U.S. Nuclear Weapons Policy in International Law

Draft Report of the Arms Control and Disarmament Committee
American Branch of the International Law Association
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New York City, Oct. 24, 2014

1 Introduction

A year after President Barack Obama's Prague speech of April 2009 announced his concept of a world without nuclear weapons and a few days before the Global Nuclear Security Summit in Washington D.C. of April 12-13 the Administration released a new Nuclear Posture Review, which projects some measures for accomplishing the goal of reducing U.S. reliance on nuclear weapons. In his April 5 Prague address the President stated "clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons." The President did not indicate, however, a specific plan for nuclear disarmament, and the steps he referred to were rather in line with the traditional arms control approach: reducing U.S. warheads and stockpiles by negotiating a new Strategic Arms Reduction Treaty with Russia, achieving a global ban on nuclear testing, including the U.S. ratification of the Comprehensive Test Ban Treaty, and strengthening the Nuclear Non-Proliferation Treaty "as a basis for cooperation."
These were generally the main objectives since the end of the Cold War, and the chief obstacles to their achievement lied within the American political and security establishments, evidenced in the debates around, and eventual rejection by the U.S. Senate of the Comprehensive Test Ban Treaty\(^7\). See Section 7 infra, Nuclear Test Ban. While questions of effective commitment, implementation, and enforcement loom large in relation to these objectives, the objectives themselves remain anchored in the limited concepts of nonproliferation and arms control management. Other defining policy positions of the Obama administration these years –the 2009 Nuclear Posture Review\(^8\), the 2010 National Security Strategy\(^9\)-- have likewise made preventing nuclear proliferation the fundamental objective.

The ILA Committee on Arms Control and Disarmament (CACD), in its Final Resolution at the 2004 Berlin Conference of the Association\(^10\), emphasized the need for new regulatory approaches and techniques, and on implementation priorities, rather than negotiation\(^11\).

The Committee identified five priority areas of work for the Association, all of which have direct application in the context of nuclear arms: a) general principles of international law as applicable to arms control and disarmament, b) legal responses to the continuing challenge of non-proliferation, c) legal considerations


\(^8\) See note 3


\(^11\) *Final Resolution*, CACD, 2004 ILA Berlin Conference. The Resolution observed that the “past years have witnessed a slowing down and, in some respects, even a reversal of arms control endeavors”, and that the “increasing preference of the United States for unilateral action with respect to weapons of mass destruction, [] the unilateral withdrawal of the United States from the ABM treaty and the BWC protocol negotiations, the emergence of new avowed nuclear powers, the stalemate in the Conference on Disarmament as well as in the UN Disarmament Commission (UNDC), the emergence of new forms of security threats such as global terrorism after September 11 and the possible access of non-state actors to weapons of mass destruction, are just some of the most disturbing recent developments.”
to support the implementation of the CTBT, the BWC, d) international and national legal contributions to limit and restrict conventional weapons, and e) the role of bilateral agreements and the protection of the legitimate concerns of third-party States: they all must be pursued with similar priority\textsuperscript{12}.

In its \textit{conclusions and recommendations} the Committee proposed the establishment “Committee on Arms Regulation” with the mandate “to assess new security strategies, including the question of pre-emptive military actions against illegal activities with weapons of mass destruction”.

Our own Committee views with uncertainty the meaning of ‘new security strategies’ in international law, and concludes on a preliminary basis that there is no norm of international law that authorizes the preemptive use of force as a result of a unilateral decision. This new committee, according to the CACD 2004 Report, would focus on international administrative law concerning arms control\textsuperscript{13}, some of the regimes of which are of significant relevance for purposes of nuclear arms control and disarmament, including the concluding observation of the Report, that our Committee largely shares, that the “complex relationship between arms regulation and the development of the economic order, the environmental challenges involved, implementation techniques under the existing communication order, and the effects for the cultural dialogue mark the requirements and difficulties for an agenda yet to be accomplished.”\textsuperscript{14} Our Committee seeks to anchor its own findings generally in the context of the CACD recommendations, with the specificities derived from the context of nuclear arms, and, perhaps because of such specificities, with some related differences.

\textsuperscript{12} \textit{Final Resolution}, CACD, 2004 ILA Berlin Conference.

\textsuperscript{13} The new committee would: 1) evaluate export control measures as a means to counter proliferation, 2) examine legal aspects of post-conflict peace building, 3) legal aspects to defend against measures directed at jeopardizing survivability, 4) defense against non-state actors, 5) legal rules for proportionate response against regional attacks, 6) proliferation of high-tech conventional weapons and small arms and light weapons to third-party States and non-state actors, 7) activities related to the new Proliferation Security initiative (PSI) and/or other new instruments, such as the HCOC (The Hague Code of Conduct Against Ballistic Missiles Proliferation), 8) applicability of relevant international treaty law and other sources of law to new issues and security challenges, such as global terrorism, non-state actors and the security and protection of nuclear, biological and chemical materials and equipment, 9) contribution that politically binding agreements as opposed to traditional legally binding ones can make in the current complex environment, 10) modalities for the improvement of existing and additional obligations, 11) role, contribution and responsibility of international organizations in the field of arms regulation, 12) new challenges – technical and other – for the effective implementation of relevant rules and provisions, 13) interrelationship of international, regional and national measures to ensure compliance and application, 14) alternative models and approaches to arms control and disarmament verification, and 15) rules for a jus post bellum (limits of the law of occupation, human rights, national law, role of international organizations).

\textsuperscript{14} \textit{Final Resolution}, CACD, para. 31 (2004 ILA Berlin Conference).
The plan of the Committee is to address the most pressing issues concerning U.S. stance and practice on the international law of nuclear arms by focusing on the following: 1) The state of international law of nuclear arms control and disarmament and the stance of the U.S. in such context; 2) basic international law issues referring to nuclear weapons, armed conflict, and use of force; 3) U.S. practice in the contexts of multilateral and bilateral regimes; 4) U.S. nuclear posture review; 5) U.S. practice on non-proliferation and its working concept of the NPT, its applications and developments; 6) U.S. practice on and approach to the nuclear test ban; 7) nuclear free zones; 8) nuclear disarmament; 9) the U.S. missile defense program in relation to nuclear arms; 10) outer and cyber space defense programs and nuclear arms. We are seeking to include in the Report basic elements of comparative practice on nuclear arms policies by other major states.

2 State of International Law of Nuclear Arms Control and Disarmament

International law of nuclear arms is a regime of norms subordinated to those which govern the two main contexts of the use of force: the decision to use it—and thus all questions pertaining to its legality and legitimacy justification—and the way to use it. The systems of norms governing these two contexts of the use of force are historically identified as jus ad bellum and jus in bello. While interrelated, both regimes have evolved on separate tracks of international relations behavior. The consequence has been a significant, maybe structural fragmentation of the norms ruling arms control and disarmament generally, and nuclear arms specifically.

In its 1996 Advisory Opinion, the ICJ appeared to induce an element of integration by identifying what it declared in the majority opinion the 'cardinal principles in the fabric of humanitarian law'. But the Court, including most of the individual declarations, anchored the question of legality on the second context of the use of force—the way to use it and left the first context—the decision to use force—into wider international juridical uncertainty. Nevertheless, in its operative decision, unanimously, the Court established that "A threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the Charter of the United Nations, and that fails to meet all the requirements of Article 5(1), is unlawful". In doing so, the Court unanimously

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16 [1996 Advisory Opinion, the ICJ appeared to induce an element of integration by identifying what it declared in the majority opinion the ‘cardinal principles in the fabric of humanitarian law’]
17 1996 ICJ 2C
appears to emphasize the necessity of both requirements of common or collective
security and self-defense [interpreting 'and']. However, in the most divisive
statement of the operative decision, seven to seven by the President's casting
vote, the Court 'functionally' decides that, while "the threat or use of nuclear
weapons would generally be contrary to the rules of international law applicable
in armed conflict [] [but] the Court cannot conclude definitively whether the
threat or use of nuclear weapons would be lawful or unlawful in an extreme
circumstance of self-defence, in which the very survival of a State would be at
stake" [ICJ 1996 2E].

Considering this inconclusiveness in the context of 2C, the Court seems to place
the onus of legality on the legitimacy of the decision to use nuclear force, and
specifically, in a joint construction of the two paragraphs, on it being made on
the basis of the principle of collective security, which underlies the prohibition
of the use of force as an instrument of national policy, in Article 2(4) of the Charter.
The logic of these normative conjunctions is based on these binding propositions:
1) The threat or use of nuclear force can only be lawful as a function of common
interest underlying collective security (but for the 'extreme self-defense'
exception); 2) The level of unlawfulness or nature of the violation of international
law to be determined by legitimacy imperatives and compliance with the basics
of international humanitarian law; and 3) A hypothetical legitimate use of
nuclear force would also have to comply with the imperatives of international
humanitarian law.

It is not readily clear, however, the extent to which the U.S. government, as a
matter of principle, regards the 1996 Advisory Opinion of the Court to be
declaratory of the international law on nuclear weapons; nor, for that matter,
whether the U.S. would be bound by the terms of the Court’s decision regardless
of its objections. In the Letter of June 20, 1995, from the Acting legal Adviser to
the Department of State addressed to the International Court of Justice, in the
context of the 1996 Advisory Opinion proceedings.

Re the question of multilateral and bilateral agreements. The general framework
of multilateral arms control and disarmament is provided by the U.N. Charter
which establishes in Article 1 that the maintenance of international peace and
security requires the establishment of an effective collective security system, and
that, in Article 26, assigns the Security Council the responsibility "for
formulating, with the assistance of the Military Staff Committee referred to in
Article 47, plans to be submitted to the Members of the United Nations for the
establishment of a system for the regulation of armaments”. On the other hand, Article 11 of the Charter gives the General Assembly the power to "consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments". In the performance of this power, UNGAR Resolution 1653 (XVI) of 1961 declared that the "use of nuclear weapons, besides being a violation of the Charter [] would be contrary to the laws of humanity and a crime against mankind and civilization", a principle reaffirmed in subsequent resolutions and as recently as 2010, and well established in the 1995 Draft Convention on the Prohibition of the Use of Nuclear Weapons.

The multilateral frameworks for arms control and disarmament in general - starting with the provisions of Article 26 of the Charter- and on nuclear arms specifically, have not entered into force, and have been opposed by the U.S. and the other nuclear armed states, and have been limited in terms of actual practice to the minimalist regimes on non-proliferation [infra #6] and nuclear test ban [infra #7], which, while functionally interdependent, have evolved trough asymmetric international law norm formations: non-proliferation with a fairly strong conventional anchor in the NPT and nuclear test ban rather anchored in a developing customary norm, especially after the U.S. -and China- rejected the ratification of the Comprehensive Nuclear Test Ban treaty. However, the general normative thrust of these multilateral developments is two-fold: the achievement of comprehensive nuclear disarmament (as provided even by the more limited regime on non-proliferation) and the commitment to and prohibition of the "use or threaten to use nuclear weapons under any circumstances.”

These two systemic components are in conflict with most of the thrust of the bilateral practice of the U.S. and the USSR/Russian Federation, as well as the

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20 U.N. Charter, Articles 1(1), 26; see Elaraby, "Practical problems with Multilateral Arms Control Treaties", in The International Law of Arms Control and Disarmament, 45-57 (Dahlitz and Dicke, editors, 1991).


22 According to Article VI of the 1968 NPT, since 1995 indefinitely extended, "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."

comparable bilateral practices between the nuclear armed states\textsuperscript{24}. Aimed at managing their mutual strategic relations, this large body of \textit{inter-partes} nuclear international law is not concerned with disarmament or non use as such, but with the \textit{balance of power}.

While it might be possible to conceive of the balance of power as a sort of structural precondition for the formation of international law norms\textsuperscript{25}, it would be hardly convincing to argue that the bilateral nuclear arms reductions agreements between the U.S. and the USSR/Russian Federation, including the last 2010 New START, have specifically led in such direction, rather than perhaps the other way around. Writing in the context of the second world war, Quincy Wright concluded that "The balance of power can no longer function effectively. The alternatives which the world faces are an imperial organization of the world by conquest or a [federal] organization of the world by general consent"\textsuperscript{26}.

That assessment is probably more strikingly accurate today than at the time of the conclusion of WWII. Nevertheless, there is no fundamental reason why bilateral nuclear arms reduction agreements cannot be considered in objective convergence with the multilateral process, but the actual intent and ensuing practice of the states parties to bilateral agreements, generally the U.S. and Russia, do largely determine whether such convergence is in fact taking place, or if, on the contrary, bilateral regimes and practice in terms of policy end undermining the multilateral process, including the basic constitutional provision on this matter in Art 26 of the U.N. Charter, "the establishment of a system for the regulation of armaments"\textsuperscript{27}.

\section*{3 Nuclear Weapons, Armed Conflict, and Use of Force}

International law of arms control has been historically anchored in the \textit{jus in bello}\textsuperscript{28}, the law that rules over conduct of armed forces in militarized conflict\textsuperscript{29}.

\begin{footnotesize}
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\item See U.S.-Russian Nuclear Arms Control Agreements (including the New START agreement of April 8, 2010), Arms Control Association (ACA), http://www.armscontrol.org/factsheets/USRussiaNuclearAgreementsMarch2010; Arms Control Agreements, Federation of American Scientists (FAS), http://www.fas.org/nuke/control/index.html
\item See the discussion of this and related aspects by Vagts and Vagts, "The Balance of Power in International Law: A History of an Idea", 73 AJIL 4 (Oct., 1979), especially the reference to this particular matter at 568ff.
\item Wright, "International Law and the Balance of Power", 37 AJIL 1, 98 (January 1943)
\item U.N. Charter, Art. 26 status []
\item International Law, Cases and Materials [International Law], 1054-1087, 1077 (Damrosch, Henkin, Pugh, Schachter, Smit 2001)
\end{itemize}
\end{footnotesize}
The Hague Conferences of 1899, 1907\textsuperscript{30}, the 1949 Geneva Conventions and the 1977 Protocols, and a number of conventions on critical contexts relating to the use of force generally, such as the Genocide Convention, or the International Covenant on Civil and Political Rights are decisive hallmarks in this trajectory of the international law of arms control. In its 1996 Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, the ICJ also anchored the international law status of nuclear weapons in the context of international humanitarian law and human rights law norms.

The prevalence of the \textit{humanitarian principle} of the law of arms control is historically understandable in the context of the world wide atrocities of the twentieth century, but it has overtime relegated to a secondary role the question of the legality of war itself, the \textit{legitimacy principle}\textsuperscript{31} Much of the dicta of the ICJ's 1996 Advisory Opinion delves into qualifications, though in a restrictive direction, of the humanitarian principle. For example, the Court Opinion states, while the right not to be arbitrarily deprived of the right to life "does not cease in times of war [,] whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself"\textsuperscript{32}. Likewise, examining the claim by some states that the Genocide Convention was applicable to the question at stake, the Court pointed out that "the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such"\textsuperscript{33}.

The concluding operative decision of the Court entails that the survival of the state might justify the use of nuclear force, which shifts the emphasis regarding the legality of the use of weapons, including nuclear weapons, to the legality - legitimacy, perhaps, at a more interpretive level of the relation between means and ends- of the decision to use military force in the first place. While the Court has inevitably contributed to a greater uncertainty as to the conditions of prevalence between state interests and peoples' interests, the uncertainty context of the Court's statement -"the Court cannot conclude definitely"-\textsuperscript{34} should be construed both ways. In fact, the Opinion had previously established,

\textsuperscript{29} Final Report on the Meaning of Armed Conflict in International Law [Final Report], ILA Committee on the Use of Force (O'Connell Chair, Gardan Rapporteur) The Hague Conference 2010, 676-721
\textsuperscript{30} International Law, 1056ff.
\textsuperscript{31} See generally, Legality and Legitimacy in International Law, Brunnee and Toope (Cambridge Studies in International and Comparative Law, 2010)
\textsuperscript{32} 1996 ICJ 226, at 240, para.25.
\textsuperscript{33} Id., 240, para. 26.
\textsuperscript{34} Id., para. 105, 2E.
unambiguously, that any use of force, including nuclear, is governed by the provisions of Articles 2(4), 42, and 51 of the Charter\textsuperscript{35}, and that the more open-ended context of self-defense is nevertheless subject to the inherent rules of necessity and proportionality\textsuperscript{36}.

The U.S. Government, both in its stance during the proceedings of the ICJ in the 1996 Advisory Opinion - when it opposed the establishment of jurisdiction by the Court\textsuperscript{37} - and as a matter of official policy, has rejected the 1996 Opinion of the ICJ as declarative of the international law of nuclear arms, in terms of the main four normative contexts addressed by the Court: 1) There is no general prohibition on the use of nuclear weapons under customary or conventional international law, 2) The law of armed conflict does not prohibit the use of nuclear weapons, 3) International environmental instruments do not prohibit the use of nuclear weapons, and 4) Human rights instruments do not prohibit the use of nuclear weapons\textsuperscript{38}. Even regarding the question of the legality of the threat to use nuclear weapons, the U.S. position is that, “if there is no prohibition per se on the use of a class of weapons , the ‘threat’ to use such weapons is likewise not prohibited per se”\textsuperscript{39}

Given the \textit{lex lata} approach by the Court’s narrow and plural majority, the U.S. rejection of the Court’s decision means little for purposes of the normative standing under international law of the basic principles and contextual norms found, literally, by the Court\textsuperscript{40}, not least because, in the end, the American government’s position on the merits of these proceedings was not substantially different from the operative holding of the Court. The fundamental significance of the U.S. stance in this case lies, however, in what indicates of the nuclear posture of the U.S., specifically as to what concerns the questions, first, of \textit{first or no first use} of nuclear weapons, and second, the \textit{strategic role} of nuclear weapons in American defense policy, as codified in the successive \textit{nuclear posture reviews} and into the \textit{single integrated operational plan} and its successors (Operations Plans 8044, Operations Plans 8010) and relevant \textit{executive instruments}. Both concepts and their related regimes are supposed to be generally governed by the principles of self-defense, whether collective or individual, for the use of force; but, given the nature of the system and its effects, the regime retaining the right to the first use

\textsuperscript{35} Id., 38.
\textsuperscript{36} Id., 41-42.
\textsuperscript{37} [U.S. stance opposing ICJ jurisdiction in Legality of the Threat or Use of Nuclear Weapons] 1996 ICJ Advisory Opinion, Written Statements, United States, June 20, 1995
\textsuperscript{38} Id., Written Statements, U.S. Department of State, Letter of June 20, 1995
\textsuperscript{39} Id., Written Statements, U.S., June 20, 1995, p. 47.
\textsuperscript{40} On the status of the ICJ Advisory Opinions in international law, see Ago, ‘\textit{Binding}’ Advisory Opinions of the International Court of Justice, 85 AJIL 3, 439 (1991)
of nuclear force against a conventional attack, is often perceived as an offensive regime on the use of force⁴¹.

While the no-first use of nuclear weapons⁴² has been considered an incremental step toward the goal of nuclear disarmament codified in Article VI of the Nuclear Non Proliferation Treaty, the U.S. – and at least three of the five nuclear armed states that are permanent members of the U.N. Security Council, with China adopting a stronger commitment in its declaratory policy⁴³ – has historically pursued an ambivalent policy on the first use, no-first use question. In his Prague speech of April 2009, President Obama stated “America's commitment to seek the peace and security of a world without nuclear weapons”, but the four-prong action program he announced⁴⁴ did not include any reference to this strategic component of the international regime on the use of nuclear force. Nevertheless, President Obama’s speech generated expectations that the U.S. was about to introduce significant changes in its nuclear defense stance, but these expectations


⁴² See H. Kissinger, S. Nunn, W. Perry, and George Schultz, Toward a Nuclear Free World, Wall Street Journal (January 15, 2008); McGeorge Bundy, George F. Kennan, Robert S. McNamara, and Gerard Smith, Nuclear Weapons and the Atlantic Alliance, 60 Foreign Affairs 4 (Spring 1982); and the earliest analysis of the question of no-first use by Richard H. Ullman, No First Use of Nuclear Weapons, 50 Foreign Affairs 4 (July 1972)


⁴⁴ First, negotiating a “new Strategic Arms Reduction Treaty” with Russia; second, pursuing – “immediately and aggressively” – the ratification by the U.S. Senate of the Comprehensive Test Ban Treaty; third, seeking “a new treaty that verifiably ends the production of fissile materials intended for use in state nuclear weapons”; and four, strengthening the Nuclear Non-Proliferation Treaty according to the terms of the “[sound] basic bargain: Countries with nuclear weapons will move toward disarmament, countries without nuclear weapons will not acquire them, and all countries can access peaceful nuclear energy”; Remarks by President Barack Obama, Hradcany Square Prague, Czech Republic, April 5, 2009; Office of the Press Secretary, The White House; President Obama Calls for Nuclear-Weapons-Free World, New Strategic Arms Reduction Treaty, Senate Approval of CTBT, and Strengthened Anti-Proliferation Efforts, Contemporary Practice of the U.S. Relating to International Law, John Crook editor, 103 AJIL 3, 600-602 (July, 2009).
were not really met by the new Nuclear Posture Review, eventually made public by the Department of Defense one year after his Prague speech\textsuperscript{45}. [See section 5 below, \textit{U.S. Nuclear Posture Review and the SIOP}].

To the extent to which the 2010 Nuclear Posture Review provides the actual U.S. nuclear weapons policy, this policy seems just slightly incremental with respect to the two historical objectives, which had already been established in the first, 1994 NPR: \textit{to prevent proliferation} and \textit{to reduce dependence on nuclear weapon systems}. Regarding the question of no-first use, the 2010 NPR is viewed by some analysts as implicitly endorsing a first strike concept in a number of critical conflict scenarios\textsuperscript{46}. However, the dominant strategic posture on the use of nuclear force remains anchored in the concept of \textit{calculated ambiguity} with varying levels of reliance –explicit and implicit– on first-strike capabilities. The 2002 NPR took a strong proactive approach which, while contradicting President Bush declarations on the “outdated nature” of these weapon systems –somewhat in accordance with the stated basis for the U.S. withdrawal from the ABM Treaty on December 13, 2001\textsuperscript{47}– was in fact more consistent with the \textit{doctrine on the preemptive use of force} announced by the President in his West Point address of June 1, 2002, and codified in the 2002 National Security Strategy of the U.S., published on September that year\textsuperscript{48}. In February, the official spokesman for the State Department reaffirmed that the U.S. “will not use nuclear weapons against non-nuclear weapons States parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United

\textsuperscript{45} Nuclear Posture Review Report, Department of Defense (April 2010)


\textsuperscript{47} ABM Treaty; \textit{U.S. Withdrawal from the ABM Treaty}, Arms Control Today (January/February, 2002)

\textsuperscript{48} 2002 National Security Strategy, National Security Strategy Archive [http://nssarchive.us/?page_id=32]. The 2001 NPR identified contingencies and targets where nuclear weapons might be used and countries –China, Russia, Iraq, North Korea, Iran, Libya and Syria– which were potential nuclear targets; it also identified situations and called for contingency plans to use nuclear weapons in an Arab-Israeli conflict, an Iraqi attack on Israel or its neighbors, a North Korean attack on South Korea or a military confrontation between China and Taiwan; it stated that the US had to be prepared to launch a nuclear strike to destroy stocks of weapons of mass destruction, or in the face of a threatening ‘sudden regime change’ in an existing nuclear state, with specific references to India and Pakistan; v. U.S. Department of Defense, ‘Nuclear Posture Review [excerpts], Submitted to Congress on 31 December 2001’, January 8, 2002 [http://www.globalsecurity.org/wmd/library/policy/dod/npr.html]; \textit{Nuclear Posture Review Report [Reconstructed]}, Kristensen, Nuclear Information Project, FAS [http://www.fas.org/blog/ssp/united_states/NPR2001re.pdf]
States, its territories, its armed forces or any other troops, its allies or States towards which it has a security commitment...”49, in fact confirming the concept of calculated ambiguity. The strategic rationale of calculated ambiguity – and its higher conceptual background in flexible response – has been forcefully disputed at the policy analytic level50

Proposals for NFU have been a constant feature of the nuclear age. NSC-48, for example, noted the argument for NFU but promptly rejected it because “in our present situation of relative unpreparedness un conventional weapons, such a declaration would be interpreted by the USSR as an admission of great weakness and by our allies as a clear indication that we intended to abandon them” [N. NSC, A Report to the NSC-NSC68 (April 12, 1950); Gerson, N42, 9-10] [Calculated ambiguity is anchored in the strategic concept of flexible response, which included the first-use option in the face of a large conventional military superiority of an attacker]

4 Multilateral and Bilateral Regimes: U. S. Practice

The relations between bilateral and multilateral agreements and practices have been a subject of controversy in international legal theory since the emergence of the modern interstate system for strong reasons. One of them is at the essence of the principle of the opinio juris: that persistent, and consistent, state international conduct is, in the aggregate and over time, the basis of the formation of customary international law, or general international law. Bilateral arms control agreements, including nuclear arms agreements, have been construed by the majority of the world nation states – as per the U.N. General Assembly resolutions – as somewhat indicative of a general thrust toward disarmament51. A general assumption underlying this interpretation lies in the principle of normative subordination of inter partes obligations to obligations under the U.N. Charter, in accordance with Article 10352. Consequently, nuclear arms control agreements between the U.S. and the Russian Federation – and previously between the U.S. and the Soviet Union – are generally welcome and noted as

49 U.S. Department of State, Daily Press Briefing [Boucher], February 22, 2002; Feiveson and Hogendoorn, No First Use of Nuclear Weapons, 10 The Nonproliferation Review 2 (Summer, 2003)
51 [bilateral nuclear arms agreements in UNGA resolutions] [http://www.fas.org/nuke/control/index.html]
positive steps “in order to achieve deeper reductions [of] nuclear arsenals [and] to take effective nuclear disarmament measures [ ]” 53.

Bilateral nuclear arms control agreements also are formulated to be coherent with general disarmament principles. The most recent development of this sort, the 2010 New START Treaty between the U.S. and Russia, provides that their agreement takes place in the context of their commitment to “the fulfillment of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968, and to the achievement of the historic goal of freeing humanity from the nuclear threat”54. This approach can be traced back to the earliest bilateral agreements [], the 1972 ABM Treaty between the U.S. and the USSR stated in its introductory that the parties, in achieving the agreement, were “Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons”55

[---practical problems with bilateral arms control agreements, Proceedings ---bilateral arms control agreements evolving into autonomous regimes related to balance of power management rather than the achievement of the general principles of disarmament ---whether the 2010 New START entails a departure of such pattern ---practical problems of a third kind, i.e., Belarus suspension of its bilateral pact with the U.S. and its progeny, see State, http://www.state.gov/t/index.htm ]

[Exchanging highly enriched uranium fuel within the framework of initiatives for decreasing global threats Belarus Suspends Pact to Give Up Enriched Uranium. The move comes in response to the latest wave of economic sanctions imposed by Washington this month as punishment for a ruthless crackdown on government opponents, including widespread arrests, that has continued unabated for months. “The imposition of new American economic sanctions goes contrary to the spirit of interaction and cooperation,” the Belarus Foreign Ministry said in a statement. “As a result, Belarus has decided to freeze projects with the United States for.”56

54 New START Treaty (2010), introduction, para. 5; http://www.state.gov/documents/organization/140035.pdf
5 U. S. Nuclear Posture

As indicated in section 3 supra, Nuclear Weapons, Armed Conflict, and Use of Force, the three nuclear posture reviews -1994, 2002, 2010- have been generally instrumental for the establishment of a relatively coherent framework on the strategic concept of this type of weapon systems, on the force structure required for such concept, and for the maintenance of a credible deterrence. These different dimensions of force posture pertain to the historically exclusive domain of national defense policy, but have strong implications for the system of international law on the use of force.

The nuclear posture review process was precisely initiated upon the end of the Cold War in order to bring in two general or structural developments which appeared warranted by the emergence of a more cooperative international system, as somewhat envisioned by Les Aspin, Secretary of Defense at the time of the first NPR, and Ashton Carter, then the Assistant Secretary of Defense for Nuclear Security and Counterproliferation, and co-chair of the central working group57: one, to induce a measure of stronger coherence between the nuclear arms policy of the U.S. and the general international law principles of non-proliferation, disarmament, and peaceful settlement; the other, to reduce the nuclear dependence of military capabilities.

Both of these components, especially the first at the structural level, required a shift in the strategic concept of nuclear forces, from primarily war-fighting system to primarily a deterrence system, which would have been instrumental for adopting a no-first-use policy. None of the two goals of the Aspin/Carter’s blueprint have been achieved other than aspects of them; in fact, the 2002 NPR and the developments which followed the adoption of the policy of preemption by the Bush administration in 200258, led to a near reversal of those goals, as revealed by the files of the doctrine of joint nuclear operations59.


The 2010 NPR follows generally the resetting approach stated by President Obama in his 2009 Prague address, that “To put an end to Cold War thinking, we will reduce the role of nuclear weapons in our national security strategy, and urge others to do the same”\(^{60}\), and restated at the policy levels in the 2012 DOD' reports, Sustaining US Global Leadership: Priorities for 21st Century Defense, and 2013 2013 Report on Nuclear Employment Strategy of the United States, directing the U.S. defense posture to “reduce the role of deterring nuclear weapons in deterring non-nuclear attack,” to “reduce the role of launch under attack,” and “reiterates the intention to work towards [the goal of making deterrence of nuclear attack the sole purpose of U.S. nuclear weapons] over time.”

However, the Military Operational Plan (OPLAN ) 8044 Revision 03 included executable strike options against regional proliferators, and potentially against six adversaries. Probably Russia, China, North Korea, Iran, Syria and 9/11-type WMD scenario; and in June 2013: Obama administration’s nuclear weapons employment strategy (PPD-24) reaffirms counterforce, directs no reductions of force structure below New START, and retains current alert posture. Thus, the 2010 NPR and its subsequent doctrine and policy developments largely reaffirms the status quo: Reaffirms counterforce strategy, rejecting countervalue or minimum deterrence, reaffirms need for Triad and the need for upload capability, directs no force structure reductions beyond New START, and retains the role of nuclear weapons against non-nuclear adversaries, the capability to launch under attack, and generally the current alert posture. The current and evolving geopolitical situation and global strategic conditions, especially, but not exclusively, after the Ukrainian crisis, will make it much harder for the U.S. administration to move forward with nuclear posture changes, which are also opposed by the Congress.

**Preliminary Recommendations for the Committee**

Scientific assessments of these developments are nevertheless generally concurring on the importance of policy and strategic reassessments, somewhat pursuing the analysis and findings of the policy report of the National Academy of Sciences, on The Future of U.S. Nuclear Weapons Policy. In its 2009 report From Counterforce to Minimal Deterrence, the Federation of American Scientists forcefully argued for changing core planning assumptions and principles to achieve a new nuclear policy, including: reducing the number or scope of target

categories, the requirement for warhead damage expectancy in strike options, the number of strike options, the removal of the launch requirement for ICBMs and SSBNs from alert, the requirement to plan for damage-limitation strikes, and limiting the role to deter nuclear attack.

Likewise, the Council on Foreign Relations report nuclear weapons policy recommends that U.S. policymakers take the following steps to lessen nuclear threats and promote cooperation on disarmament:

. State clearly that it is a U.S. goal to prevent nuclear weapons from ever being used, by either a state or a nonstate actor, and that the sole purpose of U.S. nuclear weapons is providing deterrence for itself and its allies;
. Reaffirm security assurances to allies;
. Continue to reduce reliance on nuclear weapons and do so in a transparent manner, and take the international lead in reducing the salience of nuclear weapons in security policy;
. Seek further reductions in nuclear forces, beginning with a bilateral strategic arms control agreement with Russia;
. Seek to ratify the Comprehensive Test Ban Treaty (CTBT), taking as many steps as possible toward this end before the Nonproliferation Treaty Review (NPT) Conference in May 2010;
. Call for a moratorium on the production of fissile material for weapons purposes;
. Strengthen the International Atomic Energy Agency's vital role of containing proliferation, including seeking universal adoption of the Additional Protocol and providing adequate and sustainable funding to the Agency;
. Work cooperatively to ensure that every state with nuclear weapons or weapons-usable materials, even those that remain outside the Nonproliferation Treaty like India, Pakistan [and Israel] implement safe nuclear security practices.

Our Committee should endorse these recommendations, and present them to the plenary of the International Law Association. At the normative level, the Committee should likewise endorse the declared intent of the U.S. Administration to lead to the ratification of the Comprehensive Nuclear Test Ban, and to systematically pursue both the bilateral and multilateral tracks to control and disarmament, including:

. Change to a no-first use policy at the operational level;
. Continue the implementation of the New START and insulate the nuclear negotiation process at the bilateral level from the geopolitical conditions, as it was done under the Nixon and Reagan administrations, including the establishing of specific protocols with the PRC;
. Continue and expand the policy supporting Nuclear Free Zones, especially the projected NFZ in the Middle East;
. Open systematic negotiations to bring India, Israel, and Pakistan within the system of the NPT, and bring to a successful agreement the negotiations with Iran;
. Recognize as a matter of principle the 1996 Advisory Opinion of the International Court of Justice as declaratory of current general or customary international law;
. Establish a timetable for the implementation of Article VI of the NPT, and generally adopt a nuclear-zero principle, opening a multilateral process toward global nuclear disarmament.