

1-1-2010

# Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration

Winston P. Nagan

*University of Florida Levin College of Law, [nagan@law.ufl.edu](mailto:nagan@law.ufl.edu)*

Erin K. Slemmens

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Military, War and Peace Commons](#), and the [National Security Commons](#)

---

## Recommended Citation

Winston P. Nagan & Erin K. Slemmens, *Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration*, 19 *Tulane J. Int'l & Comp. Law* 1 (2010), available at <http://scholarship.law.ufl.edu/facultypub/259>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

# Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration\*

Winston P. Nagan  
Erin K. Slemmens†

*Prior U.S. presidential administrations have developed and adhered to the nuclear weapons policy of nuclear deterrence. This policy was largely conditioned by the Cold War and the fact that the U.S. Cold War adversary was a major threat to U.S. security because of its nuclear capability. The policy of nuclear deterrence worked on the principle of mutually assured destruction. It appears to have had the effect of discouraging recourse to nuclear weapons as instruments of war. It has also been generally perceived as a position that has an uneasy relationship with conventional international law. Even before entering office, President Obama suggested the need for a new perspective in nuclear weapons control: regulation and possible abolition.<sup>1</sup> It was therefore with much anticipation that public opinion awaited the Obama Nuclear Posture Review (NPR). However, the report did not quite measure up to the public's expectations. For example, the Administration reaffirmed NATO obligations that require U.S. adherence to the policy of nuclear deterrence, which does not represent a significant change from past policy. Nevertheless, strategic developments in treaty commitments with both NATO allies and former Cold War opponents imply a closer approximation with international law standards regarding the threat and use of nuclear weapons. Therefore, while current U.S. policy generates an expectation regarding the threat or use and abolition of nuclear weapons, it still retains an element of nuclear deterrence in its strategic posture, which, as indicated, seems to be in tension with international law. U.S. security strategy straddles a delicate balance between unilateral action and action consistent with promoting and defending international law in the national interest.*

I.	INTRODUCTION .....	2
II.	THE RELEVANT BACKGROUND TO THE NUCLEAR AGE .....	5
III.	THE ROLE OF INTERNATIONAL LAW SCHOLARSHIP .....	7
IV.	LEGISLATIVE AND QUASI-LEGISLATIVE RESPONSES TO THE CONTROL AND REGULATION OF NUCLEAR WEAPONS BY LAW.....	11

---

© 2010 Winston P. Nagan and Erin K. Slemmens.

\* This Article originated as a speech presented by one of the authors at Tulane Law School on March 19, 2010, for a conference entitled “Changing Course: The United States’ Evolving Approach to International Law.”

† Professor Winston P. Nagan is Director of the Institute for Human Rights, Peace and Development and Sam T. Dell Research Scholar Professor of Law in the University of Florida Levin College of Law. He is a Fellow of the World Academy of Art and Science and a Fellow of the Royal Society of the Arts. Erin K. Slemmens received her J.D. from University of Florida in 2009. She currently serves as a Research Fellow at the Institute for Human Rights, Peace and Development.

1. Jeff Zeleny, *Obama To Urge Elimination of World’s Nuclear Weapons*, N.Y. TIMES, Oct. 2, 2007, at A22.

V. THE ROLE OF JUDICIAL PRECEDENT IN THE CONTROL AND REGULATION OF NUCLEAR WEAPONS BY LAW.....	12
VI. THE <i>LEX SPECIALIS</i> AND THE UNITED STATES .....	23
VII. NUCLEAR WEAPONS AND PRIOR PRESIDENTIAL ADMINISTRATIONS .....	25
VIII. CURRENT U.S. NUCLEAR ARMS POLICY .....	30
X. CONCLUSION .....	36

## I. INTRODUCTION

President Obama has made U.S. nuclear weapons policy a major area of concern for his Administration. In a widely reported speech given in Prague last year, President Obama stated that he had a vision that was directed at the universal abolition of all nuclear weapons as a major purpose or goal of future U.S. nuclear policy.<sup>2</sup> To this end, the President committed U.S. defense resources to the tactical and strategic imperative of a complete review of the complex issues implicated in facilitating the realization of a nuclear weapons-free world.<sup>3</sup>

The Obama Administration has generated a multitude of initiatives, each connected with complex strategic and tactical policies that are critical to a credible shifting of the current paradigm and status of nuclear weapons systems. For example, there is the critical question of how to reduce the United States' considerable warheads and stockpiles of nuclear weapons. Such a goal is tied to developments for the new strategic arms reduction treaty with Russia.<sup>4</sup> Reduction of U.S. nuclear arms is also connected with Obama's directive to both strengthen and broaden the reach of the Treaty on the Non-Proliferation of Nuclear

---

2. Barack Obama, President of the United States, Remarks by President Barack Obama at Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/).

3. *Id.*

4. In April 2009, President Obama and Russian President Dmitry Medvedev jointly declared their resolve to "pursue new and verifiable reductions in [their countries'] strategic offensive arsenals in a step-by-step process, beginning by replacing the Strategic Arms Reduction Treaty with a new, legally-binding treaty." Dmitry Medvedev, President of Russia, & Barack Obama, President of the United States, Joint Statement by President Dmitry Medvedev of the Russian Federation and President Barack Obama of the United States of America (Apr. 1, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Joint-Statement-by-President-Dmitry-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America/](http://www.whitehouse.gov/the_press_office/Joint-Statement-by-President-Dmitry-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America/). The United States and Russia signed the New START Treaty on April 8, 2010. It provides the parties with seven years to reduce their forces. For detailed explanation of the treaty's limits to forces, see AMY F. WOOLF, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS—THE NEW START TREATY: CENTRAL LIMITS AND KEY PROVISIONS (June 18, 2010).

Weapons (NPT),<sup>5</sup> and with President Obama's priority of developing a legally binding international instrument that will completely prohibit the testing of nuclear weapons.<sup>6</sup>

Another complex issue generated by the Obama Administration's activities is the question of how to establish and enforce an effective nonproliferation strategy. It is clear that the United States (in cooperation with its partners) will have to confront the presence of nuclear weapons in North Korea and (potentially) Iran.<sup>7</sup> In the continuing war on terrorism, the United States also faces the threat that terrorist groups may get their hands on nuclear materials and the ability to deliver and

---

5. The 2010 NPT Review Conference took place in New York City from May 3-28, 2010. For information on the background to the 2010 NPT Review Conference, see PAUL K. KERR ET AL., CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS—2010 NON-PROLIFERATION TREATY (NPT) REVIEW CONFERENCE: KEY ISSUES AND IMPLICATIONS (May 3, 2010). This report notes:

The Obama Administration has emphasized in strategy documents that it views the NPT as the "centerpiece" of the nonproliferation regime and has pledged to strengthen the treaty. The Administration sees a linkage between arms control and disarmament policies and progress in improving the nuclear nonproliferation measures. The 2010 Nuclear Posture Review, for example, says that progress on arms control is "a means of strengthening our ability to mobilize broad international support for the measures needed to reinforce the non-proliferation regime and secure materials worldwide." The Nuclear Posture Review also says that the conditions for nuclear disarmament will not be possible without stronger proliferation controls. Over the years, NPT states without nuclear weapons, particularly from developing countries, have cited lack of progress on disarmament as the reason they do not support further tightening of nonproliferation rules. The ability of the Administration to garner international support for its proposals to strengthen the nonproliferation regime may be tested at the 2010 NPT Review conference.

*Id.* at 1.

6. "The United States is committed to the ratification of the Comprehensive Nuclear Test Ban Treaty and to its early entry into force, and we will work with the United States Senate to help achieve advice and consent to this important international agreement." Barack Obama, President of the United States, Statement by the President on Indonesia's Announcement of Its Intention To Ratify the CTBT (May 4, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-indonesia-s-announcement-its-intention-ratify-ctbt>.

7. The new National Security Strategy promises to:

Present a Clear Choice to Iran and North Korea:

The United States will pursue the denuclearization of the Korean peninsula and work to prevent Iran from developing a nuclear weapon. This is not about singling out nations—it is about the responsibilities of all nations and the success of the nonproliferation regime. Both nations face a clear choice. If North Korea eliminates its nuclear weapons program, and Iran meets its international obligations on its nuclear program, they will be able to proceed on a path to greater political and economic integration with the international community. If they ignore their international obligations, we will pursue multiple means to increase their isolation and bring them into compliance with international nonproliferation norms.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 23-24 (May 2010), [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

detonate them.<sup>8</sup> For these reasons, the Obama Administration is also taking a hard look at controlling the production of weapons-grade materials that are crucial to the creation of nuclear bombs.<sup>9</sup>

At the widest conceptual level, any steps undermining the foundations of nuclear deterrence (for example, the maintenance of nuclear weapons and the willingness to use them) confront rigid international structures that were originally established within a bipolar political reality. The traditional policy of nuclear deterrence was drafted by two principal antagonists capable of crafting expectations of stability out of the threat of mutually assured destruction. Contemporary relations between established states and shadowy nonstate actors (or even between a conglomeration of states and a radically antagonistic single state) would appear to require a much more complicated and nuanced policy.<sup>10</sup>

Thus, the Obama Administration confronts a concept of nuclear deterrence that must be infinitely broader than the contours of a bipolar world. Simultaneously, any policy of nuclear deterrence would seem to be an obstacle to the expeditious realization of a nuclear weapons-free world; yet any constraints on the possible use of nuclear weapons by the United States may conflict with the framework of existing international obligations (for example, NATO agreements). In light of President

---

8. In April 2009, President Obama called nuclear terrorism the “most immediate and extreme threat to global security.” Obama, *supra* note 2.

9. The 2010 National Security Strategy states:

The American people face no greater or more urgent danger than a terrorist attack with a nuclear weapon. And international peace and security is threatened by proliferation that could lead to a nuclear exchange. Indeed, since the end of the Cold War, the risk of a nuclear attack has increased. Excessive Cold War stockpiles remain. More nations have acquired nuclear weapons. Testing has continued. Black markets trade in nuclear secrets and materials. Terrorists are determined to buy, build, or steal a nuclear weapon. Our efforts to contain these dangers are centered in a global nonproliferation regime that has frayed as more people and nations break the rules.

That is why reversing the spread of nuclear weapons is a top priority. Success depends upon broad consensus and concerted action, we will move forward strategically on a number of fronts through our example, our partnerships, and a reinvigorated international regime.

OBAMA, *supra* note 7, at 23. In particular, the Administration “will seek a new treaty that verifiably ends the production of fissile materials intended for use in nuclear weapons.” *Id.*

10. Following the first detonation of atomic bombs over Japan in 1945, fear of mutually assured destruction by reciprocal use of thermonuclear weapons on a massive scale between the two Cold War superpowers arguably contributed much of the peace and world order over the next fifty-six years. Over these decades, however, an increasing number of states have acquired nuclear weapons (as well as massively destructive chemical and biological weapons). Thus, “it became possible for smaller states and even some non-state actors to change this security dynamic through possession and threat of use of these more destructive weapons technologies.” DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION, at xiv (2009).

Obama's declared policy objectives, we undertake to explain the role of international law in giving concrete assistance and normative guidance to U.S. policy makers, who now proceed along a complex path toward the goal of complete nuclear disarmament.

## II. THE RELEVANT BACKGROUND TO THE NUCLEAR AGE

In August 1945, President Truman authorized the use of atomic weapons on Hiroshima and Nagasaki.<sup>11</sup> During a three-day period, two bombs were detonated, killing more than 115,000 people (possibly as many as 250,000) and injuring at least another 100,000.<sup>12</sup> To this day, the debate about whether the use of the bombs was morally appropriate (or even consistent with international law at the time) continues to inspire intense controversy.

During the Second World War, however, there seemed to be little to no concern regarding the legitimacy of using the atomic bomb.<sup>13</sup> Many military atrocities were still occurring while the U.N. Charter was drafted. While some might argue that the Charter was formed to prevent just those types of atrocities, others have argued that the Charter became obsolete precisely because it failed to anticipate the extent of the damage that could be inflicted using weapons of mass destruction. Thus, John Foster Dulles, the Secretary of State under President Eisenhower, made a statement of critical importance to international lawyers when, in an article addressing the American Bar Association, he suggested that the nuclear age had made the U.N. Charter obsolete.<sup>14</sup> Of course, modern international law draws profound inspiration from the U.N. Charter, and practice has demonstrated that even outdated prescriptive foundations of

---

11. Barton J. Bernstein, *The Atomic Bombings Reconsidered*, 74 FOREIGN AFF. 135, 147 (1995).

12. *Id.* at 135.

13. *See id.* Bernstein explains:

By early 1945, World War II—especially in the Pacific—had become virtually total war. The firebombing of Dresden had helped set a precedent for the U.S. air force, supported by the American people, to intentionally kill mass numbers of Japanese citizens. The [pre-war] moral insistence on noncombatant immunity crumbled during the savage war.

*Id.* at 140.

14. John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 39 A.B.A. J. 1063, 1066 (1953). During the formation and conclusion of the U.N. Charter, the former Secretary of State explained: “[I]n the Spring of 1945, none of us knew of the atomic bomb which was to fall on Hiroshima on August 6, 1945. The Charter is thus a preatomic age Charter. In this sense it was obsolete before it actually came into force.” *Id.* Dulles affirms that had the delegates there known “that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.” *Id.*

international law can digest evolving problems and issues. Nevertheless, the nuclear age played an important role in the development of the Cold War, and Cold War imperatives tended to ignore or possibly undermine the promise and authority of the U.N. Charter. While the real world of effective power was dominated by two hegemons, this fact created tensions about the role and efficacy of the U.N. Charter. We suggest that a world of states that more widely share effective power (and are guided by a unitary superpower that sincerely seeks to empower this constitutive arrangement) must and will return to firm standards of international behavior as outlined in the U.N. Charter.

From the perspective of the modern law of war, academics ask the critical question: whether the use of this bomb, which produced damage that exceeded any specific military objective,<sup>15</sup> could be seen as violating the principles of military necessity, proportionality, and humanitarian concern. Certainly, there could be an arguable issue of lacking mens rea for authorizing the illegal use of such bombs at the time, because these weapons were new and had never been used before.<sup>16</sup> In contrast, no contemporary leader could authorize the use of nuclear weapons with this defense. The more difficult area of analysis is in the balancing of perceived security threats and actual peace obtained by the use of nuclear weapons. Even with a modern sense of the catastrophic effects of the atomic bombings in 1945, some may find a justified legal account of those historic actions, because the use of the bombs had the direct consequence of unconditional surrender by the Japanese. This particularly difficult area of international law continues to focus the world's attention on U.S. policy regarding restraint of forces under security threat.

As long as the precise legal implications of the use of nuclear arms in terms of conventional law relating to the *ius in bello* remains

---

15.

So dominant was the assumption that the bomb would be used against Japan that only one high-ranking Washington official, Undersecretary of War Robert Patterson, even questioned this notion after V-E Day. He wondered whether the defeat of Germany on May 8, 1945, might alter the plans for dropping the bomb on Japan. It would not.

Bernstein, *supra* note 12, at 138. Among other U.S. military commanders who questioned the necessity of the atomic bombings was Admiral Chester W. Nimitz. See E.B. POTTER, NIMITZ 386 (1976) ("Nimitz considered the atomic bomb somehow indecent, certainly not a legitimate form of warfare.").

16. There was little knowledge of the effects of the bomb blast on human populations; and there was less understanding of the environmental consequences (including radiation poisoning) that resulted from its use. See CHAIRMAN'S OFFICE, U.S. STRATEGIC BOMBING SURVEY: THE EFFECTS OF THE ATOMIC BOMBINGS OF HIROSHIMA AND NAGASAKI 30 (June 19, 1946).

speculative (as we explain below), the effective power process may reveal the leader of the world's only superpower as the key architect for rules of nuclear engagement. Moreover, the expanding base of treaties aimed at regulating (and ultimately abolishing) nuclear weapons would give substantial support to the recognition of customary international law prohibiting the threat or use (or even possession) of nuclear weapons. Thus, the Obama Administration might contribute to the outlawing of nuclear arms even as it maintains the position of nuclear deterrence that the Administration's activities aim to establish as unlawful under international law.

### III. THE ROLE OF INTERNATIONAL LAW SCHOLARSHIP

Academics have a special status in international law. They are regarded as *juris consults*. Credible academic work thus has an influence on the state of international law. Important influential work has produced a conceptual map to better understand the framework of world order based on the U.N. Charter and the framework of international power underlying the creation of the Charter, which is influenced by contending and conflicting world order systems.<sup>17</sup> In effect, the world order systems they described were the global process of effective power, which was better described in terms of a bipolar world.<sup>18</sup> In this sense, the world

---

17. The scholar most responsible for giving international law an important role in the nuclear weapons issue was Dr. Emanuel Margolis. See generally Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955). Margolis' work generated a rejoinder. In this scholarly exchange, Margolis presented a conventional view of international law to demonstrate the violation of international law by the United States in the testing of its thermonuclear weapons in the South Pacific. The central thrust of his argument was that the tests restricted the use of international waters, and these restrictions violated the fundamental principle of the law of the sea: the freedom of the seas. *Id.* at 634-35. Professor Margolis conceded that the purpose that the United States had used for closing off vast tracts of the Pacific was driven by the fear of damage to users of the ocean in those areas. In short, the objective was to secure humanitarian ends. *Id.* at 635. Margolis also made reference to the trust responsibilities that the United States owed to the trust beneficiaries. *Id.* at 644-45. The U.S. trust over South Pacific islands was of course a legal product of the U.N. Charter and, in particular, the trusteeship system that created it. *Id.* Margolis thus brought a conventional view of international law to a consideration of the lawfulness of the U.S. testing of hydrogen bombs in the South Pacific and declared that the practice violated the letter of international law. *Id.* at 645.

18. The scholars McDougal and Schlei defended the lawfulness of the U.S. test in the South Pacific on the basis of international law (see Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955)), but the view of international law that they developed is a theoretically broader and contextually informed conception of it. In this sense, McDougal and Schlei sought to develop the discourse about the lawfulness of the test by taking into account contextual factors that a narrow conventional view of international law might preclude. *Id.* at 655-56. In their view, the rules and principles that Margolis relies on must be seen in terms of the relevant contextual background, and the appropriate principles of the interpretation of international legal norms. *Id.* at 691. In

process of effective power had significant influence on the idea of world order<sup>19</sup> based on the constitutional foundations of the U.N. Charter.<sup>20</sup>

---

short, the approach of contextual appraisal must account for the nature of the implicit claim the United States is making in testing these weapons in the South Pacific. That claim is based on the background of world order tensions and conflict, which pits the democratic, rule of law-based position of the United States against a worldview rooted in totalitarian order. *Id.* at 689-90. This claim is further sustained by the necessity of security preparedness. This is the relevant context in which the claims of the United States must be assessed against the rules of international law, which now include broader legal standards. *Id.*

More than that, international law itself is not a frozen system of rules. It is a process in which the major participants continually assert claims and defend those claims and from time to time act on them. *Id.* at 656-57. A reference is made to the concept of *dédoulement fonctionnel*. *Id.* at 657. In short, in a system of world order that is not highly centralized and specialized, states make unilateral claims to further their interests, and would seek to justify those claims on the basis that they are a reasonable (in this instance) security competence as judged from the perspective of a third-party appraiser. *Id.* at 661.

19. Historically, the principle of “reasonableness” has been critical in resolving competing claims to authority and control over the high seas. *See id.* at 660. McDougal and Schlei concluded that the temporary appropriation of parts of Pacific high seas for safety purposes was a reasonable use of a common resource. *Id.* at 661. They also point out that the inconvenience to the populations of these islands was temporary, involved appropriate compensation and also involved consultation. *Id.* at 653 n.35. It should also be noted that fishermen who suffered radiation burns on the high seas were also compensated. *Id.* at 653. These temporary and limited interferences would therefore have to be appraised against the security importance of free world values for which the testing of nuclear weapons was an important strategic act.

The scholarly exchange between Margolis and McDougal should also be seen as part of a broader discourse concerning the appropriateness and relevance of international law in international relations. Margolis’ view of international law is one that may fairly be characterized as being somewhat legalistic and moralistic in its theoretical assumptions and methods. Two of the most respected international relations theorists of this period provided a trenchant attack on international law as understood in terms of legalistic and moralistic procedures and methods.

The intellectual leaders of this attack were Professor Hans Morgenthau and Ambassador George F. Kennan. GEORGE F. KENNAN, *AMERICAN DIPLOMACY: 1900-1950* (1951); HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY* (Alfred A. Knopf ed., 1951). In their view, the intrusion of international law on foreign policy makers, which by implication include the nuclear posture, was dangerous, inflexible and undigested utopianism. KENNAN, *supra*, at 95; MORGENTHAU, *supra*, at 33-34. Their work generated powerful rejoinders from McDougal—*Law and Power* and *The Identification and Appraisal of Diverse Systems of Public Order*. According to Morgenthau, the “state creates morality as well as law and that there is neither morality nor law outside the state.” MORGENTHAU, *supra*, at 34. Morgenthau stresses that there is no consensus about the nature of international justice and, as a consequence, there is no international society that can be integrated in terms of principles of justice and equality as in the nation state. *Id.* at 38-39.

The role of universal morality and universal international law is therefore misplaced. As misplaced morality, the proponents of legalism cannot distinguish between what is “desirable and . . . possible” and what is “desirable and . . . essential.” MORGENTHAU, *supra*, at 117. This is a view supported by Kennan as well who stated, “I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems.” KENNAN, *supra*, at 95. This approach would certainly strengthen the view within the national security establishment that an important role for international law in the policy process is misplaced. Myres S. McDougal, *Law and Power*, 46 *AM. J. INT’L L.* 102, 103 (1952); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public*

---

*Order*, 53 AM. J. INT'L L. 1, 29 (1959). McDougal's response to both Kennan and Morgenthau was that they had a complete misunderstanding of the global system of effective power and the possibilities and potentialities of authoritative and controlling decision as a source of critical normative guidance and policy clarification in international relations. McDougal, *supra*, at 103-07. Additionally, their view of international law was a view rooted in an older and limited paradigm. The concept of international law was in our time a much more flexible instrument of inquiry and policy guidance. *Id.* at 107-08.

The central contribution of McDougal in this context was to distance a contemporary conception of international law from old-fashioned legalism and the implication in the international context that its contributions were utopian. He sought to replace this by reframing the theory and methods of international law away from utopianism and more towards a framework of realism and relevance. *See id.* at 108. This provided flexibility and greater creativity in the formulation of legal responses to problems in the international environment.

The McDougal and Schlei response to Margolis was based on an international law that was sensitive to the context out of which the testing of nuclear weapons in the South Pacific had emerged. Context thus served to underline relevance and realism and clarified in a sharper way the policy constraints and guidelines that should inform decision making in this context. McDougal & Schlei, *supra* note 18, at 691. In this sense, the response to the international relations specialist was based on a newer paradigm of international law. *See generally* Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

Moreover, the McDougal approach provided an important theory and method for appraising the lawfulness of testing nuclear weapons in international law. The approach was sufficiently nuanced to take a broader view of the role of self-defense in the Cold War, and it was focused on a problem that had practical implications for policy makers. Additionally, McDougal and Schlei made U.N. Charter expectations an important part of the professional discourse in this area and, in this sense, they were in effect repudiating the view of Dulles that the nuclear age had rendered the Charter obsolete. Dulles, *supra* note 14, at 1065-66; McDougal & Schlei, *supra* note 18, at 686-87.

McDougal concluded the *Law and Power* article as follows:

It is urgently to be hoped that attacks upon law and morality which so profoundly misconceive law, morality and power, and their interrelations, will not cause many of us to mistake the real choice that confronts us. People whose moral perspectives preclude the deliberate resort to violence, except for self-defense or organized community sanction, have in the contemporary world only the alternative of some form of law. The choice we must make is not between law and no law, or between law and power, but between ineffective and effective law. It is a choice between the doctrines and techniques of power-balancing designed for the problems and conditions of bygone days, and contemporary commitments and techniques of power-balancing through appropriate international organization that offer hope of progressive and accelerating movement toward a unified world community—a choice in sum between, on the one hand, illusory doctrines, “old-fashioned” diplomacy, and spasmodic resorts to unauthorized violence, and, on the other hand, clear moral and legal commitments to freedom, peace, and abundance which are sustained by organized community coercion and which invoke, at both national and international levels, all the contemporary instruments of power, ideological and economic as well as diplomatic and military.

McDougal, *supra*, at 113.

To a large extent, the approach of McDougal and Schlei was one that was far from Dulles' repudiation of the U.N. Charter, but was also one with sufficient flexibility to be acceptable to the security establishment in the United States. However, the central message of McDougal and Schlei was that international law, appropriately understood, had a capacity to be relevant to the discourse and policies relating to nuclear weapons systems. Despite this capacity, the effect of such an approach to international and world order is not without complexity. Consider:

Moreover, to provide some kind of stability in a system in which there were pressures to confirm the U.N. Charter's promise, and pressures to change it under the imperatives of realism, the superpowers developed

---

A characteristic of a decentralized social system is that the political claims of the powerful nation-states serve as legal precedents for other, less powerful, members of international society. Nuclear testing by the United States and the Soviet Union created permissive precedents that are very difficult to repudiate. Relative power plays a much greater role in creating precedents than in repudiating them. There is a kind of reciprocity and symmetry operative in international society, as in all social systems, that makes the assertion by one state of a legal claim to act in a specified way available to other states similarly situated. Such symmetry owes much to the external aspects of the ideology associated with national sovereignty, an ideology that has contributed so centrally to the constitutive structure of traditional international law through ideas of the equality of states, the absoluteness of territorial jurisdiction, and the doctrine in nonintervention.

RICHARD A FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 452 (1970).

With the death of Dulles, the extremist edge of Cold War foreign policy was ameliorated as President Eisenhower himself took charge and proceeded to send out signals of the importance of arms control and some form of control over the nuclear arms race. Additionally, the major nuclear powers came to recognize that atmospheric weapons tests were diminishing in importance to their nuclear posture. Moreover, the general concern that a prohibition on nuclear testing in the atmosphere would also serve as a kind of indirect limit on the prospect of proliferation.

These social developments led to the adoption of the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313 [hereinafter Partial Test Ban Treaty]. The superpowers undertook to promote the importance of the Treaty and over one hundred states became parties to it. In addition, the U.N. General Assembly, effectually noting the change of posture of the nuclear hegemony, adopted resolutions that sought to universalize expectations concerning nuclear weapons systems.

20. The problem of international law and nuclear weapons thus crystallized around the view of Dulles that the nuclear weapons problem had rendered the U.N. Charter and international law based on the Charter obsolete. Dulles, *supra* note 14, at 1065-66. The practice of the dominant nuclear powers reflected a projection of nuclear weapons developments for the purpose, so it was claimed, of deterrence. The further justification of deterrence rested on the principle of massive retaliation or mutually assured destruction. We shall defer an international law appraisal of these practices and the claims implicit in them. However, the world of scholarly discourse generated a concern for the nuclear weapons issue, but a somewhat oblique form of concern. That concern was the international law implications of the U.S. testing of thermonuclear weapons in the South Pacific. See, e.g., Margolis, *supra* note 17. In retrospect, the scholarly initiative essentially developed a wedge into the discourse concerning nuclear weapons systems. This wedge became an important bridgehead for developing a relevant role for international law based on the U.N. Charter.

Returning briefly to the claims which fueled the Nuclear Arms Race of the 1950s and its reliance on the principle of deterrence and the threat of mutually assured destruction, it is possible to conceptualize these practices as representing essentially claims on the part of the dominant nuclear powers to exempt themselves from the letter and spirit of the U.N. Charter. Alternatively, the dominant powers represented claims to fundamentally change the Charter expectations relating to international peace and security in light of the technological developments in nuclear arsenals. To the extent that deterrence is still a justification for the accumulation of massive nuclear arsenals, in particular by the United States and Russia, this claim to change the Charter remains a residual and important question. Problematically, the treaty obligations under NATO appear to give some authority to the policy of nuclear deterrence in international law.

articulate doctrines that codified their national security expectations. As we will discuss below, the critical issue is how these national security doctrines—which articulated and communicated the expectations of the critical power brokers of the system—are also generating prelegal norms, which in turn influence how international law continues to develop to account for the problems occasioned by weapons of mass destruction.

#### IV. LEGISLATIVE AND QUASI-LEGISLATIVE RESPONSES TO THE CONTROL AND REGULATION OF NUCLEAR WEAPONS BY LAW

In 1961, the U.N. General Assembly adopted the Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons.<sup>21</sup> This declaration stated, “The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.”<sup>22</sup> The declaration also stipulated, “Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.”<sup>23</sup> In 1963, the General Assembly also adopted the United Nations General Assembly Resolution 1884 (XVIII), regarding weapons of mass destruction in outer space.<sup>24</sup> Other efforts by the United Nations to shape international expectations regarding the status of nuclear weapons in international law included, in 1972, the General Assembly Resolution on the Non-Use of Force in International Relations and the Permanent Prohibition of the Use of Nuclear Weapons<sup>25</sup> and, in 1980, the United Nations General Assembly Resolution on the Non-Use of Nuclear Weapons and Prevention of Nuclear War.<sup>26</sup> The 1972 resolution declared the permanent prohibition of the use of nuclear weapons and recommended that the Security Council take steps to implement fully such a stance.<sup>27</sup> The 1980 resolution went further, declaring the use of nuclear weapons both a violation of the U.N. Charter and a crime against humanity, and stipulating that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security.<sup>28</sup>

---

21. G.A. Res. 1653 (XVI), U.N. Doc. A/RES/1653 (Nov. 24, 1961).

22. *Id.* ¶ 1(a).

23. *Id.* ¶ 1(d).

24. G.A. Res. 1884 (XVIII), U.N. Doc. A/RES/18/1884 (Oct. 17, 1963).

25. G.A. Res. 2936 (XXVII), U.N. Doc. A/RES/2936 (Nov. 29, 1972).

26. G.A. Res. 35/152D, U.N. Doc. A/RES/35/152 (Dec. 12, 1980).

27. *See* G.A. Res. 2936, *supra* note 25, ¶¶ 1-2.

28. G.A. Res. 35/152D, *supra* note 26, ¶¶ 1-3.

In addition to these General Assembly resolutions, two important multilateral treaties were generated through the U.N. system. The first was the NPT,<sup>29</sup> which entered into force on March 5, 1970. The second was the Comprehensive Nuclear-Test-Ban Treaty (CTBT), which concluded in New York on September 10, 1996, but which has not yet entered into force.<sup>30</sup>

In terms of soft-law obligations, General Assembly declarations and resolutions are emphatic about the issue of the use or the threat of the use of nuclear weapons as being completely incompatible with the legal values in the U.N. Charter. In this sense, the General Assembly uses its resolutions and declarations process to shape global legal expectations concerning the outlawing of nuclear weapons systems. It remains to be determined what normative guidance such instruments might have in the actual operations of national security strategy and practice.

On the one hand, the agreement between superpowers on atmospheric testing served as an important stimulus to achieve a limited but universal legal expectation tied to the issue of prohibiting the testing of nuclear weapons in the atmosphere. On the other hand, the two important multilateral treaties (the NPT and the CTBT, which were both built on the foundations of scholarly work seeking to challenge the lawfulness of testing nuclear weapons) served to provide a broader framework of international legal process for providing nuclear weapons. The developments of these treaties influenced and were influenced by the U.N. General Assembly Resolution 2032(XX), Urgent Need for the Suspension of Nuclear and Thermonuclear Tests.<sup>31</sup> This Resolution noted the mounting concern of world opinion for suspended tests.<sup>32</sup> The NPT and CTBT provide a firm legal foundation for establishing the important role of international law in the control and regulation of nuclear weapons.

#### V. THE ROLE OF JUDICIAL PRECEDENT IN THE CONTROL AND REGULATION OF NUCLEAR WEAPONS BY LAW

The earliest case that sought to test the legality of the use of nuclear weapons emerged in May 1955, when five individuals initiated a legal action in the Tokyo District Court against the government of Japan for the injuries sustained as a consequence of the U.S. atomic attack on the

---

29. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

30. G.A. Res. 50/245, U.N. Doc. A/RES/50/245 (Sept. 17, 1996).

31. G.A. Res. 2032 (XX), U.N. Doc. A/RES/2032(XX) (Dec. 3, 1965).

32. *Id.* pmb1.

cities of Hiroshima and Nagasaki near the end of World War II.<sup>33</sup> The Japanese court provided a lengthy decision in the case. Although this was a lower court, it received expert advice from three of Japan's most distinguished professors of international law. In addition, the plaintiff witnesses directly gave evidence concerning the effects of the atomic attack on these cities. For example, testimonial was given that "[p]eople in rags of hanging skin wandered about and lamented aloud among dead bodies. It was an extremely sad sight beyond the description of a burning hell, and beyond all imagination of anything heretofore known in human history."<sup>34</sup> The central point of the evidence was to establish that the atomic bomb caused indiscriminate suffering and that the unusually severe and grotesque pain violated the permissible limits of warfare.

Although, for procedural reasons, the plaintiffs were precluded from recovering against the Japanese state,<sup>35</sup> the court provided a careful analysis of why the use of the bombs on Hiroshima and Nagasaki were violations of international law. In formulating the theory of liability, the court relied on the principle that the indiscriminate bombing of an undefended city was a violation of international law.<sup>36</sup> These standards the court found in the Hague regulations, which were elaborated in the Draft Rules of Air Warfare.<sup>37</sup> These rules restrict the right of aerial bombardment to military objectives, specifically declaring that "bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited."<sup>38</sup> The court also quotes article 22, which forbids "[a]erial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants."<sup>39</sup> The court concluded that "the act of atomic

---

33. *Shimoda v. State*, Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Dec. 7, 1963, 355 HANREI JIHŌ [HANJI] 17 (Japan), translated in 7 JAP. ANN. INT'L L. 212, 212-52 (1963). The decision was digested in 58 AM. J. INT'L L. 1016 (1964). The *Shimoda v. State* case garnered attention among jurists as the first and (then) only judicial attempt to assess the legality of atomic—and, by extension, nuclear—weapons. See, e.g., Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 759 (1965) ("The decision thus offers a focus for a more general inquiry into the continuing relevance of the laws of war to the conduct of warfare in the nuclear age.")

34. Falk, *supra* note 33, at 761 (citing 8 JAP. ANN. INT'L L. 212, 214).

35. *Shimoda*, 355 HANJI 17, translated in 7 JAP. ANN. INT'L L. at 229.

36. *Id.* at 214-15.

37. *Id.* at 215.

38. Comm'n of Jurists at The Hague, *Hague Rules of Air Warfare*, in THE LAWS OF ARMED CONFLICTS 207, 210 (Dietrich Schindler & Jiri Toman eds., 1988).

39. *Shimoda*, 355 HANJI 17, translated in 7 JAP. ANN. INT'L L. at 215. These rules were among some of the first attempts to control the use of weapons that could not (for various reasons) be banned outright. See GÖRAN LYSÉN, THE INTERNATIONAL REGULATION OF

bombing on an undefended city . . . should be regarded in the same light as a blind aerial bombardment; and it must be said to be a hostile act contrary to international law of the day."<sup>40</sup>

The court's conclusions were that international law forbids indiscriminate bombing of undefended cities and that no principle of military necessity could change this legal conclusion.<sup>41</sup> The court also connected the use of these weapons with the production of unnecessary and cruel forms of suffering, analogous to the international law prohibition of lethal poisons and bacteria.<sup>42</sup> The atomic bomb's effects were more severe and more extensive than these prohibited weapons and therefore the use of the atomic bomb was unlawful.

The critical question remains as to the effect of the *Shimoda v. State* case as legal precedent. The *Shimoda* case is the only adversarial proceeding undertaken in a domestic court to address the legality of nuclear warfare. In this unique case, evidence was presented on behalf of the claimants (all victims who were either killed or maimed by the bombings) to the Court, which (with the assistance of juris consults who were professors of international law) rendered a carefully articulated legal judgment.<sup>43</sup> The case raises the implicit question of whether it is appropriate and within the boundaries of judicial settlement to adjudicate the issue of the lawfulness of nuclear weapons. The *Shimoda* case is an important precedent for indicating that certainly a competent domestic tribunal can render a judicially responsible and important clarification of the law in the context of a concrete adversarial proceeding.

The *Shimoda* case at least establishes that the role of law may be an important part of the larger landscape of authoritative and controlling decision making at all levels; moreover, the fact that the plaintiffs could give evidence directly on the effects the atomic blast had on them and their fellow citizens was an important formal judicial record that might influence and guide policy making in the future. It is unclear whether *Shimoda* will significantly influence the status of nuclear weapons in international law. However, it stands as an important lonely sentinel of justice.

The role of law in the form of judicial settlement has also helped in seeking to secure an important role for the normative guidance that

---

ARMAMENTS: THE LAW OF DISARMAMENT 41-48 (1990). The Air Rules were never adopted. Comm'n of Jurists at The Hague, *supra* note 38, at 207.

40. *Shimoda*, 355 HANJI 17, translated in 7 JAP. ANN. INT'L L. at 239.

41. *Id.* at 252.

42. *Id.* at 216-17.

43. See Falk, *supra* note 33, at 760-61.

international law might provide. In 1973, Australia and New Zealand sued France in the International Court of Justice (ICJ) concerning the legality of French nuclear tests in the atmosphere above the South Pacific Ocean.<sup>44</sup> Australia and New Zealand sought relief from future testing and a declaration that France's testing program in the South Pacific was a violation of international law.<sup>45</sup>

The court's first action was to issue provisional measures to ensure that no action would be taken which would prejudice the rights of the other party and that the French government should avoid nuclear tests which deposit radioactive fallouts in Australian and New Zealand territories.<sup>46</sup> The issuance of this order implied an important substantive right upon which Australia and New Zealand could rely for the prevention of the infringement of its sovereignty with nuclear pollution; and this substantive right derived from customary law rather than treaty law. Thus, the interim order carried the implicit promise that the NPT and the U.N. General Assembly action (in the form of resolutions and declarations) might have had a radiating effect of creating a customary rule of international law that prohibited the testing of nuclear weapons in the atmosphere.

In 1974, the ICJ delivered its judgment. During the period involved in the ICJ's interim order, a lower level official of the French government had issued a press statement indicating that France's testing program had been concluded. Copies of the newspaper accounts were forwarded to the court.<sup>47</sup> Because the French were no longer going to test their weapons, the object and purpose of the case (the court concluded) was no longer at issue.<sup>48</sup> In this sense, the ICJ did not pass on the merits of the question and thus did not contribute to the possible creation and clarification of an international legal norm that had the quality of an

---

44. Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 43 (May 9); Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 49 (May 14); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

45. 1974 I.C.J. at 256; 1974 I.C.J. at 460.

46. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J., ¶ 19; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J., ¶ 19.

47. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. ¶¶ 20, 28; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. ¶¶ 20, 26-29.

48. The Court explained:

In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large . . . its intention effectively to terminate these tests. . . . The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.

Nuclear Rests (Austl. v. Fr.), 1974 I.C.J. ¶ 51; Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J., ¶ 53.

authoritative legal prescription concerning the testing of nuclear weapons in the atmosphere.

In 1995, New Zealand again took France to the ICJ because France proposed to resume tests of its nuclear arsenal in the South Pacific.<sup>49</sup> However, the court declined to uphold New Zealand's claims, making a distinction between France's promise to withhold from nuclear testing in the atmosphere and the impending tests, which were to take place underground.<sup>50</sup> This decision continued the court's passive stance in assessing developing norms in international law regarding nuclear weapons testing.

The next major development in the evolution of international legal standards regarding the control and regulation of nuclear weapons emerged from an advisory opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons.<sup>51</sup> The triggering of the advisory opinion came from an unusual source, the World Health Assembly of the World Health Organization (WHO). The WHO's concern was expressed as follows: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"<sup>52</sup> In December 1994, the U.N. General Assembly sought an advisory opinion on whether "the threat or use of nuclear weapons in any circumstance [was] permitted under international law."<sup>53</sup>

The court handed down its advisory opinion on the above matter in 1996. The opinion covered a wide terrain of potentially applicable international law. The court considered, for example, the possible relevance of the arbitrary deprivation of life contrary to article 6 of the International Covenant of Civil and Political Rights.<sup>54</sup> It also considered the possible applicability of article 2 of the Convention of the Prevention and the Punishment of the Crime of Genocide.<sup>55</sup> It also looked at the law relating to the protection and safeguarding of the environment.<sup>56</sup> The court concluded that the most "directly relevant" law applicable to the

---

49. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (N.Z. v. Fr.)* Case, 1995 I.C.J. 288, ¶ 1 (Sept. 22).

50. *Id.* ¶ 63.

51. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

52. Press Release, Int'l Court of Justice, Request by WHO for an Advisory Opinion: Order Fixing Time-Limits, Int'l Court of Justice Press Release 93/30 (Sept. 13, 1993).

53. G.A. Res. 49/75K, U.N. Doc. A/RES/49/75 (Jan. 9, 1995).

54. 1996 I.C.J., ¶¶ 24-25.

55. *Id.* ¶ 26.

56. *Id.* ¶¶ 27-33.

question before it was the law “relating to the use of force enshrined in the [U.N.] Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.”<sup>57</sup> First, however, the court made a quick examination of the unique characteristics of nuclear weapons.<sup>58</sup>

The court addressed several provisions in the Charter relating to the threat and use of force.<sup>59</sup> These include articles 2(4),<sup>60</sup> 51,<sup>61</sup> and 42.<sup>62</sup> The court also noted that international law does not contain any specific prescription authorizing the threat or use of nuclear weapons, nor are there rules that specifically prohibit the threat or use.<sup>63</sup> The court noted that treaties deal largely with acquisition, manufacture, possession, deployment, and testing of nuclear weapons.<sup>64</sup> Thus, the proscriptive reach of treaty laws was found to be limited, especially as certain treaties specifically seemed to authorize recourse to the use of nuclear weapons.<sup>65</sup>

When the court examined whether customary international law provides a source of law prohibiting the threat or use of nuclear weapons, the court found no “customary rule specifically proscribing the threat or use of nuclear weapons *per se*.”<sup>66</sup> The court found the emergence of such a customary rule hampered by “continuing tensions between the nascent *opinio juris* . . . and the still strong adherence to the practice of deterrence.”<sup>67</sup>

When the court examined the breadth of customary international law for a more general prohibition relevant to the threat or use of nuclear weapons, the court did not find “sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would

---

57. *Id.* ¶ 34.

58. *Id.* ¶¶ 35-36 (“[I]n order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, 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.”).

59. *See id.* ¶¶ 37-50.

60. *Id.* ¶ 38; U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

61. 1996 I.C.J., ¶ 38; U.N. Charter art. 51 (recognizing the inherent right of individual or collective self-defense if an armed attack occurs).

62. 1996 I.C.J., ¶ 38; U.N. Charter art. 42 (recognizing that whereby the Security Council may take military enforcement measures in conformity with chapter VII of the Charter).

63. 1996 I.C.J., ¶ 52.

64. *Id.* ¶ 58.

65. *Id.* ¶¶ 59-63.

66. *Id.* ¶ 74.

67. *Id.* ¶ 73.

necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”<sup>68</sup>

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years.<sup>69</sup>

The court also reviewed the scope of international humanitarian law.<sup>70</sup> Despite finding that the new weaponry has not been explicitly accounted for in humanitarian law, the court did not discount humanitarian law’s relevancy to the question.<sup>71</sup> The critical holding by the court relates to the importance of the self-defense/deterrence principle. The Court observed:

In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with the respect for [the requirements of law applicable to armed conflict]. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict *in any circumstance*.<sup>72</sup>

Thus, the majority of the court permits the threat or the use of nuclear weapons in the narrow circumstance where the survival of the state is at stake. However, the court qualified this holding somewhat by recognizing the importance of the obligation found in article VI of the NPT, requiring the states’ parties to negotiate in good faith the issue of nuclear disarmament.<sup>73</sup>

The opinion of the International Court of Justice generated a significant dissenting opinion by Judge Weeramantry (Vice President of the Court), who took the position that the use or the threatened use of nuclear weapons was “illegal *in any circumstances whatsoever*.”<sup>74</sup> In his view, such threat or use

---

68. *Id.* ¶ 95.

69. *Id.* ¶ 96.

70. *Id.* ¶¶ 74-95.

71. *Id.* ¶ 86.

72. *Id.* ¶ 95 (emphasis added).

73. *Id.* ¶ 99 (quoting the Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 29, art. VI (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”)).

74. *Id.* at 433 (Weeramantry, J., dissenting).

violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns [that] underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23(a) of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends.<sup>75</sup>

Central to Judge Weeramantry's approach is the distillation of the keynote values embedded in the U.N. Charter. Addressing the applicability and fortitude of the U.N. Charter, which is at the foundations of the new world order's legal basis, Judge Weeramantry posed the critical question, "Did that document, drafted in total unawareness of this escalation in the weaponry of war, have anything to say of relevance to the nuclear age which lay round the corner?"<sup>76</sup> The question is critically relevant because, as Weeramantry explains elsewhere, "[t]here is an old doctrine in international law known as the Lotus doctrine, which represents the [premise] of that which is not prohibited is permitted."<sup>77</sup> However, "because you cannot in black letters enumerate all the various kinds of conduct in this uncertain world which are prohibited," surely there must be "behind the black letter rules . . . an enormous array of principles" from which one can establish that an unaddressed kind of conduct is effectively prohibited.<sup>78</sup> For Weeramantry, these principles are reflected directly in the specific articles on the preamble of the U.N. Charter.<sup>79</sup> These keynote principles are substantially rooted in the concept of human dignity.<sup>80</sup> At their essence, nuclear weapons hold such incredibly destructive capacities that they negate the idea of law, and, in particular, marginalize the fundamental human element, which is the foundation of law.

Judge Weeramantry's dissenting opinion is an illustration of Grotian jurisprudence, which seeks to provide rules to a new world order based on the shared experience of humanity. At the heart of the opinion is the principle that nuclear arsenals are simply incompatible with the idea of law, legality, and reasoned elaboration. This premise is related to a central question implicit in this Article; namely, how far and to what extent lawyers' interventions (including the powerful intervention of one

---

75. *Id.*

76. *Id.* at 441.

77. C.G. Weeramantry, *Nuclear Weapons and International Law*, 9 MICH. ST. U.-DCL J. INT'L L. 255, 257 (2000).

78. *Id.* For a broader explanation of the purpose of the "keynote principles" underlying the U.N. Charter, see *id.* at 256-60.

79. *Id.* at 257; 1996 I.C.J. at 441-42 (Weeramantry, J., dissenting).

80. Weeramantry, *supra* note 77, at 257-58.

former lawyer and legal scholar, President Obama) will improve our understanding of the role of nuclear weapons in the context of changing world order patterns.

Assuming that President Obama means to achieve complete abolition of nuclear arms, what effective legal strategies may be deployed to secure the agreed-upon objective of complete nuclear disarmament? Is it necessary to secure simultaneously a clear, legal, and moral basis for holding that the threat or use of nuclear weapons is quite simply a violation of international law?

There are two vitally important technical matters that international lawyers must resolve among themselves, and, having done so, the international lawyers must then find the means to communicate these conclusions to both the political and the relevant technological and scientific communities. The first matter concerns the scope of international law. Is the regime of nuclear weapons subject only to the law of the *lex specialis*, or are there broader sources of law that must inform this critical legal conversation?

In the dissenting opinion of Judge Weeramantry, it is strongly urged that the range of applicable international law is not confined to the *lex specialis* of treaty law. The Judge recognizes the relevant sources of law to include:

1. The international law applicable generally to armed conflicts—the *jus in bello*, sometimes referred to as the “humanitarian law of war”.
2. The *jus ad bellum*—the law governing the right of States to go to war. This law is expressed in the United Nations Charter and related customary law.
3. The *lex specialis*—the international legal obligations that relate specifically to nuclear arms and weapons of mass destruction.
4. The whole corpus of international law that governs State obligations and rights generally, which may affect nuclear weapons policy in particular circumstances.
5. National . . . , constitutional[,] and statutory [law], [which] may apply to decisions on nuclear weapons by national authorities.<sup>81</sup>

Both the majority opinion and Judge Weeramantry’s dissenting opinion have embraced a broader view of what international law is and, therefore, have in effect sanctioned a broader role for the international lawyer in world order matters. In particular, Judge Weeramantry’s list of “sources” suggests that we must broaden our base of sources in order for international adjudication to keep abreast of the critical problems of

---

81. 1996 I.C.J. at 443 (Weeramantry, J., dissenting).

world order amenable to judicial interventions. This is more than simply giving article 38 of the ICJ Statute a generous construction as to the relevant, authoritative sources of international law.<sup>82</sup> It may be that we are also in search of a more useful theory about the sources of international law and how to use them.

W. Michael Reisman, for example, anticipated just such an eventuality in his piece, *International Lawmaking: A Process of Communication*, in which he sought to provide a practical perspective drawn from communications theory about how international law is functionally created.<sup>83</sup> Professor Reisman suggested that attention be given to the identity of both communicator and target audience.<sup>84</sup> He also suggested that from an observer's view careful appraisal should be given to the "authority signal," the "control intention," and the "policy content" of a relevant flow of communications.<sup>85</sup> These theoretical ideas may find fertile ground for reflection in practical contexts of international decision making. This, of course, impacts upon how broadly or narrowly the lawyer's role is conceived.

Weeramantry's second central issue is that of interpretation. Assuming *arguendo* that Judge Weeramantry is correct about the breadth of the sources of international law relevant to the problem, what kinds of explicit, normative guidance can the interpreter invoke regarding the specific prescription and application of international law? Here, the U.N. Charter preamble, as an instrument of goal guidance as well as goal clarification, is most useful and insightful. In his dissenting opinion, Judge Weeramantry sought to ground the problem in the context of "six keynote concepts," which embody the global community's fundamental expectations about global constitutive and public order priorities.<sup>86</sup> These

---

82. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), available at <http://www.icj-cij.org/documents/index.php?p1-4&p2=2&p3=0>.

83. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981).

84. See *id.* at 107.

85. *Id.* at 108.

86. See 1996 I.C.J. at 441-42 (Weeramantry, J., dissenting). The following are a summary of the values behind the six keynote concepts found in the U.N. Charter. The opening of the preamble expresses the first standard—that the Charter's authority is rooted in the perspectives of all members of the global community, that is, the peoples. This is indicated by the words, "we the peoples of the United Nations." *Id.* Thus, the authority for the international rule of law, and its power to review and supervise the nuclear weapons problem is an authority not rooted in abstractions like "sovereignty," "elite," or "ruling class," but in the actual perspectives of the people of the world community. This means that the peoples' goals—expressed through appropriate fora (including the United Nations, governments, as well as public opinion)—are

concepts are vital if the interpretation of international law is to be guided by explicit standards of normative understanding. In short, the interpretation of international law (for example, its specific prescription and application) may be rootless, arbitrary, and even quixotic if it is not subject to explicit standards of normative guidance, which are expressed in concrete terms in the U.N. Charter taken as a whole.

These standards may influence the strategies of legal argument and legal justification concerning the legality of nuclear weapons. Moreover, it would be of value for the nuclear strategists of the Obama Administration to consider the approach of both the majority of the ICJ as well as the dissent of Judge Weeramantry in formulating the nuclear posture of the United States. One element of the strategy would be to take the facts and logic of nuclear weapons and to show them in light of these keynote concepts, after the fashion of natural lawyers, that there is nothing reasonable in the threat of the possible extinction of the entire eco-social process.

Another stratagem may be to give a cautious assessment of the available corpus of law, in light of the keynote concepts, and to appeal for caution and seriousness if states feel compelled to have recourse to nuclear weapons, in conduct and operations that are on their face

---

critical indicators of the "principle of humanity" and the "dictates of public conscience" as they relate to the conditions of war (methods and means).

The Charter's second key concept embraces the high purpose of "sav[ing] succeeding generations from the scourge of war." *Id.* at 442. The drafters clearly did not envision nuclear war in reference to the concept of war here. Nonetheless, as the passage contemplates the destructiveness of war, an enhanced technological capacity for destructive weapons would enhance the relevance of this provision, not restrict its scope. *Id.* This reading reflects a reasonable legal interpretation.

The third keynote concept is the reference to the "dignity and worth of the human person." *Id.* In blunt terms, the eradication of millions of human beings with a single weapon hardly values the dignity or worth of the human person. What is of cardinal legal, political, and moral import is the idea that international law based on the law of the Charter be interpreted to enhance the dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity.

The fourth keynote concept in the preamble is emphatically anti-imperialist. It holds that the equal rights of all nations must be respected. *Id.* Nuclear power institutionalizes hegemony (nuclear umbrellas) and destabilizes interstate relations as states face the "need" to possess their nuclear arsenal in order to deter the other states from contemplating the deployment or use of their own arsenal.

The fifth keynote in the Charter preamble refers to the obligation to respect international law based not only on treaty commitments, but also on "other sources of international law." *Id.* The entire framework of nuclear weapons perspectives and operations cannot proceed outside of the very idea of "law," or more precisely, the law of human survival that must be the foundational precept of modern international law.

The sixth keynote point in the preamble of the Charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom. *Id.* Extinction or the prospect of extinction of the human species is hardly consistent with these aims.

ostensibly incompatible with those keynote expectations. A third approach would be simply to acknowledge that the issue of nuclear weapons is *sui generis*. To do this, one would have to ignore the normative guidance of the keynote concepts and have a great deal more faith in what states have actually achieved so far.

A central question that the ICJ contribution addresses is how a major power like the United States considers the question of the lawfulness of the threat or use of nuclear weapons. The advisory opinion allowed the court the opportunity to enlarge and focus the legal discourse on a vital issue of world order. In so doing, the court generated international law expectations, with an articulate juridical structure for addressing the problem. This structure secures a process of reasoned elaboration that is more in keeping with the Grotian tradition than the tradition of state-dominated positivism. We believe that a more generous interpretation of the relevant sources, including the treaty obligations, and a restrained view of the conditions of reasonable self-defense, will provide us with a better working picture of how we must proceed expeditiously to approximate the Obama objective of a world free of the menace of nuclear weapons.

A still more realistic picture of the legal character of the problem of nuclear weapons emerges from Judge Weeramantry's dissent. Quite simply, nuclear weapons point to a legal limit on the capacity for universal destruction. This view should be considered at least as an aspect of the legal obligation of parties to the NPT to work assiduously towards a world without nuclear weapons. In any event, the awkward truth about nuclear arsenals is that they cannot be reconciled with the fundamental keynote expectations of the U.N. Charter and modern international law. They are, or should be, unlawful, and this insight should guide future U.S. policy.

## VI. THE *LEX SPECIALIS* AND THE UNITED STATES

The development of specific treaty obligations concerning the control and regulation of nuclear weapons in international law may affect the timeline for achieving a customary prohibition on the threat or use of nuclear arms. While it appears that increasingly universal restrictions on nuclear arms proliferation will contribute to a customary law prohibition against obtaining and testing nuclear weapons, it also appears that those countries that had nuclear arms prior to the establishment of the NPT will retain the right to keep and maintain their weapons under *lex specialis*.

The most important of these instruments for the United States are the treaties made with the USSR/Russia on the reduction of nuclear arsenals, as well as the Partial Test Ban Treaty. These treaties are very specific, but the critical expectation they generate is that some aspects of nuclear weapons policy are subject to treaty-based international law. However, the expectations substantively generated are very narrow. In addition, there are two critical treaties of a multilateral character generated by the international system. These are the NPT and the CTBT.

The NPT contains an implicit pact in which a small group of international players is permitted to have nuclear weapons and the rest of the parties to the treaties are prohibited from developing nuclear weapons.<sup>87</sup> The treaty does contain a loophole in the sense that, under article IV, a state has an “inalienable right” to develop nuclear technologies for peaceful purposes.<sup>88</sup> Such developments also close the distance in which a state may eventually go nuclear. The NPT also contains a provision for continued negotiation—the object of which is complete global nuclear disarmament.<sup>89</sup> The United States has signed and ratified this treaty and is an active participant in the process for ensuring the goals of the NPT. It has been suggested that the CTBT is an extrapolation of the obligation to work towards complete nuclear disarmament in the NPT.<sup>90</sup>

The United States was a leading force in securing the adoption of the CTBT, and President Clinton was the first head of state to sign it. The treaty was clearly an important complement to the NPT, since an important practical way of preventing proliferation is to prevent testing. If a state cannot test its nuclear arsenals, the risk to it of having untested devices deployed would be very great. Hence, the CTBT was an

---

87. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 29, arts. 1-2.

88. *Id.* art. 4.

89. The preamble to the NPT declares the signatories' desire to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control.

*Id.* pmbl.

90. Many states who negotiated the NPT believed that only a Comprehensive Nuclear-Test-Ban Treaty could realize the objective of Article VI of the NPT. See David A. Koplow, *Bonehead Non-Proliferation*, 17 FLETCHER F. WORLD AFF. 145, 150 (1993) (“During the key stages of the negotiations of the Non-Proliferation Treaty, the diplomatic representatives from West Germany, Sweden, Canada, Japan[,] and other pivotal countries were unambiguous in asserting that a Comprehensive Test Ban Treaty was the crucial ‘effective measure’ that Article VI would mandate.”).

important step in development of global legal expectations concerning the control and regulation of nuclear weapons systems.

When President Clinton transferred jurisdiction over the CTBT to the U.S. Senate to secure its advice and consent for the ratification of this treaty, a well-organized right-wing lobby worked quietly to secure a fast-tracked hearing and vote for the treaty.<sup>91</sup> The hearings were short and perfunctory, and the vote defeated ratification of the treaty. The defeat of the treaty sent a signal globally that the United States was moving against international efforts to reduce nuclear arms and the threat they posed.<sup>92</sup> In the larger scheme of world order, the defeat of the CTBT also suggested that the United States was not committed to the use of international law for exercising a degree of control and regulation over nuclear weapons. Because the United States is one of the world powers and leaders in this field, its role in shaping global expectations about the status of nuclear weapons was to undermine the force of international agreements in establishing new normative standards for nuclear weapons in international law.

## VII. NUCLEAR WEAPONS AND PRIOR PRESIDENTIAL ADMINISTRATIONS

In general, U.S. national security policy has adhered to the principle of nuclear deterrence. The policy of nuclear deterrence means that the United States will threaten to use (or will actually use) nuclear weapons against any adversary that threatens to use (or uses) nuclear, chemical, or even massive conventional weapons against the United States.<sup>93</sup> This Part

---

91. For a close examination of the “U.S. Senate’s previous rejection (and, by implication, the nation’s non-ratification) of the CTBT,” see Winston P. Nagan & Erin K. Slemmens, *National Security Policy and Ratification of the Comprehensive Test Ban Treaty*, 32 HOUS. J. INT’L L. 1, 2 (assessing “the political process that failed to realize the security values now imperative to U.S. national defense”).

92. See Craig Cerniello, *Russia, China, U.S. Allies Condemn Senate Defeat of Treaty*, ARMS CONTROL ASS’N, Sept.–Oct. 1999, [http://www.armscontrol.org/act/1999\\_09\\_10/reaso99](http://www.armscontrol.org/act/1999_09_10/reaso99) (“The Senate’s rejection of the [CTBT] . . . drew a barrage of criticism from Russia and China, as well as from U.S. allies in Europe and Asia.”); see also Barbara Crossette, *Defeat of a Treaty: The Shock Waves; Around the World, Dismay Over Senate Vote on Treaty*, N.Y. TIMES, Oct. 15, 1999, at A1 (quoting the disappointment of foreign ministers and defense ministers from around the world); *Senate Rejection of the CTBT: International Statements and Comment*, ACRONYM INST. FOR DISARMAMENT DIPLOMACY, <http://www.acronym.org.uk/ctbt/ctbreac2.htm> (last visited Sept. 13, 2009) (expressing statements of regret and disappointment from governments around the world); *CTBT: The U.S.’ “Dangerous Hesitance” Imperils Nonproliferation Regime*, U.S. INFO. AGENCY, Oct. 13, 1999, <http://www.fas.org/nuke/control/ctbt/news/wwwwh9o13.htm> (statements from various governments expressing regret at the failure of the U.S. Senate to pass the CTBT).

93. For legal analysis strictly addressing the policy of nuclear deterrence, see Charles J. Moxley, Jr., *The Unlawfulness of the Use or Threat of Use of Nuclear Weapons*, 8 ILSA J. INT’L & COMP. L. 447 (2002) (assessing the lawfulness of potential use of nuclear weapons by the United States pursuant to a policy of nuclear deterrence).

explores the positioning of previous presidential administrations regarding the long held U.S. policy of nuclear deterrence in light of the widely perceived illegality of the threat or use of nuclear weapons.

The security strategy of nuclear deterrence grew in direct response to the Cold War. In the years immediately following the atomic bombings in WWII, President Truman seemed reluctant to formulate a national security policy dependent upon nuclear weapons,<sup>94</sup> “[b]ut soon after the first Soviet nuclear test, official national defense policy explicitly included the possible first use of nuclear weapons.”<sup>95</sup> Facing increasing challenges to U.S. nuclear superiority, President Eisenhower made a first-use doctrine explicit in the Administration’s national security policy, stating that “[i]n the event of hostilities, the United States will consider nuclear weapons to be as available for use as other munitions.”<sup>96</sup> For the duration of the Cold War, both preemption and nuclear overkill would remain consistent features of the single integrated operations plan.<sup>97</sup> However, as the Kennedy and Johnson Administrations addressed the increasing infeasibility of a disarming first-strike, U.S. nuclear deterrence policy embraced the doctrine of mutually assured destruction (MAD).<sup>98</sup>

From the end of the Cold War until the second Bush Administration, the U.S. presidencies backed away from MAD doctrine in response to the changing nature of threats to the United States. The U.S. nuclear weapons policy on “no-first-use” was first presented at a U.N. Special Session on Disarmament in 1978, and was repeated just prior to the 1995 NPT Review and Extension Conference.<sup>99</sup> This policy disavowed the use of nuclear weapons except in extreme circumstances, yet hedged this disavowal against such a broad range of circumstances that U.S. nuclear weapons were still available for first use even to preempt a nonnuclear attack.<sup>100</sup>

---

94. In the Truman Administration, these weapons were viewed as distinct from conventional weapons, as “weapons of terror rather than part of the conventional military arsenal.” David S. McDonough, *Nuclear Superiority or Mutually Assured Deterrence—The Development of the US Nuclear Deterrent*, 60 CAN. INT’L COUNCIL: INT’L J. 811, 812 (2005). Nevertheless, hesitation to include nuclear weapons in national security strategy was as likely based on the “scarcity of atom bombs and the limited range of the delivery vehicle (the B-29 bombers)” as the apparent lack of necessity for nuclear weapons strategy (due to U.S. nuclear monopoly) or even the moral disinclination of U.S. leadership. *Id.*

95. Harold A. Feiveson & Ernst Jan Hogendoorn, *No First Use of Nuclear Weapons*, NONPROLIFERATION REV., Summer 2003, at 1, 2.

96. *Id.*

97. McDonough, *supra* note 94, at 814.

98. *Id.* at 815.

99. Harold & Hogendoorn, *supra* note 95.

100. *See id.*

The second Bush Administration came into power with President George W. Bush being a supporter of right-wing sentiment concerning the status of the CTBT. (From the perspective of a campaigning Bush, “We can fight the spread of nuclear weapons, but we cannot wish them away with unwise treaties.”<sup>101</sup>) Moreover, right-wing senators did not believe the treaty was in the interest of the United States and had no intention of promoting a Senate reconsideration of the treaty.<sup>102</sup> Additionally, the Administration had some ideas, reflected in the 2002 NPR, concerning strategic innovations regarding the deployment of nuclear arsenals. Their major innovation in nuclear policy was the development of a nuclear global strike option.<sup>103</sup> Quite clearly, the idea of a global strike option runs counter to the restraint that had been reflected in the developing treaty law as well as developing international public opinion in this area.

The second Bush Administration also sought to promote the development of a newer strategic class of nuclear weapons. These were styled as mini-nukes and bunker-buster nukes—the latter presumably for the purposes of targeting global terrorism.<sup>104</sup> This approach of the Administration coming on the defeat of the CTBT, as well as its unwillingness to support it coming up again in the Senate, further entrenched the signals that the United States was not particularly interested in a multilateral, global approach to nuclear weapons problems. The United States gave an indication of this approach by basing its invasion of Iraq on the notion that it could invade a rogue state—unilaterally—if that rogue state was developing a threatened arsenal of nuclear weapons.

The approach of the G.W. Bush Administration tended to marginalize the importance of international law as developed via the treaty-making process or the clarifications generated from authoritative sources such as the ICJ or, indeed, the U.N. itself. The expectation of obfuscation with regard to the U.S. position on the developing international law in this field have increased fears of global insecurity

---

101. *Interfaith Questionnaire on Elimination of Nuclear Weapons: US Presidential Candidates' Responses*, ACRONYM INST. FOR DISARMAMENT DIPLOMACY, Sept. 2000, <http://www.acronym.org.uk/dd/dd50/50views.htm>. Then-Governor Bush was responding to this question: “There are interim steps to take in the quest for the elimination of nuclear weapons. For example, the Comprehensive Test Ban Treaty provides a means of controlling the spread of nuclear weapons. If elected President, will you seek ratification of the CTBT by the United States Senate?” *Id.*

102. See Nagan & Slemmens, *supra* note 91, at 29.

103. See *id.* at 62.

104. See Feiveson & Hogendoorn, *supra* note 92, at 5.

causing some states to believe that the surest way to deter a U.S.-led invasion is to have some sort of nuclear device as a defense of last resort. Such states pin their security expectations on the unpredictability of their defense posture as a way of deterring a possible regime change action on the part of the United States.

To appreciate the impact of the G.W. Bush Administration's approach to the problem of the nation's nuclear weapons posture, recall that the Administration inherited the decision of the Clintonian Senate to obstruct the CTBT. Building on the CTBT's demise, the Administration gave an indication of its approach to the problem of nuclear weapons policy in its Nuclear Posture Review of 2002, which represented a radical shift from preexisting U.S. policy. The approach suggested a prioritization of the traditional value of credible deterrence and a contemplation of future security threats that would require a more flexible and credible nuclear deterrence posture. The central elements of this posture were driven by the concern that the Department of Defense had no effective tool to attack enemy assets that were buried in deep earth and concrete bunkers. Thus, there was a particular interest in developing "bunker busters" and in particular, the possibility of arming bunker busters with "mini-nukes."<sup>105</sup>

The idea of mini-nukes is tied to the idea that if mini-nukes can be developed with less environmentally destructive effects, such weapons would significantly increase the flexibility of their deployment, and this would increase the credibility of deterrence. What this implied was that research needed to be done for the development of tactical nuclear arsenals that could be much more easily integrated into the conventional armory of the nation so that their use would be routinized in terms of defense capability.

This would require a completely new warhead design, and, indeed, it would also require a new round of testing of such weapons. In this regard, the Bush Administration maintained publicly the U.S. moratorium on nuclear testing and at the same time resisted any notion of supporting the adoption of the CTBT.<sup>106</sup> Along with these positions, there was also the development of a nuclear global strike option. This principle should perhaps be understood in light of the articulate Bush Doctrine in the War on Terror. In that doctrine, the President argued for a preemptive right to

---

105. *See id.*

106. *See* Nagan & Slemmens, *supra* note 91, at 4.

self-defense,<sup>107</sup> and thus the global strike option would effectually find a place in the officially articulated New Bush Doctrine.

The idea of developing low-yield nukes had been a matter that had been talked about in the Administrations of both Presidents George H.W. Bush and Clinton. Within the nuclear community, important policy papers were written to the effect that the U.S. nuclear arsenal had no deterrent effect on dictators like Saddam Hussein. The pro-nuclear lobby therefore made the case that there was a defense need for flexible tactical nuclear weapons to fill the vacuum in the deterrence posture. Dick Cheney, in his report on defense strategy for the 1990s, argued for an increased role for nuclear forces in tackling regional threats, and he endorsed the development of new nonstrategic nuclear weapons.<sup>108</sup>

The Bush approach raised deep concerns internationally about the interrelated arms control agreements and their currency under that Administration. The central problem was the effect that Bush's nuclear strategy might have on the NPT. In 2000, the states parties to the NPT agreed on thirteen practical steps toward global nuclear disarmament. However, the Bush Administration's plans contradicted several of those agreed upon steps. For example, the 2000 NPT Review Conference committed the nuclear powers to the principle of irreversibility concerning nuclear disarmament. The parties also were committed to "[a] diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination."<sup>109</sup> However, shortly after the 2000 NPT Review Conference, the "first-use" policy articulated by the United States at the previous 1995 NPT Review Conference was reaffirmed:

[T]he United States reaffirms that it will not use nuclear weapons against non-nuclear weapon state parties to the Treaty on the Nonproliferation of

---

107. Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375, 407 (2004).

108. "In January 1991, as US forces were deployed to liberate Kuwait, Defense Secretary Cheney issued the top-secret Nuclear Weapons Employment Policy (NUWEP), which formally tasked the military to plan for nuclear operations against nations capable of developing WMD." Hans N. Kristensen, *Nuclear Futures: Proliferation of Weapons of Mass Destruction and US Nuclear Strategy* 10 (British Am. Sec. Info. Council (BASIC), BASIC Research Report 98.2, Mar. 1998) (citation omitted) (citing William M. Arkin, *Agnosticism When Real Values Are Needed: Nuclear Policy in the Clinton Administration*, Federation of American Scientists Public Interest Report, September/October 1994, p. 7.) ~~["citing" parenthetical]~~. "This guidance resulted in SIO-P93, the first overall nuclear war plan formally to incorporate Third World WMD targets." *Id.* (citation omitted) (citing USSTRATCOM, *Strategic Planning Study, Final Report*, 1 October 1993, p. 3-35 (partially declassified and released under the Freedom of Information Act)) ~~["citing" parenthetical]~~.

109. 2000 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, Apr. 24-May 19, 2000, *Final Document*, at 15, U.N. Doc. NPT/CONF.2000/28 (2000).

Nuclear Weapons, except in case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a state towards which it has a security commitment, carried out or sustained by such a non-nuclear weapon state in association or alliance with a nuclear weapon state.<sup>110</sup>

The position of the Bush Administration posed dangers for weakening the legal and political force of the NPT. The attempt to develop new flexible nuclear weapons and the refusal to rule out the use of nuclear weapons against nonnuclear states raised a serious question about the good faith of U.S. pledges under article VI of the NPT. Since the CTBT has interlocking elements with the NPT, further research into the development of mini-nuke warheads and a new generation of weapons requiring testing would essentially end the U.S. unilateral ban on testing and would radically depreciate the currency and efficacy of the CTBT.

The Bush opposition to the CTBT was a position that contrasted with the closest allies of the United States. The legacy that President George W. Bush left us is a nuclear policy that distances itself from international agreement and international law and rely on nuclear weapons systems as the basis of its nuclear policy. By rejecting the CTBT, as well as irreversible arms reductions, and by seeking to develop new more usable nuclear weapons in disregard for the NPT agenda, the George W. Bush Administration presented genuine threats to the development of international arms control institutions that have taken years to be put into place. As the Obama Administration takes on issues involved in the regulation of nuclear weapons, one of the most significant challenges that the President confronts is to rebuild the foundations for the NPT and the CTBT and to correct for his predecessor's erosion of those foundations.

#### VIII. CURRENT U.S. NUCLEAR ARMS POLICY

The current U.S. nuclear arms policy adheres to nuclear deterrence while simultaneously pursuing a path toward complete nuclear disarmament. Part IX will explain how the Obama Administration arrived at such a position. It will also explain how the Administration has justified (or will justify in the future) certain inconsistencies necessarily resulting from this position.

In anticipating the Obama Administration's NPR, many foresaw a complete overhaul of U.S. National Security Doctrine and force

---

110. Press Release, U.S. Dep't of State, Daily Press Briefing (Feb. 22, 2002), <http://2001-2009.state.gov/r/pa/prs/dpb/2002/8421.htm>.

considerations.<sup>111</sup> Among the key issues under debate was whether the primary purpose of nuclear weapons is to deter nuclear attack against the United States or its allies. For example, Senator James M. Inhofe (R-Okla.), a senior member of the Senate Armed Services Committee, argued:

United States nuclear weapons must continue to deter not only nuclear attacks but also chemical and biological attacks against the United States and its allies. While some reduction in our nuclear arsenals may be warranted, deep cuts would be destabilizing and would encourage other countries to enter into nuclear competition.<sup>112</sup>

Senator Inhofe correctly judges that in the post-Cold War world there is a need for nuclear deterrence that is broader than a response to nuclear threats,<sup>113</sup> but would see national defense as ultimately resting on a far more flexible and tactical design for nuclear arsenals to meet these new threats.<sup>114</sup>

The Obama NPR was one of the most eagerly anticipated documents in the area of national security—in part, because it reflects the challenge of his vision for a world without nuclear weapons. The challenge of the NPR was to develop strategic and tactical responses that might move this agenda purposefully forward. Moreover, it was a prelude to the 2010 National Security Strategy (NSS). As instruments of the official policy of the Executive, these two policy pieces affirm important international law expectations. They also challenge certain international law expectations and even some aspects of international law, thus staking a claim to change or modify the relevant international law. Although the NPR and the new NSS are unilateral U.S. undertakings, they are communicated worldwide, and other states (and nonstates) will react to them in predictable or unpredictable ways.

In the United States, it is an illustration of the President's vision of the future of nuclear arsenals. For this reason, many expressed

---

111. At this point, President Obama had already moved in negotiations with the Russians on a new version of the Strategic Arms Reduction Treaty of 1991, which expired on December 5, 2009. President Obama had publically expressed his intentions in a speech in early April 2009. Barack Obama, President of the United States, and Dmitry Medvedev, President of Russia, *Joint Statement by President Dmitry Medvedev of the Russian Federation and President Barack Obama of the United States of America*, April 1, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Joint-Statement-by-President-Dmitry-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America](http://www.whitehouse.gov/the_press_office/Joint-Statement-by-President-Dmitry-Medvedev-of-the-Russian-Federation-and-President-Barack-Obama-of-the-United-States-of-America).

112. Senator James M. Inhofe, Letter to the Editor, *Nuclear Policy in a Changed World*, N.Y. TIMES, Mar. 7, 2010, at WK9.

113. "United States nuclear weapons must continue to deter not only nuclear attacks but also chemical and biological attacks against the United States and its allies." *Id.*

114. *See id.*

disappointment when the NPR was issued, finding little change from traditional U.S. nuclear posture.<sup>115</sup> We disagree, however, with such a wholly negative assessment. Below, we list some of the significant changes (or decisions to adhere to traditional policies) found in the two policy pieces, and we attempt to address the most pertinent critiques that these points have received.

To differing extents, the NPR and NSS examined the following issues:

- The role of nuclear forces in the United States strategy planning and the programming;<sup>116</sup>
- The United States nuclear deterrence policy (including targeting strategy);
- The policy requirements and objectives for the United States to maintain a safe, reliable, and credible nuclear deterrence posture;
- The role that missile defense capabilities and conventional strike forces play in determining the role and size of nuclear forces;
- The levels and composition of nuclear delivery systems that will be required for implementing United States national and military strategy, including any plans for replacing or modifying existing systems;
- The type of active and inactive nuclear weapons stockpile that will be required for implementing the United States national and military strategy including any plans for replacing or modifying warheads;
- The nuclear weapons complex that will be required for implementing the United States national and military strategy, including any plans to modernize or modify the complex;
- The U.S. arms control objectives;<sup>117</sup>
- The importance of the international legal system in fulfilling U.S. policy goals;<sup>118</sup> and

---

115. See, e.g., Alexander Cockburn, *Nuclear Disarmament: A Major Defeat*, NATION, May 17, 2010, at 9 (expressing strong disappointment in the revelations of the nuclear posture review and their ineffectiveness at promoting the nuclear disarmament agenda). “The administration did not merely reassert the essential premises of [U.S.] nuclear strategy but used the publication of the review and the subsequent Nuclear Security Summit in Washington as occasions to intensify threats against North Korea and Iran.” *Id.*

116. Because “there is no greater threat to the American people than weapons of mass destruction, particularly the danger posed by the pursuit of nuclear weapons by violent extremists and their proliferation to additional states,” the United States is “pursuing a comprehensive nonproliferation and nuclear security agenda, grounded in the rights and responsibilities of nations. We are reducing our nuclear arsenal and reliance on nuclear weapons, while ensuring the reliability and effectiveness of our deterrent.” OBAMA, *supra* note 7, at 4.

117. “We are leading a global effort to secure all vulnerable nuclear materials from terrorists.” *Id.*

118. “We are strengthening the Nuclear Non-Proliferation Treaty (NPT) as the foundation of nonproliferation, while working through the NPT to hold nations like Iran and North Korea accountable for their failure to meet international obligations.” *Id.*

- The deterrence policy that will reveal President Obama's apparent concern with the inhuman effects of using nuclear weapons.<sup>119</sup>

While these issues do not explicitly account for the importance of international legal process in the consideration of the policy options, they have significantly illuminated the evolving position of U.S. nuclear arms policy and ways in which this U.S. position intends to respond to (and even direct) international law standards.

The U.S. President's emphasis on international rule of law is a positive method of addressing state outliers who refuse to engage in the regulation of nuclear weapons by international law. The eventual goal of complete nuclear disarmament cannot be achieved without first commanding a globally unified position on nuclear weapons. In both the media and international relations there have been major responses to the inclusion of Israel among the NPT outliers named in the NPT Review Report. Israel, of course, has nuclear weapons but has not signed the NPT.<sup>120</sup> The change in U.S. position regarding Israel's maintenance of nuclear weapons signals a comprehensive legal strategy to the Obama Administration's nuclear arms agenda. The move sends the message that even close U.S. allies must conform to international legal standards, lest they come under the shadow of dangerous U.S. nuclear posturing.

More distressing to the pursuit of a nuclear abolition agenda, the NPR reaffirms U.S. dedication to NATO's nuclear planning, which inspires tension with U.S. obligations under article VI of the NPT to negotiate on "effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."<sup>121</sup> As a key possessor of nuclear weapons within NATO's strategic nuclear protective stance, the United States may need to redefine its role within NATO to conform with this provision with the NPT. (Conformity may require merely the elaboration of priorities within standing NATO agreements, making it apparent that the protective strategies of NATO *include* the paramount strategy of nuclear disarmament.) As one journalist effectively points out,

---

119. According to Cockburn:

The crucial sentence in the review, insistently repeated by Obama, states that "the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations."

Cockburn, *supra* note 115. Cockburn's issue here is that the NPR, by emphasizing standing obligations under the NPT, targets the few states who have not complied with these obligations and issues to them a threat of "first use." *Id.* (Cockburn would have preferred the adoption of a "no first use" policy on nuclear weapons. *Id.*)

120. See Nagan & Slemmens, *supra* note 91, at 50, 90.

121. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 29, art. VI.

“As of 2005, the United States was providing about 180 tactical B61 nuclear bombs for use by Belgium, Germany, Italy, the Netherlands and Turkey under these NATO agreements,” despite the fact that articles I and II of the NPT prohibit the transfer of nuclear weapons to nonnuclear states.<sup>122</sup> That journalist predicts little gain for the cause of nuclear disarmament stemming from the impending redraft of NATO’s strategic concept, noting that the last reformulation (in 1999) stated:

The fundamental purpose of the nuclear forces of the Allies is political . . . to fulfill an essential role by ensuring uncertainty in the mind of any aggressor . . . . The supreme guarantee of the security of the Allies is provided by the strategic nuclear forces of the Alliance.<sup>123</sup>

Thus, the point is made again that the United States must bring obligations under NATO in conformity with obligations under the NPT.

From what we now know, the Obama Administration is interested in the developing *lex specialis* of international law relating to nuclear weapons and has placed emphasis on diplomacy, negotiation, and finding the space for common-interest activities in which law still plays an important role. The importance of broadening the relevance of international law via the *lex specialis* (as well as through general international law) is that it broadens the scope of international obligation and creates a normative system of global expectation that is inclusive. It is in the interest of the United States that U.S. strategic and tactical changes in the direction of reduced global nuclear threats should carry the mantle of credibility that is completely consistent with global normative priority. There is strong global support for arms reduction, and in particular, a reduction of nuclear threats to global peace and security. Thus, President Obama’s commitment to the vision of a world bereft of nuclear weapons will have greater force if it is underlined by international law and which carries the strength of global *opinio juris*. In short, the NPR seizes upon those aspects of which there is evidence of common interest consistent with the President’s declared policy aspiration.

In part, the credibility of the President’s policy directives in the direction of nuclear disarmament must be tied to the role of science and technology facilitating the task of reducing our nuclear arsenals. This in itself is important for international law because law that is context-sensitive will provide us with guidelines that are useful in facilitating these presidential goals.

---

122. Cockburn, *supra* note 115.

123. *Id.*

The American Physical Society (APS) recently outlined a strategy for the role of science and technology in facilitating nuclear disarmament.<sup>124</sup> The APS underlines three essential tasks for the scientific community:

- 1) verifying the process of downsizing and dismantling of stockpiles,
- 2) sustaining nuclear weapons capability and expertise for as long as is necessary, and
- 3) removing the capabilities for reversals through various confidence-building measures, in particular by ensuring the peaceful use of fissile materials.<sup>125</sup>

The APS recommends a number of important steps that it believes the government should embrace. These steps include the declassification of the number of all U.S. nuclear weapons, the establishment of international centers for verification, research and validation, the refurbishment of elements of the U.S. nuclear weapons infrastructure, the support of federal investment in key programs, and the establishment of information sharing among nuclear related industries.<sup>126</sup> The report concludes as follows:

We are confident that the development of the technology needed for a safe and secure downsizing program for global nuclear arsenals is within our reach if it is adequately supported. The associated operational and doctrinal measures will require major investments as well. The technology steps are clear; the structure of the overall program requires careful assessment and ongoing support.<sup>127</sup>

Since the nuclear weapons problem is one that deeply implicates science and technology, modern international law must also come to grips with the possibilities and limitations of science and technology in order to provide the goal guidance that is both relevant and steeped in realism. One of the central challenges of effective international law is that it must avoid specious utopianism and focus contextually with realism and discipline. From the brief discussion above, it is clear that the stakeholders of international law must provide a better contextual understanding of world order conditions and current security threats, including the threats of terrorism. Such an approach permits us to get past the doctrinal constraints of bipolar world order thinking and, at the same time, permits us to focus more clearly on the nature of security

---

124. PANEL ON PUB. AFFAIRS, AM. PHYSICAL SOC'Y, TECHNICAL STEPS TO SUPPORT NUCLEAR ARSENAL DOWNSIZING, [http://www.aps.org/policy/reports/popa-reports/upload/nuclear\\_downsizing.pdf](http://www.aps.org/policy/reports/popa-reports/upload/nuclear_downsizing.pdf) (last visited Oct. 6, 2010).

125. *Id.* at 3.

126. *Id.* at 5-22.

127. *Id.* at 23.

threats, which may facilitate or limit the achievement of the goals of nuclear disarmament. In addition, the nuclear weapons problem is one that deeply implicates science and technology. A relevant role from modern international law is to come to grips with the possibilities and limitations of science and technology in order to provide the goal guidance that is both relevant and steeped in realism.

#### X. CONCLUSION

The legal status of nuclear weapons poses a difficult, classical problem of the clash between law and effective power. It was this juxtaposition that J.F. Dulles recognized when he suggested that the sheer power of nuclear weapons represented a reality that transcended the international law of the U.N. Charter.<sup>128</sup> The control and management of nuclear arsenals and how they are produced and deployed have been matters over which there has been significant contention with the U.S. government. Nuclear weapons are such a high priority for national security matters that the high security issues implicated seem to be more suited to decision making within the class of national security operatives. The perspective of the national security operative draws on a tradition of intellectual thought that sees international relations as largely a matter of exclusively manipulating the national power posture of a state. Theorists such as Morgenthau and Kennan expressed impatience with international law having any important role in international relations involving important security matters. In their view, international law was a dangerous utopian artifact.<sup>129</sup> Its specialized language, which came packaged with a culture of legalism, was irrelevant and possibly dangerous to the appropriate management of foreign relations in a nuclear age. Regrettably, their target of attack was an older version of international law—one not influenced by functionalism or by context-sensitive analysis. It is this latter view of international law that has demonstrated a capacity for realism, a challenge to unreflective policymaking, and a willingness to clarify the appropriate role for law broadly conceived in the control and regulation of nuclear weapons. In this, it has succeeded in seeking to bring reason to bear on the possibly unrestrained exercise of raw power, which could include the destructive force of nuclear arsenals. In this sense, President Obama's decision to look to a world free of the threat of nuclear destruction is in keeping with

---

128. Dulles, *supra* note 14, at 1066.

129. *See, e.g.,* MORGENTHAU, *supra* note 19, at 33.

the tradition of law that insists on the importance of reason as an appropriate limit on the unrestrained exercise of power.

While proceeding along a complex path toward the goal of complete disarmament, confronting a concept of nuclear deterrence infinitely broader than the contours of a bipolar world, the Obama Administration presents an evolved position in U.S. nuclear arms policy—one that directly engages with and directs the standards of international law. Commanding a globally unified position on nuclear weapons (while maintaining the framework of existing international obligations that permits the world's only superpower to act as the key architect for nuclear engagement) signals a comprehensive legal strategy to the Obama Administration's nuclear arms agenda. President Obama might successfully contribute to an outlawing of nuclear arms even as the United States maintains the position of nuclear deterrence that the President's activities aim to establish as unlawful under international law. As a former lawyer and legal scholar, President Obama seems to be using effective strategies of both law and power to build a foundation of international law that will support the process of complete nuclear disarmament, even after this President no longer wields power.