

Lawyers' Committee on Nuclear Policy
866 UN Plaza, Suite 4050
New York, NY 10017 USA
www.lcnp.org; +1 212 818 1861; lcnp(at)lcnp.org

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To: State Parties to the Nuclear Non-Proliferation Treaty and Civil Society Groups
From: Lawyers' Committee on Nuclear Policy¹

FUNDAMENTAL LEGAL OBLIGATIONS REGARDING NUCLEAR WEAPONS

We urge all state parties and civil society groups to insist upon compliance with legal obligations outlined below:

- **Threat or use of nuclear weapons is illegal and criminal.**
- **The unequivocal undertaking to eliminate nuclear arsenals in compliance with NPT Article VI requires implementation of the practical steps agreed upon at the 2000 NPT Review Conference and cancelling upgrades or replacements of current nuclear weapons systems.**

A. Threat or use of nuclear weapons is illegal and criminal because the obligations to conform to the intransgressible rules and principles of humanitarian law cannot be reconciled with nuclear weapons' known and understood indiscriminate and uncontrollable effects.

1. Nuclear weapons systems are designed and intended to unleash vast heat, blast and radiation; the radiation will cause immediately lethal and long-term carcinogenic, mutagenic and teratogenic effects on human beings and other life forms that cannot be controlled in space or time. No one can deny the heat, blast and radiation-induced death, injury and illness caused by the Hiroshima and Nagasaki bombs, nor plead ignorance regarding the effects of use of any of the 26,000 nuclear warheads of nine countries, of which 96% are in the US and Russia.²
2. Threat or use of nuclear weapons is categorically and universally prohibited in any circumstance by peremptory rules and principles of humanitarian law. Any such threat or use, whether in offence or defense, is a war crime going far beyond the bounds of lawful war. This body of positive law is summarized most authoritatively by the International Court of Justice in its 1996 advisory opinion (ICJ Op.).³ The London Charter and the Nuremberg Tribunals made it clear that those rules and principles preempt contrary domestic law.
3. The inability of states possessing nuclear weapons to refute the intrinsic illegality and criminality of threat or use of nuclear weapons is illustrated by the recent UK White Paper (WP).⁴ It claims that the UK/US Trident nuclear weapon system as a deterrent is legal or justifiable because, among other reasons, "the UK would consider using nuclear

weapons only in self-defense or the defense of Britain's NATO allies and then only in extreme circumstances" (2-11). The White Paper further claims that the ICJ "rejected the argument that such use would necessarily be unlawful." However, the ICJ held that the requirements of necessity, proportionality, and humanitarian law must be met in all circumstances. Thus "a use of force that is proportionate under the law of self-defense, must in order to be lawful, also meet the requirements of the applicable law in armed conflict which comprise in particular the principles and rules of humanitarian law" (ICJ Op., § 42).

4. The fundamental rules and principles of humanitarian law include: a) "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets" (ICJ Op., § 78). A corollary is that it is prohibited to use weapons that cause uncontrollable effects [1977 Protocol I to the Geneva Conventions, Art. 51(4)]. Use of nuclear weapons system is unlawful per se because if targeted at military objects, the effects still are indiscriminate and uncontrollable. b) "It is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering" [ICJ Op., § 78; 1907 Hague Convention IV, Art. 23(e)]. c) "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law" (ICJ Op., § 78). Since any use of a nuclear weapon would cause indiscriminate harm and unnecessary suffering, the threat of such use is illegal. d) Reprisal/retaliation is not a justification for use of any nuclear weapon system; humanitarian law applies in that circumstance as others. Thus the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated: "No circumstances would legitimize an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party."⁵ Any use of any nuclear weapon system would also violate the international law of armed conflict by causing widespread, long-term and severe damage to our common environment and contaminating neutral states, and violate the right to life and other non-derogable human rights.

B. Under Article VI of the Nuclear Non-Proliferation Treaty (NPT) all states are legally obligated "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" (ICJ Op., § 105(2)F; NPT Art. VI).

1. State parties to the 2000 NPT Review Conference unanimously agreed to practical steps for systematic and progressive efforts to implement Article VI of the NPT including an unequivocal undertaking by the nuclear weapon states (NWS) to accomplish total elimination of their nuclear arsenals. Other practical steps for disarmament, affirmed in subsequent UN General Assembly resolutions, include implementing the principles of verification, transparency, and irreversibility in reducing and eliminating nuclear arsenals; the Comprehensive Test Ban Treaty; the Fissile Materials Cut-off Treaty; a diminishing role of nuclear weapons in security policies; and reduced operational status of nuclear forces.

2. Failure to implement the disarmament obligation and the 2000 commitments, or attempting to deny their continued application, undermines the object and purpose of the NPT. In particular, upgrade or replacement of nuclear weapons systems by such means as the US Reliable Replacement Warhead program or replacement of the UK/US Trident system are material breaches of obligations under Article VI of the NPT⁶ and of the general disarmament obligation stated by the Court applying to all states. In projecting the maintenance of nuclear forces for decades to come, they assume the indefinite postponement of conclusion of negotiations on nuclear disarmament and fulfillment of the unequivocal undertaking to eliminate nuclear arsenals. They further run contrary to the commitment to a diminishing role of nuclear weapons in security policies, particularly if they result in enhanced military capabilities.

No country can at once adhere to its obligations under international customary and conventional law outlined above and rely on a lawless security policy employing a “credible” nuclear deterrent (WP 4-1) posing “a uniquely terrible threat” (WP 3-3) to “deter threats anywhere in the world” (WP 4-4).

C. Practical and lawful solutions:

1. The Model Nuclear Weapons Convention developed by civil society and circulated as a UN document provides a template for the global prohibition and verified elimination of nuclear weapons.
2. Existing Nuclear Weapon Free Zones (NWFZs) provide models for new NWFZs in Europe, the Middle East, and elsewhere.
3. All debate on nuclear weapon system replacement or upgrade must acknowledge the undeniable harms and real costs of the nuclear cycle to life and our ecosystem. Such evidence is well documented by civil society groups including the Hibakusha, the International Physicians for the Prevention of Nuclear War, participants in the Indigenous World Uranium Summit, Navajo Nation, 30 Nov-2 Dec. 2006, and others. Non-violent/symbolic citizen action to insist that states uphold existing law such as Faslane 365, Trident Ploughshares can be supplemented by claims of breach of health, safety, welfare, and fiduciary duties of government including responsibility for costs from mining, testing, contamination, and waste.

¹ The principal author of this statement is Anabel Dwyer, attorney and member of the LCNP Board of Directors.

² Nuclear Information Project, “Status of World Nuclear Forces 2007,” updated March 29, 2007. Online at <http://www.nukestrat.com/nukestatus.htm>.

³ *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, ICJ Reports (1996) 226.

⁴ “The Future of the United Kingdom’s Nuclear Deterrent,” Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs (December 2006).

⁵ *Prosecutor v. Martić*, Case No IT-95-11-1 (8 Mar. 1996).

⁶ “UK’s Nuclear Deterrent, Current and Future Issues of Legality”, Philippe Sands, QC, and Helen Law, Matrix, Gray’s Inn, London, 13 Nov. 2006; “Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty,” Rabinder Singh, QC, and Professor Christine Chinkin, Matrix, London, 20 July 2004.