

Taking the Bomb Back to Court?

A working paper to examine a potential application to the International Court of Justice on non-compliance with obligations relating to the Non-Proliferation Treaty and the International Court of Justice 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

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A. Introduction: Why take a case to the ICJ now.

Nuclear weapons have not been used as a weapon in conflicts since 1945. The reasons for this good fortune can only be surmised. The United States, France and the United Kingdom argue that nuclear deterrence has worked.¹ Robert McNamara, former U.S. Secretary of Defense, and an architect of the U.S. nuclear deterrence policy, believes that it is only by luck that the world has avoided a nuclear war.² No doubt one of the reasons preventing commanders from using nuclear weapons in conflicts despite serious considerations being given to such use³ is the general norm against the use of nuclear weapons which has developed in public, political and legal sectors of international society. Up until recently, even the nuclear weapon States had indicated that nuclear weapons were a weapon of last resort. This did not by any means eliminate the threat of nuclear weapons use. In fact, the Canberra Commission on the Elimination of Nuclear Weapons concluded that it is not possible to prevent use of nuclear weapons by accident, miscalculation or design, unless nuclear weapons are eliminated.

The situation has become much more dangerous and urgent now though two key developments – namely the increasing potential for the proliferation of nuclear weapons to additional States and to non-State actors, and the broadening doctrines of the NWS to include the threat or use of nuclear weapons in response to the potential development of chemical and biological weapons and also against other conventional targets and the pre-emptive use of nuclear weapons.⁴

The Commission on Weapons of Mass Destruction, chaired by Hans Blix former Head of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), warns that “*we even see the risk of arms races involving new types of nuclear weapons, space weapons and missiles,*” and that “*The world must aim at achieving a ban on both possession and use of nuclear weapons, in the same way as bans that apply to biological and chemical weapons. All states – even the great powers – must prepare to live without nuclear weapons and other weapons of terror.*”⁵

In 1996 the International Court of Justice affirmed that the threat or use of nuclear weapons would generally be illegal and that there is an obligation to pursue negotiations in good faith on nuclear disarmament in all its aspects. The NWS have not reduced the roles of nuclear weapons in their security doctrines in order to reflect the general illegality of the threat or use of nuclear weapons.⁶ In contrast, as mentioned above, they are expanding the roles for nuclear weapons and the situations in which they might be threatened or used. Nor have the NWS made any progress on disarmament negotiations. In fact, they continue to oppose (and block) nuclear disarmament negotiations in any of the key international fora including the Conference on Disarmament, Nuclear Nonproliferation Treaty Review Conferences and the United Nations General Assembly.

These developments, coupled with a waning public memory of the devastation caused by nuclear weapons, is eroding the norm against the use of nuclear weapons and making it more likely that nuclear weapons could be used in a conflict.

¹ Despite the fact that it has not prevented over 100 wars of a non-nuclear nature since 1945 including some involving the United States, the UK and/or France.

² Robert McNamara, *Apocalypse Soon*, Foreign Policy April 2006

³ Michio Kaku and Daniel Axelrod have chronicled at least fifteen occasions when the use of nuclear weapons was seriously contemplated by the United States. *To Win a Nuclear War: The Pentagon's Secret War Plans*, 1986

⁴ U.S. Defence Department Doctrine for Joint Nuclear Operations 2005, http://www.nukestrat.com/us/jcs/JCS_IP3-12_05draft.pdf

⁵ *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms*, Weapons of Mass Destruction Commission, Sweden, June 1, 2006. http://www.wmdcommission.org/files/Weapons_of_Terror.pdf

⁶ The UK and Russia did make some changes in their policies immediately following the ICJ decision (see C. Response to the Advisory Opinion) but these were minimal.

Thus, a return to the International Court of Justice on the nuclear weapons issue, ten years after the earlier decision, could play a vital role in reversing this trend and providing increased legal weight to help prevent nuclear weapons use and achieve nuclear disarmament. In particular, the ICJ could clarify the different opinions regarding the threat or use of nuclear weapons in specific circumstances thus proscribing many of the developments in nuclear doctrine. And the Court could clarify what is required for good faith negotiations for nuclear disarmament. In doing so it would challenge the current policies of indefinite possession of nuclear weapons and assist in the commencement of nuclear disarmament negotiations.

Ten years has been a grace period overly generous to the NWS. Now is the time to return to the ICJ to ensure compliance with their obligations.

Finally, there has been a disturbing development in the doctrine of preventive use of force to respond to the suspected proliferation of nuclear weapons. Where previously the preventive use of force was generally deemed legitimate only when an armed attack was imminent, overwhelming and leaving no alternative but the use of force to prevent it,⁷ doctrines of certain States have developed to include the possible use of preventive force to respond to the suspected development of nuclear, chemical or biological weapons. The invasion of Iraq in 2003 in response to the suspected possession of nuclear weapons is one example of this policy in practice.

More recently it has been asserted that the use of nuclear weapons in such preventive strikes is also being considered.⁸ The ICJ could play an important role in helping prevent such preventive strikes, including the preventive use of nuclear weapons, by affirming their illegality.

⁷ In discussing the use of force in the *Caroline Incident* of 1837, UK Secretary of State Daniel Webster noted that it will be for the government to show that the “necessity of [the use of force in] self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation. Letter from Daniel Webster, Secretary of State, to Lord Ashburton (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906).

Oppenheim notes that The development of the law over the 150 years since the *Caroline Incident*, and particularly in light of more recent state practice, suggests that the use of force by a state can only be justified as self-defence under international law if it meets certain criteria. These are:

- (a) an armed attack is launched, or is immediately threatened, against a state’s territory or forces (and probably its nationals);
- (b) there is an urgent necessity for defensive action against that attack;
- (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;
- (d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defence.

LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW 41–42 (Robert Y. Jennings & C. Arthur Watts eds., 9th ed. 1991), cited in Singh & Kilroy. *supra* note 51, at 412.

⁸ Seymour Hersh, *THE IRAN PLANS, Would President Bush go to war to stop Tehran from getting the bomb?* New Yorker, April 10, 2006 http://www.newyorker.com/fact/content/articles/060417fa_fact

B. The ICJ Advisory Opinion

On 8 July 1996 the International Court of Justice, at the request of the United Nations General Assembly, delivered an advisory opinion on the legality of the threat or use of nuclear weapons in which it concluded, *inter alia*, 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;*

** ... 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;*

and 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.*

The Court emphasised the unique risks of nuclear weapons and affirmed that nuclear disarmament is ‘an objective of vital importance to the whole of the international community today.’

C. Response to the Advisory Opinion

The United Nations General Assembly responded to the opinion by adopting resolutions every session since 1996 calling on all States to inform the Secretary-General of efforts and measures they undertake with respect to the opinion and, in particular, to fulfil their disarmament obligation through the commencement of multilateral negotiations leading to the 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.

A number of non-nuclear weapon States have taken steps to encourage and assist the commencement of such negotiations. These include, *inter alia*, the submission by Costa Rica to the United Nations of a Model Nuclear Weapons Convention, the development by a coalition of States including Aotearoa-New Zealand, Brazil, Egypt, Ireland, Mexico, South Africa and Sweden of a New Agenda for Nuclear Disarmament, and additional resolutions to the United Nations from the Non-Aligned Movement supporting a nuclear weapons convention and steps towards it.

Following the ICJ decision, the United Kingdom lowered the operational status of their nuclear forces, reduced their nuclear forces to one system and undertook a study on nuclear verification to support a nuclear disarmament process. Russia modified its nuclear doctrine to affirm that they would only use nuclear weapons in the extreme circumstance when the very survival of the State was at stake.⁹ However, apart from these changes, the States possessing nuclear weapons, and most of their allies, have done little in response to the ICJ opinion.¹⁰

- The U.S., France, China, Russia and the UK maintain robust and expansive policies for the use of nuclear weapons, and apart from China, maintain policies of first-use of nuclear weapons and do not support the UN resolution calling for implementation of the

⁹ 1997 National Security Concept: noted "the right to use all forces and means at its disposal, including nuclear weapons, in case an armed aggression **creates a threat to the very existence of the Russian Federation as an independent sovereign state.**" Cited in Russia's Military Doctrine, by Dr. Nikolai Sokov, CNS Senior Research Associate, October 1999. <http://www.nti.org/db/nisprofs/over/doctrine.htm>

¹⁰ See Appendices IV and V for details of the stockpiles and doctrines of the nuclear weapon States.

disarmament obligation. On the contrary, it appears that most of these States are expanding the roles for nuclear weapons in the military doctrines and are modernising their nuclear forces.

- India and Pakistan openly tested nuclear weapons for the first time in 1998 and declared that they had become nuclear weapon States.
- Israel, which is believed to possess up to 200 nuclear weapons, refuses to confirm any information about its nuclear arsenal and imprisoned a nuclear technician who released information confirming Israel's nuclear status.
- The North Atlantic Treaty Organisation (NATO) maintains a security policy based on the threat of use of nuclear weapons and has made no effort to adjust this in light of the ICJ decision. In addition, a number of NATO States host U.S. nuclear weapons on their territories and maintain arrangements with the US on taking control of the weapons during wartime.
- Japan and Australia continue to accept an extended nuclear deterrence doctrine for their security provided by the United States, and do not support UN resolutions on follow-up to the ICJ opinion.

Of these States, only India¹¹ has responded to the request to inform the UN Secretary-General of steps they are taking in response to the ICJ opinion.

In addition, there is a small number of non-nuclear weapon States suspected of developing a nuclear weapons capability. These include North Korea, which announced its withdrawal from the Non-Proliferation Treaty in 2003, and Iran, which has advanced its uranium enrichment programme.

D. Nature of the legal dispute – the question of compliance

The issue of compliance by all these States with their disarmament and non-proliferation obligations has become a contentious issue in a number of international fora including the United Nations Security Council, the United Nations General Assembly, the International Atomic Energy Agency and the Non-Proliferation Treaty Review Conferences.

Nuclear weapon States and their allies claim that they are in compliance with their disarmament obligations and charge non-nuclear weapon States with violating non-proliferation obligations. Non-nuclear weapon States claim that they are within their rights and instead charge the nuclear weapon States with violating their disarmament obligations and maintaining illegal nuclear weapons use policies.

The lack of resolution on these claims is threatening the Non-Proliferation Treaty – the most comprehensive international regime for nuclear non-proliferation and disarmament. In addition, this lack of agreement is leading to States taking actions in response outside the multilateral process, many of which are also of disputed legality and most of which increase the threats to security. Examples include:

¹¹ See, for example, *Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons Note by the Secretary-General*, UNGA A/54/161/add2, 13 September 1999, Information received from governments – India.

- India testing nuclear weapons with the rationale that this was in response to the failure of the nuclear weapon States to pursue negotiations for nuclear disarmament
- The US and UK leading a coalition to attack Iraq without UN Security Council support, in response to a belief (later shown to be unfounded) that Iraq was pursuing a nuclear weapons programme
- North Korea announcing its withdrawal from the NPT, and its claim that it is developing a nuclear weapons program to protect it from the type of pre-emptive use of force used against Iraq
- The US leading a Proliferation Security Initiative which would include ocean-based interceptions of vessels from States 'of proliferation concern'. Some of these interceptions would possibly be in violation of the Law of the Sea
- Iran and Israel threatening to attack each others nuclear facilities based on suspicion that they are being used to develop a nuclear capability
- The situation regarding Iran's uranium enrichment programme being reported to the UN Security Council by the IAEA.

Determinations by the International Court of Justice of a) the compliance obligations of States under international law with respect to nuclear weapons programmes, and b) where there is currently non-compliance, would assist in solving these disputes and providing legal guidance to assist in the implementation of the 1996 advisory opinion.

E. Failure of other attempts to resolve the disputes

A resolution of disputes between the nuclear weapon States and the 'States of concern' (i.e. those most likely to proliferate) on compliance with nuclear disarmament and non-proliferation obligations has been attempted without success in a range of fora including the United Nations Security Council, the United Nations General Assembly, the Conference on Disarmament and the NPT Review Conferences. A potential for resolution was forged at the NPT 2000 Review Conference¹², however this agreement has since broken down with the US in particular stating that it will no longer comply with parts of the programme.

This break-down was reinforced by the failure of the States Parties to the NPT to reach any agreement at the 2005 NPT Review Conference on either affirmation of the 2000 agreements or on implementation of any of the steps.

States have differed over whether to start negotiations on minimal next steps or on a more comprehensive program of disarmament. A compromise proposal presented to the Conference on Disarmament (CD) by a group of CD ambassadors¹³ has been blocked by France and the United States.

At the 61st United Nations General Assembly a group of six countries – Brazil, Canada, Kenya, Mexico, New Zealand and Sweden – suggested that the UN General Assembly itself should establish ad hoc committees to commence work on four key areas identified in the CD ambassadors' proposal – a fissile material treaty, negative security assurances, prevention of an arms race in outer space and nuclear disarmament. However, this also was opposed by the U.S. and other NWS.

¹² Programme of action for steps to implement Article VI of the NPT agreed by consensus at the 2000 NPT Review Conference (13 Steps).

¹³ The A5 proposal includes negotiations on the next steps - a fissile material treaty and negative security assurances – and discussions on the more comprehensive items of prevention of an arms race in outer space and nuclear disarmament.

F. Advisory opinion or contentious case

The International Court of Justice can consider contentious cases between States and advisory opinions.

A contentious case is lodged by a State against another State both of which have accepted the jurisdiction of the Court either a) by mutual agreement for the dispute at hand, b) by declaration for any disputes with other States which have also made such a declaration, c) on an issue covered by a treaty or international agreement which specifically provides for ICJ jurisdiction.

An advisory opinion is given at the request of an international body that has been granted authority to request such opinions. These include the principal organs and some of the agencies of the United Nations.

The 1994 case on the legality of the threat or use of nuclear weapons was an advisory opinion requested by the United Nations General Assembly.

The case proposed in this paper could be initiated either as an advisory opinion or a contentious case.

The advantages of an advisory opinion would be:

- a) It would follow the approach taken by the United Nations General Assembly in requesting the original advisory opinion and thus continue the work of the UNGA in its efforts to implement the opinion.
- b) The decision of the ICJ would not be confined to a dispute between States but would be an opinion on the status of international law relating to the question and would thus be universally applicable – including to States that have not made declarations accepting the jurisdiction of the ICJ for contentious cases.
- c) It would simplify the process of application to the Court as only one case would need to be lodged as opposed to the contentious case option in which there would be many individual cases from each plaintiff country against each defendant country.¹⁴
- d) It would provide political protection for States that support the case but would be susceptible to pressure from the nuclear weapon States should they be plaintiffs in a contentious case.

The advantages of a contentious case would be:

- a) It would allow the Court to give greater attention to the specific policies and practices of the defendant/respondent States and to make more specific determinations of redress required by States as opposed to the general determinations that would be more likely given in an advisory opinion
- b) It would place greater responsibility on defendant States to participate in the case and provide accountability for their policies and practices to the Court
- c) It would be more difficult, than in an advisory opinion, for defendant States to ignore or dismiss any obligations arising from the decision of the Court as the decision would be directed specifically to them
- d) Contentious cases are generally considered to be binding on States concerned whereas there is difference of opinion as to the authority of advisory opinions

¹⁴ However, the contentious case approach can be simplified by one State acting as lead plaintiff/applicant and other States applying to intervene in order to join the case.

Consultations with a number of like-minded governments¹⁵ have indicated a general support for seeking an advisory opinion rather than a contentious case. Thus, this paper discusses both options but concentrates on the advisory opinion approach.

G. Disputants and jurisdiction

In the pursuit of an advisory opinion, the logical organisation to request the opinion would be the United Nations General Assembly (UNGA). This was the body that requested the 1996 advisory opinion on the legality of the threat or use of nuclear weapons. The UNGA has also undertaken efforts to implement the opinion, but has been frustrated in these efforts by non-compliance by key States. In addition, consideration of proposals for disarmament is a key component of the UN General Assembly's mandate. An opinion from the ICJ on compliance requirements relating to nuclear weapons obligations would assist the UNGA in fulfilling this role.

For a contentious case there could be a variety of disputants based on a) compliance issues b) jurisdictional issues, c) political issues. These are explored in Appendix III: Disputants and Jurisdiction for a Contentious Case.

H. Possible questions to ask the Court

There are a number of issues the ICJ could address in considering compliance by States with their obligations under the Non-Proliferation Treaty and with the conclusions of the 1996 advisory opinion. This would include questions of the transfer of nuclear weapons and nuclear weapons technology from NWS to any other recipient, withdrawal from the NPT, development of nuclear weapons programmes by States not parties to the NPT, nuclear testing, policies of threat or use of nuclear weapons, transparency of nuclear weapons development and doctrines, and lack of good faith in the pursuit of disarmament.

- *Transfer of nuclear weapons and nuclear weapons technology from NWS to any other recipient (NPT articles I and II)*

The United States has nuclear weapons stationed in the territories of six NATO countries - Belgium, Germany, Italy, the Netherlands, Turkey and the United Kingdom.¹⁶ The five non-NWS host US B61 'gravity' bombs that, in the event of nuclear war, could be delivered by aircraft and pilots belonging to the host nation.¹⁷

Articles I and II of the NPT prohibit the transfer of nuclear weapons or the control over nuclear weapons either directly or indirectly. The US and the NATO countries claim that these nuclear sharing arrangements are necessary for peace and security of Europe,¹⁸ and that they do not violate

¹⁵ Consultations have been conducted with a number of delegations to the United Nations in Geneva and New York and through meetings with foreign ministries. 'Like-minded' governments includes those generally supportive of nuclear non-proliferation and disarmament. In addition, consultations have been conducted with legal experts, including former ICJ judges, and disarmament experts.

¹⁶ Previously Greece also participated in nuclear sharing, but in 2003 US nuclear weapons were reportedly withdrawn from the country.

¹⁷ Each of the nuclear sharing states has an agreement with the US relating to transfer of control over the nuclear weapons during time of war. In addition, each of the nuclear sharing States undertake nuclear weapons training exercises in preparation for such a contingency.

¹⁸ "A credible Alliance nuclear posture and the demonstration of Alliance solidarity and common commitment to war prevention continue to require widespread participation by European Allies involved in collective defence planning in nuclear roles, in peacetime basing of nuclear forces on their territory and in command, control and consultation

the NPT for two reasons: a) they were negotiated prior to the NPT, were known by other States Parties to the NPT and there were no objections to them by other States Parties, b) transfer of control over nuclear weapons is only contemplated during time of war, at which time the NPT provisions would no longer apply.

It is true that there was minimal opposition to the nuclear sharing arrangements by other States Parties to the NPT at the time of the treaty's negotiation and entry into force. It may be that many States wanted the European States to join the NPT as non-nuclear States and felt that the nuclear sharing arrangements may have been the price required for them all to join. If so, it unfortunately buttresses the arguments of the nuclear sharing States that the NPT does not prohibit such arrangements.

On the other hand, since the NPT entered into force there has been criticism of the nuclear sharing arrangements by other States parties to the NPT.¹⁹ More significantly, there is nothing in the NPT that affirms that it would not apply during wartime, and there is no general provision in international law that treaties do not apply in wartime. A number of States Parties to the NPT have emphasised that *"all the articles of the NPT are binding on all States Parties and at all times and in all circumstances"*.²⁰

It could also be argued that even if the nuclear sharing arrangements might have had some legitimacy in 1969, that legitimacy could only have been short-term pending progress on nuclear disarmament as required under Article VI.

There is thus a relatively strong, but not watertight, case against the NATO nuclear sharing arrangements which could be tested in the ICJ.

In addition, the US and the UK have for decades collaborated on nuclear weapons development including the exchange of classified nuclear information, advanced technology and a range of materials (including plutonium, highly enriched uranium and tritium), training of personnel in the employment of atomic weapons and the development of nuclear weapons delivery systems. This collaboration has been facilitated by the 1958 Agreement For Cooperation on the Uses of Atomic Energy for Mutual Defence Purposes (renewed in 2004).²¹ The UK says that such collaboration is necessary in order that the UK could develop an independent nuclear deterrent that is necessary for defence and peace.²² However, this is not an adequate response to the prohibition in the NPT on the transfer of nuclear weapons and nuclear weapons technology from NWS to any other recipient. In addition, the argument that nuclear sharing arrangements were required to ensure adherence to the NPT does not hold for the UK and the US, both of which joined as Nuclear Weapons States.

arrangements." NATO's Strategic Concept (1999), as cited in NATO: Nuclear Sharing or Proliferation? BASIC Briefing 8, March 2005, <http://www.basicint.org/nuclear/NPT/2005src/brief08.htm>

¹⁹ At the 1995 NPT Review Conference, Mexico asked in Main Committee 1 for clarification on whether nuclear sharing breached Articles I and II. Mexico's concerns were taken up by the Non-Aligned Movement. As a result several proposals for language questioning the US interpretation were put forward for inclusion in the Committee's final report, including:

The Conference notes that among States parties there are various interpretations of the implementation of certain aspects of articles I and II which need clarification, especially regarding the obligations of nuclear weapon States parties...when acting in cooperation with groups of nuclear-weapon States parties under regional arrangements...

²⁰ New Agenda Coalition statement to the NPT 1999 Prep Com.

²¹ *Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the uses of Atomic Energy for Mutual Defense Purposes* AS AMENDED, 23rd day of May, 1994. Original Agreement signed, Washington, July 3, 1958. <http://www.basicint.org/nuclear/1958MDA.htm>

²² See: The Minister of State, Foreign and Commonwealth Office (Mr. David Davis): responding to questions in the House of Commons, House of Commons, Official Report, 15 December 1994, column 1235. <http://www.publications.parliament.uk/pa/cm199495/cmhansrd/1994-12-15/Debate-13.html>

There is thus a solid case to challenge these nuclear sharing arrangements in the ICJ.

The ICJ could also consider the nuclear cooperation agreements between UK and France, US and France, and the suspected nuclear cooperation between China and Pakistan. However, these are less well documented and the burden on the Court to determine the facts might be too high making the answer inconclusive.

- *Withdrawal from the NPT*

Article X provides for the withdrawal from the NPT by any State party if it decides that extraordinary events have jeopardized the security of its country. Article X requires three months notice plus an explanation of the extraordinary events. Some States parties to the NPT claim that North Korea did not adhere to these requirements in its notice of withdrawal, and in addition the withdrawal came after evidence of non-compliance with their non-proliferation obligations. The ICJ could thus be asked to examine the validity of North Korea's withdrawal announcement.

Such an action could indicate the seriousness with which the international community considers withdrawal from the NPT. However, even if the case was successful, it would be unlikely to move North Korea to rejoin the NPT nor accept full-scope safeguards on its nuclear facilities. The question of North Korea's withdrawal from the NPT is thus not included in the list of proposed questions to ask the Court.

- *Development of nuclear weapons programmes by States not Parties to the NPT*

India and Pakistan openly tested and declared themselves to be in possession of nuclear weapons in 1998. Also in 1998, Israel, for the first time, admitted that it had developed a nuclear 'option' but did not release any information about the extent of its nuclear weapons program. In 2003, following its announcement of withdrawal from the NPT, North Korea announced that it was also developing a nuclear weapons programme.

The disarmament obligation affirmed by the ICJ in 1996 did not specify that it was applicable only to States parties to the NPT. Judge Bedjaoui, President of the ICJ, in his appended declaration, noted that the disarmament obligation has acquired a customary character. It thus applies to all States regardless of whether or not they are parties to the NPT.

If Article VI has achieved the status of customary law, perhaps Article II has as well, in which case the acquisition of nuclear weapons by non-NWS would be prohibited regardless of whether or not they are party to the NPT. The ICJ could thus be asked to determine the legality of the development and acquisition of nuclear weapons by Israel, Pakistan, India and North Korea.

There is considerable evidence that there has developed a customary norm against the proliferation of nuclear weapons, including United Nations General Assembly resolutions²³ and Security Council resolutions²⁴ and the fact that the NPT itself does not entertain the possibility of any additional nuclear weapon States.²⁵

²³ See, for example, UNGA RES/60/65, *Renewed Determination towards the Total Elimination of Nuclear Weapons*, which affirms the desirability for the NPT to be universal.

<http://www.reachingcriticalwill.org/political/1com/1com05/res/L.28reissued.pdf>

²⁴ See, for example, UNSC Res 1172 regarding the nuclear tests by India and Pakistan and UNSC Res 1540 regarding measures to prevent the proliferation of nuclear, chemical and biological weapons.

²⁵ Article IX (3) of the NPT states that "For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967." Thus any

On the other hand, while the Nuclear Weapon States continue to claim a right to possess nuclear weapons, it seems contrary to the principle of non-discrimination under international law for other States to be prohibited from claiming the same right. If the NWS were implementing their Article VI obligations, there might be a stronger argument for the universality of Article II. But in the current situation it would seem difficult to sustain, and for that reason this question is not included in the list being proposed for the ICJ to consider.

- *Nuclear testing*

The Comprehensive Test Ban Treaty has been signed by 176 States but has not yet entered into force as some of the States which are required to ratify²⁶ refuse to do so. The U.S., while stating it has no current intention to test, keeps its nuclear test site open and maintains the capability to test within six months should they so decide. There are other States, including North Korea, which have not ruled out the possibility of testing at some point.

The ICJ could be asked to affirm that there is now a customary norm against nuclear testing, rendering the prohibition against nuclear testing applicable to all States regardless of whether or not they are Parties to the CTBT. Such an affirmation would place additional legal and political pressure on States not to test.

India, in its written statement to the ICJ in the 1996 Advisory Opinion, argued that if the threat or use of nuclear weapons was illegal, so too would be the testing of the weapons. There are other indications that there has now developed a customary norm against nuclear testing, including unopposed UN General Assembly resolutions²⁷ and NPT Review Conference agreements,²⁸ government declarations, extent of adherence to the CTBT and State practice.²⁹

On the other hand, it would be difficult to substantiate India's assertion that if the threat or use of nuclear weapons is generally illegal, then the testing would also be. While testing might be perceived in certain circumstances as a threat to use nuclear weapons,³⁰ in most circumstances it would merely be seen as part of nuclear weapons' design and development – actions which were not deemed illegal by the ICJ in 1996. In addition, the fact that some countries were testing up until they joined the CTBT³¹ and others were testing up until the CTBT negotiations began³² supports the contrasting argument that nuclear testing is prohibited by treaty – not by customary law. Finally, it would be difficult to apply the laws of war – the principle body of law referred to in the 1996 ICJ case – to nuclear testing as testing is not a use in wartime.

For these reasons, this paper makes no recommendation on whether or not the testing of nuclear weapons should be included in the questions to the Court.

State which had not tested a nuclear weapon prior to this date, has to join as a non-NWS and accept the obligations required of non-NWS not to possess or acquire nuclear weapons.

²⁶ For the CTBT to enter into force it must be ratified by 44 States which are listed in Annex II of the treaty and which possess either nuclear power or research reactors.

²⁷ See, for example, UNGA Res 55/41, Comprehensive Test Ban Treaty, adopted 20 November 2000

²⁸ The practical steps for disarmament agreed at the 2000 NPT Review Conference by all States Parties included a call for 'the early entry into force of the Comprehensive Test Ban Treaty' and 'a moratorium on nuclear weapon test explosions or any other nuclear explosions pending entry into force of that Treaty.'

²⁹ There have been no nuclear tests since 1996, the year the CTBT was concluded and opened for signature.

³⁰ The US nuclear tests during the Cuban Missile Crisis, for example, were perceived by the USSR as an indication of the US preparations to use nuclear weapons against them.

³¹ France and China.

³² U.S., U.K. and Russia.

- *Nuclear energy assistance to States not party to the NPT*

States parties to the NPT are required to accept safeguards arrangements on their nuclear energy facilities in order to detect and prevent diversion of fissile materials to potentially develop a nuclear weapons capability. States not parties to the NPT are not required to do so. Thus, nuclear energy assistance to States not Parties to the NPT³³ has the potential to be used by the recipient State to assist nuclear weapons programmes. Such assistance might therefore be prohibited under Article I of the NPT.

There are however difficulties in proving that a particular instance of nuclear energy assistance would in fact assist a recipient country's nuclear energy program. The fact-finding burden placed on the Court in such a case might be insurmountable – especially as the nuclear facilities in question would most likely be military facilities and thus not subject to inspection. In addition, a decision from the Court would not in reality have much impact on the threat of nuclear weapons. It might lead to some additional restrictions on energy assistance, but in most cases this would not prevent the State concerned from developing nuclear weapons – it might just slow down the development slightly.

For these reason the legality of nuclear energy assistance to States not party to the NPT is not an issue that is being suggested for question to the ICJ in this case.

- *Policies of threat or use of nuclear weapons*

The nuclear weapon States, their allies and the other States possessing nuclear weapons have not indicated that any changes to nuclear doctrines are necessary or have been made in response to the ICJ decision. On the contrary, with the possible exception of India³⁴, they have indicated that their ongoing policies are consistent with the international law affirmed by the ICJ.³⁵ This opinion is not shared by other countries, legal scholars or other observers.³⁶

³³ Such as the recent agreement on nuclear assistance between the USA and India.

³⁴ Jaswant Singh, former foreign minister of India, when asked if India's nuclear weapons tests and possession of nuclear weapons was in violation of the ICJ opinion, did not reply that India's policies were legal, but rather that too much attention was placed on the nuclear activities of the non-NPT States and not enough on the obligations of the States parties to the NPT that possessed nuclear weapons.

³⁵ The UK government, for example, responded to the ICJ Advisory Opinion by stating that:

The ICJ opinion does not require a change in the United Kingdom's entirely defensive deterrence policy. We would only ever consider the use of nuclear weapons in the extreme circumstance of self-defence which includes the defence of our NATO allies (Hansard, HL Debates, 26 January 1998, Cols 7-8).

The United States notes that: *The LOAC (Law of Armed Conflict) does not prohibit nuclear weapons use in armed conflict although they are unique from conventional and even other WMD in the scope of their destructive potential and long-term effects.* Doctrine for Joint Nuclear Operations, Joint Chiefs of Staff, 15 March 2005 page I-10

John McNeill, who represented the US at the ICJ Oral Hearings as Senior Deputy General Counsel at the United States Department of Defense, notes that the US is generally in agreement with the ICJ's conclusions including the one on the general illegality of the threat or use of nuclear weapons:

If, in the first part of this advice, what the Court means by "generally" is that in most circumstances the use of nuclear weapons would be unlawful, that is consistent with the views of the United States and other States. Given the tremendous destructive force of nuclear weapons, their use — consistent with the principles of proportionality, distinction, and prevention of unnecessary suffering — would be limited.

McNeill also notes that the US agrees with the disarmament obligation, but adds the caveat that *"the enormity and complexity of the task of concluding negotiations is daunting. This fact must be fully appreciated."*

The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases - A first appraisal, John McNeil, International Review of the Red Cross, 1997, no 316.

<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList159/177FA9E94321B0DFC1256B66005A6346>

³⁶ For a comprehensive bibliography of articles and books on the ICJ 1996 advisory opinion and its implications for nuclear policies see *Bibliography of Articles, Books, and Papers concerning the World Court Opinion on Nuclear Weapons*, <http://www.lcnp.org/pubs/biblio.htm>

The ICJ concluded that the threat or use of nuclear weapons is generally illegal. The only situation where the Court did not determine absolute illegality is the extreme circumstance where the very survival of a State is at stake. In addition, the Court affirmed that any threat or use of nuclear weapons should comply with the requirements of international law applicable in armed conflict and with Articles 2 (4) and 51 of the UN Charter.

These laws prohibit the threat or use of weapons unless an armed attack has occurred against a State and the Security Council has not taken measures to deal with this attack. They also prohibit the use of weapons that would:

- a) Cause unnecessary suffering
- b) Fail to discriminate between legitimate targets (military targets) and illegitimate targets (civilians and civilian objects)
- c) Violate neutral territory
- d) Be disproportionate to the precedent attack
- e) Cause long-term and serious damage to the environment
- f) Use poisonous gases or analogous substances

Finally, the Court established an unconditional obligation to negotiate for the elimination of nuclear weapons regardless of any other threats to the survival of a State or States.

Taken together, these conclusions along with the body of the ICJ advisory opinion indicate that the following policies and practices would arguably be illegal:

- First-use of nuclear weapons
- Use of nuclear weapons against non-nuclear weapon States
- Deployment of nuclear weapons on high alert (readiness to use) during peacetime
- Threat or use of nuclear weapons in a variety of situations beyond the threat to the very survival of a State, including the threat or use in response to a threat from chemical, biological or conventional weapons
- Counter-value targeting and use of nuclear weapons as weapons of mass destruction
- Threat or use of specific nuclear weapons the destructive force of which would make their use in any circumstance incompatible with the humanitarian laws of warfare
- Threat or use of nuclear weapons pre-emptively in response to the development or suspected development of chemical, biological or nuclear weapons

However, before examining these specific policies and practices, we must consider more closely the Court's conclusion that the threat or use of nuclear weapons **should** comply with the requirements of international law applicable in armed conflict and with Articles 2 (4) and 51 of the UN Charter.

There is some doubt as to whether the Court's use of the term '*should*' means that the threat or use of nuclear weapons **must** comply with the requirements of international law applicable in armed conflict in all circumstances, or alternatively whether the Court meant that the threat or use of nuclear weapons should comply with the requirements of international law applicable in armed conflict except in extenuating circumstances – such as the extreme circumstance when the very survival of a State is at stake. Judge Higgins, in her dissenting opinion, expressed concern that the Court was not clear on this matter.³⁷

³⁷ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 1996, Dissenting Opinion of Judge Higgins,

One can look for guidance from within the Court's decision (the full text) rather than just from the dispositif (the conclusion). The Court affirms in the decision that:

In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons. The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.³⁸

The Court also noted that the NWS themselves accepted that the threat or use of nuclear weapons must comply with international humanitarian law. It noted, for example that:

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

"Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons" (Russian Federation, CR 95/29, p. 52);

"So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello" (United Kingdom, CR 95/34, p. 45); and

"The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons < just as it governs the use of conventional weapons" (United States of America, CR 95/34, p. 85.)

Thus, the ICJ's use of the term 'should' can be read as meaning 'must' and that any threat or use of nuclear weapons must comply with international humanitarian law.

With this understanding we can now move to examine specific policies and practices which would arguably not comply with the Court's decision.

i. Policies for the first-use of nuclear weapons

The first-use, or threat of first-use, of nuclear weapons could be considered in three general situations: a) to deter or respond to an attack from conventional weapons, b) to pre-empt and protect against an impending attack from nuclear weapons, or c) to prevent the development or acquisition of nuclear, chemical or biological weapons.

a) to deter or respond to an attack by conventional weapons

During the Cold War the United States, United Kingdom and France refused to rule out the first-use of nuclear weapons claiming that the USSR had superior conventional forces, that the threat of first-use of nuclear weapons acted to deter a conventional attack, and that the first-use of nuclear

³⁸ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 1996, paragraphs 85 and 86.

weapons might be required to counter a conventional attack if deterrence failed.³⁹ The USSR and China maintained policies of no-first-use of nuclear weapons.

After the end of the Cold War, the US, UK and France maintained their first-use policies. The USSR abandoned its no-first-use policy.⁴⁰ India⁴¹ joined China⁴² in adopting no-first-use doctrines, while Pakistan appears to maintain a first-use option based on their concerns about India's superior conventional forces.⁴³

The ICJ noted that nuclear weapons have unique characteristics including their destructive capacity, their capacity to cause untold human suffering, their ability to cause damage to generations to come, their potential to destroy all civilisation and the entire ecosystem, and the fact that the destructive power of nuclear weapons cannot be contained in either space or time.

Given their uniquely destructive nature, the use of nuclear weapons in response to an aggressive act using **any** other weapons would arguably be disproportionate to the initial aggressive act, and thus illegal. This interpretation is supported by the fact that the ICJ, while affirming a State's right to self defence, established an unconditional obligation to eliminate nuclear weapons regardless of threats from any other weapons systems. If the Court envisaged the threat or use of nuclear weapons as a legitimate response to the threat from conventional forces, it would have conditioned this obligation on progress towards reducing or eliminating the threat of conventional attacks. Thus, there is a strong case that the first-use or threat of first-use of nuclear weapons to deter or respond to a conventional attack would be illegal.

b) to pre-empt and protect against an impending attack from nuclear weapons

The first-use of nuclear weapons to pre-empt and protect against an impending attack from nuclear weapons might possibly hold some legitimacy if: a) the impending attack threatened the survival of the very State concerned, b) there was no alternative to the threat or use of nuclear weapons to prevent such an attack, and c) the preventive use of nuclear weapons involved the use of weapons in such a way that their effects would not violate the humanitarian laws of warfare.

On the other hand, the Court would no doubt be aware of the serious risks in affirming legitimacy on the preventive use of force, especially in the case of nuclear weapons. If the preventive use of force is legitimate for one side in a conflict of two nuclear powers, for example, it would thus also be legitimate for the other. This would raise the stakes considerably, making both sides more likely to suspect that the other side will make a first strike, (which the other side could claim as being a legitimate act of prevention), and thus undertake a preventive nuclear strike themselves.

³⁹ See Doctrine for Joint Nuclear Operations, p 1-7

⁴⁰ Russian nuclear doctrine now holds that:

The Russian Federation reserves the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it and (or) its allies, as well as in response to large-scale aggression using conventional weapons in situations critical to the national security of the Russian Federation.

See Text of the Military Doctrine of the Russian Federation, approved by a presidential decree dated 21st April 2000. <http://dcr.csusb.edu/nss/2000mildoc.htm>

⁴¹ See Draft Report of National Security Advisory Board on Indian Nuclear Doctrine, August 17, 1999, <http://www.fas.org/nuke/guide/india/doctrine/990817-indnucl.d.htm#pr>

⁴² See **White Paper on China's National Defense in 2002** issued by the Peoples' Republic of China Information Office of State Council on 9 December, 2002. <http://www.fas.org/nuke/guide/china/doctrine/natdef2002.html>

⁴³ See Pakistan Nuclear Weapons: A Brief History of Pakistan's Nuclear Program, <http://www.fas.org/nuke/guide/pakistan/nuke/index.html>

The Court would most likely also be made aware of the facts that in most situations a first-use of nuclear weapons would in any case not be able to prevent the planned use of nuclear weapons against a State. If such use was being planned by another nuclear weapon State, it would most likely be delivered by one or more of many deployed missiles which would be difficult if not impossible to neutralise prior to their launching. If the nuclear attack was planned by a sub-national group, it would be delivered by delivery system of unknown type or location leaving no target for a preventive strike.

There is thus a strong likelihood that, faced with such potential scenarios, the Court would take a cautionary and much more common sense approach in affirming a prohibition on the preventive use of nuclear weapons.

c) to prevent the development or acquisition of nuclear, chemical or biological weapons.

This point is considered in detail below (pages 25-26).

ii. Policies for the use of nuclear weapons against non-nuclear weapon States

The Nuclear Weapon States have given undertakings not to use nuclear weapons against States Parties to the Non-Proliferation Treaty⁴⁴ and States Parties to the regional nuclear weapons free zones⁴⁵ (otherwise known as Negative Security Assurances). However, some of the NWS have made reservations to these undertakings in order to reserve the right to use nuclear weapons against non-NWS that are in alliance with other NWS. In addition, doctrinal developments of the US, France⁴⁶ and the UK indicate that they are now considering options to threaten or use nuclear weapons against non-NWS that might not necessarily be in alliance with another NWS.

The US for example, indicated in 2001 that it has nuclear targeting policies with respect to specific States including North Korea, Iraq, Iran, Syria, and Libya, all of which, with the exception of North Korea, remain in the NPT and are not allied to a NWS.⁴⁷ These policies seem to contradict the

⁴⁴ See [Security Council resolution 984 \(1995\)](#) on security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

⁴⁵ See: Additional Protocol II, Article 3 of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean,

Protocol II, Article 1 of the South Pacific Nuclear Free Zone Treaty,
Protocol I, Article 1 of the African Nuclear-Weapon-Free Zone Treaty
Protocol I, Article 2 of the Treaty on the Southeast Asia Nuclear Weapon-Free Zone
Texts of treaties available at <http://www.opanal.org/NWFZ/NWFZ's.htm>

⁴⁶ French President Chirac, in a speech at the nuclear headquarters of the Strategic Air and Maritime Forces in Brittany on January 19, 2006 indicated that France would be prepared to use nuclear weapons against non-NWS engaged in supporting terrorism:

“[T]he 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. This response could be a conventional one. It could also be of a different kind.”

See Chirac Outlines Expanded Nuclear Doctrine, Oliver Meir, Arms Control Today, March 2006
http://www.armscontrol.org/act/2006_03/MARCH-chirac.asp

⁴⁷ The 2001 Nuclear Posture Review considered nuclear targeting contingencies:

In setting requirements for nuclear strike capabilities, distinctions can be made among the contingencies for which the United States must be prepared. Contingencies can be categorized as immediate, potential or unexpected...North Korea, Iraq, Iran, Syria, and Libya are among the countries that could be involved in immediate, potential, or unexpected contingencies. All have longstanding hostility toward the United States and its security partners; North Korea and Iraq in particular have been chronic military concerns. All sponsor or harbor terrorists, and all have active WMD and missile programs.

Nuclear Posture Review, Submitted to Congress on 31 December 2001.

<http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm>

security assurances given to States parties to the NPT and NWFZs. As such, the majority of non-NWS have been calling for the NWS to subscribe to binding NSAs. An affirmation by the ICJ of the legally binding nature of NSAs could assist in moving the NWS to accept that they are bound by such assurances.

Bunn argues that the NSAs are already legally binding, even though such status is not recognised by the NWS.⁴⁸ The NSA's granted to States Parties of the NWFZs are codified in protocols to the treaties, such protocols being signed, and mostly ratified, by the NWS.⁴⁹ As an integral part of the treaties, these provisions would thus be binding on signatories. However, as treaty obligations they are restricted to what the NWS agree under the treaty. This means that the reservations made by the NWS would generally be valid, and thus the NWS would not be bound to extend NSAs to States parties to the NWFZs that are in alliance with other NWS.

The NSA's granted to States Parties to the NPT could also be argued to be binding. While they are not part of the NPT itself, they have been acknowledged by the Security Council.⁵⁰

However, the Security Council is somewhat ambiguous about the legal status of such assurances. While it notes "*the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive security assurances,*" it appears to afford a greater right to Positive Security Assurances⁵¹ than NSA's. The Security Council merely "*Takes note with appreciation*" the statements of the NWS granting NSAs. With regard to PSA's the Security Council "*Recognizes the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used.*"

A further argument to support the position that NSAs are legally binding comes from the ICJ 1996 Advisory Opinion. It has been argued above that the first-use of nuclear weapons would be illegal, with the only possible exception being a first-use to prevent a nuclear strike which would destroy a State. As such a nuclear strike could not be undertaken by a non-NWS, it would hold that any use of nuclear weapons against them would be a first-use of nuclear weapons.

There is thus a strong case to request the Court to affirm the illegality of the use of nuclear weapons against any non-NWS, including those that are States Parties to the NWFZs and the NPT.

iii. Deployment of nuclear weapons during peacetime on alert status or under a policy of launch-on-warning

The US and Russia continue to deploy approximately 4000 nuclear weapons on a high level of readiness for use⁵² and on launch-on-warning (LOW) operational procedures.⁵³ Such policy and practice constitute a real and immediate threat to use nuclear weapons. Despite calls for reducing

⁴⁸ *The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States*, George Bunn, *The Non-Proliferation Review*, Spring-Summer 1997. <http://cns.miis.edu/pubs/npr/vol04/43/bunn43.pdf>

⁴⁹ The U.S., U.K. and France have not yet ratified the protocols to the South East Asia NWFZ Treaty.

⁵⁰ [Security Council resolution 984 \(1995\)](#) on security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

⁵¹ Positive Security Assurances refer to assurances that States and the United Nations will come to the aid of a country that is subject to an act of aggression using nuclear weapons.

⁵² Such weapons are primed and ready for launching the moment a launch command is given.

⁵³ Launch-on-warning procedures enable the launch of a retaliatory nuclear strike if a nuclear armed missile is headed toward a State but before the missile strikes.

the operational readiness of nuclear weapons (de-alert), the US and Russia maintain that high alert status⁵⁴ and LOW are necessary.

The US argues that a high level of readiness to use nuclear force acts as a deterrent to potential aggressor States. However, they also argue that during times when an adversary is preparing for war, visibly increasing the readiness to use nuclear force acts as a warning to the adversary and assists deterrence.⁵⁵ If this is true, then during peacetime a lower level of readiness to use should be maintained in order that there are additional steps of readiness to progress to without having to move to actual use. Maintaining a high level of use leaves no such room for manoeuvre.⁵⁶ The policy makes the potential use of nuclear weapons by miscalculation that much more likely. While no-one may want nuclear war, military decision makers may launch an attack first if they know the other side has weapons on alert and is considering an attack themselves. This is particularly true if they believe that their nuclear forces could disable the nuclear forces of the adversary before the adversary had the opportunity to launch

The ICJ affirmed that the threat or use of nuclear weapons must comply with the requirements of international law applicable in armed conflict and with Articles 2 (4) and 51 of the UN Charter. These laws prohibit the threat or use of weapons unless an armed attack has occurred against a State and until the Security Council has taken measures to deal with this attack.

The deployment of nuclear weapons on delivery vehicles ready to be used within minutes or hours, at a time when there has been no attack or imminent threat of attack, thus constitutes an illegal threat of use of such weapons.⁵⁷

The US and Russia claim that LOW is necessary in order to protect against the possibility of a first strike by the other side which might destroy the bulk of their nuclear forces thus leaving them defenceless and unable to retaliate. During wartime launch-on-warning could possibly be justified in response to a threat of imminent nuclear attack as long as the response is designed not as retaliation but in order to prevent further attack, and is consistent with other principles of international humanitarian law previously discussed.

⁵⁴ “De-alerting undermines a basic principle of deterrence; namely the ability to retaliate promptly so as to prevent any aggressor from assuming it can achieve a *fait accompli*.”

US Nuclear Policy in the 21st Century, National Defense Council and Lawrence Livermore National Laboratory Experts Group, 1998

⁵⁵ The US Doctrine for Joint Nuclear Operations notes that:

Increased readiness levels help deter aggression. Consequently, an increased risk of attack, prompted by adversary war readiness measures, may require US forces to maintain visibly increased states of alert. Delivery system postures can send a clear warning. Nuclear-capable bombers and submarines deploying to dispersal locations can send a forceful message that demonstrates the national will to use nuclear weapons, and increase their survivability.

Doctrine for Joint Nuclear Operations, pages I-12 – I-13

⁵⁶ Robert McNamara, former US Secretary of Defense, has noted that the high alert status has left the NWS vulnerable to nuclear war by accident or miscalculation. “During the Cuban Missile Crisis we had thirteen days to muddle our way and avert nuclear war. Today we would only have thirteen minutes.” Presentation to the US Congress following a screening of “Thirteen Days.” 1 March 2001. See GSI Hosts *Thirteen Days* in Washington, D.C.

<http://www.gsinstitute.org/archives/000074.shtml#000074>

⁵⁷ C.G. Weeramantry, former Vice-President of the ICJ, has noted (with regard to naval nuclear weapons) that:

Assuming that nuclear weapons are deployed on naval vessels on alert status, they constitute a threat of use. The ICJ’s opinion was that the threat or use of nuclear weapons would be generally contrary to international law, and in particular the humanitarian laws of warfare. The only situation in which the ICJ was inconclusive on absolute illegality was the extreme circumstance of self-defence when the very survival of a State is at stake. Considering the conclusion of general illegality, the burden of proof that a specific situation of threat or use is not proscribed by this rests on the threatening or using state. There is no proof offered by the deploying states that there is currently a threat to the very survival of a state which would require a threat or use of nuclear weapons.

Illegality of deployment of nuclear weapons within Nuclear Weapon Free Zones: Principles placed before the New Zealand Select Committee on Foreign Affairs, Defence and Trade by Judge C.G. Weeramantry, August 2003

During peacetime however, launch-on-warning makes nuclear weapons use by accident or intent much more likely. The policy leaves little time to check accuracy of information regarding possible nuclear attacks before a retaliatory launch is authorised. A nuclear war could be started accidentally by faulty information of an incoming attack triggering a launch-on-warning response.⁵⁸ It also establishes a response procedure that might not be appropriate.⁵⁹ Finally, launch-on-warning and maintaining nuclear forces on high alert status constitute a highly confrontational posture which jeopardises efforts to reduce political tensions between countries, to solve longstanding conflicts and to move towards disarmament and cooperative threat reduction.

Philips and Starr have proposed that the US and Russia could rescind LOW and adopt instead a policy of RELOAD (Retaliatory Launch Only After Detonation). They argue that “Such a policy ‘is compatible with the current posture of nuclear deterrence, and that the military on both sides would be glad to accept it in order to reduce the risk inherent in LoW.’”⁶⁰

An affirmation from the ICJ of the illegality of the deployment of nuclear weapons during peacetime on alert status or under a policy of launch-on-warning, would place considerable legal and political pressure on the US and Russia to reduce the operational level of readiness to use nuclear weapons and relinquish launch-on-warning policies. It would also give legal and political weight to those States attempting to prevent the transit through their waters of warships armed with nuclear weapons on alert status.⁶¹

iv. Policies for the threat or use of nuclear weapons in a variety of situations beyond the threat to the very survival of a State, including the threat or use in response to a threat from chemical, biological or conventional weapons

As noted above the NWS, particularly France,⁶² Russia,⁶³ the UK⁶⁴ and the US⁶⁵, have policies to threaten or use nuclear weapons in a variety of circumstances.

⁵⁸ In January 1995, Russian early warning systems detected a missile heading towards Moscow. Russian leaders were alerted that it may be a nuclear tipped submarine launched nuclear missile. The “nuclear suitcase” which is used to give commands for a retaliatory strike, was “opened” in preparation for activation. It took eight minutes to conclude that the missile was not a nuclear missile – less than four minutes before the deadline for ordering a nuclear response. *Taking Nuclear Weapons off Hair-Trigger Alert*, *Scientific American*, 1998.

⁵⁹ If there is an actual nuclear attack, it could be one of a range of scenarios including a mistaken launch, a stolen nuclear weapon fired by a non-State group, a limited demonstration attack, or a massive attack. Launch-on-warning provides very little time to determine the exact nature of the attack, whether a nuclear response is the most appropriate, or what scale of response would be appropriate. Military strategy often assumes a worst-case scenario in order to provide maximum protection for ones-self. The assumption of a worst-case scenario in a nuclear strike could lead to a full-scale response which could be out of all proportion to the actual attack.

⁶⁰ Alan Philips and Steve Starr, *Change Launch on Warning Policy*, 5 April 2006, [Arms Control Russia](http://www.armscontrol.ru/pubs/en/change-low.pdf), <http://www.armscontrol.ru/pubs/en/change-low.pdf>

⁶¹ The South East Asian Nuclear Weapon Free Zone, for example, includes a protocol under which the NWS would agree not to use or threaten to use nuclear weapons within the Zone. The US, France and the UK have requested changes to the treaty to enable them to transit their nuclear armed warships through the zone. An ICJ affirmation of the illegality of the deployment of nuclear weapons on alert status would support the existing provisions and place legal and political pressure on the NWS to adhere to them.

⁶² French President Jacques Chirac Jan. 19 outlined the circumstances under which France might be prepared to use nuclear weapons. This includes to “defend the country’s vital interests.” Chirac clarified that ‘vital interests’ includes traditional concerns such as the protection of territory and population as well as “strategic supplies and the defense of allied countries.” Even threats or blackmail against these interests could stimulate a nuclear response according to Chirac. See Chirac Outlines Expanded Nuclear Doctrine, Oliver Meir, *Arms Control Today*, March 2006 http://www.armscontrol.org/act/2006_03/MARCH-chirac.asp

⁶³ “The Russian Federation retains for itself the right to use nuclear weapons in response to the use of nuclear and other kinds of weapons of mass destruction against it and its allies, and in response to wide-scale aggression using conventional weapons in situations critical to the national security of the Russian Federation and its allies.” Russian Military Doctrine, October 1999. <http://fas.org/nuke/guide/russia/doctrine/991009-draft-doctrine.htm>

The ICJ affirmed the general illegality of the threat or use of nuclear weapons with the only situation of uncertainty regarding the legality being the extreme circumstance of self-defence, in which the very survival of a State would be at stake. Thus, any policy contemplating the threat or use of nuclear weapons in situations except when the very survival of a State is at stake, would be illegal.

This includes policies considering the threat or use of nuclear weapons in response to threats from chemical, biological or conventional weapons, or for use against specific conventional targets such as underground bunkers. Such uses would constitute a first-use of nuclear weapons which, as argued above, would be illegal (see *Policies for the first-use of nuclear weapons*, above).

This also includes policies of a State to threaten or use nuclear weapons in response to the threat or use of nuclear weapons against it.⁶⁶ The ICJ did not affirm that States had a legal right to threaten or use nuclear weapons if nuclear weapons were used against it – only that the State might have a legal right to threaten or use nuclear weapons in self defence when the very survival of a State is at stake. Thus policies to threaten or use nuclear weapons when the very survival of the State is not at stake would be illegal, regardless of whether or not an act of aggression using nuclear weapons had occurred.

In addition, the ICJ affirmed that any threat or use of nuclear weapons should comply with international law applicable in armed conflict including the humanitarian laws of warfare, regardless of circumstances. Even in the extreme circumstance situation, any threat or use of nuclear weapons would still have to comply with international humanitarian law. The fact that the aggressor might have conducted an illegal act – e.g. the first use of nuclear weapons, or the use of nuclear weapons in violation of the humanitarian laws of warfare – does not relieve the afflicted State of obligations to comply with the humanitarian laws of warfare.

v. Counter-value targeting (i.e. targeting of cities or State infrastructure) and use as weapons of mass retaliation

Whilst precise targeting plans are generally classified, it has been acknowledged by the NWS that deterrence requires some degree of counter-value targeting, i.e. the targeting of State infrastructure that could contribute to the military effort⁶⁷ and possibly the use of nuclear weapons as weapons of mass destruction against cities.⁶⁸

⁶⁴ The UK Government in 2001 signalled that the use of nuclear weapons to deter chemical or biological threats could not be ruled out. In addition to a strategic role (to deter nuclear weapons) the U.K.'s Trident nuclear submarine system is also allocated with a 'sub-strategic' role linked with deterrence of, or response, to chemical and biological threats.

See Secrecy and Dependence: The UK Trident System in the 21st Century, By Nicola Butler and Mark Bromley, BASIC Research Reports, November 2001. <http://www.basicint.org/pubs/Research/2001UKtrident1.htm#Executive>

⁶⁵ US doctrine ascribes a wide role to nuclear weapons relating not merely to the defence of US and protection of the very survival of the state. The US Doctrine for Joint Nuclear Operations notes that: "*The focus of US deterrence efforts is therefore to influence potential adversaries to withhold actions intended to harm US' national interests.*"

The 2002 Nuclear Posture Review holds that: "*Nuclear weapons play a critical role in the defense capabilities of the United States, its allies and friends. They provide credible military options to deter a wide range of threats, including WMD and large-scale conventional military force. These nuclear capabilities possess unique properties that give the United States options to hold at risk classes of targets [that are] important to achieve strategic and political objectives.*"

<http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm>

⁶⁶ US Doctrine for Joint Nuclear Operations holds that: "If deterrence fails, the US objective is to repel or defeat a military attack and terminate the conflict on terms favorable to the United States and its allies..."

⁶⁷ The 1993 US Doctrine for Joint Nuclear Operations notes that:

Countervalue targeting strategy directs the destruction or neutralization of selected enemy military and military-related activities, such as industries, resources, and/ or institutions that contribute to the enemy's ability to wage war. In general, weapons required to implement this strategy need not be as numerous or accurate as those required to implement a counterforce targeting strategy, because countervalue targets generally tend to be softer and unprotected in relation to counterforce targets.

Even in the extreme circumstance of a threat to the very survival of a State, the Court affirmed that restrictions of international humanitarian law apply. Thus any policies to use nuclear weapons against cities or State infrastructure would be illegal, regardless of the provocation, as this would be targeting protected persons and sites. Indeed, the targeting of military facilities within cities would also be illegal as the proximity of protected persons and sites would make it impossible to not also adversely affect them, thus violating the prohibition against using weapons and methods of warfare in which it is impossible to distinguish between military targets and protected persons and sites.

Similarly the use of nuclear weapons as weapons of mass retaliation would be illegal regardless of whether the weapons are used against military targets or support infrastructure. Due to the inability of nuclear weapons use to be contained in time or space,⁶⁹ such a use of nuclear weapons would have an indiscriminate impact on protected persons and sites regardless of where the targets were.

One difficulty with asking the court to consider the legality of counter-value targeting is that an affirmation of it as illegal could lead to the perception that counter-force targeting, by omission, would be legal. However, while counter-force targeting would not specifically entail use of nuclear weapons as weapons of mass retaliation, in most circumstances the military requirements of destroying multiple targets, many hardened and/or underground,⁷⁰ would render counter-force use of nuclear weapons incompatible with the humanitarian laws of warfare (see next section).

vi. Threat or use of specific nuclear weapons [or targeting strategies] the destructive force of which would make their use in any circumstance incompatible with the humanitarian laws of warfare

In the extreme circumstance of a threat to the very survival of a State, even the targeting of military personnel and sites is constrained by the collateral effects of the weapons. The Court held out the possibility that nuclear weapons might be developed which would have minimal collateral effects thus making specific targeting with such small nuclear weapons legal. However, the Court found no evidence that such small, precisely target-able nuclear weapons currently existed, or that any of the current nuclear weapons could be used in such a legal manner.⁷¹

http://fas.org/nuke/guide/usa/doctrine/dod/jp3_12.htm

⁶⁸ The 1993 US Doctrine for Joint Nuclear Operations notes that:

Deterrence in the form of a large- scale attack (either WMD or conventional) requires that US forces and command and control (C2) systems be viewed by enemy leadership as capable of inflicting such damage upon their military forces and means of support, or upon their country, as to effectively deny them the military option.

⁶⁹ The ICJ in its 1996 opinion noted that:

"In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons...The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet...The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations... it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come." ICJ 1996 Advisory Opinion, paragraphs 35 and 36.

⁷⁰ The US 1993 Doctrine for Joint Nuclear Operations notes that:

Counterforce targeting is a strategy to employ forces to destroy, or render impotent, military capabilities of an enemy force.

⁷¹ "The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view."

In the ICJ hearings, the Mayors of Hiroshima and Nagasaki gave testimony on the effects of nuclear weapons equalling 12-15 kilotons of TNT.⁷² Such use had been determined as illegal by the Tokyo District Court in 1963.⁷³ The nuclear weapons currently deployed by the NWS are mostly 10 – 50 times the explosive force of the weapons used against Hiroshima and Nagasaki.⁷⁴ While the effects might be moderated somewhat if a nuclear weapon was used on a military target some distance from a city, the testimony from the Marshall Islands regarding the health and environmental effects of nuclear test explosions conducted in controlled conditions hundreds of miles from inhabited areas demonstrated that nuclear weapons, as currently designed, cannot be used without such impact.⁷⁵

With regard to the possible development of small, precisely target-able nuclear weapons for use in the extreme circumstance when the very survival of a State is at stake, we should consider how such weapons would be used to ensure the survival of the State in question. The most likely scenario would be a threat to the State from the nuclear arsenal of another state. In order to use nuclear weapons to prevent such a threat occurring, the threatened state would need to eliminate most of the nuclear weapons systems of the threatening State. The US itself has acknowledged that this would require a large number of nuclear weapons with a high explosive potential.⁷⁶

A simulation of such a counter-force preventive attack against a NWS indicated that “*even with a counterforce strategy targeting only nuclear forces, millions of civilians still die.*” This was true even if the targets were considerable distances from population areas.⁷⁷ Thus, it is not surprising that the ICJ could find no evidence that nuclear weapons used to strike military targets could be used in a manner consistent with international humanitarian law, or that such use could be limited to the use of a small number of nuclear weapons.

There is a strong case therefore that any threat or use of nuclear weapons from the current arsenal, or at the very least the strategic arsenal, would be illegal regardless of the provocation, even if it were a counter-force use.

- *Lack of good faith in the pursuit of disarmament*

As noted above the ICJ concluded 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.

⁷² See Oral Statement of Japan to the ICJ, http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9527_19951107.PDF

⁷³ Shimoda and others v the State, Tokyo District Court, 1963. Reprinted in Jap. Annl. Int. Law, L212, 1964

⁷⁴ See Appendix IV: Nuclear Stockpiles for a list of nuclear weapons in the world's arsenals and their explosive force.

⁷⁵ See “Written Statement of the Marshall Islands to the ICJ for the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_28_MarshallIslands.pdf

And the Oral statement of the Marshall Islands to the ICJ, http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9532_19951114.PDF

⁷⁶ The US 1993 Doctrine for Joint Nuclear Operations notes that:

Typical counterforce targets include bomber bases, ballistic-missile submarine bases, ICBM silos, antiballistic and air defense installations, C2 centers, and WMD storage facilities. Generally, the nuclear forces required to implement a counterforce targeting strategy are larger and weapon systems more accurate, than the forces and weapons required to implement a countervalue strategy, because counter-force targets generally tend to be harder, more protected, difficult to find, and more mobile than countervalue targets

⁷⁷ A Do-it-yourself SIOP, By Bret Lortie, Bulletin of Atomic Scientists, July/August 2001.

http://www.thebulletin.org/article.php?art_ofn=ja01lortie_022

Following the court's decision there have been numerous attempts by non-nuclear weapon States to encourage the nuclear weapon States to commence and bring to a conclusion such negotiations. The most specific of these attempts is the response of the United Nations General Assembly, the body which requested the advisory opinion, which annually adopts a resolution calling on all States to implement the obligation affirmed by the ICJ through the commencement of negotiations leading to the conclusion of a nuclear weapons convention.⁷⁸

Other attempts include:

- a) Proposals for an ad hoc committee in the Conference on Disarmament to discuss nuclear disarmament⁷⁹
- b) A proposal at the 2000 and 2005 NPT Review Conferences for implementation of the ICJ advisory opinion by States parties to the NPT through the commencement of negotiations leading to a nuclear weapons convention, and to invite States not parties to the NPT to join such negotiations⁸⁰
- c) Additional United Nations General Assembly resolutions calling on the achievement of disarmament steps leading to the complete elimination of nuclear weapons⁸¹
- d) Appeals to the United Nations Security Council to address the obligation for nuclear disarmament along with Security Council actions on non-proliferation.⁸²

The States possessing nuclear weapons have accepted that they have an obligation to work for the elimination of nuclear weapons⁸³ and most have even agreed on some of the steps that would be required to make progress towards achieving this goal,⁸⁴ but they have refused to implement this obligation and have resisted, blocked or ignored all efforts by non-nuclear States and their own

⁷⁸ United Nations General Assembly resolutions 51/45 M of 10 December 1996, 52/38 O of 9 December 1997, 53/77 W of 4 December 1998, 54/54 Q of 1 December 1999, 55/33 X of 20 November 2000, 56/24 S of 29 November 2001, 57/85 of 22 November 2002 and 58/46 of 8 December 2003, 59/83 of 3 December 2004 and 60/76 of 8 December 2005.

⁷⁹ This proposal has been made in a number of United Nations Resolutions, including most recently in UNGA Res 59/75 *Accelerating the implementation of nuclear disarmament commitments*, UNGA Res 59/76 *A path to the total elimination of nuclear weapons*, and UNGA Res 59/77 *Nuclear disarmament*. It was also included in the final document agreed by all States at the 2000 NPT Review Conference.

⁸⁰ *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons: Legal, technical and political elements required for the establishment and maintenance of a nuclear weapon-free world*. Working Paper submitted by Malaysia, Costa Rica, Bolivia, Democratic Republic of Timor-Leste, Nicaragua, and Yemen. <http://www.reachingcriticalwill.org/legal/npt/RevCon05/wp/WP41.pdf>

⁸¹ Most recent examples include UNGA Resolution 60/56 *Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments*, UNGA Resolution 60/65 *Renewed Determination towards the Total Elimination of Nuclear Weapons*, UNGA Resolution 60/70 *Nuclear disarmament*, and UNGA Resolution 60/72 *Follow-up to nuclear disarmament obligations agreed in the 1995 and 2000 Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*.

⁸² The most recent example is UN Security Council Resolution 1540 *Non-proliferation of weapons of mass destruction*. The first draft of this included no mention of nuclear disarmament. However, a number of States argued that one could not prevent nuclear proliferation without progress being made on implementation of nuclear disarmament obligations. Thus the final text included:

Affirming its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability, and

Calls upon all States: (a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons;

This latter paragraph includes full implementation of the NPT including Article VI.

⁸³ The final document adopted by consensus at the 2000 NPT Review Conference included: "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." India and Pakistan have supported the UNGA resolutions noted above (note 75) which underline 'the unanimous conclusion of the ICJ 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.' Israel accepts the obligation to achieve nuclear disarmament but ties this to achieving peace in the Middle East.

⁸⁴ Practical steps for the implementation of Article VI of the NPT agreed at the 2000 NPT Review Conference.

citizens⁸⁵ to act on this obligation.⁸⁶ This is evidenced by their opposition to key UNGA resolutions,⁸⁷ their refusal to allow nuclear disarmament negotiations to commence in the Conference on Disarmament or in any other multilateral forum, the halt in the bilateral disarmament process between the US and Russia, and the refusal to enter into pluri-lateral negotiations (between all States possessing nuclear weapons). In addition the NWS have reaffirmed a key role for nuclear weapons in military policies for the indefinite future, broadened the role for nuclear weapons, continued programs for maintaining nuclear stockpiles indefinitely and for their modernisation, and undertaken research for the development of new types of nuclear weapons.⁸⁸

The NWS, and their allies, claim they are conforming to their disarmament obligations because they accept the ultimate goal of the elimination of nuclear weapons and have taken some nuclear disarmament steps. They claim that immediate negotiations for nuclear disarmament are not required because the ICJ gave no timeframe for conclusion of the disarmament negotiations. Thus a step-by-step approach is sufficient.⁸⁹

These claims would be difficult to sustain in Court for a number of reasons:

- a) the nuclear disarmament steps undertaken are minimal and do not reduce the reliance on nuclear weapons in security doctrines
- b) the lack of a specified time-frame for implementation of an obligation does not imply an indefinite and open-ended period for implementation
- c) the Court specifically said that the obligation was to commence negotiations on nuclear disarmament **in all its aspects**, not merely on the next disarmament step. The step-by-step process fails to do this.
- d) the Court also said that the obligation was not just to commence negotiations, but also to **bring them to a conclusion**, i.e. to achieve complete nuclear disarmament. The step-by-step process includes no plan by the nuclear weapon States to achieve nuclear disarmament – merely the acceptance of the next steps
- e) the NWS have even blocked the step-by-step process from moving forwards

In addition the NWS and some of their allies point to the immense difficulties in achieving nuclear disarmament including the development of adequate verification and compliance measures. These difficulties are used as another justification for lack of progress.

A number of reports and initiatives have challenged this claim including the Canberra Commission on the Elimination of Nuclear Weapons, the Model Nuclear Weapons Convention and the Weapons of Mass Destruction Commission.

The Canberra Commission concluded that “A nuclear weapon free world can be secured and maintained through political commitment, and anchored in an enduring and binding legal framework”.⁹⁰ The Model

⁸⁵ Over 2000 organisations, including many in the States possessing nuclear weapons, have joined the Abolition 2000 international network for the abolition of nuclear weapons. Public opinion polls in all the Nuclear Weapon States indicate majority support for the elimination of nuclear weapons. See People Worldwide want Nuclear Abolition http://www.abolition2000.org/atf/cf/{23F7F2AE-CC10-4D6F-9BF8-09CF86F1AB46}/poll_worldwide.pdf

⁸⁶ The possible exceptions are China, India and Pakistan, which have all supported the UN resolutions calling for negotiations leading to a nuclear weapons convention.

⁸⁷ In this they are often supported by some of their allies including NATO States, Japan and Australia.

⁸⁸ See Appendix V: Nuclear Doctrines

⁸⁹ See, for example, the United States statement to the 2005 NPT Review Conference, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/U.S.pdf>, Explanation of Vote by Japan on the UN resolution on follow-up to the ICJ advisory opinion <http://www.reachingcriticalwill.org/political/1com/1com04/EOV/L39Japan.html>, and Explanation of Vote by Belgium on the UN resolution on follow-up to the ICJ advisory opinion http://www.reachingcriticalwill.org/political/1com/1com02/res/EOV/belg_EOVL53.html

⁹⁰ Report of the Canberra Commission, 1996, www.dfat.gov.au/cc/cchome.html

Nuclear Weapons Convention explores the legal, technical and political elements that would constitute a verifiable and enforceable framework for a nuclear weapons free world.⁹¹ The Weapons of Mass Destruction Commission concluded that “A key challenge is to dispel the perception that outlawing nuclear weapons is a utopian goal. A nuclear disarmament treaty is achievable and can be reached through careful, sensible and practical measures. Benchmarks should be set; definitions agreed; timetables drawn up and agreed upon; and transparency requirements agreed.”⁹²

The ICJ could thus be requested to affirm that a) States, especially states possessing nuclear weapons, are not in compliance with the disarmament obligation, b) the steps taken by the NWS cannot be considered as evidence of good faith compliance, especially considering their continued reliance on nuclear weapons and their indefinite maintenance of nuclear arsenals, and c) the nuclear disarmament steps agreed at the 2000 NPT Review Conference and the UNGA resolutions on follow-up to the ICJ Advisory Opinion provide guidance as to what would be required for good faith compliance.

- *Use of force to prevent acquisition of nuclear weapons*

The most dramatic development affecting international law and nuclear doctrine has been the pre-emptive use of force, possibly nuclear force, in response to the proliferation of WMD. The United States and UK justified their use of force against Iraq in March 2003 on the basis of pre-emptive self-defence to prevent Iraq from using WMD and on the claim that the Security Council authorized the use of force to ensure compliance with resolutions requiring Iraq to eliminate its WMD.⁹³

The illegality of the pre-emptive use of force against Iraq, the damage this precedent could render to international law, and the prevention of future use of force was outlined in an International Appeal by Lawyers and Jurists against the Preventive Use of Force. This appeal was endorsed by over 300 legal experts from forty countries and was submitted to the United Nations by Judge Weeramantry, former Vice-President of the International Court of Justice (ICJ).⁹⁴

The appeal recognized that “[t]he development of WMD anywhere in the world is contrary to universal norms against the acquisition, possession and threat or use of such weapons and must be addressed” but argued that “the ‘preventive’ use of force currently being considered against Iraq is both illegal and unnecessary and should not be authorized by the United Nations or undertaken by any State.”

⁹¹ UN Document A/C.1/52/7. Also found in *Security and Survival: The Case for a Nuclear Weapons Convention*, Datan and Ware, IPPNW, Cambridge MA, 1999.

⁹² *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms*, Weapons of Mass Destruction Commission, Sweden, June 1, 2006. http://www.wmdcommission.org/files/Weapons_of_Terror.pdf, page 109.

⁹³ Draft resolution sent to the US Congress on Sept. 19, 2002 by President Bush to authorize military action against Iraq, at http://www.pnnd.org/iraq_bush-resolution.htm (last visited Dec. 18, 2003); Press Release, The White House, President Says Saddam Hussein Must Leave Iraq Within 48 Hours (Mar. 17, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (last visited Dec. 18, 2003); Press Release, U.S. Secretary of State Colin Powell Addresses the U.N. Security Council (Feb. 5, 2003), at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html> (last visited Dec. 18, 2003).

UK Attorney General’s Statement, March 17, 2003, cited in Rabinder Singh QC and Charlotte Kilroy, In the Matter of the Legality of the Use of Force Against Iraq and the Alleged Existence of Weapons of Mass Destruction, Opinion for Campaign for Nuclear Disarmament and Peacerights, June 6, 2003 (on file with Seattle Journal for Social Justice).

⁹⁴ Int’l Assoc. of Law. Against Nuclear Arms, International Appeal by Lawyers and Jurists Against the ‘Preventive’ Use of Force, available at http://www.pnnd.org/lawyers_appeal.htm (last visited Dec. 4, 2003); Mark Turner, *Conflict would be Deemed Illegal*, FINANCIAL TIMES (London), Feb. 14, 2003, at 7.

More recently it has been asserted that the use of nuclear weapons in such preventive strikes is also being considered.⁹⁵ The US Doctrine for Joint Nuclear Operations includes such use in its package of possible responses to WMD proliferation.⁹⁶

The US and UK doctrines of the preventive use of force to respond to the proliferation of WMD are not only illegal - they also are in direct contradiction to the policies of the US and UK (and other NWS) to indefinitely possess nuclear weapons. How can one claim a right to use force to prevent other countries from acquiring nuclear weapons while holding onto the very same weapons oneself? If these States are permitted such preventive-use-of-force policies, what is to prevent other countries asserting the same right to preventive attacks against the nuclear weapons programmes of the US and UK. In fact, it could be argued that the deployment of nuclear weapons by the NWS coupled with robust nuclear use policies constitutes a far greater threat of use of nuclear weapons than that from potential proliferators.

At the very least, the development of such preventive use of force doctrines decreases regional stability and increases the possibility of armed conflict between potential proliferators and their neighbours, whether this be in South Asia, North East Asia, the Middle East or elsewhere.

The ICJ could thus play an important role in helping prevent preventive strikes - including the preventive use of nuclear weapons - and reversing such doctrinal developments, by affirming their illegality.

I. Considerations on the questions

There has been general agreement amongst governments and experts consulted that the application to the Court should not be too complicated involving a large number of questions. While it might be possible to address some of the other questions (namely nuclear testing, nuclear sharing arrangements, with-drawal from the NPT and development of nuclear weapons by States not party to the NPT) in the context of non-compliance with the disarmament obligation, there has not been much support for adding these as additional questions in their own right.

a) Disarmament obligation

The proposal to test compliance with the disarmament obligation has received widespread support. There has been a general perspective that this obligation was clearly and unanimously expressed by the ICJ and that the lack of compliance by the NWS is obvious and could be affirmed by the ICJ.

As noted above, most of the States possessing nuclear weapons have agreed on steps that would contribute to the achieving of the goal of nuclear disarmament and thus would go part way towards implementing the disarmament obligation,⁹⁷ and that some of these States possessing nuclear weapons have agreed to joining negotiations that would lead to the complete fulfilment of this obligation.⁹⁸

⁹⁵ Seymour Hersh, *THE IRAN PLANS, Would President Bush go to war to stop Tehran from getting the bomb?* New Yorker, April 10, 2006 http://www.newyorker.com/fact/content/articles/060417fa_fact

⁹⁶ See *The Role of U.S. Nuclear Weapons: New Doctrine Falls Short of Bush Pledge*, Hans M. Kristensen, Arms Control Today, September 2005. www.armscontrol.org/act/2005_09/Kristensen.asp

⁹⁷ Practical steps for the implementation of Article VI of the NPT agreed at the 2000 NPT Review Conference

⁹⁸ China, Pakistan and India support the UN resolutions on Follow-up to the ICJ Advisory Opinion on the Legality of the Threat or Use of nuclear weapons which calls for the implementation of the disarmament obligation through the

However, the NWS are implementing neither the steps they agree on nor the steps they oppose. What needs to be considered at this point are the arguments of some of the NWS that i) the disarmament agreements and obligations are not binding, ii) nuclear disarmament is conditional on progress on conventional disarmament iii) the security situation has changed making previously agreed commitments no longer relevant, and iv) they have been attempting to implement the obligations but that the complexity of the issue and the reluctance of other States has prevented progress.

i) obligations not binding

None of the NWS States Parties to the NPT claims that the Article VI obligation is non-binding. However, not all the NWS agree that the disarmament obligation as affirmed by the ICJ in 1996 is an accurate reflection of their nuclear disarmament obligation⁹⁹ or that it is binding. As such Russia, the United States and Israel, vote against operative paragraph 1 of UN Resolution 60/76 of 8 December 2005 which underlines the unanimous conclusion of the ICJ on the nuclear disarmament obligation. France and the UK abstain on this vote.

The US and France hold that according to Article 59 of the Statute of the ICJ, advisory opinions are not binding on States and thus the 1996 ICJ Advisory Opinion is not binding.¹⁰⁰ However, according to former ICJ Judge Mohamed Shahabuddeen ". . . *although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings*" So while States are not bound by the advisory opinion itself, they are bound by the law which is affirmed and clarified in the advisory opinion.¹⁰¹

With respect to the 2000 NPT agreements, the US has argued that the new security situation requires new strategic doctrines which may lead to relinquishing some of the commitments made previously including some of those made at the 2000 NPT Review Conference. The US views the 2000 NPT agreements as political and therefore not legally binding.

Burroughs, Weiss and Spies however, argue that:

*The 13 Practical Steps for the implementation of Article VI adopted by the 2000 NPT Review Conference... lay down criteria, principles, and measures for compliance with Article VI. They constitute subsequent agreement and practice authoritatively applying and interpreting Article VI. Accordingly, to implement the Practical Steps is to move towards complete fulfilment of the legal obligations set forth in Article VI. To fail to do so in essential respects is to demonstrate a lack of good faith and to breach the Article VI obligations.*¹⁰²

In examining the nuclear disarmament obligation, it could thus be useful for the ICJ to affirm that the United Nations follow-up resolutions and the 2000 NPT Review Conference agreements constitute a guide as to what is required for implementing the disarmament obligation.

commencement of multilateral negotiations that would culminate in a convention to prohibit and eliminate nuclear weapons.

⁹⁹ As noted previously, some States including France and the US, argue that the nuclear disarmament obligation is conditional on progress on general and complete disarmament.

¹⁰⁰ See McNeil, *The International Court of Justice Advisory Opinion in the Nuclear Weapons Cases - A first appraisal*, John McNeil, *International Review of the Red Cross*, 1997, no 316.

¹⁰¹ M. Shahabuddeen, *Precedent In The World Court*, Grotius Publications, Cambridge University Press, Cambridge, 1996, p. 171.

¹⁰² **The Thirteen Practical Steps: Legal or Political?** Peter Weiss, John Burroughs and Michael Spies, Lawyers' Committee on Nuclear Policy, May 2005. <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>

ii) nuclear disarmament is conditional on progress on conventional disarmament

The United States and France have pointed out that Article VI of the NPT includes obligations to achieve nuclear disarmament **and** general and complete disarmament. They have thus argued that it is unrealistic to expect nuclear disarmament to be achieved without also making progress on general and complete disarmament, i.e. progress on one requires progress on the other.

In some respects this is a disingenuous argument as the States that say that progress on nuclear disarmament is contingent on progress on general and complete disarmament are the very same States that maintain the best equipped and/or largest military forces and are themselves preventing progress on general and complete disarmament.¹⁰³ In particular, the P5 have failed to move the Security Council to implement Article 26¹⁰⁴ of the UN Charter in order to achieve general and complete disarmament.

In any case, it would be difficult for the NWS to maintain that nuclear disarmament is conditional on progress on general and complete disarmament. The ICJ in 1996 affirmed the nuclear disarmament obligation without linking it to progress on general and complete disarmament. The unconditionality of the nuclear disarmament obligation was also reflected in the Practical steps to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons agreed by States Parties to the NPT in 2000. In this the nuclear weapons States made an '*unequivocal undertaking... to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI.*' The obligation to achieve general and complete disarmament was also affirmed but in a separate paragraph. Thus nuclear weapon states can no longer plausibly rely on the rationale that elimination of nuclear weapons must await comprehensive global disarmament.

iii) the security situation has changed making previously agreed commitments no longer relevant

The NWS, in particular the US, have also argued that the international situation is very different now than it was in 1995 and 2000, and that emerging threats from the proliferation of nuclear weapons to 'terrorist organizations' and 'rogue States' require a focus on non-proliferation not disarmament. However, this focus on non-proliferation at the expense of disarmament is not supported by the majority of States. UN General Assembly resolution 58/51 Towards a nuclear-weapon-free world: a new agenda, for example, reaffirmed that "*nuclear non-proliferation and nuclear disarmament are mutually equally important and mutually reinforcing processes, requiring continuous irreversible progress on both fronts.*"

Burroughs argues that this is actually not a new argument, but that:

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 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

¹⁰³ This includes the P5 (five permanent members of the Security Council) - the United States, Russia, France, the United Kingdom and China.

¹⁰⁴ Article 26 of the UN Charter reads:

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

view. It is now established that the NPT requires the achievement of symmetry by obligating the nuclear weapons states to eliminate their arsenals.¹⁰⁵

iv) complexity prevents progress

The NWS argue that they are supportive of nuclear disarmament steps, such as a fissile material cut-off treaty and further reductions in nuclear arsenals, but that differences of opinion amongst States makes progress impossible.¹⁰⁶ However, complexity is no excuse for preventing the commencement of negotiations, or halting them once they commence.

Burroughs, for example, notes that:

*“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.”*¹⁰⁷

In the ICJ case involving a treaty commitment between Hungary and Slovakia carry out environmental mediation relating to the building of a dam, the Court directed the parties to return to mediation when at first it proved unsuccessful. 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”*.¹⁰⁸

In the *North Sea Continental Shelf Cases*, the Court said that the parties must make negotiations *“meaningful, which will not be the case when either insists upon its own position without contemplating any modification of it”*.¹⁰⁹

A World 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.”*¹¹⁰

Judge Bedjaoui, President of the ICJ at the time of the 1996 Advisory Opinion, noted that:

*“The legal import of that [nuclear disarmament] 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.”*¹¹¹

¹⁰⁵ John Burroughs, *The Legal Framework for Non-Use and Elimination of Nuclear Weapons*, Briefing Paper for Greenpeace International, February 2006

¹⁰⁶ In the proposal for a fissile material cut-off treaty, for example, most States at the Conference on Disarmament have agreed to the start of negotiations with the exception of the US, which has concerns over verification, and China, which has insisted in concurrent progress on preventing an arms race in outer space. See *Cooperation and Defection in the Conference on Disarmament*, John Borrie, *Disarmament Diplomacy*, Issue no 82, Spring 2006.

¹⁰⁷ John Burroughs, *The Legal Framework for Non-Use and Elimination of Nuclear Weapons*, Briefing Paper for Greenpeace International, February 2006 <http://www.lcnp.org/disarmament/Gpeacebrfpaper.pdf>

¹⁰⁸ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Rep. 1997, para. 142.

¹⁰⁹ I.C.J. Reports 1969, p. 47.

¹¹⁰ 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.

¹¹¹ Para. 99 (emphasis added).

Van Biesen¹¹² notes that the NWS could argue they have *tried* in good faith to accomplish the result required. However, it is the result that is relevant for the establishment of a breach of the obligation (result *in concreto*) and not the adoption of a particular course of conduct.¹¹³ Van Biesen cites the International Law Commission that:

*“The State, having failed to achieve the result required by an international obligation of this kind, cannot escape the charge of not having fulfilled its obligation by claiming that it did nevertheless adopt measures by which it hoped to achieve the result required of it. What matters is that the result required by the obligation should in fact be achieved; if it is not, a breach has been committed, whatever measures are taken by the State.”*¹¹⁴

From the discussion here and above¹¹⁵ it becomes evident not only that there is thus a very strong case that a) the NWS have not made good faith efforts to enter into nuclear disarmament negotiations, let alone conduct such negotiations in good faith, and b) their reasons for not doing so would most likely not stand up in court.

b) Obligations not to threaten or use nuclear weapons

Testing compliance with the general obligations not to threaten or use nuclear weapons is possibly more difficult than testing compliance with disarmament obligations. However, such a challenge is arguably as important, if not more so. The immediate threat from nuclear weapons is not from their possession, but from the fact that many are deployed on alert ready to be used and under widening policies to threaten or use them in a variety of situations. Even if the Court were to conclude that States, especially those possessing nuclear weapons, were in non-compliance with disarmament obligations and this led to some action towards compliance, the continuation of nuclear threat and use doctrines would leave the world subject to a potential nuclear disaster by miscalculation, accident or design into the indefinite future (i.e. until nuclear disarmament is achieved). In addition, States will continue to refrain from implementing their disarmament obligations so long as these weapons play such a significant role in security doctrines and military planning.

On the other hand, the imprecise nature of the ICJ’s 1996 conclusion on nuclear threat and use, and the fact that this was a divided opinion by the Court raises questions on how likely the ICJ would be to affirm illegality of the various policies. There is a risk that the Court might affirm illegality of some policies and practices, but potential legality for others. This would result in a double-edged result – with benefit gained from those policies affirmed as illegal, but a set-back in attempts to change policies and practices in which potential legality was ascribed.

It might be possible to shape the questions to avoid such a pitfall by not asking the Court about specific policies, but rather asking the Court to determine itself which policies are illegal. This way the Court would be asked to only pronounce on policies they determine to be illegal and not make any pronouncement on policies on which they are uncertain or which they might otherwise determine potential legality.

¹¹² *Phon van Biesen*, Model Application to the International Court of Justice, Questions relating to the implementation of the obligation to pursue and bring to a conclusion negotiations leading to nuclear disarmament, April 2000.

¹¹³ See also *Certain German Interest in Polish Upper Silesia* (Merits) of 25 May 1926, PCIJ, Series A, No.7, p. 19, and *Treatment of Polish Nationals in Danzig*, PCIJ, Series A/B, No. 44, p.4.

¹¹⁴ International Law Commission, <<http://www.law.cam.ac.uk/rcil/ILCSR/Stateresp.htm>> last visited on April 2000.

¹¹⁵ Section H: Possible Questions to ask the Court, Subsection on the disarmament obligation, p

However, the problems with this approach are that it gives no direction to the Court to examine specific policies and it leaves it up to the Court's whim how the consideration of such policies is shaped. As any practiced lawyer knows, the way questions are asked often sets the parameters and framework of consideration in ways beneficial to the questioner.

This paper thus recommends that the Court give its determination only on those specific policies for which there is a very strong case for illegality. Even so, there remains a risk that what might appear clearly illegal to most States and legal observers, might not be seen so by the Court. While the strength of legal arguments is one factor to consider in choosing which of the policies and practices would likely be affirmed as illegal, one should also look at the dispositions of the judges (see Section K).

c) Use of force to prevent acquisition of nuclear weapons

In initial consultations with like-minded States, there were discussions on the issue of the preventive or pre-emptive use of nuclear weapons in response to the suspected or actual proliferation of chemical, biological or nuclear weapons. This issue relates directly to the 1996 ICJ Advisory Opinion and its conclusion on the general illegality of the threat or use of nuclear weapons. However, there was also some support for extending the question to include any preventive use of force – nuclear or otherwise – in such a situation.

Asking the Court to also consider the broader question of the legality of preventive use of force would involve it in undertaking a much wider examination of international law than would be required for the other proposed questions on nuclear weapons threat or use, and would take it beyond the consideration of obligations relating to nuclear weapons.

However, the broader question of the legitimacy of the preventive use of force in these circumstances is very relevant for a few reasons. Firstly, the preventive use of force in such a situation has recently occurred (against Iraq) and is being considered again (against Iran). Secondly there is considerable debate and difference of opinion between States on the legality of such action. And thirdly, such a use of force is being contemplated as a way of enforcing nuclear non-proliferation obligations, thus appropriate to questions being asked on compliance with disarmament and non-proliferation obligations.

This paper thus proposes that a question on this issue be included in the request to the ICJ.

J. Discussion of Elements for a Draft Resolution to the United Nations General Assembly requesting an advisory opinion

Sections H and I above examine the various issues which could be considered by the ICJ.

Following consultations with like-minded governments, legal experts (including former justices of the ICJ) and disarmament experts, the author has developed *Elements for a Draft Resolution to the United Nations General Assembly requesting an advisory opinion from the International Court of Justice* (Appendix III) including a preamble and operative questions on compliance with nuclear disarmament obligations, legality of specific nuclear policies and practices and the legality of the preventive use of force to enforce nuclear non-proliferation. These elements are intended to serve as suggestions for like-minded governments for when they prepare a draft resolution for adoption by the United Nations General Assembly. They are not intended to form a take-it-or-leave-it, set-in-stone draft resolution.

To assist in preparing a draft UN resolution, this paper offers some rationale for the draft elements suggested:

a. Preamble

Paragraphs 1-3:

Expressing its grave concern at the threats posed to humanity by the possession and proliferation of nuclear weapons and the development of doctrines for their potential use,

Affirming the obligations of Non-Nuclear Weapon States Parties to the Non-Proliferation Treaty not to acquire nuclear weapons and the obligations of all States Parties to negotiate in good faith for their elimination,

Recalling the International Court of Justice Advisory Opinion on the legality of the threat or use of nuclear weapons delivered on 6 July 1996 which concluded, *inter alia*, 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*’ and 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*’,

These paragraphs establish the balanced approach of the resolution addressing both proliferation and disarmament. They also establish that the obligations being examined by the Court arise from both the NPT and from other international law affirmed by the ICJ, including customary law applicable in armed conflict. Thus, it will apply to all States, not only to States parties to the NPT.

Paragraphs 4-6

Welcoming the unequivocal undertaking given at the NPT Review Conference in 2000 by the Nuclear Weapon States to accomplish the total elimination of their nuclear arsenals

Welcoming also the practical steps agreed by States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons for the systematic and progressive efforts to implement Article VI of the Treaty,

Greatly alarmed by the lack of implementation of these steps, the reversal of some commitments made at the 2000 Conference and the failure of the 2005 NPT Review Conference to reaffirm the 2000 commitments,

These indicate the key developments, since the 1996 Advisory Opinion, which relate to the implementation of the disarmament obligation. The 2000 NPT practical steps indicate agreement by the international community – including the Nuclear Weapon States – on what steps should be taken in the near term to implement the disarmament obligation. The lack of progress on these, including the failure of the 2005 NPT Review Conference to reaffirm the steps, indicates the breakdown in implementation.

Paragraphs 7-8

Recognising the interests of all Member States in respecting and fully implementing the obligations arising from treaties to which they are parties and from other sources of international law,

Stressing that the failure by States to comply with nuclear nonproliferation and disarmament obligations threatens the security of all States and undermines the norms and regulations of international law and the mechanisms for its observance,

These paragraphs reinforce the fact that compliance by States with their international obligations enhances confidence building, peace and security.

The paragraphs are paraphrased from the US sponsored UN resolution on compliance with nonproliferation, arms control and disarmament agreements.¹¹⁶ Including these points indicate that the resolution is not anti-American, but rather is responding to some of the concerns of the US (and other States) regarding the need for implementation of obligations arising from treaties and other sources of international law, and affirms their perspectives that international law is eroded when it is not observed.

Paragraph 9

Noting the views expressed in GA resolutions 60/55,¹¹⁷ 60/56¹¹⁸ and 60/72¹¹⁹ of 8 December 2005 on the requirements for compliance with nuclear nonproliferation and disarmament obligations

This indicates that there is increasing international concern about compliance with nuclear nonproliferation and disarmament obligations, but that there are diverging opinions as to what is legally required. As such, an opinion from the ICJ on what is legally required for compliance would assist in resolving these differences.

Paragraph 10

Noting also resolutions 51/45 M of 10 December 1996, 52/38 O of 9 December 1997, 53/77 W of 4 December 1998, 54/54 Q of 1 December 1999, 55/33 X of 20 November 2000, 56/24 S of 29 November 2001, 57/85 of 22 November 2002 and 58/46 of 8 December 2003, 59/83 of 3 December 2004 and 60/76 of 8 December 2005,¹²⁰ and *expressing disappointment* at the lack of implementation of the disarmament obligations affirmed in these resolutions,

These are the UN resolutions focusing specifically on follow-up to the 1996 International Court of Justice Advisory Opinion. The resolutions go further than the 2000 NPT practical steps for disarmament. Taking their cue from the disarmament obligation as expressed by the ICJ,¹²¹ the resolutions call not only for the **commencement** of nuclear disarmament negotiations, but their **conclusion** in the abolition of nuclear weapons through a nuclear weapons convention.

¹¹⁶ UN General Assembly Resolution 60/55, *Compliance with non-proliferation, arms limitation and disarmament agreements*

¹¹⁷ *Compliance with non-proliferation, arms limitation and disarmament agreements* – sponsored by the USA

¹¹⁸ *Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments* – sponsored by NAC

¹¹⁹ *Follow-up to nuclear disarmament obligations agreed in the 1995 and 2000 Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* – sponsored by Iran

¹²⁰ ICJ follow-up resolutions sponsored by Malaysia

¹²¹ In commenting on the disarmament obligation affirmed by the ICJ, President Bedjaoui said that the obligation had a two-fold aspect – to not only negotiate for nuclear disarmament but to achieve the desired result of nuclear disarmament. See: Declaration of President Bedjaoui, http://www.icj-cij.org/icjwww/icasess/iunan/iunan_judgment_advisory

b. Compliance with nuclear disarmament obligations

Operative paragraph 1

Are states, especially states possessing nuclear weapons, in compliance with the unanimous opinion of this court 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?*

Operative paragraph 2

Is the practice of gradual reductions in the numbers of deployed nuclear weapons, coupled with policies for the indefinite possession of sufficient nuclear weapons for massive retaliation and the continued threat to use them in a variety of situations compatible with the above-mentioned obligation?

Operative paragraph 3

Do the practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) agreed in 2000 by States Parties to the NPT, and the United Nations General Assembly resolutions entitled “Follow-up to the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons” indicate what would be required for the implementation of the nuclear disarmament obligation?

There are three questions proposed on the nuclear disarmament obligation.

The first has a three-fold function: to explore the general requirements for implementation of the disarmament obligation, to examine policies and practices which are contrary to implementation of this obligation, and to obtain a decision on whether or not States are in compliance with it. This question could include consideration of contrary actions such as vetoing disarmament negotiations, maintaining plans for the indefinite possession of nuclear weapons, modernising nuclear weapons and expanding the military and political roles for nuclear weapons. An opinion from the ICJ on these questions could assist to clarify what is generally required of States for good faith compliance and place additional legal and political pressure on States to undertake negotiations in good faith and halt practices contrary to such an obligation.

The second question challenges the actions which the NWS and their allies claim to constitute adequate implementation of their disarmament obligation. An opinion from the ICJ affirming that such action does not constitute good faith compliance would expose the falsity of such claims rendering them unable to be used as a smokescreen by States to avoid implementing their obligations.

The third question directs the Court to examine key developments following on from the 1996 Advisory Opinion that give some indication of what steps are generally considered as being required for implementation of the disarmament obligation. This question indicates that the Court is not expected to demonstrate expertise in technical and political aspects of nuclear disarmament as such aspects have already been considered by the international community and have received general support. It merely asks the Court to add legal weight behind the political and legal steps deemed necessary for the fulfilment of the disarmament obligation.

c. Legality of specific nuclear policies and practices

Operative paragraph 4

Pending the elimination of nuclear weapons, would it be permissible under international law to:

- a. Threaten or use nuclear weapons against a non-nuclear weapon State
- b. Threaten or use nuclear weapons first in any conflict
- c. Deploy nuclear weapons during peacetime on high operational readiness and under a launch-on-warning operational policy
- d. Threaten or use nuclear weapons as weapons of mass retaliation, including counter-value targeting
- e. Threaten or use specific nuclear weapons, regardless of the provocation, the destructive capacity of which would render the weapon incapable of conforming to the principles and rules of international humanitarian law
- f. [Threaten or use nuclear weapons pre-emptively in response to the development or suspected development of chemical, biological or nuclear weapons]
- g. [test nuclear weapons]
- h. [establish or maintain plans and agreements to transfer control over nuclear weapons to non-nuclear weapon States.]

The opening phrase – Pending the elimination of nuclear weapons, would it be permissible under international law to: – conveys two key points. Firstly, that there is an obligation to pursue the elimination of nuclear weapons regardless of the answers to the questions on legality of specific doctrines. Secondly, that once elimination is achieved, these questions will be superseded by agreements for the abolition of nuclear weapons which would make any threat or use of nuclear weapons illegal, as well as the possession, development, acquisition, testing, deployment or transfer of such weapons.

- d. Preventive use of force, including the possibility of nuclear-weapons-use, to respond to the suspected or actual proliferation of nuclear weapons*

Operative paragraph 5

Does international law permit the preventive attack, whether by nuclear or conventional weapons, on a state suspected of seeking to acquire or produce chemical, biological, nuclear or other weapons of mass destruction?

(see **c) Use of force to prevent acquisition of nuclear weapons**, p31 above for discussion of this paragraph)

K. The judges and their positions

Likelihood of success of a case is not determined solely on the weight of legal argument and evidence, but also on the general positions and leanings of the judges on the issues of concern and other closely related issues.

The Court currently comprises the following judges:

Shi Jiuyong (China), Raymond Ranjeva (Madagascar), Ronny Abraham (France), Abdul G. Koroma (Sierra Leone), Leonard Skotnikov (Russian Federation), Rosalyn Higgins (United Kingdom), Gonzalo Parra-Aranguren (Venezuela), Awn Shawkat Al-Khasawneh (Jordan), Thomas Buergenthal (United States of America), Hisashi Owada (Japan), Bruno Simma (Germany), Peter Tomka (Slovakia), Kenneth Keith (New Zealand), Bernardo Sepulveda Amor (Mexico), Mohamed Bennouna (Morocco).

A thorough analysis of the judges' positions with respect to the different aspects of the proposed case is not possible due to most of the judges not having written specifically on nuclear weapons issues. If possible, such an analysis would probably be unwise, as each judge is expected to look at the merits of each case in its own right and not according to previously held perspectives.

However, a general overview of the judges' positions on prior decisions of relevance and their published perspectives on nuclear weapons and the balance between State security and humanitarian law would be useful to give some indication of the way this case could be decided.

a. 1994 advisory opinion on legality of the threat or use of nuclear weapons

The judges involved in the 1994 advisory opinion who remain on the Court are Shi Jiuyong (China), Raymond Ranjeva (Madagascar), Abdul G. Koroma (Sierra Leone), Rosalyn Higgins (UK).

These judges all supported the affirmation of an unconditional obligation to achieve nuclear disarmament and the decisions that any threat or use of nuclear weapons must comply with Articles 2 (4) and 51 of the UN Charter and must also be compatible with the requirements of international law applicable in armed conflict. This indicates a likelihood of support for these aspects of the current case – though how far each judge is likely to go in application to current nuclear policies and practices is uncertain.

Judge Rosalyn Higgins, opposed the conclusion that the above conclusions indicated that the threat or use of nuclear weapons is generally illegal, and would thus be unlikely to take a broad view of illegality of current nuclear policies and practices (i.e. allow for possible legality of a range of current policies and practices). Shi Jiuyong and Raymond Ranjeva supported the general illegality conclusion and would thus be likely to take a moderate view of illegality of current policies and practices. Abdul G. Koroma opposed the conclusion on the grounds that it was not strong enough in condemning the illegality of nuclear weapons and thus would probably take a comprehensive view on illegality of current policies and practices.

b. 1995 nuclear tests case (New Zealand v France)

In 1995 the ICJ rejected New Zealand's application for a re-examination of the 1974 judgement which discontinued the case against France following France's announcement of an end to atmospheric nuclear testing. New Zealand had requested the Court to examine issues surrounding underground testing being undertaken by France at Moruroa and Fangataufa and to apply provisional measures on France to halt such testing pending environmental assessment.

Judges currently on the court who supported the decision to reject New Zealand's application are Shi Jiuyong, Raymond Ranjeva and Rosalyn Higgins. This indicates a reluctance of these judges to extend the jurisdiction of the ICJ to cases except where such jurisdiction is clearly defined, including cases with respect to nuclear weapons issues. Judge Abdul G. Koroma opposed the decision

c. *2003 advisory opinion on construction of a wall in Palestinian territory*

On 9 July 2004, the ICJ delivered an advisory opinion on Israel's construction of a wall in Palestinian territory. The case was relevant to the current case because it also involves a balancing of State rights to take actions for their security against a State's international obligations.

The Court decided by fourteen votes to one that the building of the wall was contrary to international law and that Israel is under an obligation to immediately halt construction and begin dismantling already constructed parts of the wall.

The decision indicates that the current Court would likely also place considerable weight on obligations of States under international law with respect to nuclear weapons and not subordinate these to State security policies and practices.

Judge Buergenthal dissented from this opinion, possibly indicating an unwillingness on his part to challenge a domestic policy which Israel argued was vital for its security. However, in his dissenting opinion, Judge Buergenthal did not argue that international legal obligations should be offset by domestic security concerns. Rather he argued that the Court did not have sufficient information to decide on the case.¹²²

d. *Avena and other Mexican Nationals (Mexico v. United States of America)*

On 31 March 2004 the ICJ found that the United States of America had breached its obligations to certain Mexican nationals sentenced to death in the USA, and to Mexico, for not adequately fulfilling related provisions of the Vienna Convention on Consular Relations in their cases. The decision, which was supported by 14 of the judges, including Judge Buergenthal (United States of America), indicates a willingness of the Court to favour international obligations over domestic practice including in situations relating to domestic security.

e. *Specific writings, opinions and background*

*Note: In this section we make some comments on judges who joined the court since the 1994 advisory opinion and the 1995 nuclear tests case.*¹²³

¹²² "I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.... However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings." Judge Buergenthal, Declaration of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, <http://www.icj-cij.org/icjwww/idocket/imvp/imvpframe.htm>

¹²³ Prior to their election to the Court a number of the judges held positions representing their countries on international bodies such as the United Nations or in cases in international courts and tribunals. In such positions they were expected to represent their government's policies and not their personal viewpoints. In general, there is probably not a huge discrepancy between ones' personal viewpoints and the policies that one has to represent. In such a position – if there was a huge discrepancy one might be honour-bound to resign from such a position. Thus, the policies promoted by the judges when they served in such positions give some guide as to how they might address similar or

Awn Shawkat Al-Khasawneh: Judge Al-Khasawneh has had some engagement in nuclear weapons issues as member of Jordanian delegations to Non-Aligned Movement meetings in the 1980s. He has also participated in the preparation of a Draft Convention on the Criminalisation of Biological and Chemical Weapons, weapons not nearly as destructive as nuclear weapons. The fact that nuclear weapons were not addressed in this initiative was not because of lack of interest by the key actors, but because of lack of progress on nuclear disarmament.¹²⁴ This might provide an incentive for Judge Al-Khasawneh to welcome an initiative in the ICJ which could help generate such progress.

Hisashi Owada: Judge Owada represented Japan on nuclear weapons issues in many positions including Vice-Minister of Foreign Affairs and Permanent Representative to the United Nations in New York. During this time Japan has abstained on United Nations calls for implementation of the 1996 ICJ advisory opinion. However, Judge Owada also serves as a board member on the Nuclear Threat Initiative which is critical of US and Russian nuclear postures.¹²⁵ It is thus possible that he might be prepared to consider legal challenges to some of the most threatening of the nuclear weapons practices, such as launch-on-warning and first-use, but he may be more accommodating of the slow progress towards nuclear disarmament.

Ronny Abraham: Prior to being appointed to the ICJ, Judge Abraham represented France at the United Nations General Assembly and in cases before the International Court of Justice, European Court of Human Rights, Court of Justice of the European Communities and other tribunals. Judge Abraham wrote the French statement to the ICJ for the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which France argued that such a security issue was not assisted by a legal process but should be sorted out politically.¹²⁶ This could indicate a tendency of Judge Abraham to oppose the recourse to advisory opinions for highly political issues, including nuclear weapons policy, even when there are clear legal questions relating to the issue.

With respect to nuclear weapons policy itself, Judge Abraham was Chairman of the French delegation to the Assembly of States Parties to the Rome Statute of the International Criminal Court. France, when depositing its instrument of ratification to the ICC, specifically exempted the use of nuclear weapons from actions which could be included in the jurisdiction of the ICC.¹²⁷ This could indicate an unwillingness on the part of Judge Abraham to apply international humanitarian law to nuclear weapons in any way which would diminish the ‘inherent right to self-defense,’ and thus a hesitation to challenge current doctrines of the Nuclear Weapon States.

related issues on the Court. However, these can only be a rough guide as judges on the ICJ do not represent countries and can thus exercise more independence from national policies in their views.

¹²⁴ The initiative was led by James Crawford who argued strongly against nuclear weapons as one of the representatives for the Solomon Islands in the 1996 ICJ advisory opinion. However, while there are international conventions on the elimination of biological and chemical weapons, the nuclear weapon States have resisted negotiating a similar treaty for nuclear weapons.

¹²⁵ NTI is critical of the US and Russia maintaining thousands of nuclear weapons at a high readiness for use with a launch-on-warning policy. However, NTI does not challenge general nuclear deterrence policy.

¹²⁶ “The French Republic holds to the belief that the opinion which the Court has been asked to give is not conducive to facilitating the resumption of the dialogue, one which by nature is highly political, between Israel and Palestine.” *French Statement to the ICJ regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Para 5.

¹²⁷ “The provisions of article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of articles 121 and 123.” *Interpretative declaration of France on depositing its instrument of ratification to the Statute of the International Criminal Court*, 9 June 2000.

Leonard Skotnikov: Prior to being appointed to the ICJ in 2006, Judge Skotnikov represented Russia in various United Nations bodies including the UN General Assembly, the UN Conference on Disarmament and the UN Commission on Human Rights. During the 2004 UN General Assembly, at which Judge Skotnikov was the head of delegation to the First Committee (Disarmament), Russia opposed the resolution on follow-up to the ICJ 1996 advisory opinion, and was one of five countries opposing the separate vote on the unanimous conclusion of the ICJ that there exists an obligation to pursue nuclear disarmament negotiations in good faith.¹²⁸ In his presentation to the UN Conference on Disarmament on behalf of Russia on 23 June 2005 Judge Skotnikov argued that Russia has been implementing its nuclear disarmament obligations through a step-by-step process.¹²⁹ This appears to indicate that Judge Skotnikov would be hesitant to challenge the existing practices of the NWS with respect to implementation of the disarmament obligation.

However, with regard to the nuclear doctrines, Judge Skotnikov might be willing to challenge some of the more threatening of the policies. In the follow-up to the 1996 ICJ advisory opinion Russia did make some attempts to adjust their nuclear doctrine by adding that the threat or use of nuclear weapons should only be considered in the extreme circumstance where the very survival of a State is at stake. In addition, Judge Skotnikov has written condemning the preventive use of force¹³⁰ and might thus be likely to affirm the preventive use of nuclear weapons as illegal. He has also written on the primacy of law in international relations,¹³¹ including the imperative of basing State actions and international relations on "the force of law" rather than "the law of force."¹³²

Gonzalo Parra-Aranguren: (At the time of writing no legal writings or decisions of Judge Parra-Aranguren had been found or translated).

Thomas Buergenthal: Judge Buergenthal, while receiving the blessing of the United States for election to the ICJ, demonstrates a stronger adherence to international law – particularly international human rights law – than to US policy. This was indicated, for example, in his support for the ICJ's decision against the US in the *Avena and other Mexican Nationals* case (see above). In addition, Buergenthal has not hesitated to criticise US military policy. "Unbecoming of our democratic tradition, we seem to have become intoxicated with our military might, forgetting that even super powers need friends. It is not enough to preach democracy, human rights, and the rule of law. We must be seen to practice what we preach, not only at home but also abroad."¹³³

Thus, if there was sufficient information to support the claim that States are not complying with their nuclear disarmament obligations and with the general prohibition on the threat or use of nuclear weapons, Judge Buergenthal might be inclined to agree, especially if it is made clear that the NWS are preaching nuclear non-proliferation to others but not practicing it themselves.

Bruno Simma: (At the time of writing no legal writings or decisions of Judge Parra-Aranguren had been found or translated).

Peter Tomka: Prior to his election to the ICJ in 2003 Judge Tomka was the Permanent Representative of Slovakia to the United Nations. During his term as Permanent Representative, Slovakia opposed the United Nations General Assembly resolution on follow-up to the 1996 ICJ advisory opinion.

¹²⁸ The other five countries opposing were Israel, Palau, the United Kingdom and the United States.

¹²⁹ <http://www.reachingcriticalwill.org/political/cd/speeches05/June23Russia.pdf>

¹³⁰ *The Right of Self-Defense and the New Security Imperatives*, L. Skotnikov, *International Affairs* 2004-12-31

¹³¹ *Primacy of Law in International Relations*, I. Ivanov, Hans Corell, Iu. Fedotov, I. Lukashuk, B. Ganiushkin, A. Zmeevskii, M. Fedotov, A. Iakovenko, L. Skotnikov, O. Khlestov, D. Rogozin, *International Affairs*, Vol. 12, 2000

¹³² *Legal Limits of the Use of Force*, L. Skotnikov, *International Affairs*, Vol. 11, 2003

¹³³ Judge Buergenthal, Commencement address to George Washington Law School, 2004.

http://www2.gwu.edu/~magazine/archive/2004_law_summer/docs/feat_buergenthal.html

However, Slovakia did support the unanimous conclusion that there exists an obligation to achieve nuclear disarmament.

Kenneth Keith: Judge Keith was a member of the New Zealand legal team in the Nuclear Tests cases before the International Court of Justice 1973, 1974 and 1995 in which New Zealand challenged the nuclear tests conducted by France in the South Pacific. New Zealand argued that the testing of nuclear weapons in the atmosphere violated the territorial rights of other States in the Pacific due to the radioactive fall-out and that the underground testing of nuclear weapons violated international environmental laws. In its application New Zealand emphasised that customary law and treaties applicable to nuclear activities can not be ignored or minimised in the pursuit of national security. This could indicate that Judge Keith would not be hesitant to fully apply both customary and treaty law to nuclear weapons policies without subverting these to national security policies.

Bernado Sepulveda Amor: Judge Sepúlveda was Secretary of Foreign Relations of Mexico from December 1982 to 1988. During this period, Mexico took a lead role in the Six Nation Initiative which called on the nuclear weapon States to freeze their nuclear arsenals, negotiate a Comprehensive Test Ban Treaty, and take other steps for nuclear disarmament.

Mohamed Bennouna. Prior to his election to the ICJ Judge Bennouna was Permanent Representative of Morocco to the United Nations. During his tenure Morocco supported the United Nations General Assembly resolution on follow-up to the 1996 ICJ Advisory Opinion.

L. Potential impact of an advisory opinion on policies and practices

On consideration of the above issues the current court could be expected to affirm:

- a) that the nuclear weapon States and their allies are not complying sufficiently with their disarmament obligations
- b) some of the current policies and practices relating to the threat or use of nuclear weapons fail to comply with international law

Depending on the set of questions asked, the Court might also affirm that some practices relating to the transfer of nuclear weapons and nuclear weapons technology fail to comply with obligations under the NPT.

Given the reluctance of the NWS to abandon their nuclear weapons policies and implement their disarmament obligations, it would be unrealistic to expect them to willingly comply with such a decision. The Court has no enforcement body to ensure compliance, and the principal body for ensuring compliance with international law particularly in the field of peace and security, is the Security Council – a body in which each of the official NWS has power of veto. In addition, an advisory opinion from the ICJ is not directly binding on States, a situation which provides legal and political cover for NWS to refuse to comply.

Thus, on the surface it could appear that even if the Court delivered a strong opinion it might have little impact on the policies and practices of States, particularly the NWS.

In reality however, ICJ decisions can have considerable influence. In a major study of compliance with decisions of the International Court of Justice, Constanze Schultze concludes that while there have been some notable exceptions, the compliance record for ICJ decisions is very positive.¹³⁴ C.G.

¹³⁴ Constanze Schultze, *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004.

Weeramantry, a former judge of the ICJ, has noted that even though the ICJ has no enforcement powers, 90% of its decisions are implemented.¹³⁵ The reasons for this include, *inter alia*, a) the political and legal benefits for States to be seen to be in compliance with international law, b) the political and legal weight ICJ opinions give to domestic constituencies desiring progress on the issue at hand (in this case the domestic forces urging nuclear disarmament), and c) the political and legal weight ICJ opinions give to international forces calling for progress on the issue at hand (such as other States and international organisations).

States benefit from being seen to be in compliance with international law because it enhances their image and political standing in the international community, provides confidence to other States on what behaviours to expect thus increasing the capacity for trade and other agreements, encourages reciprocal observance of the law by other States and prevents retributive actions.

The three previous cases in the ICJ on nuclear weapons issues provide some indication of the possible impact of the proposed case. In the Nuclear Tests Case,¹³⁶ even though the Court's actions were inconclusive,¹³⁷ the political impact was such that France discontinued the actions challenged the year following each case.¹³⁸

As noted above, there has been only minimal implementation of the 1996 Advisory Opinion by the NWS. However, this could be partly a result of the inconclusiveness of the decision on the legality of the threat or use of nuclear weapons. The NWS have, for example, have claimed that they are in compliance. Non-NWS and civil society have attempted to use the 1996 Advisory Opinion to move the NWS to implement their disarmament obligations – and have had some limited success – but have been hampered by the lack of specific condemnation by the ICJ on specific policies and practices. A more specific opinion on compliance requirements would close that door of uncertainty that gives political cover to the NWS. It would thus strengthen non-NWS and civil society in their nuclear abolition campaigns.

There are numerous variables influencing the impact an ICJ advisory opinion on compliance with nuclear disarmament and non-use obligations would have on nuclear policies and practice. These include unforeseeable political developments,¹³⁹ how the opinion is formulated, publicity given to the opinion, responses of non-nuclear weapon States and other influential actors¹⁴⁰ including the political and legal use they make of the opinion.

The global campaign against landmines struggled for years making very little progress until a seminal political moment occurred when the prevailing perception of landmines changed from them being a defensive weapon to being an indiscriminate and inhumane device of destruction.

An ICJ opinion on compliance, which emphasises the inhumanity and illegality of current nuclear policies and practices, might be the seminal contribution that shifts the prevailing political force regarding nuclear weapons from one of the status quo to one of nuclear abolition.

¹³⁵ Illegality of deployment of nuclear weapons within Nuclear Weapon Free Zones Principles placed before the New Zealand Select Committee on Foreign Affairs, Defence and Trade by Judge C.G. Weeramantry, August 2003

¹³⁶ In 1974 New Zealand and Australia filed a case against France for testing nuclear weapons in the atmosphere in the South Pacific. In 1995 New Zealand requested the case be re-opened to challenge the underground nuclear tests conducted by France in the South Pacific.

¹³⁷ In 1975 the Court discontinued the case because France announced an end to atmospheric testing. In 1995 the Court declined to re-open the case to consider underground testing.

¹³⁸ France discontinued atmospheric testing in 1975 and discontinued all nuclear testing in 1996.

¹³⁹ Such as changes in governments, changes in security situations of States, incidents which might increase or decrease public support for nuclear disarmament, technological developments in military equipment and weaponry...

¹⁴⁰ Such as lawyers, law professors, legal advisers to governments, parliamentarians, civil society leaders, religious leaders and non-governmental organisations

M. Conclusion

The international situation regarding nuclear weapons has become very bleak. There is a continuing threat of proliferation of nuclear weapons to new States and non-State actors. The current nuclear weapons States have halted the progress towards nuclear disarmament that was started following the end of the Cold War, and are instead expanding nuclear doctrines thus increasing the possibility that nuclear weapons could be used. The key international nuclear disarmament forums – the Conference on Disarmament and the Non-Proliferation Treaty Conferences – are blocked, despite an increasing potential to adequately verify nuclear disarmament agreements and resolve disputes without the recourse to nuclear weapons.¹⁴¹

In this context an advisory opinion from the International Court of Justice on the compliance requirements of States with their nuclear disarmament obligations and on the illegality of existing nuclear policies and practices, could provide significant legal and political impetus to move the nuclear weapon States to reduce the threat postures for their existing arsenals and begin negotiations which would eventually lead to complete nuclear disarmament.

There are numerous considerations whenever a case of such import is contemplated, including the nature of the questions asked, the many variables that could affect the outcome, and the impact this outcome will have.

In considering the nature of the questions asked, it is important to emphasise that the Court is not being asked to re-examine the 1996 opinion. This is not an appeal. Rather, the Court is being asked to consider implementation of the obligations and law as determined in the 1996 opinion. Thus, the request to the Court will not face the danger of returning an opinion that is less restrictive of policy and practice than was the 1996 opinion. Rather, it will advance the 1996 opinion by asking the Court to expressly condemn specific policy and practice which is not consistent with the 1996 decision, including non-implementation of the disarmament obligation.

In considering the many variables that could effect the outcome – the current state of international law, the policies and practices of the NWS, the leanings of the judges – one could be confident of a positive result that will considerably advance the legal norms against nuclear weapons and provide a very strong impetus to advance nuclear disarmament.

The impact of the decision will of course rely as much on how it is advanced and used by non-nuclear governments, media, non-governmental organisations, and wider civil society including mayors and parliamentarians. The fact that significant representatives of these sectors are already calling on States to demonstrate good faith compliance with the nuclear disarmament obligations affirmed by the Court in 1996¹⁴² indicates that a decision from the Court will be picked up and used widely and effectively.

It would thus appear that there is much to gain and little to risk in using the 10th anniversary of the 1996 ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons to return to the Court requesting an advisory opinion on compliance with nuclear disarmament obligations and the legality of specific nuclear policies and practices.

¹⁴¹ For a discussion on alternatives to nuclear weapons for responding to security threats see RULE OF FORCE OR RULE OF LAW? Legal Responses to Nuclear Threats from Terrorism, Proliferation, and War, Alyn Ware, Seattle Journal of Social Justice, Fall/winter 2003. <http://www.law.seattleu.edu/sjsj/2003fall/Ware.pdf>

¹⁴² The Mayors for Peace, for example, comprising over 1200 cities worldwide, launched a Good Faith campaign in 2006 focusing on the ICJ advisory opinion and calling on governments to negotiate in good faith to achieve nuclear disarmament. Also, the States Parties to the Treaty of Tlatelolco (Nuclear Weapon Free Zone in Latin America and the Caribbean) agreed in November to:

“Call upon the United Nations General Assembly, on the occasion of the Xth anniversary of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, to consider the actions that States should undertake to fulfill nuclear disarmament obligations emanating from the treaty on the Non-Proliferation of Nuclear Weapons and the 1996 Advisory Opinion.”

Santiago Declaration, paragraph 6, adopted 8 November 2005. www.opanal.org/Docs/cg/res/CG19res487i.pdf

International Court of Justice



LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Advisory Opinion of 8 July 1996

(dispositif)

The Court handed down its Advisory Opinion on the request made by the General Assembly of the United Nations on the question concerning the Legality of the Threat or Use of Nuclear Weapons. The final paragraph of the Opinion reads as follows:

"For these reasons,

THE COURT

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judge* Oda.

(2) *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,

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

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

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;

IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F. 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".

*

The Court was composed as follows: *President* Bedjaoui, *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, *Registrar* Valencia-Ospina.

President Bedjaoui, *Judges* Herczegh, Shi, Vereshchetin and Ferrari Bravo appended declarations to the Advisory Opinion of the Court; *Judges* Guillaume, Ranjeva and Fleischhauer appended separate opinions; *Vice-President* Schwebel, *Judges* Oda Shahabuddeen, Weeramantry, Koroma and Higgins appended dissenting opinions.

Appendix II: Possible Elements for a Draft Resolution to the United Nations General Assembly

Requirements for compliance with nuclear non-proliferation and disarmament obligations – request for an advisory opinion from the International Court of Justice

The General Assembly

Expressing its grave concern at the threats posed to humanity by the possession and proliferation of nuclear weapons and the development of doctrines for their potential use,

Affirming the obligations of Non-Nuclear Weapon States Parties to the Non-Proliferation Treaty not to acquire nuclear weapons and the obligations of all States Parties to negotiate in good faith for their elimination,

Recalling the International Court of Justice Advisory Opinion on the legality of the threat or use of nuclear weapons delivered on 6 July 1996 which concluded, *inter alia*, 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*’ and 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*’,

Welcoming the unequivocal undertaking given at the NPT Review Conference in 2000 by the Nuclear Weapon States to accomplish the total elimination of their nuclear arsenals

Welcoming also the practical steps agreed by States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons for the systematic and progressive efforts to implement Article VI of the Treaty,

Greatly alarmed by the lack of implementation of these steps, the reversal of some commitments made at the 2000 Conference and the failure of the 2005 NPT Review Conference to reaffirm the 2000 commitments,

Recognising the interests of all Member States in respecting and fully implementing the obligations arising from treaties to which they are parties and from other sources of international law,

Stressing that the failure by States to comply with nuclear nonproliferation and disarmament obligations threatens the security of all States and undermines the norms and regulations of international law and the mechanisms for its observance,

Noting the views expressed in GA resolutions 60/55, 60/56 and 60/72 of 8 December 2005 on the requirements for compliance with nuclear nonproliferation and disarmament obligations,

Noting also resolutions 51/45 M of 10 December 1996, 52/38 O of 9 December 1997, 53/77 W of 4 December 1998, 54/54 Q of 1 December 1999, 55/33 X of 20 November 2000, 56/24 S of 29 November 2001, 57/85 of 22 November 2002 and 58/46 of 8 December 2003, 59/83 of 3 December 2004 and 60/76 of 8 December 2005, and *expressing disappointment* at the lack of implementation of the disarmament obligations affirmed in these resolutions,

Believing that the resolution of conflicting views on the requirements for compliance with nuclear nonproliferation and disarmament obligations would assist in maintaining international peace and security, and would assist in the prompt and full implementation of such obligations,

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following questions:

- 1) Are states, especially states possessing nuclear weapons, in compliance with the unanimous opinion of this court 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*?
- 2) Is the practice of gradual reductions in the numbers of deployed nuclear weapons, coupled with policies for the indefinite possession of sufficient nuclear weapons for massive retaliation and the continued threat to use them in a variety of situations compatible with the above-mentioned obligation?
- 3) Do the practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) agreed in 2000 by States Parties to the NPT, and the United Nations General Assembly resolutions entitled “Follow-up to the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons” indicate what would be required for the implementation of the nuclear disarmament obligation?
- 4) Pending the elimination of nuclear weapons, would it be permissible under international law to:
 - a. Threaten or use nuclear weapons against a non-nuclear weapon State
 - b. Threaten or use nuclear weapons first in any conflict
 - c. Deploy nuclear weapons during peacetime on high operational readiness or under a launch-on-warning operational policy
 - d. Threaten or use nuclear weapons as weapons of mass retaliation, including counter-value targeting
 - e. Threaten or use specific nuclear weapons, regardless of the provocation, the destructive capacity of which would render the weapon incapable of conforming to the principles and rules of international humanitarian law
 - f. Threaten or use nuclear weapons pre-emptively in response to the development or suspected development of chemical, biological or nuclear weapons
 - g. Test nuclear weapons
 - h. Establish or maintain plans and agreements to transfer control over nuclear weapons to non-nuclear weapon States.
- 5) Does international law permit the preventive attack, whether by nuclear or conventional weapons, on a state suspected of seeking to acquire or produce chemical, biological, nuclear or other weapons of mass destruction?

Appendix III: Disputants and Jurisdiction for a Contentious Case.

For a contentious case there could be a variety of disputants based on a) compliance issues b) jurisdictional issues, c) political issues.

1) Compliance issues

a) transfer of nuclear weapons and nuclear weapons technology from NWS to other recipients

Possible defendants:

- ii) Transferees: UK, USA, France, [China, North Korea re missile technology to Pakistan] [Pakistan, Netherlands, Malaysia re support for the activities of the Khan network], [Russia re nuclear capable submarines to India], [Russia re uranium enrichment technology to Iran]
- iii) Recipients: Belgium, Germany, Greece, Italy, Netherlands, Turkey, [India], [Iran], [Pakistan], [Iran]

Possible plaintiffs: Any other State party to the NPT

b) withdrawal from the NPT

Possible defendants: North Korea

Possible plaintiffs: Any other State party to the NPT

c) development of nuclear weapons programmes by States not parties to the NPT

Possible defendants: India, Israel, North Korea, Pakistan

Possible plaintiffs: Any other State

d) policies of threat or use of nuclear weapons

Possible defendants:

- ii) States possessing nuclear weapons: China, France, India, Israel, Pakistan, Russia, UK, USA
- iii) NATO States: Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States.

Possible plaintiffs: Any other State

e) lack of transparency on nuclear weapons development and doctrine

Possible defendants: Israel, North Korea, Pakistan

Possible plaintiffs: Any other/non-nuclear State

f) lack of good faith in the pursuit of disarmament.

Possible defendants

- i) States possessing nuclear weapons: [China,] France, [India,] Israel, [Pakistan,] Russia, UK, USA
- ii) NATO States: Belgium, Bulgaria, [Canada,] Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States.
- iii) Allies: Australia, Japan

Possible plaintiffs: Any other State

2) Jurisdictional issues

a) *Treaty based jurisdiction*

There is no provision in the Non-Proliferation Treaty for reference to the International Court of Justice of disputes between States parties. Thus the NPT provides no basis for compulsory jurisdiction of the ICJ for contentious cases between parties.

b) *Declarations of acceptance*

The following non-nuclear countries that are also non-members of a nuclear alliance have made declarations under Article 36 of the Statute of the International Court of Justice and thus could be potential plaintiffs/applicants:

Austria, Barbados, Botswana, Cambodia, Cameroon, Colombia, Costa Rica, Cote d'Ivoire, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Gambia, Georgia, Guinea, Guinea-Bissau, Haiti, Honduras, Kenya, Lesotho, Liberia, Liechtenstein, Madagascar, Malawi, Malta, Mauritius, Mexico, Nauru, New Zealand, Nicaragua, Nigeria, Panama, Paraguay, Peru, Philippines, Senegal, Somalia, Sudan, Suriname, Swaziland, Sweden, Switzerland, Togo, Uganda, Uruguay, Yugoslavia.

The following States which either possess nuclear weapons or are part of a nuclear weapons alliance have made declarations under Article 36 of the Statute of the International Court of Justice and thus could be potential defendants/respondents:

Australia, Belgium, Bulgaria, Canada, Denmark, Estonia, Greece, Hungary, India, Japan, Luxembourg, Netherlands, Norway, Pakistan, Poland, Portugal, Spain, UK

c) *Mutual acceptance*

Any non-nuclear weapon State could invite any or all of the States which possess weapons or are part of a nuclear weapons alliance but which have not made declarations under Article 36 of the Statute of the International Court of Justice, to jointly refer the dispute over compliance to the ICJ. These cases would only proceed if the respondent States agreed. Such States include:

China, Czech Republic, France, Germany, Iceland, Israel, Italy, Latvia, Lithuania, North Korea, Romania, Russia, Slovakia, Slovenia, Turkey, USA

Combination approach

It could be advisable to proceed with a combination of (b) and (c), i.e. that a group of non-nuclear weapon States that have made declarations under Article 36 of the Statute of the International Court of Justice:

- i) lodge an application against States which either possess nuclear weapons or are part of a nuclear weapons alliance and have made declarations under Article 36 of the Statute of the International Court of Justice, and
- ii) invite the remaining States which possess weapons or are part of a nuclear weapons alliance but which have not made declarations under Article 36 of the Statute of the International Court of Justice, to jointly refer the dispute over compliance to the ICJ.

3) Political Issues

There are political considerations relating to decisions by States on whether to take a contentious case to the ICJ, when to do so, on which issues and against which defendants. These considerations include the relations between the applicants States and the defendant States and whether a case against only those States which accept ICJ jurisdiction would be seen as discriminatory and let other States (possibly the more serious violators) off the hook.

This paper does not discuss the first of these considerations as such relations vary widely depending on which would be the applicant States.

On the second consideration, there is concern that the US, France, China, Russia and Israel do not accept the jurisdiction of the ICJ. The UK, which does accept ICJ jurisdiction, has possibly been the NWS which has responded the most to the 1996 ICJ advisory opinion – being the only one to reduce the operational status of its nuclear forces and to undertake a study on verification for nuclear abolition following the opinion. Thus, to conclude a case against the UK but not the other NWS could be seen as punishing the State which has responded the best and might damage the political momentum towards nuclear disarmament and the norm against nuclear weapons threat or use rather than assist these.

This is one of the reasons why governments consulted have tended to support the advisory opinion approach rather than the contentious case approach.

Appendix IV: Nuclear stockpiles

Global Stockpiles

There are currently about 31,000 nuclear warheads deployed or in reserve in the stockpiles of eight countries: China, France, India, Israel, Pakistan, Russia, the United Kingdom and the United States. Of these about 13,000 are deployed and 4,600 of these are on high alert, i.e. ready to be launched within minutes notice.

The combined explosive yield of these weapons is approximately 5,000 megatons, which is about 200,000 times the explosive yield of the bomb used on Hiroshima.

Global Stockpiles			
	Strategic delivery Systems	Deployed warheads ¹	Total warheads
U.S.	1097	6700	~10,916
Russia	1122	5826	~16,000
China	250	400	390
France	132	348	348
U.K.	64	185	185
Israel	-	-	~150
India	-	-	~80
Pakistan	-	-	~20
North Korea			?
Total deployed warheads		13,459	
Non-operational warheads		~14,500	
Total warheads			~28,000
Total yield			5,000 Mt
Number of weapons on alert			4,600

1. Israel, India and Pakistan are reported to have not yet deployed nuclear weapons, but have short-medium range missiles which could be used for deployment.
2. There are sometimes variances in numbers cited for stockpiles due to uncertainties of the status of some weapons, i.e. whether they are deployed, in non-active reserve, or dismantled.

United Kingdom

Since Britain withdrew its last WE177 gravity bomb from service in March 1998, it has relied on a single nuclear weapon system, Trident missiles deployed on nuclear-powered ballistic missile submarines. In 1998 the UK also made some changes to deployment policy for the Trident submarines as part of its obligations to take steps towards nuclear disarmament. From this point on:

- Only one British submarine would patrol at any given time
- The submarines would patrol at a reduced state of alert – capable of firing its missiles within several days or weeks instead of within several minutes or hours

On the other hand, in 2000 the UK signalled that the role for Trident would expand to include a sub-strategic role as well as a strategic one. The Trident warheads are thus configured flexibly in order to obtain a low yield for sub-strategic missions or higher yields for strategic missions.

The Trident system will reach the end of its life in approximately 20 years, and already the UK government is considering replacing it with a new generation of nuclear weapons, although there have been calls in parliament¹⁴³ and from within government for the UK to use this as an opportunity to phase out nuclear weapons completely.¹⁴⁴

United Kingdom Nuclear Forces							
Delivery vehicle	Number deployed	Year	Range (km)	Warheads	yield	total	warheads
SLBMs							
D-5 Trident II	64	1994	7,400	1 – 3	1 – 100 kt		185

¹⁴³ See Early Day Motion 129, submitted by Alan Simpson MP, which calls on the government to implement its NPT disarmament obligations and thus phase out Trident.

¹⁴⁴ Just before he died unexpectedly in early August, Robin Cook, the former foreign secretary, called upon Prime Minister Tony Blair to "break from the past" and make "the case that nuclear weapons now have no relevance to Britain's defenses in the modern world." Robin Cook, "Worse Than Irrelevant," *Guardian*, July 29, 2005, p. 25

China

Bombers: China's has a small arsenal of nuclear weapons which can be delivered by aircraft. Although their yield is unknown, they have tested aircraft delivered bombs of up to 4 megatons yield.

Ballistic Missiles: China uses liquid fuelled missiles which would take some time to prepare for launch, and reportedly stores the warheads separate from these missiles. However, a solid fuelled missile, the DF-31, is under development. Each missile carries one warhead. However, China has the technical capability to develop multiple re-entry vehicles and could deploy these in response to US development of Ballistic Missile Defence.

Non-strategic warheads: There is no official evidence of existence of non-strategic weapons. However, the US Defense Intelligence Agency believes that China has developed nuclear artillery, demolition munitions and nuclear capable short-range missiles. Land attack cruise missiles being developed might be nuclear capable.

Warheads: China's strategic weapons have high yields – mostly in the megaton range – but are not as accurate as those of the US or Russia.¹⁴⁵

Chinese Nuclear Forces						
Type	NATO designation	Number Year deployed	Range (km)	Warhead & yield	Number of warheads	
<i>Aircraft</i>						
Hong-6	B-6	100	1965	3100	1-3 x ?	100
Qian-5	A-5	30	1970	400	1 x ?	30
<i>Land-based missiles</i>						
DF-3A	CSS-2	40	1971	2800	1 x 3.3 Mt	40
DF-4	CSS-3	20	1980	>5500	1 x 3.3 Mt	20
DF-5A	CSS-4	20	1981	13,000	1 x 4.5 Mt	20
DF-21A	CSS-5	48	1985	1800	1 x 200 kt	48
<i>SLBM</i>						
Julang	CSS-N-3	12	1986	>1000	1 x 200 kt	12
<i>Tactical weapons</i>						
DF-15, DF-10						120
Total						390

France

Bombers: Both the Navy and Airforce deploy nuclear capable aircraft. France is developing a new nuclear capable fighter-bomber, the Rafale. France is supposedly the only country to still deploy nuclear weapons on aircraft carriers.

Submarines: France has four nuclear capable submarines. Two more Triomphant class submarines are currently being built. France is testing a new submarine launched missile the M51 which will replace the M45.

Nuclear testing: The nuclear testing facilities at Moruroa and Fangataufa were closed following France's accession to the CTBT. However, France continues to test nuclear weapons through supercomputer simulations, linear electron beam acceleration and other means, and is building a new laser mega-joule facility for nuclear fusion research.¹⁴⁶

French Nuclear Forces						
Delivery Vehicle	Number Year	Range deployed (km)	Warhead and yield	Type	Number of warheads	
<i>Aircraft</i>						
Mirage 2000	60	1988	2750	1 x 300kt	TN 81	50
<i>SLBMs</i>						
M4	16	1985	6000	6 x 150 kt	TN 70/71	96
M45	32	1996	6000	6 x 100 kt	TN 75	192
<i>Carrier-based aircraft</i>						
Super Etendard	24	1978	650	1 x 300 kt	TN 81	10
Total						348

¹⁴⁵ China's nuclear forces 2006, By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, May/June 2006. http://www.thebulletin.org/article_nn.php?art_ofn=mj06norris

¹⁴⁶ France's nuclear forces 2005, By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, July/August 2005. http://www.thebulletin.org/article_nn.php?art_ofn=ja05norris

United States

As of January 2006, the U.S. stockpile contains almost 10,000 nuclear warheads. This includes 5,735 active or operational warheads: 5,235 strategic and 500 non-strategic warheads. Approximately 4,225 additional warheads are held in the reserve or inactive stockpiles, some of which will be dismantled. Under plans announced by the Energy Department in June 2004 (and possibly revised in spring 2005), some 4,365 warheads are scheduled to be retired for dismantlement by 2012. This would leave approximately 5,945 warheads in the operational and reserve stockpiles in 2012, including the 1,700-2,200 "operationally deployed" strategic warheads specified in the 2002 Moscow Treaty or Strategic Offensive Reductions Treaty (SORT).

Intercontinental ballistic missiles: Under START II, all operational MX missiles are to be deactivated by 2007. Minuteman III missiles continue to be upgraded. The Guidance Replacement Program will extend the life of the guidance system beyond the year 2020 and improve Minuteman III accuracy to near that of the current MX--a circular error probable of 100 meters

Submarine launched ballistic missiles: All Trident I submarine-launched ballistic missiles (SLBMs) are expected to be replaced with longer-range and more accurate Trident II D5s by the end of 2006.

Bombers: Long-range bombers are equipped with air launched cruise missiles and free fall bombs. The B-2 bomber is capable of carrying the B61-11, an earth-penetrating nuclear bomb, introduced in November 1997. The US is continuing to produce nuclear capable advanced cruise missiles (ACM)



An advanced cruise missile in flight

Non-strategic forces: Nuclear weapons were removed from surface ships in 1991. However, the US maintains a robust stockpile of tactical nuclear weapons in Europe and on its territory and is not expected to reduce these while Russia maintains a large stockpile.

Stockpile: In addition to the active stockpile, the U.S. maintains a large inactive stockpile as a "hedge" in case arms control expectations fail to materialise.

New nuclear weapon capabilities. The Defense Department is upgrading its nuclear capabilities to reflect new policy and operational practice. This includes CONPLAN 8022, a concept plan for the quick use of nuclear warfare capabilities to destroy--preemptively, if necessary--"time-urgent targets" anywhere in the world. Defense Secretary Donald Rumsfeld issued an Alert Order in early 2004 that directed the military to put CONPLAN 8022 into effect. As a result, the Bush administration's preemption policy is now operational on long-range bombers, strategic submarines on deterrent patrol, and presumably intercontinental ballistic missiles (ICBMs).¹⁴⁷

United States Nuclear Forces					
Delivery Vehicle	Launchers	Year deployed	Warheads and yield	Total warheads	
<i>ICBMs</i>					
Minuteman III	150	1970	1 W62 x 170 kt	150	1050
	50	1970	3 W62 x 170 kt	150	
	300	1979	2-3 W78 x 335 kt	750	
<i>SLBMs</i>					
Trident II D-5	250	1990	6 W88 x 455 kt	384	2016
		1992	6 W76 x 100 kt	1,632	
<i>Bombers</i>					
B-2 Spirit	21	1994	B61, B83 x 5 - 150 kt	555	1955
B-52 Stratofortress	56	1961	ACM x 5 - 150 kt	400	
			ALCM x 5 - 150 kt	1000	
<i>Non-strategic weapons</i>					
Tomahawk	325	1984	W80 x 5 - 150 kt	320	1670
B 61 bombs	n/a	1979	0.3 - 170 kt	1,350	
	Total active			6691	
	Inactive stockpile			~4225	
	Total			~10,916	

¹⁴⁷ United States nuclear forces, 2006, , By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, January/February 2006, http://www.thebulletin.org/article_nn.php?art_ofn=jf06norris

Israel

Israel neither acknowledges nor denies that it has nuclear weapons. Israel is generally regarded as a de facto nuclear weapon state. Mordechai Vanunu, a former nuclear technician at the Dimona facility, revealed that Israel could have up to 200 nuclear warheads.¹⁵⁰ Vanunu also reported that Israel had produced tritium and lithium, indicating that Israel may have developed boosted nuclear weapons. Seymour Hersh has claimed that Israel has developed low-yield weapons for artillery and land-mines, as well as thermo-nuclear weapons.¹⁵¹ Some analysts assume that Israel could not have advanced to the point of producing thermonuclear weapons because they are not known to have conducted any physical nuclear testing. However, it is reported that Israel has been able to acquire data on thermonuclear tests from France and the U.S. Also, there is speculation that a signal detected by a US satellite over the Atlantic on September 22, 1979 was in fact a nuclear test conducted by either Israel or South Africa. Israel currently deploys two nuclear capable ballistic missile systems: the Jericho I (range 660 km) and the Jericho II (range 1500 km). In addition, the Shavit space launch vehicle could be modified to carry nuclear weapons giving it an intercontinental capability (range 7800 km). Israel also has a number of aircraft that could deliver nuclear gravity bombs including F-4 Phantoms, A-4 Skyhawks, and more recently, F-16s and F-15Es.¹⁵²

India

India demonstrated a nuclear weapons capability in 1974 by detonating a device in what it called a peaceful nuclear experiment. Then in May 1998, India openly tested nuclear weapons and declared itself a nuclear weapons power. India currently has a stockpile of approximately 40-50 assembled nuclear warheads, but this number is likely to increase over the next decade. India has enough separated weapons grade plutonium to make about 85 nuclear warheads and is increasing that capacity. Over the next decade India expects to spend \$2 billion a year to create a Strategic Forces Command infrastructure.

India has developed two missiles which could be adapted to nuclear capability. They are the Prithvi (range 200 km) and the Agni (range 1,500 – 2,500 km). India has also been enhancing its nuclear air-delivery capability by purchasing and re-producing the Russian Su-30MK fighter-bomber, and could also use previously purchased Mirage 2000Hs, Jaguar ISs or MiG-27s. In addition, India claims to be developing a submarine launched ballistic missile known as Sagarika, and nuclear capable cruise missiles.¹⁵³



Ghauri II nuclear capable missile.
Photo: AFP

Pakistan

Pakistan is believed to have started developing its nuclear weapons program in 1971, following its war with India. By 1998, it was believed that Pakistan had built a small arsenal of unassembled nuclear weapons. In response to the Indian tests of May 1998, Pakistan followed with nuclear tests itself in Chagai Hills. It is now possible that Pakistan would have built and assembled up to 25 nuclear warheads. Pakistan possesses about 30 nuclear capable surface-to-surface missiles provided by China.

Pakistan has built and tested its own ballistic missiles including the Haft-3 (range 600 km) and the Ghauri (range 1500 km). In addition, Pakistan has purchased F-16s, Mirage V and Chinese-produced A-5s which could be used for delivering gravity bombs.¹⁵⁴

North Korea

On February 10, 2005 North Korea announced for the first time that it possesses nuclear weapons, but it has not been possible to substantiate this claim. North Korea has never conducted a nuclear test, and although it has extracted weapon-grade plutonium, it has never conclusively demonstrated that it possesses operational nuclear warheads. In addition, North Korea is reported to have uranium enrichment capacities assisted by Abdul Qadeer Khan, scientist and "father" of Pakistan's nuclear program. North Korea has developed nuclear capable medium range missiles (Nodong), and is in the process of developing a long-range missile (Taepodong).¹⁵⁵

¹⁵⁰ [Revealed: The Secrets of Israel's Nuclear Arsenal](#), Sunday Times, London, October 5, 1986

¹⁵¹ [The Sansom Option](#), Random House, New York, 1991

¹⁵² Israel's nuclear forces 2002, , By Robert S. Norris and Hans M. Kristensen, [Bulletin of Atomic Scientists](#), September/October 2002, http://www.thebulletin.org/article_nn.php?art_ofn=so02norris

¹⁵³ India's nuclear forces 2005, By Robert S. Norris and Hans M. Kristensen, [Bulletin of Atomic Scientists](#), September/October 2005, http://www.thebulletin.org/article_nn.php?art_ofn=so05norris

¹⁵⁴ Pakistan's nuclear forces 2001, By Robert S. Norris and Hans M. Kristensen, [Bulletin of Atomic Scientists](#), January/February 2002, http://www.thebulletin.org/article_nn.php?art_ofn=jf02norris

¹⁵⁵ North Korea's nuclear program 2005, By Robert S. Norris and Hans M. Kristensen, [Bulletin of Atomic Scientists](#), May/June 2005, http://www.thebulletin.org/article_nn.php?art_ofn=mj05norris

Appendix V: Nuclear doctrines - Summary

United States

In August/September 2005 the US Department of Defence completed a new draft doctrine *Doctrine for Joint Nuclear Operations*¹⁵⁶ which updates the nuclear doctrine outlined in the 2002 *Nuclear Posture Review*,¹⁵⁷ which in itself was a development of the 1996 *US Joint Chiefs of Staff Doctrine for Joint Nuclear Operations*. Key points in the doctrine include:

- A strong US nuclear capability is necessary to deter aggression
- Nuclear weapons could be used for political or military reasons
- Nuclear weapons are not just to deter a nuclear strike, but have a role in deterring, or pre-emptively destroying, any weapons of mass destruction. This appears to contradict previous US assurances not to use nuclear weapons against non-nuclear states.
- The US requires a wide range of nuclear systems tailored for a variety of military and political objectives.

The 1996 Doctrine includes detailed plans for nuclear strikes and describes targets for such strikes including: WMD, their delivery systems and support units; ground combat units; air defense facilities; naval installations and vessels; on-state actors that possess WMD; and underground facilities. In order to be capable of delivering such strikes at a moment's notice, the US maintains over 2000 nuclear weapons on high alert status. The 2006 doctrine repeats the NPR's decision that a force level of 1,700-2,200 operationally deployed strategic warheads is "the lowest possible number" that the United States can maintain while maintaining a credible deterrent.

In May 2001, US President George Bush outlined "new concepts of deterrence that rely on both offensive and defensive forces." The new policy was an admission that nuclear deterrence was not infallible. The approach to deal with this was not to abandon the current nuclear policy but supplement it with missile defence and conventional forces. The 2002 Nuclear Policy Review confirmed this "New Triad" of capabilities, as well as the intention of the US to modernise nuclear delivery systems and maintain a strong nuclear stockpile indefinitely.

The 2006 doctrine continues the thinking of the previous versions in its reaffirmation of nuclear deterrence, a wide role for nuclear weapons,¹⁵⁸ a demonstrated readiness to use nuclear weapons¹⁵⁹ and a new triad of capabilities. However, it differs in three key elements: the threshold for nuclear use, nuclear targeting and international law, and the role of conventional and defensive forces.

Threshold for nuclear use. The 2006 doctrine lowers the threshold for nuclear use in a number of ways. Firstly it talks about use of nuclear weapons in a 'conflict' where-as previously nuclear weapons use was mostly envisaged in a 'war'. Secondly, it includes more detailed nuclear plans and capabilities to enable destruction of a much wider range of potential targets anywhere in the world more efficiently. In that transformation lays a subtle belief that nuclear deterrence will fail sooner or later, and before it does, U.S. nuclear forces and war plans need to be ready and capable of striking. Thirdly it affirms a wider role for the threat or use of nuclear weapons against threats not only from nuclear weapons, but also from chemical, biological and conventional weapons.¹⁶⁰ Fourthly, it indicates a greater integration of nuclear weapons into regular military planning on the use of force, a move from the use of nuclear weapons purely for deterrent purposes to one of war-fighting (see role of conventional forces below). Finally it envisages the possibility of using nuclear weapons in pre-emptive (preventive) strikes even when there is no immediate threat of attack from the adversary, but when there is the suspected development of chemical, biological or nuclear weapons.

¹⁵⁶ Doctrine for Joint Nuclear Operations, US Joint Chiefs of Staff, 2006, http://www.nukestrat.com/us/jcs/JCS_JP3-12_05draft.pdf

¹⁵⁷ See Nuclear Posture Review [Excerpts], Submitted to Congress on 31 December 2001, <http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm>

¹⁵⁸ "The focus of US deterrence efforts is therefore to influence potential adversaries to withhold actions intended to harm US' national interests..." Doctrine for Joint Nuclear Operations, US Joint Chiefs of Staff, 2006

¹⁵⁹ "US national determination to use them, and a potential adversary's perception of both the capabilities and the will to use them contribute to the effectiveness of deterrence..." , Doctrine for Joint Nuclear Operations, US Joint Chiefs of Staff, 2006

¹⁶⁰ "US nuclear forces deter potential adversary use of weapons of mass destruction (WMD) and dissuade against a potential adversary's development of an overwhelming conventional threat." Doctrine for Joint Nuclear Operations, Chapter 1 page 2.

Nuclear targeting and international law: The 2006 doctrine raises important questions about nuclear targeting and international law, particularly in its expansion of the range of potential targets beyond nuclear facilities, and its lowering the bar for when nuclear weapons could be used.

Kristensen reports that during the editing process of the new nuclear doctrine, a debate was triggered over the legal status of counter-value targeting, a practice of targeting a country's infrastructure – whether military or civilian. Some military lawyers argued that countervalue" targeting violates key aspects of the laws of warfare including prohibitions on targeting civilians and civilian targets and the necessity to allow for the resumption of peace and regular life following a conflict.

However, military planners wanted to retain the option of counter-value targeting as a way of increasing the ability to defeat the enemy. Thus, while the term has disappeared from the 2006 doctrine, the strategy has not. This is indicated by the doctrine stating that the role of nuclear forces is to impose "sever penalties for aggression on an adversary's military capability **and supporting infrastructure**;" that "Maintaining US ambiguity about when it would use nuclear weapons (and how) helps create doubt in the minds of potential adversaries, deterring them from taking hostile action," and "For deterrence to be effective, the force mixture must hold at risk **those assets most valued** by adversary leaders and provide a range of options for the US."¹⁶¹

Role of conventional and defensive forces: The 2006 doctrine envisages a greater integration of nuclear and conventional forces. "**Integrating conventional and nuclear attacks** will ensure the most efficient use of force and provide US leaders with a broader range of strike options to address immediate contingencies." On the one hand this lowers the threshold for the potential use of nuclear weapons, as they are considered not merely as weapons of deterrence, but also as weapons able to be used in war fighting. On the other hand, there is a tacit acceptance that conventional weapons could fulfill the roles of nuclear weapons, thus undermining the US argument that nuclear weapons would be required into the indefinite future. "As non-nuclear strike capabilities and nuclear strike are integrated, targets that may have required a nuclear weapon to achieve the needed effects in previous planning may be targeted with conventional weapons, provided the required effects can be achieved."

Indefinite possession of nuclear weapons: The doctrine provides no evidence that the US is considering implementing its nuclear disarmament obligations. On the contrary, the doctrine assumes that the US will continue to rely on nuclear weapons indefinitely. It notes that the minimum number of nuclear weapons required into the foreseeable future will be 1,700 to 2,200 operational warheads with a stock of additional warheads in reserve.

"US Operationally Deployed Strategic Nuclear Warheads will be limited to 1,700 to 2,200 by 2012... This range establishes the lowest possible number consistent with national security requirements and alliance obligations while maintaining a level that provides a credible deterrent... The remaining US strategic nuclear weapons remain in storage and serve as an augmentation capability should US strategic nuclear force requirements rise above the levels of the Moscow Treaty."

In addition the doctrine notes that "US nuclear forces dissuade potential adversaries by being so numerous, advanced, and reliable that the US retains an unassailable edge for the foreseeable future."

Russia

In January 2000, the Russian Government released its new nuclear policy in a document entitled Concept of National Security,¹⁶² which followed the Russian Military Doctrine¹⁶³ released in 1999. The documents update policy statements made in 1993 and 1997. They indicate a heightened sense of conflict with NATO and the US

¹⁶¹ The Role of U.S. Nuclear Weapons: New Doctrine Falls Short of Bush Pledge, Hans M. Kristensen, http://www.armscontrol.org/act/2005_09/Kristensen.asp, last visited April 15, 2006

¹⁶² <http://fas.org/nuke/guide/russia/doctrine/gazeta012400.htm>

¹⁶³ <http://fas.org/nuke/guide/russia/doctrine/991009-draft-doctrine.htm>

on nuclear issues, and an increased reliance on nuclear weapons. It affirms a strengthened Russian policy for the use of nuclear weapons, not only in response to a nuclear attack, but also to a conventional attack.¹⁶⁴

Cooperation between the US and Russia, including the Cooperative Threat Reduction Programs to secure Russian nuclear weapons and fissile materials, came under strain in the wake of NATO expansion, the NATO attacks on Serbia and the decision by the US to move ahead with National Missile Defense. These, along with a perceived deterioration in Russian conventional forces, were influences in Russia placing greater reliance on nuclear forces. Russia no longer maintains a 'no-first-use' policy (formally abandoned in 1993), and is considering re-deployment of tactical nuclear weapons.

As noted above, following the 1996 ICJ Advisory Opinion, Russia modified its doctrine inferring that the use of nuclear weapons would be restricted to situations where the very survival of Russia was at stake.¹⁶⁵ This provision was dropped in the 1999 and 2000 doctrinal documents, reflecting the widening role being given to nuclear weapons in the doctrine.

Russia has reduced its nuclear stockpile considerably since the end of the Cold War, but reductions beyond those agreed under the SORT Treaty do not appear to be planned and there are even some doubts as to whether SORT and START II reductions will be fully implemented. The Russian Duma (Parliament) ratified START II on the basis that the ABM Treaty be maintained. Thus the US decision to withdraw from the ABM has prompted Russia to maintain a number of START II missiles, and may lead Russia to increase the numbers of warheads on some of them.

In addition, Russia appears to be planning the modernisation of existing arsenals and possibly the development of new types of weapons. On December 24, 2005, Col. Gen. Nikolai Solovtsov, the commander of Russia's strategic missile forces, said that "many countries are eager to come in possession of nuclear weapons; the nuclear club will be expanding." He noted that Russia's plans to develop its strategic missile forces will take "into account all these threats. We're working on new missile complexes and new types of equipment with completely new characteristics," he added.¹⁶⁶

China

China joined the "nuclear club" in 1964 with a nuclear test at Lop Nor. At the same time China announced a 'no-first-use' policy. It joined the International Atomic Energy Agency (IAEA) in 1984 and the Nuclear Nonproliferation Treaty (NPT) in 1992. In comparison to Russia and the USA, China maintains a limited nuclear capability, emphasising the deterrent effect of retaliation rather than flexible use strategies. However, US development of ABM systems is perceived by China to be eroding the retaliation capabilities and thus the deterrence value of their nuclear arsenal. In response, China may increase its arsenal.¹⁶⁷ China has opposed NMD and called for negotiations to prevent an arms race in outer space.

It has a policy of nuclear disarmament,¹⁶⁸ and supports negotiations on a nuclear weapons convention, but calls on the US and Russia to bring their stockpiles down to numbers commensurate with those of the other nuclear powers as the first step.

¹⁶⁴ "The Russian Federation retains for itself the right to use nuclear weapons in response to the use of nuclear and other kinds of weapons of mass destruction against it and its allies, and in response to wide-scale aggression using conventional weapons in situations critical to the national security of the Russian Federation and its allies." Russian Military Doctrine Paragraph 1 (24)

¹⁶⁵ The 1997 National Security Concept noted that 'Russia reserves the right to use all forces and means at its disposal, including nuclear weapons, **in case an armed aggression creates a threat to the very existence of the Russian Federation as an independent sovereign state.**' In the 2000 National Security Concept this was reworded as "the use of all forces and means at its disposal, including nuclear weapons, **in case it needs to repel an armed aggression, if all other measures of resolving the crisis situation have been exhausted or proved ineffective.**"

¹⁶⁶ *Russian Army Acts on Possible 'Nuclear Club' Expansion*, ITAR-TASS, December 12, 2005, as cited in *Russian Nuclear Forces*, By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, March/April 2006.

http://www.thebulletin.org/article_nn.php?art_ofn=ma06norris

¹⁶⁷ See Chinese nuclear forces, 2006, By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, May/June 2006. http://www.thebulletin.org/article_nn.php?art_ofn=mj06norris

¹⁶⁸ China's Defence Policy notes that:

China consistently stands for complete prohibition and thorough destruction of nuclear weapons. It always pursues a policy of no first use of nuclear weapons, and undertakes unconditionally not to use or threaten to use nuclear weapons against non-nuclear-weapon states or nuclear-weapon-free zones. China did not and will never engage in

NATO

NATO's policy on nuclear weapons was outlined in the 1999 Strategic Concept released on NATO's 50th anniversary.¹⁶⁹ It included a reaffirmation of NATO reliance on nuclear weapons,¹⁷⁰ a wide and undefined policy on when nuclear weapons would be used,¹⁷¹ and a continuation of nuclear sharing arrangements.¹⁷² Attempts by Canada, Germany and the Netherlands to initiate a wide debate on NATO nuclear doctrine were rebuffed by the US, UK and France. However, they did agree to an ongoing review of NATO nuclear policy.

The US deploys tactical nuclear weapons in six NATO countries (Italy, Germany, Turkey, Belgium, UK and the Netherlands),¹⁷³ and has agreements with these countries allowing them to take control of the weapons and use them during wartime.¹⁷⁴ Despite US nuclear weapons being removed from Greece recently, NATO policy gives little reason to expect that the remaining weapons will be removed at any time soon.¹⁷⁵

NATO policy, like that of the US, UK, France and Russia, allows for the possible 'first-use' of nuclear weapons. In the 1980s NATO Military Command maintained detailed plans for the use of nuclear weapons in specific scenarios. However, in recent years it has developed "adaptive targeting capability" designed to allow NATO commanders to develop target plans and nuclear weapons employment plans on short notice.

United Kingdom

In December 2003 the UK Department of Defence released a white paper entitled Delivering Security in a Changing World¹⁷⁶ which outlined the UK's nuclear policy. It noted that:

"the continuing risk from the proliferation of nuclear weapons, and the certainty that a number of other countries will retain substantial nuclear arsenals, mean that our minimum nuclear deterrent capability, currently represented by Trident, is likely to remain a necessary element of our security."

The paper noted *"the need to ensure that Trident could remain an effective deterrent for up to 30 years,"* and *"the continuing role of nuclear weapons as the ultimate guarantor of the UK's national security."*

Previously, in 1998 Britain's Labour government announced several changes to its nuclear forces following a Strategic Defense Review:

- Only one British submarine will patrol at any given time carrying 48 warheads

a nuclear arms race with any other country. It supports the international community in its efforts to start substantive discussions on nuclear disarmament.

China's National Defense in 2004, White paper published by the State Council Information Office,

<http://fas.org/nuke/guide/china/doctrine/natdef2004.html>

¹⁶⁹ **The NATO Alliance's Strategic Concept**, approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, 23-24 April 1999

<http://www.nato.int/docu/pr/1999/p99-065e.htm>

¹⁷⁰ *Nuclear weapons make a unique contribution in rendering the risks of aggression against the Alliance incalculable and unacceptable. Thus, they remain essential to preserve peace,* The NATO Alliance's Strategic Concept, paragraph 46

¹⁷¹ *They will continue to fulfil an essential role by ensuring uncertainty in the mind of any aggressor about the nature of the Allies' response to military aggression,* The NATO Alliance's Strategic Concept, paragraph 62

¹⁷² *"A credible Alliance nuclear posture and the demonstration of Alliance solidarity and common commitment to war prevention continue to require widespread participation by European Allies involved in collective defence planning in nuclear roles, in peacetime basing of nuclear forces on their territory and in command, control and consultation arrangements"* The NATO Alliance's Strategic Concept, paragraph 63

¹⁷³ They were also employed in Greece until very recently.

¹⁷⁴ See NATO Nuclear Sharing and the NPT - Questions to be Answered, PENN Research Note 97.3, July 1997,

<http://www.basicint.org/nuclear/NATO/PENNnote-nuclearsharing-1997.htm>

¹⁷⁵ "Nuclear forces based in Europe and committed to NATO provide an essential political and military link between the European and the North American members of the Alliance. The Alliance will therefore maintain adequate nuclear forces in Europe." The NATO Alliance's Strategic Concept, paragraph 63

¹⁷⁶ http://www.mod.uk/NR/rdonlyres/051AF365-0A97-4550-99C0-4D87D7C95DED/0/cm6041I_whitepaper2003.pdf

- The submarine will patrol at a reduced state of alert – capable of firing its missiles within several days instead of within several minutes
- Britain will maintain fewer than 200 operationally available warheads

Despite this, Britain continues to participate in nuclear experiments (sub-critical testing) which could be used to test new nuclear weapon designs.¹⁷⁷ In addition, the UK maintains a policy of first-use of nuclear weapons.

The United Kingdom has supported the concept of multi-lateral negotiations leading to the elimination of nuclear weapons, but says that such negotiations cannot start until the nuclear stockpiles of the US and Russia are reduced commensurate to the stockpiles of the other NPT NWS.

France

On February 13, 1960, France became the fourth country to test a nuclear device by detonating its first atomic bomb in Reggane (Sahara). The decision to go nuclear was prompted by WWII experience of occupation by Germany and the differences with allies post World War II, especially in the Suez Canal crisis. Since then, nuclear weapons have been integral to France's international political status as well as to military doctrine. At the International Court of Justice hearing on nuclear weapons, France argued that it had a special right and duty, as a responsible nuclear weapon state, to maintain nuclear weapons for the purpose of international peace and security.

France has developed both tactical and strategic weapons. However, the military purpose for its tactical weapons is to serve primarily as warning shots in a strategic conflict and not as battlefield weapons.

France currently has two nuclear weapons systems: submarine-launched ballistic missiles (SLBMs) carried by nuclear-powered ballistic missile submarines (SSBNs) and medium-range air-to-surface missiles carried by Mirage 2000N and Super Étendard aircraft. Fifteen years ago, it had four additional systems that have now been removed from service. France retired, and presumably disassembled, the 175 warheads associated with these systems.

However, according to Kristensen and Norris, France still deploys nuclear weapons aboard aircraft carriers, the only country to do so. In addition, France is making plans to develop, procure, and deploy new nuclear weapons, and to maintain its existing arsenal without nuclear testing, for years to come.¹⁷⁸

The most comprehensive statement on French nuclear doctrine was contained in the 1994 Livre Blanc (White Paper) on Defence. It re-affirmed existing doctrine on the possible threat or use of nuclear weapons in international or regional conflicts, but did not adopt the US doctrine of counter-proliferation roles for nuclear weapons. However, in a speech at the nuclear headquarters of the Strategic Air and Maritime Forces in Brittany on January 19, 2006 French President Chirac indicated an expanding role for French nuclear weapons including one of counter-proliferation.¹⁷⁹

India

"... the refusal of the nuclear weapon states to consider the elimination of nuclear weapons...continues to be the single biggest threat to international peace and security... It is because of the continuing threat posed to India by the deployment of nuclear weapons... that we have been forced to carry out these tests." – Indian Press Statement, May 15, 1998

¹⁷⁷ **Britain to Participate in US Nuclear Test** BASIC Press Release 14 February 2002, http://www.basicint.org/pubs/Press/2002feb-britian_participate.htm

¹⁷⁸ French Nuclear Forces 2005, By Robert S. Norris and Hans M. Kristensen, *Bulletin of Atomic Scientists*, July/August 2005. http://www.thebulletin.org/article_nn.php?art_ofn=ja05norris

¹⁷⁹ “[T]he 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. This response could be a conventional one. It could also be of a different kind.”

See Chirac Outlines Expanded Nuclear Doctrine, Oliver Meir, *Arms Control Today*, March 2006 http://www.armscontrol.org/act/2006_03/MARCH-chirac.asp

In 1998 India openly tested nuclear weapons and declared that it had achieved a nuclear capability. It had been widely suspected that India had an undisclosed nuclear capability since the early 1970s. The decision to openly declare nuclear capability has been attributed to a combination of reasons including domestic popularity, an attempt to gain greater international consideration and frustration at the lack of progress towards nuclear disarmament by the nuclear weapon states.

The government followed its tests with policy announcements including the report on "Indian nuclear doctrine" released by India's National Security Advisory Board in August 1999.¹⁸⁰ These hold that:

- India would not be the first to use nuclear weapons and would support a treaty on non use of nuclear weapons
- India supports negotiations on a nuclear weapons abolition convention
- India supports the inclusion of the threat or use of nuclear weapons as a crime in the Statute of the International Criminal Court

On the other hand, the doctrine also embraced the concept of massive retaliation,¹⁸¹ deployment of nuclear weapons on a range of delivery vehicles,¹⁸² and excess numbers for contingencies.¹⁸³

India had initially proposed negotiations for a Comprehensive Test Ban Treaty, but in 1996 opposed its conclusion on the grounds that it allowed sub-critical explosions and other high-tech nuclear weapons experiments and was no longer a step towards nuclear disarmament.

Pakistan

Pakistan is believed to have been developing a nuclear capability since the early 1970s. In May 1998, Pakistan responded to India's nuclear tests by testing a series of nuclear weapons and declaring itself a nuclear weapon power. Pakistan's quest for a nuclear deterrent has been motivated principally by fears of domination by India. The ongoing conflict between India and Pakistan over Kashmir has further fuelled this fear, and provided an unstable environment which makes the deployment of nuclear weapons in the region extremely dangerous.¹⁸⁴

Pakistan has supported comprehensive disarmament proposals at the United Nations and Conference on Disarmament, but did not join the CTBT for similar reasons as India. Pakistan has proposed a number of bilateral or regional initiatives which India has not supported. These include a Nuclear Weapons Free Zone in South Asia and joining the NPT. India opposes these on the grounds that they do not address the nuclear threat India faces from China and the other NWS.

Pakistan and India have concluded a number of bilateral confidence building measures including a hot-line agreement and an agreement not to attack each other's nuclear power facilities. They have both agreed to maintain a moratorium on nuclear testing unless "unless, in exercise of national sovereignty, [either state] decides that extraordinary events have jeopardized its supreme interests."¹⁸⁵ However, what is notable in the confidence building measures is that they reaffirm the policy of deterrence and omit any references to nuclear disarmament.

Pakistan does not have a no-first-use policy, but instead proposes no-use-of-force arrangements with India. Supposedly Pakistan policy holds that nuclear weapons could be used if

- a. India attacks Pakistan and conquers a large part of its territory (space threshold)*
- b. India destroys a large part either of its land or air forces (military threshold)*
- c. India proceeds to the economic strangling of Pakistan (economic strangling)*⁹

¹⁸⁰ <http://fas.org/nuke/guide/india/doctrine/990817-indnucl.htm>

¹⁸¹ "any nuclear attack on India and its forces shall result in punitive retaliation with nuclear weapons to inflict damage unacceptable to the aggressor." Indian nuclear doctrine, Paragraph 2 (3).

¹⁸² These forces will be based on a triad of aircraft, mobile land-based missiles and sea-based assets in keeping with the objectives outlined above. Indian nuclear doctrine, Paragraph 3 (1).

¹⁸³ Survivability of the forces will be enhanced by a combination of multiple redundant systems, mobility, dispersion and deception. Indian nuclear doctrine, Paragraph 3 (1)

¹⁸⁴ See *Pakistan's Nuclear Descent*, Zia Mian, INESAP Bulletin, <http://www.inesap.org/bulletin16/bul16art03.htm>

¹⁸⁵ *New Accord a Modest Step to Ease Nuke Danger*, by Praful Bidwai, June 26, 2004
www.antivar.com/bidwai/?articleid=2854

d. India pushes Pakistan into political destabilization or creates a large scale internal subversion in Pakistan (domestic destabilization)”¹⁸⁶

Israel

“Give me peace and we will give up the atom... If we achieve regional peace, I think we can make the Middle East free from any nuclear threat.”

Israeli Prime Minister Shimon Peres
December 1995

Israel does not officially acknowledge that it has nuclear weapons but is believed to have been developing a nuclear weapons program since the mid 1950s, with technical support from France and possibly the US. In October 1986, the Sunday Times published details of Israel's undeclared nuclear programme, based on information and photographs supplied by Mordechai Vanunu, who had worked as a nuclear technician at Israel's secret Dimona complex.

Israel's nuclear policy is related to its relationships with its Arab neighbours. It includes policies of deterrence to prevent conventional attacks or those with weapons of mass destruction, as well as the “Samson option” of nuclear use following outbreak of war in order to ensure the survival of the state.

Israel has joined the CTBT but not the NPT. It is not opposed to negotiations on nuclear disarmament, but links its participation to these with progress on peace in the Middle East. Israel also has concerns about verification provisions of arms control treaties, believing that these can be too intrusive and detrimental to intelligence security particularly in geographically small states.

¹⁸⁶ Comments made by Khalid Kidwai, Director General of the Pakistan Strategic Plan Division, *Nuclear safety, nuclear stability and nuclear strategy in Pakistan: A concise report of a visit by Landau Network - Centro Volta*, January 21, 2003