

Also worth noting is the Rome Statute's treatment of protection of the environment. The Statute lists as a war crime:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁴⁶

Regarding damage to the environment, this provision confirms and advances the ICJ opinion.⁴⁷ A contested question before the Court was whether use of nuclear weapons is

⁴³ For example, a use of nuclear weapons in an urban area probably would constitute the war crime of "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" (Art. 8(2)(b)(ix), and the crime against humanity of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack" consisting of "inhumane acts ... intentionally causing great suffering" (Art. 7(1)(k)).

⁴⁴ Paper prepared by the International Committee of the Red Cross relating to the crimes listed in article 8, paragraph 2(b)(i), (ii), (iii), (iv), (v), (vi), (vii), (ix), (xi) and (xii), of the Statute of the International Criminal Court, submitted by the governments of Belgium, et al., to the Preparatory Commission for the ICC, PCNICC/1999/WGEC/INF.2/Add.1 (30 July 1999), p. 14. The ICRC reference is to the Court's statement in paragraph 78 that states "must never make civilians the object of attack [the principle of civilian immunity], and must consequently *never* use weapons that are incapable of distinguishing between civilian and military targets" (emphasis supplied).

⁴⁵ Article 8(2)(b)(i).

⁴⁶ Art. 8(2)(b)(iv).

⁴⁷ The ICJ opinion does not discuss the longstanding rule of humanitarian law, codified in this provision of the Rome Statute, imposing "proportionality" on particular military operations in order to limit indirect effects on civilians and civilian property. The rule requires a balancing between collateral damage, on the one hand, and military advantage on the other, conferring a certain discretion upon the decisionmaker. The Court's decision not to discuss that requirement may reflect an unwillingness to concede that such a flexible rule is

barred by Article 35(3) of Protocol I to the Geneva Conventions, which prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe environmental damage. As with the ban on reprisals, the nuclear weapon states contended that this provision is “new” law not reflecting existing customary law, understood not to apply to nuclear weapons when Protocol I was negotiated. The Court did not attempt to settle the controversy, stating only that Protocol I environmental rules are “powerful constraints for all the States having subscribed to these provisions”.⁴⁸ The United States, India, Israel, and Pakistan are not parties to Protocol I; the United Kingdom ratified subject to its understanding that rules newly introduced by the Protocol do not apply to nuclear weapons; and France ratified on the entirely implausible understanding that none of Protocol I applies to nuclear weapons.

However, **the prohibition of inflicting widespread, severe, and long-lasting damage to the environment has achieved, or at least is close to achieving, the status of customary law applicable to all states and all weapons.** That is shown in part by its inclusion within the Rome Statute provision, where, however, environmental damage is to be balanced against the anticipated military advantage of an attack. More generally, while noting that environmental treaties were not “intended to deprive a State of the exercise of its right of self-defence,” the Court stated that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives” and “in the context of implementing” law applicable in armed conflict.⁴⁹ Despite its apparent moderation, this holding is another firm basis for the conclusion of general illegality.

4) Negative Security Assurances and Protocols to Regional Nuclear Weapon Free Zone Treaties

The NPT-acknowledged nuclear weapon states (Russia, China, France, Britain, United States) have given assurances of non-use of nuclear weapons to non-nuclear weapon states parties to the Nuclear Non-Proliferation Treaty, regional nuclear weapon free zone (NWFZ) treaties (re NWFZs, see *infra*, Part III), and a few individual states.⁵⁰ They have been made through protocols (binding supplemental legal agreements) to regional treaties, memoranda on security assurances with Belarus, Kazakhstan, and Ukraine, and declarations made in the NPT context.

Protocols on non-use are in effect for the Latin American (Treaty of Tlatelolco) and South Pacific (Treaty of Raratonga) NWFZs.⁵¹ They require the NPT nuclear weapon states not to use nuclear weapons against member states of those zones. However, upon ratifying the protocols, the nuclear weapon states made reservations limiting their

relevant to analyzing nuclear weapons. As explained in the text, the central point is that nuclear weapons are inherently indiscriminate such that their use would amount to an attack on civilians, and therefore may not be used in any circumstance.

⁴⁸ Para. 31.

⁴⁹ Paras. 30, 33.

⁵⁰ For further analysis and cites regarding the issues discussed in this section, see John Burroughs, “Two Legal Issues Confronting the NPT Regime,” May 3, 1999, <http://lcnp.org/disarmament/npt/nato.htm>.

⁵¹ In the case of the South Pacific NWFZ protocol, the United States has signed but not ratified.

applicability, in particular where a zone member is allied with a state possessing nuclear weapons.⁵²

The most recent declarations NPT-based declarations regarding non-use, known as “negative security assurances,” were made shortly before 1995 NPT Review and Extension Conference and referred to in Security Council Resolution 984 (1995). The U.S. declaration is representative:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.⁵³

There is a strong argument that negative security assurances made in declarations by the nuclear weapons states are legally binding, especially because they were made with the intent of inducing non-nuclear weapon states to agree to the indefinite extension of the NPT.⁵⁴ Assurances made in other forms are clearly binding. Protocols to nuclear weapon free zone treaties are treaty instruments. Memoranda of agreement have a legally binding form. In its advisory opinion, the International Court of Justice appeared to refer to assurances made in these forms in its conclusion that “[a] threat or use of nuclear weapons should also be compatible ... with specific obligations under treaties and *other undertakings which expressly deal with nuclear weapons*.”⁵⁵

Nonetheless, the nuclear weapons states have not accepted that their declarations are legally binding, regarding them as only political commitments. The United States has also stated that the assurances apply only when a state is a member in good standing of relevant regimes. This would include the NPT and a regional NWFZ, but does not exclude

⁵² As the ICJ recounts (para. 59):

The Protocol [to the Tlatelolco Treaty] was signed and ratified by the five nuclear-weapon States. Its ratification was accompanied by a variety of declarations. The United Kingdom Government, for example, stated that “in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State”, the United Kingdom Government would “be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II”. The United States made a similar statement. The French Government, for its part, stated that it “interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter”. China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved “the right to review” the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either “in support of a nuclear-weapon State or jointly with that State”.

⁵³ S/1995/263 (6 April 1995).

⁵⁴ George Bunn, “The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States,” 4 The Nonproliferation Review (Spring-Summer 1997, No. 3) 1.

⁵⁵ Para. 105(2)(D).

other regimes like those on biological and chemical weapons. Further, it is not clear from U.S. statements who determines whether a state is a member in good standing of, e.g., the NPT. Finally, U.S. doctrines now contemplate a nuclear response to use of a biological or chemical weapon, regardless of negative security assurances contained in NWFZ protocols or NPT declarations. However, as explained earlier, the doctrine of reprisal does not justify use of nuclear weapons. In particular, in most cases a nuclear use would be vastly disproportionate to a biological or chemical use. Also, in some cases whether a biological or chemical use had occurred would be subject to dispute.

The negative security assurances should be considered legally binding requirements protecting non-nuclear weapon states in the NPT and regional nuclear weapon free zones, unless an internationally authoritative body, e.g. the IAEA or NPT states parties acting collectively, have determined that they have forfeited the protections of those regimes. Understandably, non-nuclear weapon states are not satisfied with the current state of affairs, and are demanding negotiation of an agreement codifying negative security assurances. Nonetheless, negative security assurances as they are today reinforce and supplement the basic requirements of humanitarian and other international law forbidding threat or use of nuclear weapons.

5) The State of Compliance

The first and most important point is that since the Court's opinion in 1996, and indeed since the U.S. atomic bombings of Hiroshima and Nagasaki in 1945, there has been no use of nuclear weapons in warfare. This is good from any point of view. But does it have legal significance? In its opinion, the Court found that the practice of non-use since 1945 did not support the illegality of use, since the practice was not accompanied by an acknowledgement of illegality.⁵⁶ Given the expansive doctrines regarding possible nuclear use which remain in place today, this is a defensible conclusion. Nonetheless, the longer the practice of non-use persists, the more persuasive the argument for illegality from that practice becomes, despite the doctrines. One scholar contends that there is a virtual taboo on use of nuclear weapons.⁵⁷

Regarding the illegality of threatened use of nuclear weapons, a good argument can be made that the declared options of use in the doctrines of nuclear weapon states contravene this prohibition.⁵⁸ The argument is reinforced by the adoption of a commitment to a "diminishing role for nuclear weapons in security policies to minimize the risk" of their use by the 2000 NPT Review Conference, and by the inconsistency of ongoing reliance on the doctrines of use with the obligation of good faith negotiation of disarmament. From an orthodox international law point of view, however, it is likely that a "threat" contrary to the UN Charter and humanitarian law will be considered to have occurred in a concrete

⁵⁶ Paras. 66, 67.

⁵⁷ Nina Tannenwald, "Stigmatizing the Bomb: Origins of the Nuclear Taboo," *International Security*, vol. 29, no. 4, spring 2005, online at <http://mitpress.mit.edu/catalog/item/default.asp?ttype=6&tid=18649>.

⁵⁸ See John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (Munich: Lit Verlag, 1997), "Introduction" at p. 4, also pp. 41-43. The Introduction is online at <http://lcnp.org/wcourt/adlegalintro.htm#17>.

situation, like an ongoing war, where one state signals to another, “If you do not do X or refrain from Y, we will resort to the use of nuclear weapons.”

6) Summary

Nuclear weapons threat or use is illegal under fundamental principles of international law stated by the International Court of Justice, especially:

- States must “*never* use weapons that are incapable of distinguishing between civilian and military targets” (emphasis supplied)
- Self-defense warrants “only measures which are proportional to the armed attack and necessary to respond to it”
- States “must take environmental considerations into account when assessing what is necessary and proportionate”

The use of nuclear weapons would also constitute war crimes as defined in the Rome Statute of the International Criminal Court, as well as, depending on the circumstances, crimes against humanity and genocide.

Use of nuclear weapons against non-nuclear weapon states to the NPT and to regional NWFZs would violate requirements of non-use against states which have forsworn the option of acquiring nuclear weapons. Those requirements are set forth in declarations made by nuclear weapon states in connection with the NPT and in protocols to the treaties establishing NWFZs.

III. The Role of Regional Nuclear Weapon Free Zones

Regional nuclear weapon free zones (NWFZs) are in effect in Latin America and the Caribbean (Treaty of Tlatelolco), the South Pacific (Treaty of Rarotonga), and Southeast Asia (Treaty of Bangkok). A treaty establishing an NWFZ has been negotiated for Africa (Treaty of Pelindaba), but has not yet entered into force because the required number of ratifications is lacking. As discussed earlier, protocols on non-use of nuclear weapons ratified by the NPT nuclear weapon states are in effect for the Latin American and South Pacific NWFZs. They have been negotiated for the Southeast Asia and African NWFZs. In the case of the Southeast Asia NWFZ, their entry into force has been delayed by the objection of nuclear weapon states to the zone’s application to bar deployment or transport of nuclear weapons in extensive regional waters. Efforts continue to complete negotiations on an NWFZ for Central Asia.

The NWFZs in general prohibit the manufacture, production, possession, testing, acquisition, receipt, and deployment of nuclear weapons within the zone. **They therefore stand as an important reinforcement to the NPT, applying to most of the Global South.** The NWFZs also have the effect of barring deployment by the nuclear weapon states, therefore precluding arrangements like the one between NATO and the United States in which U.S. nuclear bombs are deployed in NATO countries (see *infra*, Part IV).

They also contribute to confidence-building and consensus in the region. For example, the Treaty of Tlatelolco provided leverage additional to the NPT for persuading Brazil and Argentina to abandon the option of nuclear weapons.

Considering NWFZs together with the NPT, the Antarctic Treaty barring deployment of nuclear weapons in that region, and other agreements, the International Court of Justice stated that

the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves.⁵⁹

Implicit in the Court's opinion, however, is a recognition, as noted earlier, that a norm of non-possession, manifested among things by the NWFZs, now exists; this is a basis for the conclusion that those countries which do have nuclear arsenals are legally bound to eliminate them, through good-faith negotiation. In this sense, the NWFZs along with the NPT are essential to creating the framework for the illegality and illegitimacy of nuclear weapons.

NWFZs have the potential to be strengthened in various ways, for example by extending the prohibition of deployment and transport to international waters within a zone,⁶⁰ and by increasing coordination among zones.⁶¹ Perhaps taking a different form than the existing ones, NWFZs may also have an important role to play in advancing disarmament in the troubled regions of Northeast Asia, South Asia, and the Middle East.⁶² For example, Hiromichi Umebayashi of Peace Depot has proposed a Northeast Asia NWFZ composed of Japan, South Korea, and a denuclearized North Korea, with non-use assurances provided by the United States, China, and Russia.⁶³

⁵⁹ Para. 62.

⁶⁰ See Devon Chaffee and Jim Wurst, "Strengthening Existing Nuclear Weapon Free Zones," April 2002, <http://www.lcnp.org/disarmament/nwzf/StrengtheningExistingNWFZ.htm>.

⁶¹ See 2005 NPT Review Conference document NPT/CONF.2005/WP.46 regarding the conference of states parties to NWFZ treaties held April 26-28, 2005, in Tlatelolco, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/wp/wp46.pdf>

⁶² See generally Scott Parish and Jean Du Preez, "Nuclear-Weapon-Free Zones: Still a Useful Disarmament and Non-Proliferation Tool," Weapons of Mass Destruction Commission Paper No. 6, pp. 5-6.

⁶³ Hiromichi Umebayashi, Peace Depot and Pacific Campaign for Disarmament and Security, Briefing Paper, "A Northeast Asia Nuclear Weapon-Free Zone (NEA-NWFZ)," April 2004, online at <http://www.nautilus.org/napsnet/sr/2005/0566NEANWFZ.pdf>

IV. Nuclear Sharing

“Nuclear sharing” refers to deployment of U.S. nuclear bombs in several NATO countries on the basis of possible NATO-directed and U.S.-authorized use *by non-U.S. personnel* from the cooperating states.⁶⁴ Five non-nuclear weapon states, Belgium, Germany, Italy, The Netherlands, and Turkey, are involved in NATO nuclear cooperation programs conducted pursuant to agreements between each of those states and the United States. The programs include maintenance of dual capable aircraft prepared for the conduct of nuclear missions and training in nuclear weapons use. According to a recent estimate of the Natural Resources Defense Council, on the order of 480 nuclear bombs are deployed in the cooperating states and the United Kingdom.⁶⁵ They cannot be armed without an order from the United States. In time of war, according to a 1969 statement of the chairman of the U.S. Joint Chiefs of Staff, release of the weapons to the cooperating states could be authorized. NATO’s 1999 “Strategic Concept” affirms a continuing commitment to nuclear sharing.

NATO nuclear sharing appears contrary to the terms of Articles I and II of the NPT. Article I provides:

Each nuclear-weapon State Party to the Treaty *undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.*” (emphasis supplied)

Article II imposes the corollary obligation on non-nuclear weapons states not to receive the transfer of nuclear weapons or control thereof. But under the nuclear sharing arrangement, the United States is *transferring* to non-nuclear weapon states *control over nuclear weapons directly or indirectly*. First of all, the bombs are on the territory of other, non-nuclear weapon, states. Additionally, according to analyst Otfried Nassauer, while the bombs would be in U.S. hands until implementation of a decision to use them, the delivery to targets would be accomplished by personnel from the cooperating state.⁶⁶ In a non-NATO context, the United States likely would not accept the explanation that the control

⁶⁴ See generally regarding the issues discussed in this section: Otfried Nassauer, “Nuclear Weapons in Europe – A Question of Political Will,” Berlin Information-center for Transatlantic Security (BITS), Policy Note 05.4, June 2005, prepared for Greenpeace Germany; Martin Butcher, Nicola Butler, Oliver Meier, Otfried Nassauer, Dan Plesch, Georg Schofbanker and Stephen Young, Austrian Study Center for Peace and Conflict Research, Berlin Information-centre for Transatlantic Security, British American Security Information Council, Centre for European Security and Disarmament, *NATO Nuclear Sharing and the NPT - Questions to be Answered* (June 1997); John Burroughs, “Two Legal Issues Confronting the NPT Regime,” May 3, 1999, <http://lcnp.org/disarmament/npt/nato.htm>.

⁶⁵ Robert S. Norris and Hans Kristensen, NRDC Nuclear Notebook, “U.S. nuclear weapons in Europe, 1954-2004,” *Bulletin of the Atomic Scientists*, November/December 2004 pp. 76-77 (vol. 60, no. 6), online at http://www.thebulletin.org/article_nn.php?art_ofn=nd04norris.

⁶⁶ “Nuclear Weapons in Europe – A Question of Political Will,” *supra* note 64.

exerted by cooperating states is partial. Further, the United States is presently *assisting* non-nuclear weapon states in acquiring future *control* in time of war.

The best argument in favor of the legality of nuclear sharing is that the arrangement was in place at the time of negotiation of the NPT, and that other states were aware of the U.S. and NATO position when they ratified the treaty. However, NATO nuclear sharing is nowhere acknowledged in the treaty, unlike the acknowledgement (Article IX(3)) of possession of nuclear weapons, subject to the disarmament obligation, by the five states which had tested prior to 1968. Also, research by Nassauer, BASIC analysts, and others has demonstrated that most states had little reason to know the U.S./NATO legal position regarding nuclear sharing, because the United States made little effort to make it known it outside a relatively small circle of states.⁶⁷

The worst argument, advanced by the U.S. State Department when the U.S. Senate was considering whether to approve its ratification, is that the NPT is no longer valid in time of a “general” war. The NPT does not provide that it becomes ineffective in time of war. States parties to the NPT appear to have repudiated, at least implicitly, this suggestion in Review Conference final documents, referring to the need for compliance with the treaty “under any circumstances.” Thus the 2000 Final Document provides:

The Conference reaffirms that the strict observance of the provisions of the Treaty remains central to achieving the shared objectives of preventing, *under any circumstances*, the further proliferation of nuclear weapons and preserving the Treaty’s vital contribution to peace and security.⁶⁸

Nor is there a solid basis in international law for maintaining that the NPT would become ineffective in time of “general” war. As a treaty regulating weapons, it would seem that, if anything, it becomes more relevant in wartime rather than less. While it is recognized that some treaties, for example bilateral agreements regulating trade, may become inapplicable in time of war, depending on the circumstances, the notion that a multilateral treaty regulating matters of general interest becomes ineffective in time of war undermines international law. In considering human rights and environmental treaties in connection with the legality of threat or use of nuclear weapons, the International Court of Justice assumed that they continue to apply during wartime.⁶⁹

A primary objective of the NPT is to prevent the acquisition of nuclear weapons by states other than those states having possessed and tested them by 1968. Elimination of NATO nuclear sharing would contribute to fulfillment of that objective and bring the United States and cooperating NATO states into full compliance with Articles I and II. It would also be a wise choice consistent with the aims of the NPT, the disarmament obligation, and the illegality of threat or use.

⁶⁷ *Id.*; *NATO Nuclear Sharing and the NPT - Questions to be Answered* (June 1997), *supra* note 64.

⁶⁸ 2000 NPT Review Conference, Final Document, Vol. I, Part I, Articles I and II and first to third preambular paragraphs, p. 2, para. 5 (emphasis supplied). Online at <http://www.reachingcriticalwill.org/legal/npt/2000FD.pdf>.

⁶⁹ Paras. 25, 30.

NATO nuclear sharing now serves as a terrible precedent for other nuclear-armed states to deploy nuclear weapons outside their territory and to share them with non-nuclear weapon possessing states. Hypothetically, for example, Pakistan could cite NATO nuclear sharing as a practice supporting sharing its nuclear weapons with another state in the Middle East. It also impedes efforts to negotiate with Russia regarding reductions of “non-strategic” weapons. Finally, it gives some operational reality to the continued NATO insistence, mirroring that of the United States, that nuclear weapons are useful instruments of military and foreign policy. This makes use of nuclear weapons more likely, undermines arguments against their spread, and is inconsistent with good faith negotiation of their elimination.