

Draft

Changing Course: The United States' Evolving Approach to International Law

Tulane Law School

March 19, 2010

**US Nuclear Weapons Policy and International Law: The Challenge
For the Obama Administration**

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Introduction

President Obama has made nuclear weapons policy a major priority of his administration. In a widely reported speech given in Prague last year, President Obama stated that he had a vision of US nuclear policy that was directed at the universal abolition of all nuclear weapons as a major purpose or goal of future US nuclear policy. To this end, the President is now committed to the tactical and strategic imperative of a complete review of all the complex issues implicated in facilitating the realization of a nuclear weapons free world. To give credence to this idea there are a multitude of initiatives each implicating complex strategic and tactical policies and which 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 US's considerable warheads and stockpiles of nuclear weapons. In part, this initiative is tied to developments for a new strategic arms reduction treaty with Russia. Both Russian President Dmitry Medvedev and Obama recognize that it is important for both Russia and the US to involve other nuclear weapons states in the process of reducing their arsenals. Related to this is the priority of developing a legally binding international instrument which will completely prohibit the testing of nuclear weapons. Additionally, there is a recognized need to both strengthen and broaden the reach of the Non-Proliferation Treaty. 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. In addition, the US and its partners in cooperation have to confront the problem of North Korea and the possibility of Iran having nuclear weapons. Finally, there is the important issue of the war on terrorism and the fear that terrorist groups may get their hands on nuclear materials and the ability to deliver and detonate them.

Thus, the problem of the nuclear cornerstone of mutual deterrence as a constraint on the possible use of such weapons by states must now confront a concept of deterrence that is infinitely broader than the contours of a bipolar world where the principal antagonists were able to craft expectations of stability out of the threat of mutually assured destruction. Deterrence with regard to shadowing non-state actors would appear to be a much more complicated policy, which policy may prove to be a constraint on the expeditious realization of a non-nuclear weapons world.

In the light of President Obama's declared policy objectives, the critical question that confronts international law stakeholders is precisely what role international law can play in giving concrete assistance and normative guidance to policy makers who must now proceed along a complex path toward the goal of complete nuclear disarmament. This question of the precise role of international law is unusually complex in this context. As we have seen from the Bush Doctrine and its conduct of the war against terrorism, there are always challenges and complexity about the claim and urgent priority of a national security imperative and the critical importance in the restraining force and normative guidance that international law can provide.

The war on terrorism demonstrated a classical challenge for the efficacy of international law. This was the claims to power and expediency versus the claims of law to the restraint of power and the substitution of a decision according to principle rather than expediency as a critical rule of law expectation.

In the context of the deployment of nuclear weapons systems we also confront the critical question of the imperatives of national security priority and the extent to which in such matters of high policy, the national security strategy and tactics are amenable to the rule of law restraints of international legal order. To clarify this, we assay some of the important high points in the development, testing and deployment of nuclear arsenals, and the role of law in shaping security legal perspectives in ways that enhance the common interest.

The Relevant Background to the Nuclear Age

The first and most important but troubling insight into the nature of the power in microscopic particles such as the atom is that the power in such a small mass is stupendously enormous. It is almost counter intuitive to think that the atom before being split contains as much energy, which can be used for destructive war-making ends.

It was the physicists who were aware of German developments in this area that brought it to the attention of President Roosevelt, with the support and authority of Albert Einstein, the most famous physicist of his time. The military implications of these developments it was thought would give Hitler's Germany an incredible capacity to annihilate its enemies. It became apparent to the Roosevelt administration that it would be critical for the race to master the science and technology of splitting the atom and the engineering for developing a bomb-like weapon for this to be done by the allies before the axis forces. Thus was launched the Manhattan Project under the scientist, Robert Oppenheimer and the military administrator, General Leslie Groves.

The atomic devices were tested in New Mexico and passed the test of detonation. By this time Roosevelt was dead and the new president who knew nothing of the project was confronted with the choice of using this new weapon to end the war in Asia. President Truman authorized the use of atomic weapons on Hiroshima and Nagasaki. The critical question from the perspective of the law of war was whether the use of this bomb whose damage exceeded any specific military objective, could be seen as violating the principles of military necessity, proportionality and the principle of humanitarian concern. To this day, the debate about whether the use of the bombs was morally appropriate or even consistent with international law at the time is a matter of controversy. It is worthy to note that US military commanders such as McArthur and Patton were quite uneasy about the use of the atom bomb. Indeed, Admiral Chester Nimitz considered the bomb obscene.

Since these weapons had never been used before 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. Although efforts were made to provide some sort of legal accounting, the use of the bombs had the direct consequence of unconditional surrender by the Japanese. As a consequence, the precise legal implications of the use of the bomb in terms of conventional law relating to the *ius in bello* remains speculative.

The US ended World War II as an intact power with a nuclear weapons monopoly. This created a sense that the US could significantly influence the direction of post-war foreign policy interest. On the other hand, the Red Army of Stalin had physically conquered much of Eastern Europe and Stalin saw the consolidation of these conquests a critical objective of Soviet foreign policy. Getting the Russian bomb was therefore a critical, Soviet objective. When Dulles became Secretary of State, he made a statement of critical importance to international lawyers. Addressing the ABA, Dulles suggested that the nuclear age had made the UN Charter obsolete. Of course modern international law draws profound inspiration from the UN Charter and practice has demonstrated, contrary to Dulles that it is not obsolete. However, the nuclear age played an important role in the development of the Cold War and often Cold War imperatives tended to ignore or possibly undermine the promise and authority of the UN Charter.

The Role of International Law Scholarship

McDougal and Lasswell attempted to provide a conceptual map to better understand the framework of world order based on the UN Charter and the framework of international power at the back of the Charter influenced by contending and conflicting world order systems. In effect, the world order systems they were describing were the global process of effective power which was better described in terms of a bipolar world. In this sense, the world process of effective power was having a significant influence on the idea of world order based on the constitutional foundations of the UN Charter. Moreover, to provide some kind of stability in a system in which there were pressures to confirm the UN Charter's promise and pressures to change it under the imperatives of realism, the super powers developed articulate doctrines which codified their national security expectations. The critical question today is whether these national security doctrines which articulated and communicated the expectations of the critical power brokers of the system, were also generating pre-legal norms that would in turn influence how the law would develop to account for the problems occasioned by weapons of mass destruction.

The problem of international law and nuclear weapons thus crystallized around the view of Dulles that the nuclear weapons problem had rendered the UN Charter and international law based on the Charter obsolete. 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 had generated a concern for the nuclear weapons issue but a somewhat and oblique form of concern and that concern was the international law implications of the testing (of the US testing) of thermal nuclear weapons in the

South Pacific. In retrospect, the scholarly initiative essentially developed a wedge into the discourse concerning nuclear weapons systems. This wedge became an important bridge head for developing a relevant role for international law based on the UN 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 either exempt themselves from the letter and spirit of the UN Charter, or that they represented claims to fundamentally change Charter expectations relating to international peace and security in light of the technological developments on nuclear arsenals. To the extent that deterrence is still a justification for the accumulation of massive nuclear arsenals in particular, by the US and Russia, this claim to charter change remains a residual and important question.

The scholar most responsible for giving international law an important role in the nuclear weapons issue was Dr. Emanuel Margolis¹ In this scholarly exchange Margolis presented a conventional view of international law to demonstrate the violation of international law by the US in the testing of its thermal nuclear 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. Professor Margolis conceded that the purpose that the US had used for closing of 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. Margolis also made reference to the trust responsibilities that the US owed to the trust beneficiaries. The US trust over South Pacific islands was of course a legal product of the UN Charter and in particular, the Trusteeship system which it created. Margolis thus brought a conventional view of international law to a consideration of the lawfulness of the US testing of hydrogen bombs in the South Pacific and declared that the practice violated the letter of international law.

McDougal and Schlei defended the lawfulness of the US test in the South Pacific also on the basis of international law, 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 which a narrow conventional view of international law might preclude. 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 norms. In short, the approach to contextual appraisal must account for the nature of the implicit claim the US is making in the testing of 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

¹ The Hydrogen Bomb Experiments in International Law, 64 Yale Law Journal 629 (1955) and Myres McDougal and Norbert A. Schlei. The Hydrogen Bomb Tests and Perspective: Lawful Measures for Security, 64 Yale Law Journal 648 (1955).

based position of the US against a world view rooted in totalitarian order. This claim is further sustained by the necessity of security preparedness. This is the relevant context in which the claims of the US must be assessed against the rules of international law, which now include broader legal standards. More than that, international law itself is not a frozen cake or doctrine. It is a process in which the major participants continually assert claims and defend those claims and from time to time act on them. A reference is made to the concept of *dedoublement fonctionnel*. 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 a third party appraiser. The principle of reasonableness has historically been critical in “resolving competing claims to authority and control over the high seas.” 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. They also went to point out that the inconvenience to the populations of these islands was also temporary, involved appropriate compensation and also involved consultation. It should also be noted that fishermen who suffered radiation burns on the high seas were also compensated. 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. 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.

The intellectual leaders of this attack were Professor Hans Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy*, 1951 and Ambassador George F. Kennan, *American Diplomacy 1900-1950*. Their work generated a powerful rejoinder from McDougal, “Law and Power”² and “The Identification and Appraisal of Diverse Systems of Public Order.”³ According to Morgenthau, the “state creates morality as well as law and that there is neither morality nor law outside of the state.” 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.

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

² See McDougal, *Law and Power*, 46 *American Journal of Intl Law*, 102-114 (1952).

³ McDougal and Lasswell, 53 *American Journal of Intl Law*, 1-29 (1959)

what is possible and what is desirable and what is essential. This is a view supported by Kennan as well who stated “I can 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.” 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. 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. 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.

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. 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. In this sense, the response to the international relations specialist was based on a newer paradigm of international law.

Moreover, the McDougal approach provided an important theory and method for appraising the lawfulness of the testing of 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 practical policy makers. Additionally, McDougal and Schlei made UN 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.

McDougal concluded this article as follows:

“It is urgently to be hoped that attacks upon law and morality which so profoundly misconceive law, morality and power and the interrelations will not cause many of us to misconceive the real choice that confronts us. People whose moral perspectives preclude the deliberate resort to violence, and except for self defense or organize community sanction, have in the contemporary world only the alternative to some form of law. The choice we must make is not between law and no law or between law and power, but between effective and ineffective 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 accelerated movement toward a unified world community – a choice in some between, on the one hand, elusory doctrines, old fashioned diplomacy and spasmodic resorts to unauthorized violence, and on the other hand, clear moral 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.”⁴

To a large extent the approach of McDougal and Schlei was one that was far from Dulles’ repudiation of the UN Charter, but was also one with sufficient flexibility to be acceptable to the security establishment in the US. 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. However, the effect of such an approach to international and world order is not without complexity. Consider the following:

“[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 the international community. 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 make 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 of nonintervention.”⁵

With the death of Dulles, the extremist edge of Cold War foreign policy was ameliorated as Eisenhower himself took charge and proceeded to send out signals of the importance of arms control and some form of control over the Nuclear Weapons Arms Race. Additionally, the major nuclear powers came to recognize that atmospheric weapons tests were diminishing in their 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. This development led to the adoption of “The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater (1963).” The super powers undertook to promote the importance of the Treaty and over one-hundred states became parties to it. In

⁴ Law and Power, 115

⁵ Richard A. Falk, *The Status of Law in International Society*, 452, Princeton U. Press (1970).

addition, the UN General Assembly effectually noting the change posture of the nuclear hegemony adopted resolutions which sought to universalize expectations concerning nuclear weapons systems.

Legislative and Quasi-Legislative Responses to the Control and Regulation of Nuclear Weapons by Law

In 1961 the General Assembly adopted the “Declaration on the Prohibition of the Use of Nuclear and Thermal Nuclear Weapons”⁶ This document stipulated that the use of nuclear and thermal nuclear weapons was contrary to UN expectations and a direct violation of the UN Charter. The Declaration also stipulated “Any state using thermal and 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.”

In 1963 the General Assembly also adopted a resolution regarding weapons of mass destruction in outer space.⁷ Other efforts by the UN to shape international expectations regarding the status of nuclear weapons in international law include United Nations General Assembly Resolution on the Non-Use of Force in International Relations and the Permanent Prohibition of the Use of Nuclear Weapons.⁸ The Resolution stipulates that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security. It also affirms that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity. Moreover, “the threat or use of nuclear weapons should therefore be prohibited pending nuclear disarmament.” In addition, two important multilateral treaties were generated through the UN system: The first being The Treaty on the Non-Proliferation of Nuclear Weapons. The Treaty entered into force on March 5, 1970.⁹ The second is the Comprehensive Nuclear Test Ban Treaty (concluded New York, Sept. 10, 1996 (This treaty is not yet enforced)).¹⁰

The super power agreement on atmospheric testing served as an important stimulus to seek to universalize a limited legal expectation tied to the issue of prohibiting the testing of nuclear weapons in the atmosphere. In terms of soft-law obligation 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 UN Charter. In this sense, the General Assembly was using its resolutions and declarations process to shape global legal expectations concerning the outlawing of nuclear weapons systems. It remains to be

⁶ 4 UN Doc. A/511 (1962).

⁷ GA Res. 1884, UN GAOR 18th Session Supp. 15 at 13, UN Doc. A/5571 (Annex ii) (1963).

⁸ General Assembly Res. 2936, UN GAOR 27th Session, Supp. No. 30 at 5, UN Doc. A/8730 (1972). Additionally, General Assembly Resolution on the Non-Use of Nuclear Weapons and the Prevention of Nuclear War, GA Res. 35/152D, UN GAOR, 35th Sess., Supp. No. 48 at 69, UN Doc. A/35/48 (1981).

⁹ 729 UNTS 161, 168 UNJYB 156; 170 UKTS 88, CMMD. 4474; 21 USTS 483, TIAS 6839 (1968).

¹⁰ GA Res. 50/245, UN GAOR, 50th Sess. No. 49 at 4, Doc. A/50/1027 (1996).

determined what normative guidance such instruments might have in the actual operations of national security strategy and practice.

On the other hand, the two important multi-lateral treaties built on the foundations of scholarly work that sought to challenge the testing of thermal nuclear weapons, or sought to provide a broader framework of international legal process for providing a proper place for international law in this important area is reflected in the development of the Non-Proliferation Treaty in process, and the important complement to this Treaty, the Comprehensive Test Ban Treaty. The developments of these treaties influenced and were influenced by the UN General Assembly Resolution 2032 (XX) Urgent Need for the Suspension of Nuclear and Thermal Nuclear Tests (Dec 3, 1965). This Resolution noted the mounting concern of world opinion for suspended tests. These two treaties provide a firm legal foundation for establishing the important role of international law in the control and regulation of nuclear weapons. We shall return to this issue.

The Role of Judicial Settlement in the Control and Regulation of Nuclear Weapons by Law

The earliest case which sought to test the legality of the use of nuclear weapons emerged in May 1955 when five individuals initiated a legal action against the government of Japan for the injuries sustained as a consequence of the American atomic attack on the cities of Hiroshima and Nagasaki near the end of World War II. The decision was filed in the District Court of Tokyo. That 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. This was a case in which the plaintiff witnesses directly gave evidence concerning the effects of the atomic attack on these cities. For example, testimonial was given that "People in rags of hanging skin and 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." The central point of the evidence was to establish that the Atom 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. 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. These standards the Court found in the Hague regulations which were elaborated in the draft rules of air warfare. These rules restrict the right of aerial bombardment to military objectives. The rules go on declare that "bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited." The Court also quotes Article 22 which forbids "aerial bombardment for the purposes of terrorizing the civilian population, destroying or damaging private property or injuring non-combatants." The Court concludes that "the act of atomic bombing of an

undefended city...should be regarded in the same light as blind aerial bombardment; and must be said to be a hostile act contrary to international law of the day.”

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. The Court also saw that the use of these weapons which produced unnecessary and cruel forms of suffering were analogous to the international law prohibition of lethal poisons and bacteria. The Atom Bomb’s effects were more severe and more extensive than these prohibited weapons and therefore the use of the Atom Bomb was unlawful. The critical question remains as to what the legal effect the Shimoda case is as a legal precedent. The Shimoda is the only case in which in an adversarial proceeding, evidence was led and a carefully articulated legal judgment was rendered, which judgment the Court was assisted in by juris consults serving as professor of international law. 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 judiciary 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 and moreover, the fact that the plaintiffs could give evidence directly on the effects of the atomic blast on them and their fellow citizens was in 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 had a role to play in seeking to secure an important role for the normative guidance that international law might provide. In 1973 Australia sued France because it was conducting nuclear tests between the years 1966, 1967, 1968, 1970, 1971 and 1972, east of Australia in the Pacific. Australia sought to both prevent and declare that France’s testing program in the South Pacific was a violation of international law. There were two aspects to the decision in the International Court of Justice. The first decision 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 territory. This order at least implied that there might be an important substantive right upon which Australia could rely for the prevention of the infringement of its sovereignty with nuclear pollution. Implicit in this was the notion that the substantive right would be based on custom rather than treaty law.

Thus, the interim order carried the implicit promise that the limited Test Ban Treaty and the UN General Assembly action in the form of resolutions and declarations might have had the radiating effect of creating a customary law rule of international law which prohibited the testing

of nuclear weapons in the atmosphere. In 1974 the Court delivered its judgment. During the period involved in the Court'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. Since the French were no longer going to test their weapons the object and purpose of the case the Court concluded no longer obtained. In this sense, the Court did not pass on the question and thus did not contribute to the possible creation and clarification of an international legal norm concerning the testing of nuclear weapons in the atmosphere which had the quality of a valid legal prescription. In 1995 New Zealand again took France to the ICJ because France proposed to once more test its nuclear arsenals in the South Pacific. However, the Court declined to uphold New Zealand.

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, *Legality of the Threat or Use of Nuclear Weapons*.¹¹ The triggering of the advisory opinion came from an unusual source The World Health Assembly of the World Health Organization. The WHO 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 UN Charter. In December 1994, the General Assembly sought an advisory opinion on a foreign question: Is the threat or use of nuclear weapons in any circumstance permitted under international law?

The Court handed down its advisory opinion on the above matter in 1966. The Court observed as a preliminary matter that it had considered the question of whether the question posed by the General Assembly was "by their very nature susceptible to a reply based on law." The Court concluded that these questions were of a legal character and that it was within the appropriate competence of the Court to provide appropriate legal responses.

The decision of the Court 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. It also considered the possible applicability of Article 2 of the Convention of the Prevention and the Punishment of the Crime of Genocide. It also looked at the law relating to the protection and safeguarding of the environment. The Court essentially felt that the most effective way to respond to the question was to examine the unique characteristics of nuclear weapons in the context of the UN Charter itself and in particular, provisions relating to the control and regulation of the use of force. These include Article 2(4), Article 51 and Article 42.

The Court also notes 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. The Court notes that treaties deal largely with acquisition, manufacture, possession,

¹¹ ICJ 1996, 226.

deployment and testing of nuclear weapons. The prescriptive reach of treaty laws is limited. When the Court examines the question of whether there is a customary rule of law that is relevant it finds that the *opinio juris* is not sufficiently developed for the emergence of a rule of clear prescriptive reach. On the other hand, what has limited such a development is the strength of claims based on the doctrine of deterrence. The Court also canvassed the scope of international humanitarian law, but found that the new weaponry has not been explicitly accounted for in humanitarian law, does not mean that humanitarian law may not be relevant to the question. The critical holding of the Court relates to the importance of the self defense/deterrence principle.

According to the Court

“The Court observes that 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. It considers nevertheless, 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 applicable to armed conflict in any circumstance. Furthermore, the Court cannot lose sight of the fundamental right of every state to survival and thus its right to resort to self defense, 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 international community adhered for many years.”

The majority of the Court thus 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 somewhat by referring to the obligation in Article 6 of the Treaty on Non-Proliferation of Nuclear Weapons. This Article obligates the state's parties to negotiate in good faith the issue of nuclear disarmament.

The opinion of the World Court generated a significant dissenting opinion by Judge Weeramantry. The learned judge took the position that the use or the threatened use of nuclear weapons was illegal “under any circumstances whatsoever.” In the judge's view such threat or use would violated fundamental principles of international law and represents “the very negation of the humanitarian concerns which underlie the structure of humanitarian law.” The judge also contended that nuclear weapons offend such treaties as the Geneva Gas Protocol of 1925 and Article 23(a) of the Hague Regulations of 1907. Moreover, such weapons contradict the fundamental principle of the dignity and worth of the human person on which all law depends. Additionally, it endangers the human environment which could threaten all of life on the planet. Judge Weeramantry came to the conclusion that the threat or use of nuclear weapons under any circumstances is incompatible with international law. The analysis is representative of the Grotian tradition of international law.

Central to his approach is the distillation of the keynote values embedded in the UN Charter. All specific articles in the Charter are simply a more specific reflection of the rationale which informs the instrument itself. That rationale is found in the keynote principles which are substantially rooted in the concept of human dignity. 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 at its finest. At the heart of the opinion is the principle that nuclear arsenals are simply incompatible with the idea of law, legality, and reasoned elaboration. It may thus be of value to assay some aspects of the Weeramantry dissent in terms of the more general issue concerning the future role of the international lawyer. This issue is related to a central question implicit in this Essay; namely, how far and to what extent lawyer interventions will improve our understanding of the role of nuclear weapons in the context of changing world order patterns. This question is a matter that deeply implicates the fundamental values of the role, function, identity, and responsibility of a learned profession. Additionally, what effective legal strategies can be employed to secure the agreed-upon objective of complete nuclear disarmament and to secure a clear, legal, and moral basis for holding that the threat and/or use of nuclear weapons is quite simply a violation of international law?

In this context, it seems there are two vitally important technical matters that international lawyers must resolve among themselves. Having done so, the international lawyers must then find the means to communicate these resolutions 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 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 law, constitutional and statutory, that may apply to decisions on nuclear weapons by national authorities.¹²

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. It is obvious; however, that Judge Weeramantry's list of "sources" suggests that we must broaden our "sources" base for international adjudication to keep abreast of the critical problems of world order amenable to judicial interventions. I would suggest that this is more than simply giving Article 38 of the ICJ Statute a generous construction as to the relevant, authoritative sources of international law.¹³ It may be that we are also in search of a more useful theory about the sources of international law.

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.¹⁴ Professor Reisman suggested that attention be given to the identity of both communicator and target audience.¹⁵ He also suggested that, from an observer's view, careful appraisal be given to the "authority signal," the "controlling intention," and the "policy content" of a relevant flow of communications.¹⁶ 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 role is conceived.

The 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, for example, 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.¹⁷ These 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 (i.e., its specific prescription and application) may be rootless, arbitrary, and even quixotic if it is not subject to explicit standards

¹² *Id.* at 443 (Weeramantry, J., dissenting).

¹³ See Statute of the International Court of Justice, art. 38.

¹⁴ See Reisman, *supra* note 60, at 101.

¹⁵ See *id.* at 107.

¹⁶ *Id.* at 108 (citing Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 *Yale Stud. World Pub. Ord.* 249, 250 (1980)).

¹⁷ See *Legality of Nuclear Weapons*, 1996 I.C.J. at 443 (Weeramantry, J., dissenting).

of normative guidance, which are expressed in concrete terms in the U.N. Charter taken as a whole.

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, i.e., the peoples. This is indicated by the words, "we the peoples of the United Nations."¹⁸ 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 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 saving succeeding generations from the scourge of war.¹⁹ 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. This reflects a reasonable legal interpretation.

The third keynote concept is the reference to the "dignity and worth of the human person."²⁰ 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. 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."²¹ The entire framework of nuclear weapons perspectives and operations cannot proceed outside of the

¹⁸ U.N. Charter pmbl.

¹⁹ See id.

²⁰ Id.

²¹ Id.

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. Extinction or the prospect of extinction of the human species is hardly consistent.

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 in this administration. One element of strategy would be to take the facts and logic of nuclear weapons and to show 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 ostensibly incompatible with those keynote expectations. A third approach would be to simply 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 ICJ has allowed the court the opportunity to enlarge and focus the legal discourse on a vital issue of world order. In so doing, the court has established an international law, juridical structure for 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. I believe that a more generous interpretation of the relevant sources, including the treaty obligations, and a highly restrictive view of reasonable self-defense, will provide us with a better working picture of how we must proceed expeditiously 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 states' parties to the Non-Proliferation Treaty 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.

The *Lex Specialis* and the United States

The *lex specialis* is a reference to the development of specific treaty obligations concerning the control and regulation of nuclear weapons in international law. The most important of these instruments are the treaties made with the USSR/Russia on the reduction of nuclear arsenals, as well as the limited Test Ban Treaty. These treaties are very specific, but the critical expectation they generate is that some aspects of nuclear weapons policy is 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 Non-Proliferation Treaty and the Comprehensive Test Ban Treaty.

The Non-Proliferation Treaty contains an implicit pact in which a small group of international players are permitted to have nuclear weapons and the rest of the parties to the treaties are prohibited from developing nuclear weapons. The treaty does contain a loophole in the sense that a state has an inalienable right to develop nuclear technologies for peaceful purposes. Such developments also close the distance in which a state may eventually go nuclear. The treaty also contains a provision for continued negotiation – the object of which is complete global nuclear disarmament. The United States has signed and ratified this convention and is an active participant in the process for ensuring the goals of the convention. It could be suggested that the Comprehensive Test Ban Treaty is in addition an extrapolation of the obligation to work towards complete nuclear disarmament in the NPT.

The United States was a leading force in securing the adoption of the Comprehensive Test Ban Treaty and President Clinton was the first head of state to sign it. The treaty was clearly an important complement to the NPT. Indeed, 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 Comprehensive Test Ban Treaty was an important step in development of global legal expectations concerning the control and regulation of nuclear weapons systems. In the context of the United States the CTBT was simply an extrapolation of a pre-existing bipartisan consensus on nuclear arms control.

President Clinton transferred jurisdiction over the CTBT to the Senate to secure its advice and consent for the ratification of this treaty. Within the Senate there was a well organized right-wing lobby led in part by the late Senator Jesse Helms, Senator Kyle and Senator Inhofe. These Senators and others worked quietly to secure a blocking minority vote for the treaty. Regrettably, the administration was not aware of the quiet organization within the Senate to line up votes to kill the treaty. Once a blocking minority vote had been secured the sad leadership put the CTBT on a fast track to ensure a speedy defeat of the treaty. When the administration became aware of the behind-the-scenes politics, it tried to have the treaty returned to the Executive branch.

However, the blocking groups were determined to kill the treaty. The hearings were short and perfunctory and the vote was held in which the treaty was defeated. Senator Helms himself was interested in whether the defeat of the treaty meant that it was completely “dead.” A study by the Congressional Research Service determined that the treaty had reverted to the status of one pending before the Senate. In short, it is within the jurisdiction and discretion of the Senate to determine whether and when it should be brought up for consideration. The defeat of the treaty sent a signal globally that the US commitment to the use of international law for exercising a degree of control and regulation over nuclear weapons was not particularly strong since the US is one of the world powers and leaders in this field, its role in shaping global expectations about the status of nuclear weapons was thus diminished.

Nuclear Weapons and the Bush Administration

When the Bush Administration came to power they were apparently in full agreement with right wing sentiment in the Senate on the question of the status of the CTBT. They did not believe the treaty was in the interest of the United States and they had no intention of using its good offices to promote a Senate reconsideration of the treaty. Additionally, the administration had some ideas which were reflected in the Nuclear Posture Report, concerning strategic innovations regarding the deployment of nuclear arsenals. Their major idea was the development of a nuclear global strike option. 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 opinion in this area.

The 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. 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 US was not particularly interested in a multi-lateral, global approach to the nuclear problem. The US 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 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 UN itself. The expectation of in clarity with regard to the US position on the developing international law in this field have increased fears of global insecurity and some states may believe that the surest way to deter a US led invasion is to have some sort of nuclear device as a defense of last resort mechanism. 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 US.

To fully appreciate the impact of the Bush Administration's approach to the problem of the nation's nuclear weapons posture we should be reminded that the Administration inherited the decision of the Senate to kill the Comprehensive Test Ban Treaty. It turns out that the Administration fully supported the demise of the Treaty. Building on the Treaty's demise the Administration gave an indication of its approach to the problem of nuclear weapons policy in its Nuclear Posture Review of 2002. The approach recommended was a radical shift from pre-existing US Policy. The approach suggested a concern for the traditional value of credible deterrence. Its understanding of future security threats required that a more flexible and credible deterrence posture should be developed for the new nuclear weapons policy. The central elements of this were driven by the concern that the Department of Defense had no effective tool to effectively 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."

The idea of mini-nukes is tied to the idea that if mini-nukes can be developed with less environmental 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 development of tactical nuclear arsenals which 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 US moratorium on nuclear testing and at the same time resisted any notion of supporting the adoption of the Comprehensive Test Ban Treaty. Along with these views 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 self-defense and thus the global strike option would effectually find a place in the officially articulated New Bush Doctrine.

It should be noted that the idea of developing low-yield nukes had been a matter that had been talked about in the administration of President George H.W. Bush as well as in the Clinton Administration. Within the nuclear community important policy papers were written to the effect that the US's nuclear arsenal had no deterrent effect on dictators like Saddam Hussein. The prone 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 non-strategic nuclear weapons. The Bush approach certainly raised deep concerns internationally about the interrelated arms control agreements and their currency under that administration. The central problem is the effect that Bush's nuclear strategy might have on the important Non-

Proliferation Treaty. Rhetorically the administration supported the NPT as the “bed rock of global efforts to prevent the spread of nuclear and horizontal proliferation of nuclear weapons. More importantly, in 2000 the states parties to the NPT agreed on thirteen practical steps toward global nuclear disarmament.

The Bush Administration’s plans contradicted several of those agreed upon steps. The 2000 NPT Review Conference for example, 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 risks that these weapons ever be used and to facilitate the process of their total elimination.” The attempt to develop new flexible nuclear weapons and the refusal to rule out the use of nuclear weapons against non-nuclear states has raised a serious question about the good faith of US pledges under Article VI of the NPT. It is worth quoting the specific pledge the US gave at the 1995 NPT Review Conference:

“The United States reaffirms that it will not use nuclear weapons against non-nuclear weapons states parties to the treaty on the Non-Proliferation Treaty of Nuclear Weapons except in case of an invasion or any other attack on the United States, its territories, its armed forces or armed 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 weapons threat.”

It may be concluded that the position of the Bush Administration posed dangers for weakening the legal and political force of the NPT. As we earlier indicated, the Comprehensive Test Ban Treaty has interlocking elements with the NPT. Thus, further research into the development of mini-nuke warheads and a new generation of weapons requiring testing, would essentially end the US’ unilateral ban on testing and would radically depreciate the currency and efficacy of the CTBT. According to Bush, “We can fight the spread of nuclear weapons, but we cannot wish them away with unwise treaties.”

The current US opposition to the CTBT is a position that contrasts with the closest allies of the US. The legacy that President Bush has left us with is a nuclear policy that wants to distance 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, the Bush Administration has presented genuine threats to the development of international arms control institutions that have taken years to be put into place. The greatest threat for nuclear proliferation is the undermining of the NPT and the CTBT. This is the challenge that the Obama Administration confronts. The critical question for the administration will be the extent to which it can reformulate its nuclear posture priorities in conformity with the *lex specialis* of the NPT and the CTBT.

The Obama Administration

The Obama Administration's Nuclear Posture Review which has not been released at the time of writing promises a complete overhaul of US National Security Doctrine and force considerations. He has 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. Among the key issues that are currently debated and which may find inclusion in the Nuclear Posture Report is whether the primary purpose of nuclear weapons is to deter nuclear attack against the US or its allies. Senatorial right wingers such as James Inhofe are insisting that "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." The Senator also believes that in the Post-Cold War world there is a need for nuclear deterrence that is broader than a response to nuclear threats. He sees national defense as ultimately resting on a far more flexible and tactical design for nuclear arsenals to meet these new threats. He has indicated that he may oppose the Arms Limitation Treaty with the Russians as well as the Comprehensive Test Ban Treaty.

The Obama Nuclear Posture Review Challenge

The Obama NPR is one of the most eagerly anticipated documents in the area of national security. In part this reflects the challenge of his vision for a world without nuclear weapons. It should be added that Ronald Reagan shared this vision. Moreover, Senator John McCain has himself endorsed it. The challenge of the NPR is to develop strategic and tactical responses that might move this agenda purposefully forward. It will doubtless require a review of the strategic and tactical approaches reflected in the Bush inspired NPR.

In a larger sense, the Obama NPR will be an important statement of Obama's National Security Doctrine for the foreseeable future. As an instrument of the official policy of the Executor it will affirm important international law expectations. It may also challenge certain international law expectations and may in fact challenge some aspects of international law and thus stake a claim to change or modify the relevant international law. Although the NPR will be a unilateral US undertaking it will be communicated worldwide. Others will react to it in predictable or unpredictable ways.

In the US it will be an illustration of the President's vision of the future of nuclear arsenals. Moreover, his announced desire to see them eliminated touches on a critical political asset viz., "hope." However, this is hope in the serious context of collective and personal insecurity. That context has historically been politically exploited by another political asset: "fear." The administration will therefore have to confront and respond to political advocacy which will challenge his vision and which will seek to exploit the political assets of fear and insecurity. I would suggest that in defense of the President that the hope aspect of the NPR is to

some degree supported and therefore strengthened by the promise and the possibilities of an international law role in this process.

It is anticipated that the NPR will examine the following issues which have been stipulated by Congress:

1. The role of nuclear forces in the United States strategy planning and the programming
2. The policy requirements and objectives for the United States to maintain a safe, reliable and credible nuclear deterrence posture
3. Relationship among United States nuclear deterrence policy, targeting strategy, and arms control objectives
4. The role that missile defense capabilities and conventional strike forces play in determining the role and size of nuclear forces
5. 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
6. 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
7. Active and inactive nuclear weapons stockpile will be required for implementing the United States national and military strategy including any plans for replacing or modifying warheads

Regrettably, the issues identified and required by Congress for the review do not explicitly account for the importance of international legal process in the consideration of the policy options. This is a pity.

To the extent that there is an expectation that the review may be a transformative report on the status of nuclear arsenals in the US, there is a critical fact that must be kept in mind. The instrument will be an expression of unilateral expectation and to the extent that external forces and conditions will influence the development of policy options, it may be asserted that the expression of unilateral action without the cooperation of other critical players in the global environment is a constraining factor that should be kept in mind.

To a large extent, the scope of any strategic and tactical changes in our nuclear posture is dependent on factors and threats that are outside of US borders. It is therefore critical that tools of contextual analysis be considered in the formulation of realistic and actionable policy alternatives. Here the tools of modern international law may provide us with insights of realism and relevance. In this context it would seem that there is an important role for international law as an instrument of policy guidance. For example, any credible moves that the US pursues it would seem must in some way be dependent with a sense of common interest that we share with the other great nuclear power, Russia. Thus, the boldness of US efforts to reduce its nuclear

stockpiles as they are deployed would seem to be dependent on reciprocated commitments to limitations on the part of Russia and other powers. In the past the agreements with Russia had two purposes: one narrow and one broader.

The narrow purposes have been a tool to assure agreements that are narrowly focused and whose consequences are predictable and possibly verifiable. There is considerable practice and experience between the United States and Russia in seeking to develop instruments to guide the reduction of nuclear weapons systems. The broader implication of such agreement making is that they create confidence in the realism of established goals to limit the threat of nuclear weapons systems. More importantly, they demonstrate that high security issues such as reducing deployed or deployable nuclear weapons systems are amenable to control and regulation through the processes of international agreement. These agreements depend on international law for their validity and efficacy. They establish important legal expectations for broadening the role and importance of international law and its procedures for the broader mandates of arms control under the international rule of law.

In the United States the NPR process has generated a great deal of public interest. For example, Peace Action West joined with 179 organizations representing 31 states and hundreds of thousands of people for action and outcome that would be truly transformative. They have stressed three principle issues:

- the United States does not need and shall not pursue new nuclear warheads;
- maintaining a large, ready-to-launch nuclear arsenal hurts U.S. security interests overall by encouraging similar Russian behavior, and;
- only substantial reductions in those arsenals, U.S. ratification of the Comprehensive Test Ban Treaty, and a commitment to a world without nuclear weapons can attract the international support necessary to stop more countries from getting the bomb and terrorists from using one.²²

In President Obama's Prague speech in April 5, 2009, he provided what we hope will be the broad framework in which the NPR will be undertaken. He said the following:

“The United States will take concrete steps towards a world without nuclear weapons. To put an end to Cold War thinking, we will reduce the role of nuclear weapons in our nuclear strategy, and urge others to do the same. Make no mistake: As long as these weapons exist the United States will maintain a safe, secure and effective arsenal to deter any adversary and guarantee that defense to our allies... But we will begin the work of reducing our arsenals.”

²² 179 Organizations Ask Obama for a Transformational Nuclear Posture Review, Cara Bautista, Oct. 15, 2009 <http://blog.peaceactionwest.org/2009/10/15/179-organizations-ask-obama-for-a-transformational-nuclear-posture-review/>

The central point that Obama is making is that the nuclear posture of the United States is dictated by the conditions of the Cold War. During that period world power which tracked the distribution of nuclear arsenals was centered in the USSR and the USA. Clearly, a contextual analysis of current conditions of world order will demonstrate that the perspectives which fuel that order are no longer relevant. The ideological divide between us and the Russians no longer carries the barrier of Stalinistic rigidity. Thus, a continued deployment of arsenals which are response to the Russian arsenals no longer carries a defensible security rationale. We now are in a Post Cold War world and the threats are different and require different approaches. It is therefore very important that the strategic arms reduction follow on agreement as well as the Fissile Material Cut Off Treaty and the ratification of the Comprehensive Test Ban Treaty will serve to demolish the nuclear ghosts of the Cold War.

One of the important difficulties that may confront the development of the NPR document is the existence of a well entrenched nuclear security bureaucracy with turf to protect within the government of the United States. Thus, such resistance may well be reflected in the critical question of the scope of deterrence and the role of nuclear arsenals. There are strong voices that would seek to broaden the deterrence uses of future nuclear arsenals. For example, a Defense Department analyst, David Ochmanek indicated that he was “a little bemused by suggestions that the U.S. nuclear arsenals mission be limited to retaliation for a nuclear strike.” The others would like to see the option of a nuclear strike in the event of the use of chemical or biological weapons as well. Still others would hold out for tactical nuclear weapons to target underground terrorists’ hideouts. This at least carries the implication that there will be considerable bureaucratic interest in maintaining a nuclear status quo with some modest fringe reductions.

The role of nuclear weapons was one of the issues that the International Court of Justice addressed under general international law. In that context it took the position that there are limited circumstances of self-defense such as where the survival of the state is at issue, where that state may lawfully use nuclear weapons in self-defense. What is clear is that the expression of general international law by the Court reflects an effort to significantly limit the occasion for the use of nuclear weapons. Although the Court does not explicitly suggest that a threat which a state feels compromises its survival permits it to unilaterally attack the potential aggressor with a nuclear weapons strike. It would nonetheless be consistent with the approach of the Court to significantly limit the occasion for the deterrent use of nuclear weapons. In any event, some policy positions that are argued suggest that nuclear self-defense should only be deployed in the event of a prospective nuclear attack.

The precise guidance of international law of self-defense permits some flexibility. However, the general policy of international legal order as expressed by the ICJ is one that requires us to see nuclear weapons as exceptional and their use and deployment must meet higher standards for it to be consistent with international law. However, there seems to be little in the current discourse that grapples with the question of the importance of rationally limiting the

defensive use of nuclear weapons. It is also possible that the preemptive or offensive use of nuclear weapons may be reasonably understood in terms of the context of the World Court judgment that such uses are unlawful. Additionally, even if we considered the judgment of Weeramantry (his dissent), he has sought to predicate the unlawfulness on the threat of use of nuclear weapons on the most defensible values of global order shared by the world community. That analysis itself provides compelling restraining guidance in the formulation of the deterrence posture and in particular the role of nuclear weapons. At the very least there may be some value in showing that a no first use policy is very consistent with international law and that if there are narrow circumstances of self-defense that those circumstances should to an objective third party appraiser be seen as extreme circumstances. Still other possibilities in the minimal deterrence posture which is reconcilable with international law would not only underline no first use, but also demand a constrained and proportional second use.

The aspect of the force structure of the US nuclear posture must also meet the understandings from the non-proliferation process. The NPT is a multilateral treaty to which the United States is a part. The treaty divides the world into nuclear weapon and non-nuclear weapons states. The nuclear weapon states are under an obligation not to proliferate nuclear weapons (Article I); they must facilitate the use of peaceful use of nuclear technology (Article IV) and they must negotiate in good faith towards nuclear disarmament (Article VI). It should be noted that the International Court of Justice gave special attention to Article VI and the obligation to negotiate for the limitation and ultimately the elimination of nuclear arsenals. The non-nuclear weapon states agree to not acquire nuclear weapons (Article II) and accept IAEA safeguards over peaceful nuclear activities (Article III).

In the 2000 NPT Review Conference thirteen specific measures were adopted to serve as benchmarks in appraising progress under the NTP. These benchmarks included the entry into force of the Comprehensive Test Ban Treaty, a Fissile Material Cut Off Treaty, as well as the verification provisions for sustaining the Anti-Ballistic Missile Treaty. The Bush Administration repudiated this political understanding of the 2000 NPT Review Conference. This has created difficulties for the NPT process since the non-nuclear power states are under continuous pressure from non-proliferation diplomacy but are reluctant to assume new non-proliferation obligations unless there is a reciprocal commitment on the part of nuclear powers to reduce their arsenals. It is widely conceded that the ability of the US to promote improvement in non-proliferation will be conditioned by US nuclear weapons policies.

To the extent that the expressions of policy aspiration from the Obama Administration may have influenced the Preparatory Committee for the 2010 NPT Review Conference the Preparatory Committee has for the first time in fifteen years agreed upon a provisional agenda for that meeting. That agenda includes provisions to protect non-nuclear states from nuclear coercion, establishment of more nuclear weapon free zones, operationalizing the rights of each nation to develop peaceful nuclear energy, and measures to enhance non-proliferation and disarmament. To the extent that a changed US posture might significantly influence the review

conference and provide the NPT with a stronger global mission, it is clear that these preliminary expressions of policy are already having a global effect. However, it would be critical that the NPR be explicitly seen as endorsing the critical importance of the NPT process, in part because the NPT is an important instrument of conventional international law in the control and regulation of nuclear arsenals. In particular, progress on the force structure with credible reductions in US arsenals joined by reciprocated reductions with Russia will be an important development. Indeed, it would be seen as giving life to Article VI of the NPT.

In the context of international treaty law the NPT is complemented and fulfilled by the CTBT. It will be recalled that the CTBT was ambushed by the right wing in the Senate and defeated. The Obama Administration has indicated that it will work toward ratification of the CTBT. The Bush Administration made it continuously clear that it would not support a reintroduction of the CTBT in the Senate for its advice and consent. This sent a message that the US was a disinterested player in developing the conventional international law by agreement on the control and regulation of nuclear weapons systems. If nuclear weapons cannot be tested, the non-testing becomes an important non-proliferation constraint.

The CTBT was challenged in the Senate on a number of grounds which we have addressed in a separate paper. The real objection to the CTBT was the commitment to develop new generations of tactical nuclear weapons. More specifically, the critical question was tied to the management of the US nuclear stockpile of weapons. The question was whether in the management of the stockpile there should be a commitment to reliable replacement warheads. Congress itself was not inspired by this and the Obama Administration has indicated its opposition to the reliable replacement warheads concept. Of course, should the administration move in that direction, it would require testing and a commitment to testing would effectually be a rejection of the CTBT. Currently the administration is considering a stockpile management program to replace obsolete warheads. The details have to be seen to determine whether these are essentially new weapons which require testing and which might compromise the commitment to the CTBT.

It should be kept in mind that the US does have a Stockpile Stewardship Management Program (SSMP). This program was established to maintain the confidence in the safety, reliability and performance of our nuclear arsenals. The SSMP process uses advanced computer based computations and modeling of the process of nuclear explosions to assist in predicting, evaluating and identifying problems in the arsenals. In effect, it could be suggested that the SSMP is a form of virtual testing. It is possible that some could argue that such computer-based virtual testing is testing for the purposes of the CTBT. It may be suggested that when the administration promotes the advice and consent of the Senate on the CTBT that it includes either a reservation, declaration or preferably, an understanding that computer-based virtual testing under an SSMP process is not within the reach of the contemplated ban on nuclear testing in the CTBT.

Conclusion

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 in which the role of law still has an important role in this important area. 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 its strategic and tactical changes in the direction of reduced global nuclear threats should also carry the mantle not only of US credibility, but also that US credibility is completely consistent with global normative priority. It will also be apparent that 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 Nuclear Posture Review should seize 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 will 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 an international law that is context sensitive will provide us with guidelines that are useful in facilitating these presidential goals. Recently, the American Physical Society ("APS") outlined a strategy for the role of science and technology in facilitating nuclear disarmament. The society underlines three essential tasks for the scientific community. These are:

- "verifying the process of downsizing and dismantling stockpiles."
- "sustaining the capability and expertise to ensure that the remaining arsenal is safe, secure, reliable and effective for as long as necessary"
- "ensuring the peaceful use of fissile materials."

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 US nuclear weapons, the establishment of international centers for verification, research and validation, the refurbishment of elements of the US nuclear weapons infrastructure, the support of federal investment in key programs, and the establishment of information sharing among nuclear related industries. 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 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.”²³

As McDougal and his colleague have reminds us, one of the central challenges of an international law that is relevant to the problems of our time is that it must avoid specious utopianism and focus contextually with the realism and discipline. From the above brief discussion 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 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.

²³ The APS Panel on Public Affairs, “Technical Steps to Support Nuclear Arsenal Downsizing” on February 18, 2010.