

THE LEGAL AND POLICY IMPERATIVES FOR THE ABOLITION OF NUCLEAR WEAPONS

More than two decades after President Ronald Reagan and President Mikhail Gorbachev seriously discussed the abolition of nuclear weapons at Reykjavik, there is renewed, bipartisan attention to achievement of a “world free of nuclear weapons.” That is the objective set by George Shultz, William Perry, Henry Kissinger, and Sam Nunn in their [January 2007](#) and [January 2008](#) op-eds in the Wall Street Journal and supported by a growing number of present and former military and civilian dignitaries and by large popular majorities in countries around the world.

This shift in the policy debate is long overdue. But one dimension of the problem is being ignored: Not only is reliance on nuclear weapons bad policy, it is unlawful. The use or threat of use of nuclear weapons and the indefinite maintenance of a nuclear arsenal are contrary to established, universally recognized rules of international law.

Nuclear weapons cannot be used in compliance with the fundamental rules of discrimination, proportionality, and necessity acknowledged by the United States as requirements for lawful military operations. Nor is it lawful to threaten to use nuclear weapons. Further, rather than ongoing reliance on nuclear weapons, the United States is obligated under the Nuclear Non-Proliferation Treaty (NPT) to negotiate their elimination in good faith.

By recognizing the unlawfulness of nuclear weapons and working for their elimination, the United States would both fulfill its legal obligations and foster our security and that of nations and peoples throughout the world. In addition to reducing the risks arising from existing arsenals, taking this course of action would give a powerful boost to diplomatic and law-enforcement efforts to prevent the spread of nuclear weapons and their acquisition by terrorists.

Established Rules of Law Prohibiting the Use of Nuclear Weapons

The *rule of discrimination* prohibits the use of weapons that cannot discriminate in their effects between military and non-military targets. It is unlawful to use weapons whose effects cannot be controlled and therefore cannot be directed against a military target. The effects of nuclear weapons, including powerful and prolonged ionizing radiation with its continuing genetic and environmental as well as immediate effects, and the blast, heat, electromagnetic impulse, and escalation effects, are uncontrollable in space and time. They are not subject to the control of the user and cannot discriminate between lawful and unlawful targets. The use of nuclear weapons is therefore barred by the rule of discrimination. The rule is not subject to any balancing test and applies in every circumstance. As stated by the International Court of Justice in its 1996 advisory opinion, states must “never” use weapons incapable of meeting the “fundamental” and “intransgressible” requirement of discrimination. (Emphasis supplied.)

Under the *rule of necessity*, a state may only use that degree and kind of force as is necessary to achieve the military objective of a particular strike. Under the *rule of proportionality*, it is prohibited to use a weapon whose potential incidental effects on non-combatant persons or objects (civilian infrastructure) or damage to the environment would likely be disproportionate to the value of the military advantage anticipated from the attack. If the state cannot control such effects, it cannot ensure that the collateral effects of the attack will be proportional to the anticipated military advantage or that the force applied will

be only that necessary to achieve the military objective. The effects of nuclear weapons being uncontrollable, the weapons cannot be employed in compliance with the requirements of necessity and proportionality. If in extraordinary circumstances a contemplated nuclear attack is nonetheless deemed to meet those requirements, it remains barred by the requirement of discrimination.

Reprisal is not a justification for use of nuclear weapons. To be lawful, reprisals must be limited to a level of force necessary to cause the other side to cease its unlawful attack and must be proportional to that attack and necessary to address it. Due to their uncontrollability, nuclear weapons are not subject to being limited to such a level of force, nor could their effects be limited to what is proportional or necessary, nor could the effects meet the requirement of discrimination.

The Obligation of Good-Faith Negotiation of Nuclear Disarmament

The NPT obligates the United States, as a party to the treaty, to “*pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.*” The International Court of Justice unanimously concluded that there exists an obligation to “*bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*” The United States has acknowledged that under the NPT it has an unequivocal obligation to accomplish the elimination of its nuclear arsenal and has made an NPT commitment to a diminishing role of nuclear weapons in its security policy. Yet it is currently planning and preparing for maintenance of nuclear forces for decades to come.

Threat and Deterrence

The fact that the use of nuclear weapons would be unlawful under the law of armed conflict necessarily means that any specific threat to use nuclear weapons would be unlawful. This follows from the established rule of international law that it is unlawful for a state to threaten to use levels and kinds of force that it would be unlawful to use. The policy of nuclear deterrence declares a general readiness to resort to nuclear weapons in certain circumstances. It therefore rests on unlawful foundations. Further, the intent to rely on nuclear deterrence for the indefinite future is contrary to the NPT disarmament obligation.

Individual Responsibility

The unlawfulness of nuclear weapons has significance not only for the U.S. government, but also for its civilian and military leaders, and for industrial leaders and other agents through whom it conducts activities. As the Nuremberg judgments established for all time, they are potentially subject to criminal liability for violation of the law of armed conflict.

The Policy Imperative

The immense danger of a holocaust caused by nuclear weapons makes their continued possession, as well as continued reliance on nuclear deterrence, extremely unwise. To this must be added the risk of the weapons falling into the hands of terrorists and the increasing instability of the non-proliferation regime.

Conclusion

The unlawfulness of the use and threat of use of nuclear weapons and of indefinite maintenance of a nuclear arsenal are compelling reasons for the United States to end its policy of reliance on nuclear weapons and to take leadership in eliminating them globally. It is time to achieve and implement a treaty formally banning, worldwide, the possession, threat of use, and use of nuclear weapons.

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