

GOOD FAITH NEGOTIATIONS LEADING TO THE TOTAL ELIMINATION OF NUCLEAR WEAPONS

**Request for an Advisory Opinion
from the International Court of Justice**



Legal Memorandum

**FOREWORD BY
JUDGE C.G. WEERAMANTRY**

**INTERNATIONAL ASSOCIATION OF LAWYERS
AGAINST NUCLEAR ARMS**

**INTERNATIONAL HUMAN RIGHTS CLINIC
AT HARVARD LAW SCHOOL**

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Human Rights Program, Harvard Law School**

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FOREWORD

Should it occur, the next use of a nuclear weapon in war will not be upon a sitting target with no power of retaliation, as was the case with Hiroshima and Nagasaki.

Thanks to the proliferation of nuclear weaponry, such use will be the first in a series of exchanges causing suffering and devastation on a scale that will dwarf Hiroshima and Nagasaki, just as Hiroshima and Nagasaki dwarfed all previous suffering and devastation caused in war. As the International Court of Justice (ICJ or the Court) unanimously and categorically pointed out in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons of 8 July 1996, this weapon, incapable of being contained in space and time, has the potential to destroy all civilization and the entire ecosystem of the planet.¹

No task can therefore be more urgent than the elimination of this possibility, which can only result from the total elimination of nuclear weapons. The unanimous declaration of the world's highest court clearly shows the route to this objective. It is one of the most potent tools we have for the elimination of this threat that hangs so ominously over the entire human future.

With this tool at its command, the entire UN system can move confidently, cooperatively, and constructively towards the implementation of what is not merely a moral but a legal obligation—the total elimination of this weapon.

Compliance in every respect with the important legal obligations set out in this Opinion is crucial, and it is therefore vitally important that no uncertainty should exist in regard to the interpretation or application of this pronouncement.

The conclusion so clearly stated in international jurisprudence demands urgent action at every level, through every discipline and by every nation, for the elimination of this peril. The implementation of this Opinion is a matter of such international concern that the UN General Assembly has, every year since its delivery, drawn attention to the obligation the Court formulated of pursuing in good faith and bringing to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The ICJ was giving expression to a principle of great antiquity, which has integrated itself into international law over the centuries. Even three thousand years ago ancient legal systems compulsorily outlawed the use of weapons described as hyper-destructive,² and over the centuries the world's cultures and civilizations have banned the use in war of weapons that fail to discriminate between civilians and combatants and weapons that cause cruel and unnecessary suffering.

No doubt should be permitted to exist or to continue to exist in regard to any aspect whatsoever of this obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects. The overriding obligation spelt out by the ICJ as lying upon every nuclear power and all states cannot consistently with international law and the principle of good faith be diluted or modified in any manner whatsoever. Any clarification of this bedrock principle underpinning all international obligations and treaties would help to place all parties on the road to the fulfilment of the course of conduct indicated by the Court.

More than a decade has passed since the Court so categorically formulated this obligation, and yet we see a continued readiness to develop nuclear weapons and maintain nuclear arsenals. We also see the proliferation of nuclear dangers all around us, which increases from day to day the danger of a nuclear weapon being used by someone, somewhere. Many sources of increasing danger can be spelt out including the easier accessibility, due to modern communication methodologies, of the technology for the construction of nuclear weapons. All of this can only be overcome by a concerted and cooperative global effort to bring nuclear disarmament under strict and effective international control.

Recent statements at the highest international and national levels raise universal hopes that the goal of total elimination is not illusory but is within reach. Among these are UN Secretary-General Ban Ki-moon's Five Point Proposal for Progress on Disarmament announced in October 2008³ and U.S. President Obama's categorical statement in Prague on 5 April 2009 regarding "America's commitment to seek the peace and security of a world without nuclear weapons."⁴

The fact that the goal of a nuclear-free world is altogether attainable renders it all the more imperative that the route prescribed by the Court should be meticulously followed. The 2010 Nuclear Non-Proliferation Treaty Review Conference offers an outstanding opportunity to pursue this objective.

Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

the Thirteen Steps to implement this Article agreed at the 2000 Review Conference of the Parties to the Treaty, and the Opinion of the ICJ involve the concept of good faith. Ongoing modernization of nuclear arsenals highlights the importance of and need for good faith negotiations towards total nuclear disarmament.

The draft resolution contained in this memorandum and the intensive research that has gone into its preparation deserve the most careful study and attention.

Judge C.G. Weeramantry
President of IALANA

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PART I: INTRODUCTION AND BACKGROUND

CHAPTER ONE

WHY GO TO THE INTERNATIONAL COURT OF JUSTICE AGAIN?

The International Court of Justice (ICJ or the Court) in 1996 determined that the key to overcoming the risks posed by nuclear weapons is the legal obligation to negotiate disarmament in good faith. In spite of the Court's finding, states have made little progress for more than a decade towards fulfilling that obligation. States have also had strongly opposing views of what they are required to do. High-level voices have noted the lack of progress and, stressing the urgency of the situation, called for renewed efforts to achieve a nuclear weapon-free world. Given the failure to act and ongoing debates about what conduct is legally required for states to meet the good faith negotiation obligation, it is time to return to the Court to obtain guidance for the disarmament enterprise and to ensure that the legal obligation is effectively implemented.

In its Advisory Opinion of 8 July 1996, the ICJ unanimously concluded: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."⁵ In large part, the ICJ was interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),⁶ which obligates each state party 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."⁷

More than a decade later, both NPT and non-NPT states possessing nuclear weapons are planning and preparing to retain nuclear forces for the indefinite future and have made virtually no progress on disarmament negotiations. They have also not reduced the roles of nuclear weapons

in their security doctrines. Some have blocked nuclear disarmament negotiations in the key relevant international fora including the Conference on Disarmament, the General Assembly, and the NPT review process.⁸

In 2006, the Weapons of Mass Destruction (WMD) Commission led by Hans Blix stressed the urgency of the situation and stated, “It is easy to see that the nuclear-weapon parties to the NPT have . . . failed to ‘pursue negotiations in good faith’ as required of them under the NPT.”⁹ The Commission pointed to a “loss of confidence in the [NPT] as a result of the failure of the nuclear-weapon states to fulfill their disarmament obligations under the treaty and also to honour their additional commitments to disarmament made at the 1995 and 2000 Review Conferences.”¹⁰

The need to prevent the acquisition of nuclear weapons by additional states and by non-state actors also calls for urgent action. Proliferation of nuclear weapons to new states has predictably continued. Proliferation, either real or feared, jeopardizes world peace and the international system by increasing tensions between states. This dynamic demonstrates the importance of the NPT prohibition of the acquisition of nuclear weapons by non-nuclear weapon states parties (NNWS), a prohibition that is closely connected to the disarmament obligation laid down in Article VI.

Since the 2006 WMD Commission report, persons with authority have made numerous statements highlighting the gravity of the present situation and calling for revitalization of the disarmament agenda.¹¹ For example, in October 2008, UN Secretary-General Ban Ki-moon stated:

Most States have chosen to forego the nuclear option, and have complied with their commitments under the Nuclear Non-Proliferation Treaty. Yet some States view possession of such weapons as a status symbol. And some States view nuclear weapons as offering the ultimate deterrent of nuclear attack, which largely accounts for the estimated 26,000 that still exist.

Unfortunately, the doctrine of nuclear deterrence has proven to be contagious. This has made non-proliferation more difficult, which in turn raises new risks that nuclear weapons will be used.

Then the Secretary-General offered his five-point proposal for progress on nuclear disarmament and non-proliferation. In the first point, he stated in part:

I urge all NPT parties, in particular the nuclear-weapon States, to fulfill their obligation under the Treaty to undertake negotiations on effective measures leading to nuclear disarmament.

They could pursue this goal by agreement on a framework of separate, mutually reinforcing instruments. Or they could consider negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations. Upon the request of Costa Rica and Malaysia, I have circulated to all United Nations Member States a draft of such a convention, which offers a good point of departure.

The nuclear Powers should actively engage with other States on this issue at the Conference on Disarmament in Geneva, the world's single multilateral disarmament negotiating forum. The world would also welcome a resumption of bilateral negotiations between the United States and the Russian Federation aimed at deep and verifiable reductions of their respective arsenals.¹²

The Secretary-General's call for negotiations on a framework or convention to meet the NPT disarmament obligation is consistent with the UN General Assembly resolution passed each year by a very large majority since the Court delivered its Advisory Opinion in 1996.¹³ Each resolution, entitled Follow-up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, welcomes the ICJ's conclusion regarding the nuclear disarmament obligation and calls for commencement of multilateral negotiations that would lead to a convention prohibiting and eliminating nuclear weapons. In spite of these resolutions, no multilateral forum has been created to begin negotiations. NPT commitments made in 1995 and 2000 have also not been implemented.

In addition, states possessing nuclear weapons do not accept the view that they are not living up to their nuclear disarmament obligation. The presidents of Russia and the United States have recently reaffirmed the goal of a nuclear weapon-free world and endorsed further bilateral reductions and other steps in that direction.¹⁴ They have not agreed, however, to commence multilateral negotiations leading to the global elimination of nuclear weapons nor have they committed to, or even discussed, a timeframe for accomplishing such elimination. Nuclear weapons states (NWS), including these two countries, have argued that pursuing piecemeal

regulation of nuclear weapons meets their disarmament obligation under international law.

It is precisely because of these conflicting views and failures of implementation that the world is in need of clear guidelines as to what state behavior is required to meet the nuclear disarmament obligation. “The long-promised complete nuclear disarmament,”¹⁵ which the ICJ referred to in its 1996 Advisory Opinion, is not only a political commitment but also a binding legal undertaking. Therefore, the ICJ, as the principal judicial organ of the United Nations, should be called upon to articulate much-needed legal guidance resolving current controversies over how to implement the obligation. It should provide the world community with the insights needed to turn the promise into reality.

This memorandum begins with a background part. Chapter Two describes advisory opinions in general, and Chapter Three summarizes the 1996 ICJ Opinion. Chapter Four introduces the NPT and analyzes the Court’s holding on the two-part obligation of good faith negotiation leading to nuclear disarmament laid out in Article VI. The next part explains continuing controversies about the obligation. Chapter Five examines the debate about implementation of commitments collectively made by NPT parties to fulfill Article VI, and Chapter Six highlights states’ failure to negotiate a nuclear weapons convention. The last part calls for a return to the ICJ. Chapter Seven describes the legal requirements for good faith negotiations and how they relate to Article VI. Chapter Eight concludes by proposing and explicating a General Assembly resolution that would ask the ICJ to clarify the requirements of good faith negotiations leading to total elimination of nuclear weapons.

CHAPTER TWO

ADVISORY PROCEEDINGS BEFORE THE INTERNATIONAL COURT OF JUSTICE

The ICJ can provide direction on the obligation to negotiate nuclear disarmament through an advisory proceeding. As one of the six principal organs of the United Nations,¹⁶ the ICJ has two roles: 1) in contentious cases, judging and deciding disputes between states; and 2) in advisory cases, providing legal guidance to the United Nations and its member states by giving opinions on legal issues.¹⁷

Contentious proceedings are limited to states that are entitled to appear before the Court.¹⁸ The Court may deal with contentious cases only if the states involved have, in one way or another, explicitly recognized its jurisdiction. These proceedings lead to a judgment of the Court, which is binding on the states that are parties to the case and which is enforceable under the conditions laid down in the UN Charter.¹⁹

Advisory proceedings do not lead to a judgment against a specific state as in a contentious case, but they are nonetheless significant regarding questions of law. In some situations, the import of an advisory opinion may be greater than that of a judgment. The latter settles a dispute between particular states while the former offers an authoritative interpretation of legal principles that apply to the international community of states generally.

In advisory proceedings, the UN organ requesting the opinion calls on the Court to give guidance on questions of international law. The proceedings may involve practical legal questions, such as the handling of certain UN financial matters, or questions on broader issues of overriding importance to the entire world. If the General Assembly requests an advisory opinion, issues in the latter category are more likely to be central considerations. The authority of an advisory opinion is enhanced by the fact that, in principle, all states that are entitled to appear before the Court are also entitled to participate in advisory proceedings.²⁰ Thus, the international community may offer views on the legal questions involved, and the Court takes them into consideration when shaping its Opinion.

While advisory opinions are neither binding²¹ nor directly enforceable upon any particular state, in many such cases the Court has pronounced on the existence of specific obligations for all states or for an individual state.²² Judge Gros in the *Western Sahara* Advisory Opinion observed:

[W]hen the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put.²³

Thus, with regard to interpretation of treaty or customary law, an ICJ advisory opinion, having been delivered by the highest court of international law in the world, authoritatively instructs the international community on questions of law.²⁴

May the Court Refuse to Deliver an Advisory Opinion?

According to its Statute, the Court *may* give an advisory opinion, which suggests that the Court has discretion whether or not to deliver an opinion.²⁵ The Court itself, however, has taken the position that, in principle, it should not use this discretionary power to decline a request for an advisory opinion, since this part of its judicial role goes to its very participation in the United Nations.²⁶ Therefore, the Court has never refused to deliver an opinion for reasons of discretion.

The Court has rarely used other justifications for declining to give an advisory opinion. The Court found that it was unable to give an opinion on the nuclear weapons issue put before it by the World Health Organization (WHO), but its decision was a matter of admissibility. The Court found that because this particular issue fell outside the scope of the WHO's activities, the WHO was not entitled to ask about it.²⁷ The Court may also decline to give an advisory opinion in cases about issues that relate exclusively to a limited number of states that have made it clear that they do not want the Court to be involved. History provides only one example of such a case,²⁸ and several other cases that some thought the Court might decline but did not demonstrate the very exceptional status of this ground for refusal.²⁹

On many occasions states have argued that the Court should abstain from delivering an advisory opinion in a particular case since the question put before the Court would be of an overriding political nature. In none of these cases did the Court adopt this position, and in fact it seems to have

taken the opposite one. The Court observed in one such case in 1980:

[I]n situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an Advisory Opinion from the Court as to the legal principles applicable with respect to the matter under debate.³⁰

Since then, the Court has repeatedly made similar observations, including in its 1996 *Nuclear Weapons* Advisory Opinion.³¹ As long as the question asked presents legal issues, the Court will not abstain because there may be political ramifications to its conclusions.

Role of States

States are part of the process leading up to a decision to ask for an advisory opinion. The UN Charter entitles the General Assembly and the Security Council as well as other UN organs and specialized agencies to request advisory opinions.³² They must reach their decision to do so in accordance with their governing rules. For the General Assembly a simple majority of states suffices to support requesting the Court's opinion. If the UN organ requesting an advisory opinion deems it necessary to obtain the Court's findings as early as possible, it may indicate so in its request. The Court will then make arrangements to expedite the process.³³

In the actual advisory proceedings, states do not act as parties to a dispute but rather as members of the world community, which provide the Court with information and views related to the questions posed to the Court. They may present information to the Court in the form of written statements and/or—if the Court decides to hold oral hearings—in the form of oral statements.

States are under no obligation to participate, but they should be aware that non-participation does not lessen the authority of the opinion. Instead it deprives them of the possibility that the Court will take into account their views. States participating in advisory proceedings are also entitled to comment on the statements produced by the other participating states.³⁴

Role of Non-State Actors

The Court has discretionary power to invite international organizations to submit information on the same footing as states that are entitled to appear before the Court.³⁵ The Court has interpreted this power as relating to public international organizations of states. In the recent *Wall* Advisory

Opinion, for example, the Court allowed two such organizations, the League of Arab States and the Organization of the Islamic Conference, to submit their views.³⁶

The Court does not consider civil society organizations eligible to provide information in the same way as public international organizations of states. The Court has, however, through its Practice Direction XII, opened a small window for international nongovernmental organizations (NGOs) to submit written statements and documents in the case of advisory proceedings.³⁷ These submissions do not form part of the file but are made available to the judges and to the states participating in the proceedings.

CHAPTER THREE

THE COURT'S ADVISORY OPINION OF 8 JULY 1996

The ICJ has once already provided an advisory opinion on the general issue of nuclear weapons. The General Assembly had asked the ICJ to address the following question: “Is the threat or use of nuclear weapons permitted in any circumstance under international law?” The bulk of the Opinion, delivered on 8 July 1996, addressed that question directly, but the Court also addressed the obligation to negotiate disarmament in good faith.

The General Holding of the Advisory Opinion

In its Advisory Opinion, the ICJ analyzed the question of the legality of the threat or use of nuclear weapons primarily under international humanitarian law. The Court concluded, unanimously, that the rules “applicable in armed conflict, particularly those of the principles and rules of international humanitarian law,” apply to nuclear weapons just as they do to any other sort of threat or use of armed force.³⁸ The Court described nuclear weapons as “explosive devices whose energy results from the fusion or fission of the atom,” and noted that “[b]y its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation.”³⁹ “These characteristics,” the Court then observed, “render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.”⁴⁰ The Court found that given the weapons’ characteristics, the use of nuclear weapons “in fact seems scarcely reconcilable with respect for [the] requirements” of international humanitarian law.⁴¹ In this context, the Court specifically highlighted the requirement to make at all times a distinction between civilian and military objects and the prohibition on causing unnecessary suffering to combatants.⁴²

The Court also analyzed the relationship between human rights law and environmental law on the one hand and international humanitarian law on the other. The latter, the Court wrote, prevails as *lex specialis*.⁴³ At the same time, the Court found that human rights law and environmental law do

not cease to exist during armed conflict. They provide important restraints on the use of armed force by serving as factors in the determination of general principles, such as proportionality and necessity.⁴⁴ In other words, these bodies of law raise the threshold for legality of any use of armed force.

Although the reasoning of the Court seemed almost inevitably to lead to the conclusion that any conceivable threat or use of nuclear weapons would be illegal, the Court stopped short of drawing that conclusion. It did not, however, draw the opposite conclusion either. It noted

that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons.⁴⁵

In fact, during these proceedings, the possessor states were unable to provide proof that the threat or use of nuclear weapons would be legal under some circumstances. These states also have not offered proof of their position since the Advisory Opinion.

The ICJ balanced two positions: stating that use of nuclear weapons seems “scarcely reconcilable” with international humanitarian law but also noting that it could not “make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance either.”⁴⁶ The Court concluded “that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.”⁴⁷

Responding to a Question Not Asked

While the General Assembly’s request for the 1996 Advisory Opinion did not directly ask the ICJ about the obligation to negotiate nuclear disarmament in good faith, which is enshrined in Article VI of the NPT, the Court addressed it as “one further aspect of the question before it.”⁴⁸ An analysis of the Advisory Opinion shows that the Court took a broad view of the question posed. The Court observed that the question before it “has a relevance to many aspects of the activities and concerns of the

General Assembly including those relating to the threat or use of force in international relations, the *disarmament process*, and the progressive development of international law.”⁴⁹

The ICJ noted the “eminently difficult issues” raised by the threat or use of nuclear weapons, and further observed:

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.⁵⁰

CHAPTER FOUR

THE ICJ ADVISORY OPINION AND THE NUCLEAR NON-PROLIFERATION TREATY

In its 1996 Advisory Opinion, the ICJ based its analysis regarding the obligation to negotiate the elimination of nuclear weapons on Article VI of the NPT. This Article plays a critical role in the treaty because it represents a compromise between the NWS and NNWS that helped make the treaty possible. The ICJ found that Article VI imposes a strict, two-pronged obligation on all states parties; it requires that they not only pursue but also complete good faith negotiations on nuclear disarmament. An analysis of the language and history of the Article supports the Court's conclusion.

History of the NPT

Four years after the United States dropped the atomic bomb in 1945, the Soviet Union detonated its first atomic bomb, and Britain followed soon after.⁵¹ Responding to the grave threat posed by nuclear weapons, in 1957 the United Nations founded the International Atomic Energy Agency to oversee the peaceful use of nuclear energy.⁵² Even so, France and China came into possession of nuclear weapons in the early 1960s.⁵³ Recognizing a need for further measures, in 1961 the General Assembly passed an Irish resolution supporting the creation of an international agreement prohibiting the transfer of nuclear weapons.⁵⁴

Thereafter, the Eighteen-Nation Disarmament Committee (ENDC),⁵⁵ the Soviet Union, and the United States undertook negotiations on what would ultimately become the NPT.⁵⁶ By 1967, the Soviet Union and the United States had largely resolved initial disagreements, and they submitted identical draft treaties to the ENDC.⁵⁷ Their texts contained the core non-proliferation provisions in NPT Articles I and II. Article I prohibits NWS from transferring nuclear weapons to any other states, while Article II prohibits NNWS from receiving or manufacturing nuclear weapons.⁵⁸

Subsequent negotiations led to the inclusion of new articles in a January 1968 treaty draft.⁵⁹ A safeguard provision concerning compliance verification procedures appeared in Article III.⁶⁰ This draft also added Article IV, which preserves states parties' right to use nuclear energy for peaceful purposes.⁶¹ Of grave importance for the viability of the NPT, the January 1968 draft introduced provisions addressing the concerns of NNWS in Articles V, VI,

and VII, which protect the benefits of peaceful nuclear explosions to NNWS, obligate states parties to pursue good faith negotiations leading to nuclear disarmament, and recognize the right of states to agree upon regional nuclear-free zones, respectively.⁶²

Numerous NNWS nonetheless criticized the draft for being disproportionately soft on NWS, and in March 1968, following further multilateral negotiations, the Soviet Union and the United States produced a new joint draft treaty that referenced a comprehensive test ban in the preamble and strengthened Article VI.⁶³ The ENDC submitted this draft to the General Assembly in late April.⁶⁴ After additional fine-tuning, the General Assembly passed a resolution endorsing the treaty on 12 June 1968, by a vote of 94 to 4, with 21 abstentions.⁶⁵ The NPT entered into force in March 1970, and as of January 2009, it has 189 states parties.⁶⁶

Statements in the Course of Advisory Opinion Proceedings

Article VI, one of the last provisions to be agreed on in the NPT negotiation process, attracted renewed attention during the proceedings of the 1996 Advisory Opinion. In the final version, it reads:

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.⁶⁷

Although the General Assembly did not specifically ask about Article VI in its request to the Court, several states made statements about the provision during the Advisory Opinion proceedings.

States' written statements demonstrated support for Article VI. Some states, such as Germany, the Netherlands, and New Zealand, stressed the national, regional, and global significance of its obligation.⁶⁸ Other states, including Mexico and Nauru, highlighted the discriminatory character of the NPT and referred to the obligation in Article VI as constituting a possible way "to attain a balance between the rights and the obligations of the Parties."⁶⁹ Of the NWS, only the United Kingdom addressed the provision, stating that "nuclear weapon States reaffirm their commitment, as stated in Article VI to pursue in good faith negotiations on effective measures relating to nuclear disarmament."⁷⁰

During the hearings before the Court, a few states addressed more substantively the obligation to conduct negotiations in good faith. Iran noted the fact that "[i]nclusion of 'good faith' both in Article VI of the Non-

Proliferation Treaty and in the Security Council resolution [984] indicates the high value attached to good faith negotiations.⁷⁷¹ In this context Iran's counsels drew attention to the ICJ's rationale in the *North-Sea Continental Shelf Judgment*, where the Court found that "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement."⁷⁷²

Malaysia and Australia also commented on Article VI and the importance of nuclear disarmament. Malaysia said that "as long as [NWS] fail to commit to a time frame for the elimination of nuclear weapons, and for as long as [they] refuse even to give up the first use option, there is every possibility of further proliferation and of an enhanced risk of a nuclear conflagration that can threaten the planet and all of humanity."⁷⁷³ Australia clarified that "[a]ll States, including the nuclear weapon States are prohibited by customary international law from engaging in any action inconsistent with [the commitment to complete nuclear disarmament]."⁷⁷⁴ Australia's former Foreign Minister Gareth Evans contended that such an obligation means that states cannot introduce new nuclear weapons, refine their existing stockpiles, or engage in action intended to ensure maintenance of their nuclear arsenals indefinitely into the future.⁷⁷⁵ Australia also emphasized that in order to achieve complete elimination of nuclear weapons within a reasonable timeframe, practical programs of nuclear reductions to which all five NWS are committed are required.⁷⁷⁶

The ICJ's Findings on Article VI

The ICJ also addressed Article VI. Relying on an international law distinction between obligations of conduct and result, the Court unanimously held that the Article's obligation to negotiate disarmament in good faith is a twofold one to pursue and to conclude negotiations leading to complete nuclear disarmament.⁷⁷⁷ In other words, the Article requires both conduct (negotiation) and result ("nuclear disarmament in all its aspects").⁷⁷⁸

While the Court wrote that the obligation "formally concerns" NPT states parties, it stressed that this issue has traditionally been a concern to all states. It observed that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States."⁷⁷⁹ It also noted that "virtually the whole [international] community" was involved with the UN General Assembly resolutions concerning nuclear disarmament.⁷⁸⁰ Though the Court did not address the point directly, its reasoning leaves open the possibility that the nuclear disarmament obligation applies to states not party to the NPT.

While the ICJ does not provide an in-depth analysis of Article VI to justify its holding, a close reading of the Article's text supports the position that it imposes a two-part obligation. The text specifically speaks of "negotiations in

good faith,” which on its face relates to the conduct prong. Article VI’s focus on “effective measures” in particular substantiates the Court’s conclusion that results are also obligated.⁸¹ The phrase “at an early date,” which was added at the end of the negotiations,⁸² has a similar implication. By adding a time constraint on negotiations, the phrase suggests that the result of cessation must actually be achieved.

The complicated negotiating history of the NPT’s disarmament provisions offers further support for the ICJ’s understanding of Article VI’s two-pronged obligation. It also shows the importance the NNWS placed on this obligation as a counterweight to their duty under Article II not to develop or obtain nuclear weapons.

Prior to the August 1967 draft, NNWS had pressed for provisions requiring nuclear disarmament.⁸³ The Soviet Union and the United States responded by inserting a call for the “cessation of the nuclear arms race” at the “earliest possible date” in the preamble of the August 1967 draft.⁸⁴ In reply, Mexico proposed a draft treaty article requiring that NWS “pursue negotiations in good faith” toward specific disarmament measures, including the elimination of existing stockpiles and delivery systems.⁸⁵ The January 1968 U.S.-USSR draft incorporated some of the language of the proposed Mexican amendment—it required parties to “pursue negotiations in good faith” on an agreement ending the nuclear arms race and on a “general and complete disarmament” treaty—while omitting the specifically enumerated disarmament measures.⁸⁶ Several NNWS coolly received the partial incorporation of the Mexican amendment because they considered it an insufficient balance to Article II.⁸⁷

The NNWS ultimately refused to acquiesce in freeing the NWS from all obligations of result. In his account of the NPT negotiations, Mohamed Shaker, a member of the Egyptian delegation to the ENDC during the NPT negotiations, noted that the “obligation to pursue negotiations in good faith . . . was not admitted without . . . broad interpretation of its implications” and that it “was generally felt that negotiating was not an end in itself but a means to achieving concrete results.”⁸⁸ The inclusion of Article VI and its “negotiations in good faith” obligation was more than a symbolic gesture. By inserting the good faith obligation into the body of the NPT, the NNWS were pushing towards a treaty that would compel, as the ICJ later articulated it, “nuclear disarmament in all its aspects under strict and effective international control.”⁸⁹ As a whole, the exchanges between NWS and NNWS demonstrate that Article VI represented an agreement wherein the NWS consented to adopting strategies to accomplish the Article’s objectives in exchange for a certain degree of latitude regarding the specific course of action to be pursued.

A view that diverges from both the ICJ Opinion and treaty analysis contends that the mere pursuit of negotiations satisfies Article VI.⁹⁰ This

interpretation seeks to draw a distinction between Article VI and other NPT articles that articulate what each state party “undertakes” to do and not to do as opposed to what each party “undertakes to pursue.”⁹¹ This reading also interprets Soviet and U.S. rejections of specific disarmament measures during Article VI negotiations as staunch rejections of any obligation of result.⁹²

Such a reading of Article VI fails to appreciate Article VI’s text and the role the Article played in fostering NPT consensus. Like other NPT articles, Article VI explicitly states that each party “undertakes” an obligation, in this case, to realize nuclear disarmament. The effectiveness and “at an early date” language implies that the obligation requires results. The dismissive view of Article VI also greatly discounts the compromise between the NWS and the NNWS. The NPT is a “strategic bargain”: the NNWS agreed not to acquire nuclear weapons, and the NWS agreed to negotiate their elimination.⁹³ The insertion and phrasing of Article VI in the body of the NPT therefore amounted to more than just a token effort. As concluded by the ICJ, a complete picture of Article VI incorporates an obligation not only to negotiate but also to achieve nuclear disarmament.

PART II: CURRENT CONTROVERSIES

CHAPTER FIVE

DIVERGENT POSITIONS ABOUT IMPLEMENTATION OF ARTICLE VI

The ICJ clearly stated the dual nature of Article VI's obligation, to negotiate and to achieve the elimination of nuclear weapons, but it did not explain how states should meet both aspects of the obligation. Since the entry into force of the NPT, states have disagreed on the steps necessary to implement the provision. Even though virtually all states have now accepted the ICJ's conclusion that the treaty requires the realization of complete nuclear disarmament,⁹⁴ they dispute what conduct that result requires and have made little progress toward achieving it. The ICJ should thus be asked to revisit the Article VI provision and provide a more detailed explanation of the actions states parties must take for full implementation that reaches the result.

The results of the NPT's seven Review Conferences,⁹⁵ which have struggled with the treaty's practical interpretation and application, exemplify the ongoing differences among states about how to meet their Article VI obligations. The final documents adopted by the 1975 and 1985 Conferences highlighted divergent positions, which still exist, as to the proper implementation of Article VI.⁹⁶ While the United States and the Soviet Union contended that negotiation and implementation of bilateral arms limitation and reduction treaties were sufficient to comply with Article VI, many NNWS argued that Article VI implementation required actions going beyond limitation or control of weapons. Especially before the Cold War ended, much emphasis was placed on the Comprehensive Nuclear Test Ban Treaty. This debate blocked agreement on final documents at the 1980⁹⁷ and 1990 Conferences.⁹⁸ States parties finally agreed to specific action plans by consensus at the 1995 and 2000 Review Conferences. While describing disarmament as one of the three central pillars of the NPT,⁹⁹ however, the 2005 conference again failed to produce a final document largely because two states rejected the previously adopted 2000 consensus.¹⁰⁰

Treaties Regulating Nuclear Weapons

NWS often contend they have complied with Article VI through negotiation and implementation of bilateral or multilateral treaties related to nuclear disarmament or arms control.¹⁰¹ Such treaties regulate a variety of issues: number and type of permissible stockpiled or deployed nuclear warheads, type of permissible delivery or defense systems, permissible testing procedures, and locations of nuclear weapons. (See box at the end of this chapter for a list of post-1970 treaties related to nuclear arms.) NWS refer to ratification of and compliance with these treaties as constituting “strict” and “full” implementation of Article VI,¹⁰² and preambles to U.S.-Soviet/Russian treaties such as START state that the parties are “[m]indful of their undertakings with regard to strategic offensive arms in Article VI of the [NPT].”¹⁰³

To date, however, such treaties have not been undertaken within a process deliberately aimed at achieving the total elimination of nuclear weapons. Nor have they accomplished that aim, clearly intended by the NPT (see Chapter 4) and in accordance with a UN position. As explained by Sergio Duarte, the UN High Representative for Disarmament Affairs, the United Nations considers general and complete disarmament to encompass both the complete elimination of weapons of mass destruction (biological, chemical and nuclear weapons) and the regulation of conventional weapons.¹⁰⁴

1995 and 2000 Review Conference Action Plans

The NWS’s position that treaties merely regulating nuclear weapons are sufficient to meet the Article VI obligation is now a minority one. In 1995 and 2000, states developed by consensus an alternative approach to implementing Article VI’s disarmament obligation. At the twenty-fifth anniversary of the NPT, the 1995 Extension and Review Conference both determined how long the NPT would remain in force¹⁰⁵ and reviewed implementation.¹⁰⁶ The Conference, a meeting of all NWS and NNWS states parties, decided without a vote to continue the NPT indefinitely.¹⁰⁷ The 1995 Review Conference also adopted a decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament.¹⁰⁸ The principles of nuclear disarmament set forth a “program of action” for implementation of Article VI:

- a) completion of the Comprehensive Test Ban Treaty (CTBT) by 1996;
- b) immediate commencement and early conclusion of negotiations of a convention banning production of fissile material for nuclear weapons; and

- c) the “determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of elimination of those weapons, and by all States of general and complete disarmament under strict and effective international control.”¹⁰⁹

Ten years later at the 2005 Review Conference, the United Kingdom stated that it fully supported these measures,¹¹⁰ and France claimed the 1995 action program had become a “fundamental benchmark for France.”¹¹¹

The 2000 Review Conference, four years after issuance of the ICJ Advisory Opinion, reaffirmed the 1995 Principles of Disarmament and elaborated on those principles with Thirteen Practical Steps toward nuclear disarmament under Article VI.¹¹² The Thirteen Steps reiterate the 1995 program of action calling for a test ban treaty (Steps 1 and 2) and negotiation of a treaty banning production of fissile material (Step 3). Six of the Steps are directed at NWS, including some measures that NWS were already pursuing in 2000, such as ratification of START II (Step 7), unilateral disarmament measures (Step 9), and trilateral negotiations between the United States, Russia, and the International Atomic Energy Agency (Step 8). Two other Steps directed at NWS require the removal of fissile material from military programs (Step 10) and increased transparency and decreased strategic reliance on nuclear weapons (Step 9).

The Steps also affirm the “unequivocal undertaking of the NWS to accomplish the *total elimination* of their nuclear arsenals” (Step 6, emphasis added). To promote nuclear disarmament, the Steps commit states to the establishment of a Conference on Disarmament subsidiary body to deal with the topic (Step 4) and include measures to build disarmament capacity by calling for submission of regular reports on Article VI implementation by all states (Step 12) and the development of verification capabilities (Step 13). The Steps state that the ultimate goal is “general and complete disarmament” (Step 11). (See Appendix III for complete list of Thirteen Steps.)¹¹³

The Thirteen Steps do not represent an exhaustive list of the steps that may be taken towards nuclear disarmament, but they provide a standard for action. Indeed, there is a strong argument that the 1995 Principles and Objectives and the 2000 Thirteen Steps are “subsequent agreements” under Article 31 of the Vienna Convention on the Law of Treaties that supply criteria for the interpretation and application of Article VI.¹¹⁴ Both documents were adopted by consensus at meetings of the states parties. The Thirteen Steps also mark a notable break from the usual content and language of NPT final documents. They set forth specific actions for state parties. Moreover, the text of the 2000

Final Document states that the “Conference *agrees* on the following practical steps . . . to implement Article VI.”¹¹⁵

Post-2000

While states parties had agreed to a consensus document in 2000, divergent positions on implementation reemerged at the 2005 Review Conference. That conference was stymied by the refusal of France and the United States—unprecedented in the history of NPT Review Conferences—to accept the final declaration of 2000 as part of the basis and standard against which the 2000–2005 period would be reviewed.¹¹⁶

Furthermore, despite the clarity and in many cases specificity of the Thirteen Steps, states parties to the NPT have largely failed to implement them.¹¹⁷ The CTBT has not been brought into force. States have not lived up to their obligations, individually or collectively, through the Conference on Disarmament.¹¹⁸ No subsidiary body to deal with nuclear disarmament has been established there. Although the 1995 Principles called for the immediate commencement of negotiations on a fissile materials treaty, and although the Thirteen Steps called for conclusion of negotiations in the Conference on Disarmament on such a treaty by 2005, there have been no such negotiations. The actions of NWS in particular have fallen short of the Thirteen Steps’ requirements.¹¹⁹ Even as NWS reduce their stockpiles, they maintain, replace, and modernize nuclear weapons and delivery systems.¹²⁰ The United States and Russia have not applied principles of verification and irreversibility to reductions. The NWS generally have failed to reduce the role of nuclear weapons in their security policies, and some have even expanded their role.

At the same time, a majority of NNWS has continued to call for further action to implement Article VI. At the 2005 Review Conference, Nigeria argued that bilateral and unilateral disarmament “can only be meaningful if it leads to complete nuclear disarmament.”¹²¹ In a preparatory meeting for the 2010 Review Conference, the Non-Aligned Movement noted “a trend of vertical proliferation” that it views as “non-compliance by NWS” under Article VI and expressed its concern about the “slow pace of progress towards nuclear disarmament” and “lack of action by NWS.”¹²² Similarly, the New Agenda Coalition, a separate coalition of NNWS, “remains seriously concerned” by the modernization of nuclear arms and the continued belief in the “doctrine of nuclear deterrence.”¹²³ The failure of NWS to negotiate complete disarmament in good faith has motivated NNWS coalitions to make such statements and to continue to call for negotiations leading to total nuclear disarmament finally and actually to begin. NWS are unlikely to change their position that they are currently in compliance, however, unless they receive further guidance by the ICJ. The ICJ should be asked to clarify the precise meaning of Article

VI's disarmament obligation and in particular whether failure to meet the Principles and Objectives and the Thirteen Steps violates the obligation to negotiate in good faith that is laid out in the NPT and the 1996 Advisory Opinion.

TREATIES ON NUCLEAR WEAPONS

- **Sea-Bed Treaty (1971)** – multilateral agreement including the United Kingdom, United States, and the USSR banning the placement of nuclear weapons on the ocean floor beyond a 12-mile coastal zone.
- **Anti-Ballistic Missile Treaty (1972)** – agreement between the United States and the USSR limiting the number of anti-ballistic missile systems that could be used to defend against nuclear weapon attack.
- **Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War (1973)** – agreement setting forth rules of behavior deemed necessary to avoid nuclear war and requiring dialogue before resorting to nuclear force.
- **Strategic Arms Limitation Treaty Agreements: SALT I (1972) and SALT II (1979)** – agreements between the United States and the USSR resulting in a freezing of (SALT I) and later a reduction in (SALT II) the number of nuclear delivery systems possessed by each state. SALT II was negotiated but never entered into force.
- **Intermediate-Range Nuclear Forces Treaty (1987)** – an agreement between the United States and the USSR to eliminate nuclear missiles with a 500 to 5000 km intermediate range capacity.
- **Strategic Arms Reduction Treaty (START) (1991)** – agreement between the United States and the USSR (later Russia) requiring reduction of the number of strategic delivery systems and associated nuclear warheads in U.S. or Russian control.
- **Comprehensive Test Ban Treaty** – multilateral treaty that would ban the testing of nuclear weapons; it opened for signature in 1998 but has not yet been ratified by the necessary states to enter into force. France, Russia, and the United Kingdom have ratified the CTBT. China signed the treaty in 1998 but has not yet ratified it; the United States signed in 1996, but in 1999 the U.S. Senate refused to approve its ratification.
- **Strategic Offensive Reduction Treaty (2002)** – an agreement between the United States and Russia to reduce the number of deployed strategic warheads to between 1700 and 2000 each by 2012. The agreement requires no reduction in overall stockpiles and contains no verification measures.

CHAPTER SIX

NUCLEAR WEAPONS CONVENTION

Some states have proposed creating a nuclear weapons convention as another way to meet the Article VI obligation to achieve complete nuclear disarmament. This proposal, which is linked closely to the ICJ Advisory Opinion, has received widespread and high-level support. As with the Thirteen Steps, however, states have made little progress towards its realization.

Every year since 1996, the UN General Assembly has adopted a resolution following up on the Advisory Opinion of that year. In 2008, the General Assembly adopted the resolution by a vote of 127 to 30, with 23 abstentions.¹²⁴ The first operative paragraph welcomes the ICJ's conclusion that the Article VI obligation is one of conduct and result, and the second provides that the General Assembly:

Calls once again upon all States immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.

The proposal for a nuclear weapons convention derives directly and logically from the ICJ Advisory Opinion on nuclear weapons, which holds that states are obligated “to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” Such a convention would deal with, and achieve, nuclear disarmament “in all its aspects.” It would also establish mechanisms for compliance and verification of nuclear disarmament that would ensure “strict and effective international control.”

In 1997, at the request of Costa Rica, the UN Secretary-General circulated to all UN member states a Model Nuclear Weapons Convention.¹²⁵ Costa Rica submitted the Model Convention as “an effective and helpful instrument in the deliberative process for the implementation of” the annual resolution on follow-up to the ICJ Advisory Opinion.¹²⁶ In 2008, at the request of Costa Rica and Malaysia, the Secretary-General circulated an updated version of the Model Convention.¹²⁷ The Secretary-General later described the model as “a good point of departure” for negotiation of a nuclear weapons convention.¹²⁸

Costa Rica and Malaysia also submitted to the 2000 and 2005 NPT

Review Conferences working papers calling for implementation of the ICJ Advisory Opinion through multilateral negotiations leading to the conclusion of a nuclear weapons convention.¹²⁹ Costa Rica submitted the updated Model Convention to the 2007 Preparatory Committee for the 2010 NPT Review Conference with an explanation of its relevance to the NPT review process.¹³⁰

Civil society experts drafted the Model Nuclear Weapons Convention to stimulate thinking and to demonstrate the feasibility of negotiating the comprehensive prohibition and elimination of nuclear arsenals.¹³¹ It applies the approach taken by the Chemical Weapons Convention. The Model Convention provides general obligations regarding non-use and non-possession of nuclear weapons and their verified dismantlement; sets out phases of elimination; provides for multiple means of reporting, monitoring and verification, from declarations of states to satellite observation; prohibits production of fissile material for nuclear weapons; requires national implementation measures; provides for prosecution of individuals accused of committing crimes proscribed by the convention; establishes an implementing agency; and establishes mechanisms for dispute resolution and compliance inducement and enforcement. The Model also builds upon existing nuclear non-proliferation and disarmament regimes and verification and compliance arrangements, including the NPT, International Atomic Energy Agency safeguards, the International Monitoring System for the CTBT, regional nuclear weapon-free zones, UN Security Council Resolution 1540, the International Convention for the Suppression of Acts of Nuclear Terrorism, and bilateral agreements between Russia and the United States.

Employment of a multilateral treaty to prohibit and eliminate nuclear weapons would follow a well-established path. As the ICJ observed:

The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction—which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use—and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction—which prohibits all use of chemical weapons and requires the destruction of existing stocks.¹³²

This approach of categorically banning a type of weapon has also been applied in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production,

and Transfer of Anti-Personnel Mines and on Their Destruction and in the recently signed and not yet entered into force 2008 Convention on Cluster Munitions.

As the pattern with respect to weapons of mass destruction indicates, negotiation of a nuclear weapons convention is the logical course to follow in order to comply with the nuclear disarmament obligation. The Model Nuclear Weapons Convention demonstrates that there is, indeed, no practical reason to refrain from actually beginning negotiations on a specific convention. Its framework is available and could serve as a starting point for such negotiations.

Despite the annual General Assembly resolution discussed above, however, there have been no inter-governmental negotiations or deliberations in any official forum leading toward adoption of a nuclear weapons convention. The question is whether the failure to commence such negotiations constitutes a lack of compliance with the obligation set forth in Article VI of the NPT and in paragraphs 98-103 and 105(2)F of the 1996 ICJ Advisory Opinion “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” ICJ guidance on this question would be extremely helpful.

PART III: RETURNING TO THE ICJ

CHAPTER SEVEN

GOOD FAITH OBLIGATIONS

Due to the current controversies over how to implement the Article VI obligation, a return to the ICJ is necessary. Article VI expressly obligates states parties to “pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament.”¹³³ In its 1996 Advisory Opinion, the ICJ unanimously concluded that the provision establishes “an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”¹³⁴ The ICJ did not, however, offer any specifics about how to implement the obligation. Since the ICJ and other tribunals have laid out elements of good faith in the past, the ICJ should be now asked to define them in the context of nuclear disarmament.

The Meaning of Good Faith

Good faith constitutes a “fundamental principle” of international law.¹³⁵ It is associated with building trust and stabilizing relationships by preserving the legitimate interests and expectations of parties. Good faith is particularly vital to the negotiation, interpretation, and implementation of treaties.¹³⁶

Good faith interpretation requires states to determine what conduct a treaty requires in light of its text and object and purpose. They must also take into account relevant practice and agreements that came after adoption of the treaty.¹³⁷ Regarding implementation of treaties, the ICJ stated the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.”¹³⁸

Several international tribunals, including the ICJ, have illuminated fundamental elements of good faith negotiation: meaningful negotiations, willingness to compromise, compliance with temporal and procedural requirements, and serious efforts to reach an agreement.¹³⁹ These obligations can be expanded upon and clarified by additional situation-specific agreements, such as, in the nuclear weapons context, the NPT. While itself already negotiated, the NPT in Article VI requires states parties to engage in

additional good faith negotiations. In that setting, the obligation to negotiate in good faith encompasses not only efforts toward elimination of nuclear weapons but also achievement of that result. Conduct that prevents achieving the result is contrary to the obligation.¹⁴⁰

1. Meaningful Negotiations

Good faith negotiations must be meaningful in nature. In the 1969 *North Sea Continental Shelf* case, the ICJ asserted that negotiating parties should “not merely . . . go through a formal process of negotiation” but rather “are under an obligation so to conduct themselves that the negotiations are meaningful.”¹⁴¹ In other words, parties to a negotiation must avoid mere formalism and must engage substantively with the issues in question. As indications of engagement, states should declare their positions and rationale for those positions openly, so as to identify points of conflict and to facilitate an exchange of views. States should avoid making diplomatic statements that reiterate the purpose of negotiations without raising new ideas. In order to conduct meaningful negotiations, states must deal honestly and fairly with each other, represent their motives and purposes truthfully, and refrain from taking unfair advantage of other parties.

2. Willingness to Compromise

Good faith negotiations require willingness to compromise. Negotiations must consider the interests of all parties¹⁴² and should not force any state to breach previous agreements.¹⁴³ According to the 1972 Arbitral Tribunal of the Agreement on German External Debts, “parties must make every effort . . . to reach a mutually satisfactory compromise, even going so far as to abandon previously inflexibly held positions.”¹⁴⁴ The obligation to be willing to compromise does not require a party to accept an agreement with unreasonable terms. Rather, a party would violate good faith if it demonstrated “systematic refusals to consider adverse propositions or interests”¹⁴⁵ or consistently rejected a proposed agreement, even though the party’s objections had been taken into account, in order to prevent the conclusion of any reasonable agreement.¹⁴⁶ As the *Lake Lanoux* Arbitral Tribunal explained, good faith requires parties to “consent to suspend, for the period of the negotiation, the full exercise of their rights.”¹⁴⁷ Parties retain the right to object to proposed agreements, but to do so in order to prevent compromise is to refuse to give meaning to the negotiations and to violate the principles of good faith.

3. Compliance with Temporal and Procedural Requirements

States must not unjustifiably delay negotiations or adoption of an agreement. In *Lake Lanoux*, the Arbitral Tribunal ruled that good faith would

be violated “in case of unjustified breaking off of talks, of abnormal delay, [or] of failure to follow agreed procedures.”¹⁴⁸ The Tribunal in *Kuwait v. Aminoil* declared good faith required a “sustained upkeep of the negotiation over a period appropriate to the circumstances.”¹⁴⁹ Judge Higgins, in her Separate Opinion in the *Wall* Advisory Opinion, noted that in addition to existing substantive obligations, states should honor the “procedural obligation to move forward simultaneously.”¹⁵⁰ States also must not insert procedural flaws into the negotiations that result in susceptibility to delay or rupture or that render it impossible to reach the agreement.

4. Serious Efforts to Achieve Agreement

As a general concept in international law, good faith is an obligation of conduct rather than an obligation of result.¹⁵¹ When there is no more specific applicable law, as in the *Gulf of Maine* case, the ICJ has held that parties are under a duty to negotiate with a genuine intention to achieve a positive result.¹⁵² In a similar decision, the 1972 Arbitral Tribunal of the Agreement on German External Debts stated that good faith does not imply “the obligation to reach an agreement, but it does imply serious efforts aimed toward that end.”¹⁵³ Nonetheless, as noted in the *Lake Lanoux* case, state obligations with regard to good faith can vary according to the way they are defined in specific situations or treaties.¹⁵⁴ In the NPT regime, Article VI requires both conduct and result. NPT states parties must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must also actually achieve that result.

Good Faith Negotiations in the NPT Context

While the ICJ has issued decisions related to good faith negotiations in general, it has not applied the principles specifically to the nuclear weapons context. In its 1996 Advisory Opinion, the ICJ held that Article VI of the NPT requires both conduct—good faith negotiations—and result—nuclear disarmament. The Court did not define at that time, however, the particular requirements of negotiations leading to disarmament. To clarify the obligation and push states to action, it should be asked to do so now.

As discussed earlier, both a failure to act and a divergence of opinion on the Article VI obligation have made clarification an urgent matter. To pursue negotiations, states must first initiate them, and states have failed to take even this initial step towards a nuclear weapons convention or other multilateral framework for disarmament. They have also failed to live up to the Thirteen Steps. Even if states acknowledge an obligation to eliminate nuclear weapons, they disagree about how they are required to go about it.

In ruling on the meaning of good faith negotiations specifically under

Article VI, the ICJ should consider the significance of existing proposals for implementation. In adopting the Thirteen Steps, states parties outlined one possible path toward meeting the good faith requirements of Article VI.¹⁵⁵ As explained in Chapter 5, there is a strong argument that the Thirteen Steps are a subsequent agreement supplying criteria for the application and interpretation of Article VI and that states in substantially failing to implement the Steps have failed to comply with Article VI. Even if the Thirteen Steps are not viewed as a subsequent agreement, however, implementation of the Steps, which has yet to occur, would demonstrate good faith.¹⁵⁶ The ICJ should also evaluate the broadly supported call for commencement of multilateral negotiations leading to an early conclusion of a convention prohibiting and eliminating nuclear weapons. As discussed in Chapter 6, a large majority of UN General Assembly members annually urge states to pursue this form of implementation of the nuclear disarmament obligation.

A new advisory opinion by the ICJ could clarify the application of the principles of good faith identified above in the nuclear context. In particular, it could address whether good faith compliance with the nuclear disarmament obligation requires substantial implementation of the Thirteen Steps and commencement of multilateral negotiations on the total elimination of nuclear weapons.

CHAPTER EIGHT

THE QUESTIONS TO BE ASKED

The International Association of Lawyers Against Nuclear Arms and Harvard Law School's International Human Rights Clinic recommend that the UN General Assembly request that the ICJ render an advisory opinion on the obligation of good faith negotiations leading to nuclear disarmament. The opinion would clarify legal aspects of the obligation and provide guidance for complying with it.

The UN General Assembly should adopt in its 2009 session a resolution requesting such an opinion because the matter would then be pending before the ICJ at the time of the 2010 NPT Review Conference. The knowledge that the Court was soon going to issue an opinion could positively affect the outcome of the conference. Alternatively, the General Assembly could adopt a resolution after the conference taking its result into account.

A draft request for an advisory opinion is attached as Appendix I. Operative provisions are:

[The General Assembly] Decides, pursuant to Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following questions:

Having regard to the legal obligation of good faith negotiations leading to nuclear disarmament set forth in article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and in paragraphs 98-103 and 105(2)F of the Advisory Opinion of 8 July 1996 of the International Court of Justice on Legality of Threat or Use of Nuclear Weapons,

1) What legal consequences for States' compliance with the obligation flow from general legal principles concerning good faith?

2) Does compliance in good faith with the obligation require immediate commencement of multilateral negotiations leading to the total elimination of nuclear weapons within a time-bound framework?

3) *Does compliance in good faith with the obligation require substantial implementation of a) the Principles and Objectives for Nuclear Non-Proliferation and Disarmament agreed at the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, and b) measures and principles agreed at the 2000 Review Conference of the Parties to the Treaty and affirmed in subsequent United Nations General Assembly resolutions?*

4) *Would a lack of compliance in good faith with the obligation be demonstrated by acts such as:*

a) planning and implementing long-term retention, maintenance, and modernization of nuclear arsenals, delivery systems, and supportive technical complexes, and

b) development of nuclear weapons systems with new military capabilities or for new missions?

5) *Does the obligation apply universally?**

Explanatory Remarks

In a new advisory opinion that answered the questions above, the Court would explain what the Article VI obligation of good faith negotiating that achieves the result of nuclear disarmament requires of governments. It would take into account the requirement to refrain from conduct that prevents achieving the result and is contrary to the object and purpose of the NPT.

In responding to **Question 1**, which is based on the articulation of a parallel question in the *Wall* Advisory Opinion,¹⁵⁷ the Court would specify the consequences of general legal principles of good faith for compliance with the

* An alternative, if the General Assembly prefers to pass a simpler resolution, would be to ask a single question, with the intention of briefing the Court on the five issues above, as follows. With respect to the obligation of good faith negotiations leading to nuclear disarmament set forth in Article VI of the NPT and in the 1996 ICJ Opinion:

What are the legal consequences arising from the obligation, considering the rules and principles of international law, including principles of good faith, and outcomes of Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and relevant Security Council and General Assembly resolutions?

nuclear disarmament obligation. In other words, it would analyze the general principles of good faith in the context of nuclear disarmament and explain what legal obligations the principles impose. As explained in Chapter 7, it is a fundamental principle of international law that states must implement treaties in good faith, and Article VI also specifically requires good faith negotiations on nuclear disarmament. International tribunals have found that good faith in the context of negotiations demands: meaningful negotiations, willingness to compromise, compliance with temporal and procedural requirements, and serious efforts to reach an agreement. The opinion would provide guidance, under these principles, for the conduct and assessment of negotiations leading to the elimination of nuclear weapons and for compliance with the NPT and other legal instruments on nuclear weapons.

In answering **Question 2**, the Court would contribute to resolution of a sharply posed dispute. A large majority of governments take the position that fulfillment of the disarmament obligation requires one of three options: negotiation and adoption of a nuclear weapons convention, a time-bound program for elimination of nuclear weapons, or a framework of instruments on elimination.¹⁵⁸ They expressly or implicitly contend that the elimination of nuclear weapons should be accomplished within the foreseeable future. In contrast, several of the states that possess nuclear weapons, at least France, Israel, Russia, the United Kingdom, and the United States, have in practice resisted identification of a timeframe or initiation of a process that would establish a timeframe. The United States and Russia have essentially said that gradual reductions in their arsenals suffice to demonstrate good faith compliance with the disarmament obligation.¹⁵⁹

In responding to **Question 3**, the Court would clarify the legal status of the 1995 and 2000 commitments of the NPT Review Conferences, including the Thirteen Steps, which have been affirmed in subsequent General Assembly resolutions. Since 2000, almost all governments have supported General Assembly resolutions reaffirming and drawing on the 1995 and 2000 NPT conference outcomes and specifying measures and principles for implementation of the disarmament obligation, including the CTBT; a Fissile Material Cut-Off Treaty (FMCT); application of the principles of verification, transparency, and irreversibility to reduction and elimination of nuclear arsenals; reduction of the role of nuclear weapons in security postures; and reduction of the operational status of nuclear forces.¹⁶⁰ Moreover, as Chapter 5 explained, there is respectable legal opinion that, under well-established rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, the 1995 and 2000 outcomes constitute agreements subsequent to the adoption of the NPT authoritatively applying and interpreting Article VI.

Nevertheless, as documented in Chapter 5, controversy about the

significance of the 1995 and 2000 commitments remains, evidenced by the substantial failure to implement them and by the refusal of some NWS to reaffirm them in 2005. The United States has characterized the NPT outcomes as political commitments, lacking legal force.¹⁶¹ Furthermore, while the new U.S. administration has announced it will pursue certain measures specified in 1995 and 2000, including the CTBT and the FMCT, it has a long history of non-compliance with the consensus documents, and the position of some other states with nuclear weapons regarding the CTBT and FMCT remains unclear. Whether and how the NWS intend to implement other commitments made in 2000 is in question. In its answer to Question 3, the ICJ will provide guidance as to the legal implications of the 1995 and 2000 commitments.

In replying to **Question 4**, the Court would assist in settling current controversies concerning ongoing planning for and implementation of long-term retention, maintenance, and modernization of nuclear forces. Simply maintaining existing nuclear forces involves present-day planning for and large-scale investment in upkeep and replacement of warheads, delivery systems, and technical complexes. Modernization may involve adding new military capabilities. A WMD Commission recommendation identifies some of the issues raised:

Any state contemplating replacement or modernization of its nuclear-weapon systems must consider such action in the light of all relevant treaty obligations and its duty to contribute to the nuclear disarmament process. As a minimum, it must refrain from developing nuclear weapons with new military capabilities or for new missions. It must not adopt systems or doctrines that blur the distinction between nuclear and conventional weapons or lower the nuclear threshold.¹⁶²

The Court could examine the legal implications of maintenance and modernization and more generally address the compatibility of planning for long-term retention of nuclear arsenals with the obligation to achieve nuclear disarmament through good faith negotiation and with the object and purpose of the NPT.

In answering **Question 5**, the Court would clarify whether the disarmament obligation applies to all states, including those that have not joined the NPT, such as Israel, India, and Pakistan.¹⁶³ While the latter two states have accepted the obligation with their votes on General Assembly resolutions,¹⁶⁴ it still would be useful to have an ICJ statement on this question. An affirmative answer could help point towards integration of those states into a disarmament/non-proliferation regime. Since Israel does not officially acknowledge possessing

nuclear weapons, it is in a different position than India and Pakistan. NPT Article VI applies to all NPT parties, not only those with nuclear arsenals. Thus an ICJ conclusion that the disarmament obligation founded upon Article VI applies universally would confirm that Israel is bound by the obligation regardless of how Israel is classified. It would support Israel's joining the NPT as a NNWS or its participation in the creation of additional instruments to create a nuclear weapon-free world.

Benefits of a Return to the ICJ

An advisory opinion responding to the five questions proposed above would provide vital clarity regarding what conduct is required by the obligation to negotiate nuclear disarmament in good faith.

Returning to the ICJ would also generally reaffirm the place of law in disarmament, in line with the "growing interest among [UN] member states in the positive value of international law in serving their individual and collective security interests."¹⁶⁵ Repeated resort to the Court can elevate the role of law in matters of intense global concern. The Court's affirmation that South Africa was obligated to terminate its occupation of Namibia and the accompanying legal condemnation of apartheid came only after a series of cases were brought to the Court.¹⁶⁶ With a new opinion building on the 1996 Opinion, the role of the Court in the disarmament process would be viewed as similarly ongoing.

Finally, a new opinion would have positive effects on prospects for disarmament and would revitalize the movement for a world free of nuclear weapons. It would inform deliberations within the UN system and the NPT. It would become part of the environment for responsible officials and diplomats and enter into public and professional discourse. The opinion would also stimulate and reinforce civil society support for disarmament by such groups and efforts as the Mayors for Peace (who have mounted a "good faith" campaign), the International Campaign for the Abolition of Nuclear Weapons, and Global Zero. An advisory opinion on good faith negotiation would thus not only elucidate specific questions of law but also more generally advance the cause of total elimination of nuclear weapons.

APPENDIX I

PROPOSED UN GENERAL ASSEMBLY RESOLUTION

Request for an Advisory Opinion from the International Court of Justice on the obligation of good faith negotiations leading to nuclear disarmament:

The General Assembly,

Recalling its resolution 49/75 K of 15 December 1994 requesting an advisory opinion on threat or use of nuclear weapons from the International Court of Justice, and its resolutions on follow-up to that opinion, 51/45 M of 10 December 1996, 52/38 O of 9 December 1997, 53/77 W of 4 December 1998, 54/54 Q of 1 December 1999, 55/33 X of 20 November 2000, 56/24 S of 29 November 2001, 57/85 of 22 November 2002, 58/46 of 8 December 2003, 59/83 of 3 December 2004, 60/76 of 8 December 2005, 61/83 of 6 December 2006, 62/39 of 5 December 2007, and 63/49 of 2 December 2008,

Recalling also its resolutions on achieving the elimination of nuclear weapons and other weapons of mass destruction, including 1(1) of 24 January 1946, 808A (IX) of 4 November 1954, and S-10/2 of 30 June 1978,

Convinced that the continuing existence of nuclear weapons poses a threat to all humanity and that their use would have catastrophic consequences for all life on Earth, and recognizing that the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again,

Reaffirming the commitment of the international community to the goal of total elimination of nuclear weapons and the creation of a nuclear weapon-free world,

Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

Reaffirming the importance of all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons complying with their obligations under all the articles of the Treaty,

Noting in particular the obligation of each State Party set forth in article VI of the Treaty on the Non-Proliferation of Nuclear Weapons 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,

Emphasizing the unequivocal undertaking by the nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, adopted at the 2000 Review Conference of the Parties to the Treaty,

Recalling the principles and objectives for nuclear non-proliferation and disarmament adopted at the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons,

Recalling the thirteen steps to implement article VI of the Treaty on the Non-Proliferation of Nuclear Weapons agreed at the 2000 Review Conference of the Parties to the Treaty,

Noting its resolutions concerning nuclear disarmament and non-proliferation, including implementation of obligations and commitments arising from the Treaty on the Non-Proliferation of Nuclear Weapons, *in particular* 63/46, 63/58, and 63/73 of 2 December 2008,

Underlining the unanimous conclusion of the International Court of Justice in paragraph 105(2)F of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, issued on 8 July 1996, that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control,

Recognizing the interests of all United Nations Member States in respecting and fully implementing the obligations arising from treaties to which they are parties and from other sources of international law,

Convinced that the resolution of conflicting views on the legal requirements for compliance with the obligation of good faith-negotiation of nuclear disarmament obligation would assist in the prompt and full implementation of the obligation and in maintaining international peace and security, and,

Noting that Article 96, paragraph 1, of the Charter empowers the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question,

Decides, pursuant to Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to *urgently* render an advisory opinion on the following questions:

Having regard to the legal obligation of good-faith negotiations leading to nuclear disarmament set forth in article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and in paragraphs 98-103 and 105(2)F of the Advisory Opinion of 8 July 1996 of the International Court of Justice on *Legality of Threat or Use of Nuclear Weapons*,

- 1) What legal consequences for States' compliance with the obligation flow from general legal principles concerning good faith?
- 2) Does compliance in good faith with the obligation require immediate commencement of multilateral negotiations leading to the total elimination of nuclear weapons within a time-bound framework?
- 3) Does compliance in good faith with the obligation require substantial implementation of a) the Principles and Objectives for Nuclear Non-Proliferation and Disarmament agreed at the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, and b) measures and principles agreed at the 2000 Review Conference of the Parties to the Treaty and affirmed in subsequent United Nations General Assembly resolutions?
- 4) Would a lack of compliance in good faith with the obligation be demonstrated by acts such as:
 - a) planning and implementing long-term retention, maintenance, and modernization of nuclear arsenals, delivery systems, and supportive technical complexes, and

b) development of nuclear weapons systems with new military capabilities or for new missions?

5) Does the obligation apply universally?

APPENDIX II

EXCERPTS FROM THE ADVISORY OPINION OF 8 JULY 1996, RELATED TO ARTICLE VI OF THE NPT¹⁶⁷

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

“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.”

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially

nuclear disarmament, necessitates the co-operation of all States.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”. In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

“that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.”

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.

Nor has the Court omitted to draw attention to it, as follows:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.” (Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 268, para. 46.)

103. In its resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm “the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations”

and urged

“all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.”

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995.

In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today. . . .

105. For these reasons,

THE COURT. . . .

(2) *Replies* in the following manner to the question put by the General Assembly: . . .

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

APPENDIX III

THIRTEEN STEPS FROM 2000 REVIEW CONFERENCE FINAL DOCUMENT¹⁶⁸

The Conference agrees on the following practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 Decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament”:

1. The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty.
2. A moratorium on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of that Treaty.
3. The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices in accordance with the statement of the Special Coordinator in 1995 and the mandate contained therein, taking into consideration both nuclear disarmament and nuclear non-proliferation objectives. The Conference on Disarmament is urged to agree on a programme of work which includes the immediate commencement of negotiations on such a treaty with a view to their conclusion within five years.
4. The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament. The Conference on Disarmament is urged to agree on a programme of work which includes the immediate establishment of such a body.
5. The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.
6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI.

7. The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.

8. The completion and implementation of the Trilateral Initiative between the United States of America, Russian Federation and the International Atomic Energy Agency.

9. Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all:

- Further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally
- Increased transparency by the nuclear-weapon States with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to Article VI and as a voluntary confidence-building measure to support further progress on nuclear disarmament
- The further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process
- Concrete agreed measures to further reduce the operational status of nuclear weapons systems
- A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination
- The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons

10. Arrangements by all nuclear-weapon States to place, as soon as practicable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification and arrangements for the disposition of such material for peaceful purposes, to ensure that such material remains permanently outside of military programmes.

11. Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.

12. Regular reports, within the framework of the NPT strengthened review process, by all States parties on the implementation of Article VI and paragraph 4 (c) of the 1995 Decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament”, and recalling the Advisory Opinion of the International Court of Justice of 8 July 1996.

13. The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.

NOTES

1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243 ¶ 35 (July 8), *available at* <http://www.icj-cij.org/docket/files/95/7495.pdf> [hereinafter Nuclear Weapons Advisory Opinion].
2. See Nagendra Singh, *The Distinguishable Characteristics of the Concept of the Law as It Developed in Ancient India*, in LIBER AMICORUM FOR THE RIGHT HONOURABLE LORD WILBERFORCE 93 (1987) (cited in Nuclear Weapons Advisory Opinion, *supra* note 1, at 257 n.66 (dissenting opinion of Judge Weeramantry)).
3. Ban Ki-moon, UN Secretary-General, Address to the East-West Institute: The United Nations and Security in a Nuclear-Weapon-Free World (Oct. 24, 2008), <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.
4. Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered.
5. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 105(2)(F).
6. *See id.*, ¶¶ 98-102.
7. Treaty on the Non-Proliferation of Nuclear Weapons art. VI, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (*entered into force* 1970).
8. *See, e.g.*, LAWYERS' COMMITTEE ON NUCLEAR POLICY ET AL., NUCLEAR DISORDER OR COOPERATIVE SECURITY? 46–50, 63–74 (Michael Spies & John Burroughs eds., 2007); WEAPONS OF MASS DESTRUCTION COMMISSION, WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, CHEMICAL AND BIOLOGICAL ARMS 24, 179, *passim* (2006); reports regarding the Conference on Disarmament, NPT, and General Assembly, prepared by the Reaching Critical Will project of the Women's International League for Peace and Freedom, *available at* www.reachingcriticalwill.org.
9. WEAPONS OF MASS DESTRUCTION COMMISSION, *supra* note 8, at 94.
10. *Id.*, at 53.

11. See, e.g., George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, Op-Ed., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15; George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, Op-Ed., *Toward a Nuclear-Free World*, WALL ST. J., Jan. 15, 2008, at A13. George P. Shultz and Henry A. Kissinger are former U.S. Secretaries of State, William J. Perry is a former U.S. Secretary of Defense, and Sam Nunn is a former U.S. Senator. See also Helmut Schmidt, Richard von Weizsäcker, Egon Bahr and Hans-Dietrich Genscher, Op-Ed., *Toward a Nuclear-Free World: A German View*, INT. HERALD TRIB., Jan. 9, 2009. Helmut Schmidt is a former chancellor, Richard von Weizsäcker is a former president, Egon Bahr a former minister, and Hans-Dietrich Genscher a former foreign minister, all for the Federal Republic of Germany.

12. Ban Ki-moon, *supra* note 3.

13. See, e.g., Follow-Up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 63/49, U.N. Doc. A/RES/63/49 (Dec. 2, 2008).

14. Joint Statement by Russian Federation President Dmitriy Medvedev and U.S. President Barack Obama, Office of the Press Secretary, The White House (Apr. 1, 2009), <http://www.whitehouse.gov/>. See also Remarks by President Barack Obama, Prague, *supra* note 4.

15. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 98.

16. U.N. Charter, art. 7.

17. *Id.* art. 92–96.

18. See *id.* art. 93; Statute of the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

19. See U.N. Charter, *supra* note 16, art. 94; see also ICJ Statute, *supra* note 18, art. 59.

20. ICJ Statute, *supra* note 18, art. 66.

21. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30).

22. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 133 (June 21) [hereinafter Namibia Advisory Opinion]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 163(3)(A)–(D) (July 9) [hereinafter Wall Advisory Opinion].
23. Western Sahara, Advisory Opinion, 1975 I.C.J. Reports 73, ¶ 6 (Oct. 16) (declaration of Judge Gros).
24. MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 171 (2007).
25. ICJ Statute, *supra* note 18, art. 65, ¶ 1.
26. Interpretation of Peace Treaties, *supra* note 21, at 71.
27. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶¶ 29–32 (June 8); U.N. Charter, *supra* note 16, art. 96, ¶ 2.
28. *See* Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23).
29. *See* Wall Advisory Opinion, *supra* note 22; Namibia Advisory Opinion, *supra* note 22, at 16.
30. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 33 (Dec. 20), *available at* <http://www.icj-cij.org/docket/files/65/6303.pdf>.
31. *See* Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 13; *see also* Wall Advisory Opinion, *supra* note 22, ¶ 58.
32. U.N. Charter, *supra* note 16, art. 96.
33. Rules of Court (1978), art. 103.
34. ICJ Statute, *supra* note 18, art. 66, ¶ 4.

35. *Id.* art. 66, ¶ 2.

36. Wall Advisory Opinion, *supra* note 22, ¶ 6.

37. Practice Direction XII, 2009 I.C.J. Acts & Docs. *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

38. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 105(2)(D); *see id.* ¶¶ 85–87.

39. *Id.* ¶ 35.

40. *Id.*

41. *Id.* ¶ 95.

42. *Id.*

43. *Id.* ¶ 25.

44. *Id.* ¶¶ 25, 30.

45. *Id.* ¶ 94.

46. *Id.* ¶ 95.

47. *Id.* ¶¶ 97, 105(2)(E).

48. *Id.* ¶ 98.

49. *Id.* ¶ 12 (emphasis added).

50. *Id.* ¶ 98.

51. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 530 (2d ed. 2006).

52. *Id.* at 530–31.

53. *Id.* at 531–32.

54. BENJAMIN N. SHIFF, *INTERNATIONAL NUCLEAR TECHNOLOGY TRANSFER: DILEMMAS OF DISSEMINATION AND CONTROL* 78 (1983).

55. The ENDC was a UN-sponsored negotiating body of eighteen states, including Eastern, Western, and nonaligned states. JEAN E. KRASNO, *THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY* 196 (2004).

56. COIT D. BLACKER & GLORIA DUFFY, *INTERNATIONAL ARMS CONTROL: ISSUES AND AGREEMENTS* 153–55 (2d ed. 1984).

57. SHIFF, *supra* note 54, at 79.

58. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, arts. I–II.

59. Edwin Brown Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711, 717–21 (1969).

60. Article III compels parties to abide by safeguards negotiated with, and monitored by, the IAEA. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, art. III.

61. *Id.* art. IV.

62. *Id.* arts. V–VII.

63. Firmage, *supra* note 59, at 719–20.

64. *Id.* at 719.

65. *Id.* at 720–21. Albania, Cuba, Tanzania, and Zambia voted against.

66. UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml> (mentioning 190 parties but not counting the withdrawal of Democratic People's Republic of Korea) (last visited Apr. 15, 2009).

67. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, art. VI.

68. *See, e.g.*, Note Verbale from the Embassy of N.Z. (June 20, 1995) together with Written Statement of the Gov't of N.Z. ¶ 6. New Zealand provided examples of “enactment of national legislation, the establishment of the South Pacific Nuclear Free zone: and involvement in multilateral disarmament negotiations and regimes, in particular efforts to secure a comprehensive nuclear test ban treaty.” The Netherlands saw the 1995 NPT conference’s final decision, which will be discussed in Chapter 5, as a signal of the international community’s increasing awareness of significance of nuclear disarmament. Letter from the Minister for Foreign Affairs of the Netherlands (June 16, 1995) together with the Written Statement of the Gov’t of the Netherlands 6, ¶ 12.

69. Note Verbale from the Embassy of Mex. (June 19, 1995) together with Written Statement of the Gov’t of Mex. 6, ¶ 22. *See also* Letter from Counsel Appointed by Nauru (June 15, 1995) together with Written Statement of the Gov’t of Nauru 12.

70. Letter from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Gr. Brit. and N. Ir. (June 16, 1995) together with Written Comments of the U.K. 13, ¶ 3.

71. I.C.J. Verbatim Record, CR 1995/26 ¶ 28 (Nov. 6, 1995) (public sitting held at 10 a.m. at the Peace Palace, President Bedjaoui presiding).

72. *Id.* n.23. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 47, ¶ 85 (Feb. 20) [hereinafter North Sea Continental Shelf Case].

73. I.C.J. Verbatim Record, CR 1995/27 ¶ 44 (Nov. 7, 1995) (public sitting held at 10 a.m. at the Peace Palace, President Bedjaoui presiding).

74. I.C.J. Verbatim Record, CR 1995/22 ¶ 56 (Oct. 30, 1995) (public sitting held at 10 a.m. at the Peace Palace, President Bedjaoui presiding).

75. *Id.*

76. *Id.* ¶ 64.

77. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 105(2)(F) (“There exists an obligation to pursue in good faith and bring to a conclusion

negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”).

78. *Id.* ¶ 99.

79. *Id.* ¶ 100.

80. *Id.* ¶ 100.

81. This reasoning regarding an obligation of result is supported by the NPT preamble. It identifies as aims “cessation of the manufacture of nuclear weapons, the liquidation of . . . existing stockpiles, and the elimination . . . of nuclear weapons” to be achieved in a treaty on general and complete disarmament. Such a treaty is also referred to in Article VI. In the 1950s and 1960s, such a treaty had been envisioned as a) the limitation and reduction of armed forces and conventional armaments; b) prohibition of nuclear weapons and weapons of mass destruction of every type; and c) establishment of effective international control through a control organ. *See* G.A. Res. 808 (IX) A (1954). Subsequent to the negotiation of the NPT, the practice of states was to negotiate separate conventions on prohibition and elimination of distinct types of weapons, notably on biological weapons, chemical weapons, antipersonnel landmines, and cluster munitions, with an implementing agency in the case of chemical weapons. Such matters are considered by the UN General Assembly under the rubric of “general and complete disarmament.”

82. In February 1968, Sweden proposed amending Article VI to insert “at an early date,” the word “nuclear” before “disarmament,” and a reference to a comprehensive test ban in the preamble of the treaty. U.N. ENDC, 363d mtg. at 6–7, U.N. Doc. ENDC/PV.363 (Feb. 8, 1968). These changes were accepted, and they became part of the March 1968 joint draft, and ultimately the final treaty. Firmage, *supra* note 59, at 734.

83. MOHAMED SHAKER, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979*, at 556–57 (1980).

84. Firmage, *supra* note 59, at 733–34.

85. U.N. Eighteen-Nation Disarmament Committee [ENDC], 343d mtg. at 10, U.N. Doc. ENDC/PV.331 (Sept. 19, 1967).

86. Firmage, *supra* note 59, at 734.

87. SHAKER, *supra* note 83, at 558.

88. *Id.* at 572.

89. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 105.

90. Christopher A. Ford, *Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 NONPROLIFERATION REV. 401, 403 (2007).

91. *Id.* at 403–04.

92. *Id.* at 405–07.

93. Thomas Graham, Correspondence, *The Origin and Interpretation of Article VI*, 15 NONPROLIFERATION REV. 7, 9 (2008), available at http://cns.mii.edu/npr/pdfs/151_correspondence.pdf.

94. The first operative paragraph of the annual General Assembly resolution, Follow-up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, “[u]nderlines once again the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” In 2006, the last time a separate vote was held on that paragraph, it was approved by a vote of 168 to three, with five abstentions. India and Pakistan voted yes; Israel, Russia, and the United States voted no; France and the United Kingdom abstained. The entire resolution, G.A. Res. 61/83, U.N. Doc. A/RES/61/83 (Dec. 6, 2006), was adopted by a vote of 125 to 27 with 29 abstentions. Voting results can be accessed at <http://disarmament.un.org/vote.nsf>.

95. Article VIII, ¶ 3 sets forth the process by which a majority of state parties may elect to hold a Review Conference every five years. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 1, art. VIII, ¶ 3.

96. See Reaching Critical Will, NPT Review Process: 1970–1995, <http://www.reachingcriticalwill.org/legal/npt/history.html> (last visited Apr. 15,

2009); *see also* Carlton Stoiber, *The Evolution of NPT Review Conference Final Documents, 1975-2000*, 10 *NONPROLIFERATION REV.* 126, 126 (2003), available at <http://cns.miis.edu/npr/pdfs/103stoi.pdf>.

97. *See* Stoiber, *supra* note 96, at 126 (“In 1980, conference president Ismet Kittani (of Iraq) suspended negotiations . . . noting that . . . progress on Article VI (disarmament) was ‘disappointing.’”).

98. *See id.* (stating that Article VI debate was again the main issue of contention and the reason why there was no final document).

99. The other two pillars are non-proliferation and peaceful uses of nuclear energy. *See* 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), New York, N.Y., U.S.A., May 2–27, 2005, *Report of Main Committee I*, U.N. Doc. NPT/CONF/2005/MC.I/1, available at <http://www.reachingcriticalwill.org/legal/npt/RevCon05/MCIreport.pdf>.

100. *See* HARALD MÜLLER, *THE 2005 NPT REVIEW CONFERENCE: REASONS AND CONSEQUENCES OF FAILURE AND OPTIONS FOR REPAIR* (Weapons of Mass Destruction Commission, 2005), available at www.wmdcommission.org/files/No31.pdf.

101. *See, e.g.*, 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), New York, N.Y., U.S.A., May 2–27, 2005, *Implementation of the Treaty on the Non-Proliferation of Nuclear Weapons: Report Submitted by the People’s Republic of China*, U.N. Doc. NPT/CONF.2005/24, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/333/90/PDF/N0533390.pdf> (listing signature and ratification of Comprehensive Test Ban Treaty (CTBT) as full compliance with Article VI); H.E. Mr. François Rivasseau, Ambassador, Permanent Representative of France to the Conference on Disarmament, Statement to the General Debate 7 (May 5, 2005), available at <http://www.un.org/events/npt2005/statements/npt05france.pdf> (listing signature and ratification of CTBT as full compliance with Article VI); Vladimir Putin, President of the Russian Federation, Address to the Participants in the Review Conference of the Parties to the NPT 2 (May 3, 2005), available at <http://www.un.org/events/npt2005/statements/npt03russiapresident1.pdf> (stating simply that Russia “strictly complies with all of its disarmament requirements”); Ambassador John Freeman, Head of U.K. Delegation, Statement to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons 5,

¶¶ 18–20, (May 5, 2005), *available at* <http://www.un.org/events/npt2005/statements/npt05unitedkingdom.pdf> (listing the United Kingdom's unilateral disarmament measures as placing the United Kingdom in strict compliance with all its obligations); Stephen G. Rademaker, U.S. Assistant Sec'y of State for Arms Control, Statement to the 2005 Review Conference of the NPT 6 (May 2, 2005), *available at* <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/U.S.pdf> (discussing compliance with Article VI in terms of START and SORT negotiations and unilateral disarmament measures).

102. *See supra* note 101 and sources listed; *see also* Stephen G. Rademaker, U.S. Assistant Sec'y of State for Arms Control, U.S. Compliance with Article VI of the Non-Proliferation Treaty (NPT): Remarks at a Panel Discussion at the Arms Control Association (Feb. 3, 2005), *available at* http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/policies/us-nuclear-policy/nti_dos020305.pdf.

103. Strategic Arms Reduction Treaty (START I), U.S.-U.S.S.R, July 31, 1991, 31 I.L.M. 246 (1992).

104. Sergio Duarte, UN High Representative for Disarmament Affairs, Speech at Netherlands Institute of International Relations (Clingendael): New Perspectives in the United Nations for Disarmament (Mar. 4, 2008), *available at* http://www.clingendael.nl/events/20080304/20080304_cli_speech_duarte.pdf.

105. This decision amended Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, art. X, ¶ 2.

106. In the end, the Conference was unable to agree on an assessment of implementation but did adopt principles regarding future implementation in connection with the extension decision.

107. Center for Nonproliferation Studies, *Decisions and Resolution Adopted at the 1995 NPT Review and Extension Conference*, in *Inventory of International Non-Proliferation Organizations and Regimes* 364, 367, Decision 3, ¶ 3 (2002), *available at* <http://cns.miis.edu/inventory/pdfs/npt95rc.pdf>; *see also* Jean du Preez, *Avoiding a Perfect Storm: Recharting the NPT Review Process*, *ARMS CONTROL TODAY*, October 2008, http://www.armscontrol.org/act/2008_10/duPreez (stating that decisions were adopted according to consensus without a vote).

108. Center for Nonproliferation Studies, *supra* note 107, at 365, Decision 2, ¶¶ 3–4.
109. *Id.*, at 365, Decision 2, ¶ 4.
110. Ambassador John Freeman, *supra* note 101, at 5, ¶¶ 18–20.
111. H.E. Mr. Francois Rivasseau, *supra* note 101, at 7.
112. 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), New York, N.Y., U.S.A., Apr. 24–May 19, 2000, *Final Document, Part II*, at 14, ¶ 15, U.N. Doc. NPT/CONF.2000/28, available at <http://www.reachingcriticalwill.org/legal/npt/2000FD.pdf> [hereinafter 2000 Review Conference, *Final Document, Part II*] (“The Conference agrees on the following practical steps for the systematic and progressive efforts to implement article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4 (c) of the 1995 Decision on ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’”).
113. *Id.*
114. See, e.g., Philippe Sands, QC, & Helen Law, *UK’s Nuclear Deterrent, Current and Future Issues of Legality*, MATRIX, GRAY’S INN (London), Nov. 13, 2006, at 11-15 n.29, <http://www.greenpeace.org.uk/MultimediaFiles/Live/FullReport/8072.pdf>; Peter Weiss, John Burroughs & Michael Spies, Lawyers Committee on Nuclear Policy, *The Thirteen Practical Steps: Legal or Political?* May 2005, <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>. For an opposing view, see Ford, *supra* note 90, at 411-413.
115. 2000 Review Conference, *Final Document, Part II*, *supra* note 112, at 14, ¶ 15 (emphasis supplied). The term “agrees” is used only twice in the Final Document: to agree to the Thirteen Steps and to agree that legally binding security assurances are necessary.
116. See MÜLLER, *supra* note 100.
117. States, for example, have not yet achieved ratification of the CTBT by the necessary states for it to enter force (Step 1) or increased international

verification procedures (Step 14). Notably, China and the United States have both signed but failed to ratify the CTBT. Arms Control Association, *The Status of the Comprehensive Test Ban Treaty: Signatories and Ratifiers* (Feb. 2008), <http://www.armscontrol.org/factsheets/ctbtsig> (last visited Apr. 15, 2009). With respect to verification procedures, the United States has specifically objected to the inclusion of international verification procedures in a treaty banning production of fissile material, blocking the use of international verification measures and slowing negotiations on the cutoff treaty. U.S. Mission to the United Nations, Geneva, *White Paper on a Fissile Material Cutoff Treaty—Conference on Disarmament* (May 18, 2006), <http://www.state.gov/t/isn/rls/other/66901.htm>.

118. The Conference on Disarmament has not concluded negotiations on a treaty banning production of fissile material (Step 3) or established a subsidiary body to deal with nuclear disarmament (Step 4). *See, e.g.*, Press Release, The United Nations Office at Geneva [UNOG], Conference on Disarmament, Conference on Disarmament Hears Statements from Malaysia and the United Kingdom (Feb. 5, 2009), [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/9E3D0FC03E317A39C125755400383F89?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/9E3D0FC03E317A39C125755400383F89?OpenDocument) (statements calling on the Conference on Disarmament to move forward with its substantive work and to address nuclear disarmament). The Conference on Disarmament undertook negotiations for a fissile material ban in 1995 and again for three weeks in 1998, but despite repeated calls for negotiations since then, it has not resumed negotiations. *See* Nuclear Threat Initiative, *Ending Further Production: Fissile Material Cutoff Treaty* (Aug. 1, 2006), http://www.nti.org/e_research/cnwm/ending/fmct.asp.

119. NWS have failed to strengthen existing disarmament treaties (Step 7), to negotiate new treaties (Step 7), or take unilateral measures resulting in a reduction of nuclear arsenals (Step 9). Rather than strengthening the Anti-Ballistic Missile Treaty, the United States actually withdrew from the treaty in 2001. *America Withdraws from ABM Treaty*, BBC NEWS, Dec. 13, 2001, <http://news.bbc.co.uk/1/hi/world/americas/1707812.stm>. START II was negotiated but has not entered into force because the United States has failed to ratify a 1997 addendum to the treaty. *See* Nikolai Sokov, *START II Ratification: More Than Meets the Eye*, CNS REP., Apr. 17, 2000, <http://cns.miis.edu/reports/start2.htm>; *see also* Nuclear Threat Institute, *WMD411: U.S.–Russian Treaties & Agreements* (Jan. 2007), http://www.nti.org/f_WMD411/f1b2_2.html. These START II disputes have stymied development of START III and led instead to the weaker SORT agreement, which requires

only a reduction in deployed strategic nuclear warheads, lacks verification measures, and does not require a reduction of the total nuclear arsenals. See Ambassador Yuri Nazarkin, *The START and SORT Treaties: Comparative Analysis of Their Compliance System*, Apr. 20, 2007, available at http://www.gcsp.ch/e/meetings/Security_Challenges/WMD/Meeting_Conf/2007/Nazarkin_START-SORT.pdf. NWS have also not diminished the strategic role for nuclear weapons (Step 9e).

120. See, e.g., Michael Spies & Ray Acheson, Renewal vs. Disarmament: Update on Disarmament Compliance, NGO presentation to the 2008 NPT PrepCom (Apr. 29, 2008), available at <http://www.reachingcriticalwill.org/legal/npt/prepcom08/ngostatements/DisarmamentOverview.pdf>.

121. 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), New York, N.Y., U.S.A., May 2–27, 2005, *Issues to be Considered by Main Committee I: Working Paper Submitted by Nigeria*, at 1, ¶ 4, U.N. Doc. NPT/CONF.2005/MC.I/WP.2, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/351/42/PDF/N0535142.pdf>.

122. H.E. I Gusti Agung Wesaka Puja, Ambassador of the Republic of Indon. to the U.N., WTO, and other Int'l Orgs. in Geneva, Statement on Behalf of the Group of Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons at the General Debate of the Second Session of the Preparatory Committee for the 2010 Review Conference 2 (Apr. 28, 2008), available at <http://www.reachingcriticalwill.org/legal/npt/prepcom08/statements/NAMApril28.pdf>.

123. H.E. Don MacKay, New Zealand Permanent Representative to the U.N. in Geneva, Statement on Behalf of the New Agenda Coalition at the Preparatory Committee for the 2010 Review Conference 3 (Apr. 28, 2008), available at <http://www.mfat.govt.nz/downloads/disarmament/nac-general-debate-statement.pdf>.

124. G.A. Res. 63/49, *supra* note 13. Among states possessing nuclear arsenals, France, Israel, Russia, the United Kingdom and the United States voted against the resolution, and China, India, and Pakistan voted for it. Press Release, UN Dep't of Pub. Info., On Recommendation of First Committee, General Assembly Adopts 57 Texts, including Two New Ones on Halting Illicit Arms Brokering, Banning Cluster Munitions, GA/10792 (Dec. 2, 2008), available at <http://www.un.org/News/Press/docs/2008/ga10792.doc>.

htm.

125. See *Letter Dated 31 October 1997 from the Charge d'affaires a.i. of the Permanent Mission of Costa Rica to the United Nations Addressed to the Secretary-General*, U.N. Doc. A/C.1/52/7 (Nov. 17, 1997).

126. *Id.*

127. *Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations Addressed to the Secretary-General*, U.N. Doc. A/62/650 (Jan. 18, 2008).

128. Press Release, Secretary-General Ban Ki-moon, *The United Nations and Security in a Nuclear-Weapon-Free World*, U.N. Doc. SG/SM/11881 (Oct. 24, 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.

129. *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons to the 2000 NPT Review Conference*, Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Working Paper Nos. NPT/CONF.2000/MC.I/SB.1/WP.4 and NPT/CONF.2005/WP.41.

130. Costa Rica, *Model Nuclear Weapons Convention*, 2007 Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, Working Paper No. NPT/CONF.2010/PC.I/WP.17, 2007, available at <http://www.reachingcriticalwill.org/legal/npt/prepcom07/workingpapers/17.pdf>.

131. The three civil society organizations sponsoring the work were the International Association of Lawyers Against Nuclear Arms, the International Network of Engineers and Scientists Against Proliferation, and International Physicians for the Prevention of Nuclear War. The model convention is explained in MERAV DATAN, FELICITY HILL, JÜRGEN SCHEFFRAN & ALYN WARE, INT'L PHYSICIANS FOR THE PREVENTION OF NUCLEAR WAR, *SECURING OUR SURVIVAL: THE CASE FOR A NUCLEAR WEAPONS CONVENTION* (2007), available at <http://www.icanw.org/securing-our-survival>.

132. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 57.

133. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, art. VI.

134. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶ 105(2)(F).

135. See ROBERT KOLB, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L'ÉTUDE DES PRINCIPES GÉNÉRAUX DU DROIT* 112-13 (2001). The principle of good faith is equally applicable to the general performance of a state's obligations under international law. For instance, a UN General Assembly resolution proclaims that "every State has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law." Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625 (XXV), Annex Art. 1 (Oct. 24, 1970).

136. The duty to include good faith in the negotiations, interpretation and implementation of treaties is encapsulated in Articles 26, 31, and 49 of the Vienna Convention on the Law of Treaties.

Article 26: *Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 31(1): *General rule of interpretation*: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 49: *Fraud*: If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Vienna Convention on the Law of Treaties arts. 26, 31, 49, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679. Articles 50-52 of the Vienna Convention on the Law of Treaties also discusses the responsibility not to coerce or corrupt states or state representatives in order to bring about an agreement or performance. See *id.* arts. 50-52.

137. *Id.* art. 31.

138. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ¶ 142, 1997 I.C.J. 7 (Sept. 25).

139. See ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* 55 (1977). For an application of international case law and scholarly commentary in the context of the NPT, see Mohammed Bedjaoui, Keynote Address at Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, Geneva, (May 1, 2008), available at <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>. Bedjaoui was President of the ICJ when it delivered its Opinion on nuclear weapons in 1996.

140. Regarding proscribed conduct, see Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 567 (1993), available at <http://www.ejil.org/journal/Vol4/No4/>. He writes that when there is an obligation of good faith negotiation, “both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty.”

141. *North Sea Continental Shelf Case*, *supra* note 72, at 3, ¶ 85.

142. *Id.*; see also *Aminoil Arbitration* (Kuwait v. American Int'l Oil) 66 I.L.R. 578 (1982) (declaring that good faith requires “awareness of the interests of the other party; and a persevering quest for an acceptable compromise”).

143. For example, an agreement cannot require one party to violate an agreement already in place with a third party that would result in disproportionate harm to that third party. See *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18); see also *Affaire Relative à la Repartition des Biens Communaux*, in XIII RECUEIL DES SENTENCES ARBITRALES [R. INT'L ARB. AWARDS] 521 (1953).

144. Genevieve Guyomar, *Arbitration Panel/Tribunal of the Agreement on German External Debt AFDI*, in XIX RECUEIL DES SENTENCES ARBITRALES [R. INT'L ARB. AWARDS] 27-64 (1973). See also *North Sea Continental Shelf*, *supra* note 72, at 3, ¶ 85 (holding that compromise requires flexibility by all parties and an understanding that no party “insists upon its own position without contemplating any modification of it”).

145. *Lake Lanoux Arbitration* (Fr. v. Spain), 12 R. Int'l Arb. Awards 281 (1957).

146. Tacna-Arica (Chile v. Peru), 2 R. Int'l Arb. Awards 921, 929-40 (1925). Calvin Coolidge, the arbitrator, stated:

[I]n order to justify either Party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions of article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed there under because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite.

147. Lake Lanoux Arbitration, *supra* note 145, at 281.

148. *Id.*

149. Aminoil Arbitration, *supra* note 142, at 578.

150. Wall Advisory Opinion, *supra* note 22 (separate opinion of Judge Higgins, ¶ 18).

151. According to Paul Reuter, the minimum content of the obligation to negotiate requires that states undertake to open negotiations and conduct themselves as negotiators; concerning this undertaking to conduct themselves as negotiators, he states that “it is unanimously known that this is not an obligation to reach a result, but an obligation of conduct: negotiators must behave in a certain manner, but is rather the object of somewhat flexible standards. The dominant principle is that of good faith; negotiators must refrain from certain types of behavior because such is behavior is incompatible with an honest intention to negotiate.” PAUL REUTER, *De l’Obligation de Négocier* [Obligation to Negotiate], in *COMUNICAZIONI E STUDI* [COMM. & STUD.] 717-18 (1975).

152. Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 246, ¶ 87 (Oct. 12).

153. Guyomar, *supra* note 144, at 535.

154. Lake Lanoux Arbitration, *supra* note 145, at 281.

155. The Thirteen Steps largely concern partial measures (verified reductions, the CTBT, etc), but they also envisage complete nuclear disarmament. They include an “unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals” (Step 6) and “engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons” (Step 9e, emphasis added). 2000 Review Conference, *Final Document, Part II, supra* note 112, at 14, ¶ 15.

156. See Ford, *supra* note 90, at 404. Ford argues that the Thirteen Steps are not legally binding, but he still states that fulfillment of the Thirteen Steps would be a demonstration of good faith.

157. Wall Advisory Opinion, *supra* note 22, at 136, ¶ 1.

158. Notably, as described in Chapter 6, every year since 1997 the General Assembly has adopted a resolution welcoming the ICJ’s statement of the disarmament obligation and calling upon all states immediately to fulfill the obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention. In 2008, the resolution was adopted by a vote of 127 to 30, with 23 abstentions. G.A. Res. 63/49, *supra* note 13.

The General Assembly also for many years has issued a call for the elimination of nuclear weapons within a time-bound framework. In 2008, paragraph 20 of the resolution entitled Nuclear Disarmament provided that the General Assembly:

Reiterates its call upon the Conference on Disarmament to establish, as soon as possible and as the highest priority, an ad hoc committee on nuclear disarmament early in 2009 and to commence negotiations on a phased programme of nuclear disarmament leading to the total elimination of nuclear weapons with a specified framework of time.

Nuclear Disarmament, G.A. Res. 63/46, U.N. Doc. A/RES/63/46 (Dec. 2, 2008) (adopted by a vote of 117 to 45, with 19 abstentions).

Also noteworthy is the General Assembly resolution adopted in 2000, Towards a Nuclear-Weapon-Free World: The Need for a New Agenda, G.A. Res. 55/33C, U.N. Doc. A/RES/55/33 (Nov. 20, 2000). In paragraph 18, it

Affirms that a nuclear-weapon-free world will ultimately

require the underpinning of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments.

The resolution was adopted by a vote of 154 in support (including China, United Kingdom, United States) to three opposed (India, Israel, Pakistan), with eight abstentions (including France and Russia). Voting results can be accessed at <http://disarmament.un.org/vote.nsf>.

159. Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation, Opening Remarks to the 2008 Nonproliferation Treaty Preparatory Committee: A Recipe for Success at the 2010 Review Conference 3-4 (April 24, 2008), *available at* <http://www.reachingcriticalwill.org/legal/npt/prepcom08/statements/USApril28.pdf>; Anatoly Antonov, Head of the Del. of the Russian Fed'n, Statement at the 2d Sess. of the Preparatory Comm. for the 2010 Review Conf. of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons 5-7 (April 28, 2008), *available at* <http://www.reachingcriticalwill.org/legal/npt/prepcom08/statements/RussiaApril28.pdf>.

160. The resolution Towards a Nuclear-Weapon-Free World: Accelerating the Implementation of Nuclear Disarmament Commitments, G.A. Res. 63/58, ¶ 3, U.N. Doc. A/RES/63/58 (Dec. 2, 2008), “[*r*]eaffirms that the outcome of [2000 NPT conference] sets out the agreed process for systematic and progressive efforts towards nuclear disarmament.” It was adopted by a vote of 166 to 4, with 7 abstentions. The resolution Renewed Determination towards the Total Elimination of Nuclear Weapons recalls the 1995 and 2000 NPT outcomes and endorses, among others, the measures and principles listed in the text. G.A. Res. 63/73, U.N. Doc. A/RES/63/73 (Dec. 2, 2008) (adopted by a vote of 173 to 4, with 6 abstentions). The resolution Nuclear disarmament, G.A. Res. 63/46, ¶ 12, U.N. Doc. A/RES/63/46 (Dec. 2, 2008), “[*c*]alls for the full and effective implementation of the thirteen practical steps for nuclear disarmament contained in the Final Document of the 2000 Review Conference” and was adopted by a vote of 117 to 45, with 19 abstentions.

161. Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation, Opening Remarks to the 2007 Nonproliferation Treaty Preparatory Committee: A Work Plan for the 2010 Review Cycle 5 (Apr. 30, 2007), *available at* <http://www.reachingcriticalwill.org/legal/npt/prepcom07/statements/30aprilUS.pdf> (saying that review conference consensus documents contain “recommendations”).

162. WEAPONS OF MASS DESTRUCTION COMMISSION, *supra* note 8, at 99.

163. The Democratic People's Republic of Korea announced its withdrawal, but its status as an NPT member remains in limbo and is the subject of the six-party negotiations.

164. *See supra* note 94 (discussing the last time a separate vote was held on a paragraph of a General Assembly resolution underlining the disarmament obligation). India and Pakistan voted in favor of the paragraph.

165. Duarte, *supra* note 104.

166. *See* Namibia Advisory Opinion, *supra* note 22.

167. Nuclear Weapons Advisory Opinion, *supra* note 1, ¶¶ 98-102.

168. 2000 Review Conference, *Final Document, Part II*, *supra* note 112.

ABOUT THE ORGANIZATIONS

The International Association of Lawyers Against Nuclear Arms (IALANA) works to prevent nuclear war, abolish nuclear weapons, strengthen international law, and encourage the peaceful resolution of international conflicts. For more information, visit <http://www.ialana.net>.

The International Human Rights Clinic at Harvard Law School (IHRC) is a center for critical thought and active engagement in human rights, working in partnership with dozens of human rights organizations around the globe. For more information on the IHRC, visit <http://www.law.harvard.edu/programs/hrp>.

GOOD FAITH NEGOTIATIONS LEADING TO THE TOTAL ELIMINATION OF NUCLEAR WEAPONS

Request for an Advisory Opinion from the International Court of Justice

The presidents of the United States and Russia, the UN Secretary-General, and other high-level voices have embraced the goal of realizing a world free of nuclear weapons. International law in fact mandates the achievement of that result. In a 1996 Advisory Opinion requested by the UN General Assembly, the International Court of Justice unanimously concluded that the Nuclear Non-Proliferation Treaty requires states “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

However, controversy reigns about whether the United States, Russia, and other states possessing nuclear weapons are meeting their nuclear disarmament obligation. While claiming to be in compliance, they are planning and implementing retention, maintenance, and modernization of their nuclear forces for many years to come. Several states have also blocked commencement of multilateral negotiations leading to the global elimination of nuclear weapons as called for by an annual General Assembly resolution.

To help clarify what the obligation of good faith negotiation of nuclear disarmament requires of governments, this study examines its history and context and the principle of good faith under international law. It also recommends that the General Assembly request a new opinion from the International Court of Justice specifying how the obligation must be implemented and proposes and explains a set of questions to be asked of the Court.

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