

## **Response of the Lawyers Committee on Nuclear Policy to the Nuclear Posture Review Report**

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### Nuclear Disarmament

The Nuclear Posture Review Report (NPR) released April 6, 2010 has a marked improvement in tone and direction regarding nuclear disarmament over previous reports released by the Bush administration in 2001 and the Clinton administration in 1994. The report

- states that the “long-term goal of U.S. policy is the complete elimination of nuclear weapons”;<sup>1</sup>
- identifies this objective to be pursued after entry into force of the New START agreement signed April 8, 2010 and “substantial further nuclear force reductions with Russia”: “engage other states possessing nuclear weapons, over time, in a multilateral effort to limit, reduce, and eventually eliminate all nuclear weapons worldwide”;<sup>2</sup> and
- decides upon this step: “Initiate a comprehensive national research and development program to support continued progress toward a world free of nuclear weapons, including expanded work on verification technologies.”<sup>3</sup>

Regarding the legal obligation of good faith negotiation of nuclear disarmament set forth in the Nuclear Non-Proliferation Treaty (NPT), the NPR contends that “reducing the role and number of nuclear weapons” will demonstrate “that we are meeting our NPT Article VI obligation to make progress toward nuclear disarmament.”<sup>4</sup> While welcome, such reductions do not suffice.

In its 1996 advisory opinion, the International Court of Justice unanimously concluded that Article VI requires that states “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>5</sup> The United States is therefore obligated to go beyond the measures outlined in the NPR to support and actively work toward the commencement and conclusion of negotiations on a convention for the global elimination of nuclear weapons.<sup>6</sup> That is a process long called for by the vast majority of the world’s states in UN General Assembly resolutions, and in recent years endorsed by UN Secretary-General Ban Ki-moon. It is time for the United States to meet the legal obligation and to lead other states with nuclear weapons in launching this process.

In many respects, however, the NPR conveys quite the opposite intention, projecting reliance on nuclear forces as central instruments of national security strategy for decades to come:

- No substantial changes are made in the US nuclear force structure of heavy bombers, ICBMs, and ballistic missile submarines (SSBNs), or in their alert states (“nearly all ICBMs on alert, and a significant number of SSBNs at sea at any given time”<sup>7</sup>);
- The arsenal of operationally deployed warheads and bombs the United States will field under New START limits – probably several hundred in excess of 1550 due to a counting rule equating one bomber to one warhead – would enable a full-scale, Cold-War style preemptive or responsive attack upon Russian nuclear forces, airfields, command and control centers, military-industrial targets, *etc.*
- The United States is planning to develop and deploy new generations of nuclear weapons delivery systems in the next two decades, including ballistic missile submarines and ICBMs;<sup>8</sup> is replacing existing nuclear-capable fighter-bombers with the F-35 Joint Strike Fighter;<sup>9</sup> will study whether and how to replace the current air-launched cruise missile;<sup>10</sup> and will not accept limits on its ongoing missile defense program.<sup>11</sup>
- Warhead “life extension” work will proceed for the W76, deployed on submarine-launched ballistic missiles, the B61, deployed on fighter-bombers, and the W78, deployed on ICBMs.<sup>12</sup> While the NPR claims that the work will not “support new military missions or provide for new military capabilities,”<sup>13</sup> in fact life extension for the W76 is adding to the capability to hit hard targets.<sup>14</sup> Also, the military capability of a nuclear weapon does not depend on the warhead alone, and there are ongoing improvements in delivery systems, for example the F-35, targeting, command and control, *etc.*
- Major investments in new weapons production facilities are approved, supposedly to hedge against further reductions in deployed and non-deployed nuclear warheads (now amounting to about 5,000, not counting the several thousand awaiting dismantlement).<sup>15</sup> Hedging against unexpected technical problems and “geopolitical surprise” was a central theme of previous reviews. It provides a convenient rationale for keeping the nuclear establishment well-funded and more inclined to support ratification of New START and the Comprehensive Nuclear-Test-Ban Treaty.

Taken as a whole, the modernization of nuclear forces and the nuclear weapons complex now underway or planned is contrary to the requirement that the United States meet its disarmament obligation in “good faith”. Good faith is required both by the terms of NPT Article VI and by general international law. As Judge Mohammed Bedjaoui, former president of the ICJ, has explained, good faith requires states “to respect the integrity” of the NPT and “to refrain from acts incompatible with [its] object and purpose,” and it proscribes “every initiative the effect of which would be to render impossible the conclusion of the contemplated

disarmament treaty.”<sup>16</sup> US plans also are contrary to commitments made at the 2000 NPT Review Conference to a diminishing role for nuclear weapons and to the application of principle of irreversibility to nuclear arms control and disarmament measures. In particular, building weapons facilities that among other things provide the capability for expanding arsenals is a circumvention of the principle of irreversibility.

### Doctrine on Use of Nuclear Weapons

The NPR signals that it is desirable for the United States to move toward a policy of “detering” only nuclear attack, though not a policy that would rule out preemption. For now, however, the longstanding elements of US doctrine remain in place: the United States may use nuclear weapons, preemptively or responsively, in relation to both nuclear and non-nuclear (conventional, chemical, biological) capabilities and attacks by other states possessing nuclear weapons, or states deemed not to be in compliance with the NPT.<sup>17</sup> In this regard, the NPR is fundamentally deficient in its treatment – or rather ignoring – of law. It is inescapable that the use of nuclear weapons, with their uncontrollable collateral effects, is incompatible with requirements of necessity, proportionality, and discrimination.<sup>18</sup> Yet despite the fact that the US military accepts and applies these rules in its conventional military operations, they receive no mention in the NPR.

It is true that the NPR evinces no enthusiasm for use of nuclear weapons. It states: “It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.”<sup>19</sup> And: “the United States wishes to stress that it would only consider use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.”<sup>20</sup> However, in those circumstances as in others, the rules apply. Thus in its 1996 advisory opinion, the International Court of Justice characterized this rule as “*fundamental*” and “*intransgressible*”: “States must never make civilians the object of attack and must consequently *never* use weapons that are incapable of distinguishing between civilian and military targets.”<sup>21</sup> The Court also restricted the area where it could not reach a definitive conclusion regarding the lawfulness or unlawfulness of threat or use of nuclear weapons to “an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>22</sup> This is considerably narrower than the NPR’s reference to “vital interests.”

A positive aspect of the NPR in relation to doctrine concerns a US assurance dating back to 1978 of non-use of nuclear weapons against non-nuclear weapon states parties to the NPT. The NPR prominently features the assurance and retracts a Clinton administration qualification reserving the option to respond with nuclear weapons to a non-nuclear weapon state’s chemical or biological weapon attack or capability.<sup>23</sup> Here the NPR is acknowledging a basic element of the NPT bargain: states that have renounced possession of nuclear weapons are entitled to a guarantee that the weapons will not be used against them. The assurance indeed

appears to be legally binding. The United States formally restated it in 1995, joined by three other NPT nuclear weapon states (China already had a declared policy of no first use). Non-nuclear weapon states relied upon the assurances that year in agreeing to extend the NPT indefinitely, and reliance is a key factor in determining whether promises are binding. The United States should now support a process to make assurances by the nuclear weapon states legally binding without any question, by a treaty, or by a Security Council resolution that makes them mandatory as a matter of international peace and security.

One aspect of the NPR's statement of the assurance is problematic. That is the addition of the requirement that states receiving the assurance be "in compliance with their nuclear non-proliferation obligations."<sup>24</sup> The NPR offers no detail on who is to decide this, but the implication is that in the end it is up to the United States. Nor does the NPR explain what the degree of non-compliance must be. In commenting on the NPR, however, US officials have said that they do not consider Iran to be covered by the assurance. Yet Iran does not have nuclear weapons and has not been found by any international body to be in breach of the fundamental NPT obligation set forth in Article II not to "manufacture or otherwise acquire" nuclear weapons. Other states have, like Iran, violated safeguards reporting rules; states parties are obligated to enter into safeguards agreements with the IAEA by Article III of the NPT. Further development of the assurances should clarify that determinations of non-compliance are to be made by authoritative international bodies and that only a breach of the Article II obligation of non-acquisition of nuclear weapons renders a state ineligible for the assurances.

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<sup>1</sup> Department of Defense, *Nuclear Posture Review Report*, April 2010 ("NPR"), p. 48.

<sup>2</sup> *Id.* at p. 47.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at p. 7.

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2)F (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.

<sup>6</sup> See *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice*, International Association of Lawyers Against Nuclear Arms and International Human Rights Clinic, Human Rights Program, Harvard Law School, 2009, pp. 25-28. See also the Model Nuclear Weapons Convention circulated by the UN Secretary-General to member states, available at [http://www.2020visioncampaign.org/filestorage/337/File/1/A\\_62\\_650\\_CostaRica.pdf](http://www.2020visioncampaign.org/filestorage/337/File/1/A_62_650_CostaRica.pdf).

<sup>7</sup> NPR at p. 27.

<sup>8</sup> *Id.* at p. 23.

<sup>9</sup> *Id.* at p. 27.

<sup>10</sup> *Id.* at p. 24.

<sup>11</sup> *Id.* at p. x.

<sup>12</sup> *Id.* at p. 39.

<sup>13</sup> *Id.*

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<sup>14</sup> See Greg Mello, "That Old Designing Fever," *The Bulletin of the Atomic Scientists*, January/February 2000,

Vol. 56, No. 1, pp. 51-57.

<sup>15</sup> *NPR* at pp. 41-42.

<sup>16</sup> Mohammed Bedjaoui, Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, May 1, 2008, Geneva, pp. 21-22, *available at*

<http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>. Judge Bedjaoui was President of the ICJ when it gave its 1996 advisory opinion on nuclear weapons.

<sup>17</sup> *NPR* at p. 16.

<sup>18</sup> See Lawyers Committee on Nuclear Policy, "Ending U.S. Reliance on Nuclear Weapons and Achieving Their Global Elimination: Wise Policy and Required by Law," March 2008, *available at* <http://lcnp.org/disarmament/LCNPstatement2008.pdf>; LCNP Letter re Nuclear Posture Review and the Law, August 10, 2009, *available at* <http://lcnp.org/pubs/NPRandLawfinal.pdf>.

<sup>19</sup> *NPR* at p. 16.

<sup>20</sup> *Id.*

<sup>21</sup> Advisory Opinion at ¶¶ 78, 79 (emphasis supplied).

<sup>22</sup> *Id.* at ¶ 105(2)E. In the first clause of that conclusion, the Court stated 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."

<sup>23</sup> *NPR* at pp. 15-16. Regarding biological weapons, however, the *NPR* says: "Given the catastrophic potential of biological weapons and the rapid pace of bio-technology development, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat." *Id.* at p. 16.

<sup>24</sup> *NPR* at p. 15.