BOMBS AWAY!

Newsletter of the ***Lawyers' Committee on Nuclear Policy***
Spring 2003 Vol. 13, No. 3

Judge Allows Bush's Withdrawal from ABM Treaty to Stand; Future Role of Congress Preserved

In a December 30, 2002 decision, Judge John Bates of the U.S. District Court in Washington, D.C., ruled that lead plaintiff Representative Dennis Kucinich and 31 other members of the House of Representatives have no standing to challenge President Bush's withdrawal from the Anti-Ballistic Missile (ABM) Treaty without congressional approval. He also held that the case presents a "political question" not suitable for resolution by the courts. The judge accordingly did not rule on the merits of whether or not the Constitution requires a president to obtain congressional consent to termination of a treaty.

In a 31-page written opinion, Judge Bates left open the possibility that in the future, Congress as a whole may be able to invoke the aid of the judiciary in constitutional disputes over treaty termination or other matters with the President. He noted that in this case, "there is no claim that Congress, as an institution, has asserted its role in the treaty termination process."

In a January 1, 2003 press release, Peter Weiss, LCNP president and lead counsel for plaintiffs, commented: "Judge Bates' decision places a heavy burden on Congress to provoke full-blown political crises in order to obtain from the courts rulings interpreting the Constitution, which is, after all, the business of the courts. Such 'institutional' challenges are unlikely to occur when, as now, the President's party controls Congress. It is equally unlikely that a Congress, regardless of which party controls it, will challenge the President's decisions concerning national security at a time when the President has declared war on terrorism and asked everyone to close ranks behind him." Weiss concluded, "Thus the decision represents a considerable advance toward the imperial presidency and a commensurate retreat from constitutional government." (See also analysis by Mr. Weiss, p.2.)

John Burroughs, LCNP executive director and one of plaintiffs' lawyers, commented: "Future decisions regarding matters as momentous as withdrawal from the ABM Treaty must involve Congress if the United States is to remain a democracy. The framers of the Constitution rejected the monarchical system of government and did not intend that a president could rule by fiat."

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Inside

War Is Not the Answer to Nuclear Proliferation

Nuclear weapons have returned to the center stage in global politics. But now it is not the specter of annihilation of the human species that commands attention, as during the Cold War. Rather it is the paradoxical assertion that disarmament is a justification for war - that a nuclear-armed country, the United States, is entitled to use its military might to stop other countries' acquisition of nuclear arms. No matter that this assertion appears to be a mere pretext for war on Iraq pursued for other, imperial reasons. By all objective accounts, of the IAEA and others, Iraq has no significant nuclear weapons program, and certainly not a capacity to produce the necessary special materials, plutonium and enriched uranium. But if the U.S. stance - "counterproliferation" by force if necessary - is the right one, the facts may soon support its application against North Korea. (See "Nonproliferation Treaty Applies to Both North Korea and United States", p.8) Indeed, it could become a formula for war without end.

The Lawyers' Committee on Nuclear Policy categorically rejects war as the answer to real or suspected or imagined nuclear proliferation. As LCNP has urged for more than two decades now, the reasonable and effective path is one of rejection of use of nuclear weapons in any circumstance, stand-down of nuclear forces globally, and rapid and verified reduction and elimination of all nuclear arsenals. Only on such a path will it be possible to prevent the proliferation of nuclear weapons, and indeed of other existing and future weapons that inflict massive or indiscriminate harm.

Moreover, preventive war - the use of force against potential future threats - is flatly contrary to the United Nations Charter, as set forth in the appeal, reproduced on p. 6, signed by more than 300 lawyers from 40 countries. That is so even if a preventive war is approved by the Security Council, an unlikely prospect at the time of this writing. The appeal was drafted by LCNP consultant Alyn Ware, drawing in part on analyses prepared jointly by LCNP and Western States Legal Foundation. It was circulated by LCNP's parent organization, the International Association of Lawyers Against Nuclear Arms, and signed by its new president, Judge Christopher Weeramantry, former vice-president of the International Court of Justice.

ABM Treaty Decision *continued from page 1*

In a December 30 statement, Representative Kucinich said, "The Administration is undermining both national and international security by taking a wrecking-ball to the Constitution and international agreements."

On the advice of their lawyers, Rep. Kucinich and the other congressional plaintiffs decided not to appeal the case, recognizing that Bates' decision preserves the potential role of future Congresses with respect to treaty termination and that in the present political climate appellate rulings could very well be less favorable.

Kucinich v. Bush, filed on June 11, 2002, named as defendants President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld. The House Members bringing the lawsuit were: Dennis Kucinich, D-10-Ohio; James Oberstar, D-8-MN; Patsy Mink, D-2-HI; Tammy Baldwin, D-2-WI; Peter DeFazio, D-4-OR; John Olver, D-1-MA; Sam Farr, D-17-CA; Barbara Lee, D-9-CA; Maurice Hinchey, D-26-NY; John Conyers, D-14-MI; Hilda Solis, D-31-CA; Janice Schakowsky, D-9-IL; Alcee Hasting, D-23-FL; Fortney (Pete) Stark, D-13-CA; Bernard Sanders, I-1-VT; Earl Hilliard, D-7-AL; Carolyn Kilpatrick, D-15-MI; Lane Evans, D-17-IL; Jim McDermott, D-7-WA; Bob Filner, D-50-CA; Cynthia McKinney, D-4-GA; George Miller, D-7-CA; Lynn Woolsey, D-6-CA; William Lacy Clay, D-1-MO; Edolphus Towns, D-10-NY; Maxine Waters, D-35-CA; Jesse Jackson, Jr., D-2-IL; Gregory Meeks, D-6-NY; Marcy Kaptur, D-9-OH; Jerrold Nadler, D-8-NY; Stephanie Tubbs Jones, D-11-OH; and Sheila Jackson-Lee, D-18-TX.

They were represented by James Klimaski, Klimaski & Grill, P.C. Washington, DC; Peter Weiss and John Burroughs, Lawyers' Committee on Nuclear Policy, New York, NY; Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School, New Haven CT ; Jeremy Manning, Esq., New York, NY; Jules Lobel and Michael Ratner, Center for Constitutional Rights, New York, NY; Edward Aguilar, Philadelphia Lawyers Alliance for World Security, Philadelphia, PA; and Michael Veiluva, Western States Legal Foundation, Oakland, CA.

The decision and the main papers filed in the case are available online, in pdf format, at http://www.lcnp.org/disarmament/ABMlawsuit/indexoflinks.htm

Judge Bates' Decision in *Kucinich v. Bush:* Is the Glass Half Empty or Half Full?

By Peter Weiss

Judge Bates' decision of December 30, 2002 in *Kucinich v. Bush*, the ABM Treaty Termination case, was foreshadowed by his decision of December 9 in *Walker v. Cheney*.

In *Kucinich*, 32 members of Congress sought a ruling that the President's unilateral termination of the ABM Treaty was unconstitutional because, under the supremacy clause, a treaty is "the supreme law of the land" and therefore cannot be terminated by the President alone any more than a law can be repealed by the President without the consent of Congress. The plaintiffs also argued that the President's action ran counter to historical practice because, with one exception, no treaty of such importance had ever been terminated by the President acting alone.

The exception was President Carter's unilateral termination of the Taiwan Mutual Defense Treaty, which was challenged by a group of conservative Republican members of Congress on precisely the same grounds invoked in *Kucinich*. The earlier case, *Goldwater v. Carter,* reached the Supreme Court, which dismissed the complaint in a splintered opinion lacking a majority rationale. Neither *Goldwater* nor *Kucinich* reached the merits of the supremely important constitutional question whether, absent a specific constitutional provision dealing with treaty termination, the President is authorized to terminate treaties without consulting Congress and obtaining Congress' approval.

The *Kucinich* decision rests on two grounds: standing and political question. Judge Bates held that, under the 1998 Supreme Court decision in *Raines v. Byrd,* the line item veto case, individual members of Congress have no standing to obtain judicial determination of a dispute with the

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Judge Bates' Decision... *continued from page 2*

executive branch unless they can show "personal injury". He further held that, while *Goldwater,* contrary to the President's position, was not controlling, he was persuaded by Justice Rehnquist's plurality opinion in *Goldwater* that here, as in the earlier case, plaintiffs had raised a non-justiciable political question. However, he also stated that Congress has "extensive self-help remedies", thus challenging, by implication, the President's position that, given the President's allegedly "plenary power over foreign affairs", Congress is powerless to challenge unilateral treaty termination.

Thus, the decision lays to rest two myths which seemed to paralyze Congressional action following the President's announcement that he had – without consulting Congress – given notice of termination of the ABM treaty to Russia:

MYTH 1: *Goldwater v. Carter* decided, once and for all, that unilateral treaty termination by the President is constitutional;

MYTH 2: Regardless of *Goldwater*, the President is authorized, in the absence of any constitutional provision to the contrary, to terminate treaties unilaterally.

Kucinich and Weiss outside the Federal Courthouse in Washington, D.C.,October 31, 2002

It is significant that, throughout his 31 page opinion, Judge Bates repeatedly and with implicit approval refers to Justice Powell's opinion in Goldwater that courts should not intervene in disputes between the two political branches until a "constitutional impasse" has been reached. He cites, for instance, this statement by Justice Powell, who, incidentally, disagreed strongly with the plurality view on political question doctrine:

> *Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.*

This is the same rationale on which Judge Bates dismissed the complaint in *Walker,* the case in which the Comptroller General had, on instructions from the ranking members of two Congressional committees, sought his aid in ordering the Vice President to disclose the names of the persons he had consulted as Chairman of the energy task force. In other words, Congress as an institution has standing to raise constitutional questions in court, individual members do not.

It is difficult to accept Judge Bates' reference to Congress' "self-help remedies" – the power of the purse, the power to raise armies and navies, the power to declare war – in relation to treaty termination. But the following intriguing questions remain after his decision:

- Would he have considered the complaint justiciable if a majority of Congress had expressed its opposition to termination?
- Would he have done so if Congress had authorized the bringing of the suit?
- Would he honor a clause attached to the ratification of a future treaty stating that it can only be terminated with the approval of Congress (or of the Senate)?
- Would he honor a sense of Congress resolution that henceforth no treaties may be terminated without the approval of Congress (or of the Senate)?
- Would he have ruled differently if the Senate Ethics Committee had not disapproved Senator Feingold's application to accept *pro bono* legal services for this suit? (At the hearing, the judge seemed to express some sympathy for the proposition that "symmetry" would suggest that a treaty, which requires the approval of two thirds of the Senate, should not be terminated without some input by the Senate).

This leaves open the relevance of the second ground of dismissal, political question. As to this, it should be noted that Judge Bates makes much of the fact that the *Kucinich* suit was not brought until two days short of the six month period when the termination of the ABM Treaty was to become effective. This, according to the judge, brought it within the parameters of the *Baker v. Carr* standard of "unusual need for unquestioning adherence to a political decision already made." Will the political question rationale fall away if Congress acts more promptly in a future treaty termination case? Time will tell.

Peter Weiss is president of LCNP and was lead counsel for plaintiffs in Kucinich v. Bush.

Jayantha Dhanapala, Champion of Disarmament

LCNP salutes Jayantha Dhanapala for his years of dedicated service, beginning in February 1998, as UN Under-Secretary-General for Disarmament Affairs, and we look forward to his continued contributions to the disarmament cause after his departure from that position at the end of May.

Mr. Dhanapala has been relentless and inspiring in speaking out for the abolition of nuclear weapons. One example, from a May 9, 2002 speech to the American Bar Association:

[T]he specific contribution of "disarmament" - as distinct from "arms control" - is that it offers the benefit of extending the scope of the international legal obligation to the total physical elimination of nuclear weapons, rather than just their reduction or management. It offers real security benefits that nothing else can offer. In the Final document of the 2000 NPT Review Conference, the participating states parties underscored this point by reaffirming that "the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons." In short, no weapon system - whether defensive or offensive in orientation - offers this kind of guarantee. Whenever I hear that disarmament is naive or idealistic, I can only wonder about the naivete or idealism of those who dream that a perfect defense or superior offense will forever guarantee the peace.

A National Strategy to Promote Nuclear Weapons?

By John Burroughs

In December 2002, the Bush administration released its "National Strategy to Combat Weapons of Mass Destruction." Unfortunately, what the strategy really does is *promote* nuclear weapons. The administration declared that the United States "reserves the right to respond with overwhelming force - *including through resort to all of our options* - to the use of WMD against the United States, our forces abroad, and friends and allies." "All of our options" encompasses both "conventional and *nuclear* response" capabilities, employed in "appropriate cases through *preemptive* measures."

Consistent with the policy, in January the Los Angeles Times reported that the Pentagon is planning for possible U.S. use of nuclear weapons to respond to or "preempt" any Iraqi use of chemical and biological arms in response to a U.S. invasion and to attack deeply buried targets.

While elements of this policy have been signaled in various ways in past administrations, the December statement is the first time it has been unambiguously stated in an unclassified document with a presidential imprimatur. It comes at a time of preparation for a war on Iraq in which, as the CIA warned, U.S. forces could confront Iraqi use of chemical or biological weapons. Reflecting a decade long campaign of the U.S. nuclear establishment to create a new mission for nuclear arms following the collapse of the Soviet Union, 60% of Americans support a U.S. nuclear response in that circumstance according to a December 2002 Washington-Post ABC News poll.

The policy should be renounced. It is irrational, illegal, and immoral.

It is irrational because increased U.S. reliance on nuclear arms encourages other states - and possibly terrorists - to acquire them, and ultimately increases the risk that a nuclear explosion will take place on American soil. While some states may reject acquiring a nuclear arsenal in part because they fear a U.S. "counter-proliferation" attack, perhaps even a nuclear one, other states may calculate that nuclear arms are the only feasible balance against U.S. military might. North Korea is exhibit one. It has announced its withdrawal from the Nuclear Nonproliferation Treaty and taken initial steps towards resumption of production of plutonium for nuclear weapons. There could be no better illustration that a "do as I say, not as I do" approach, even when backed with a military threat, is bound for failure.

The policy should be renounced. It is irrational, illegal, and immoral.

Emphasizing the nuclear threat also increases pressure to resort to nuclear weapons in the event of enemy use of chemical or biological weapons even though common sense would dictate otherwise. Otherwise the threat, and U.S. credibility, will come to seem hollow. The assumption of equivalence among nuclear, chemical, and biological weapons underlying the threat is false. Nuclear arms are orders of magnitude more destructive than the other "weapons of mass destruction."

The WMD Strategy, together with the September 2002 National Security Strategy, also invites imitation by other states of the "preemptive measures" doctrine, by which the Bush administration really means preventive war of the kind planned for Iraq. Other states may decide that their security demands a similar approach, for example India in relation to Pakistan, or Russia in relation to bordering Islamic countries.

The new policy is illegal because nuclear weapons cannot be used in a discriminate and proportionate fashion as required by international law acknowledged by the U.S. military services. There is much talk now of the need for "bunker busting" nuclear explosives. But earth penetrators are likely to cause large numbers of civilian deaths because of the immense amounts of radioactive dust they would kick up. (For more analysis, see "The Lawfulness of 'Low-Yield,' Earth-Penetrating Nuclear Weapons," at www.lcnp.org/wcourt/nwlawfulness.htm).

Finally, the policy is immoral because it reinforces the threat of mass nuclear destruction at the core of U.S. foreign policy, and introduces a new element at odds with U.S. tradition, the right to *initiate* war, not simply to respond to an attack.

A path of abolition of nuclear weapons, at home as well as abroad, would meet the demands of law and morality and make all of us much more secure.

An earlier version of this article was distributed by Minuteman Media on January 1, 2003 (see www.opedresource.com).

Senators Oppose Shift in Nuclear Doctrine

Dear Mr. President:

We are writing you to convey our grave concern about recent public revelations that suggest that ... your administration may use nuclear weapons in the looming military conflict against Iraq.... [A]ccording to a Jan. 31 *Washington Times* article, you approved a national security directive that specifically allows for the use of nuclear weapons in response to biological or chemical attacks, apparently changing decades-old U.S. policy of deliberate ambiguity....

This apparent shift in U.S. nuclear policy threatens the very foundation of nuclear arms control as shaped by the 1970 nuclear Nonproliferation Treaty (NPT), which has helped stem nuclear proliferation for over 30 years. In the context of our efforts to strengthen the NPT, Washington issued a negative security assurance in 1978 which was reiterated in 1995 that the United States would not use its nuclear force against countries without nuclear weapons unless the non-nuclear weapon state was allied with a nuclear weapon possessor....

In addition, such a shift in U.S. policy would deepen the danger of nuclear proliferation by effectively telling non-nuclear states that nuclear weapons are necessary to deter a potential U.S. attack, and by sending a green light to the world's nuclear states that it is permissible to use them. Is this the lesson we want to send to North Korea, India, Pakistan, or any other nuclear power?

Excerpts from February 21, 2003 letter to President Bush from Senators Kennedy, Feinstein, Leahy, Corzine, Dorgan, Murray, Lautenberg, Reed, Akaka, and Johnson.

India Reflects U.S. Nuclear Policy

By Elizabeth Shafer

On January 4, 2003, the Indian Cabinet Committee on Security expanded India's nuclear use options by announcing that "in the event of a major attack against India, or Indian forces anywhere, by biological or chemical weapons, India will retain the option of retaliating with nuclear weapons". The statement was made less than a month after the Bush administration announced that the United States "reserves the right to respond with overwhelming force—including through use of all of our options —to the use of [weapons of mass destruction]". Nuclear weapons were specifically cited as one of the options.

In this significant respect, India has dropped its policy of "no first use" of nuclear weapons. Unlike U.S. policy, the Cabinet Committee did appear to foreclose the use of nuclear weapons for a preemptive strike against enemy nuclear forces, stating ambiguously that " a posture of 'no first use' will only be used in retaliation against a nuclear attack on Indian territory or on Indian forces anywhere". But the new doctrine is contradictory in retaining its former policy of a "Credible Minimum Deterrent" while also stating that "nuclear retaliation to a first strike will be massive and designed to inflict unacceptable damage".

The doctrine also stated India's retention of its policy of non-use of nuclear weapons against non-nuclear states – now limited, though, by the option of nuclear retaliation against a biological or chemical attack. Here the Indian policy is similar to U.S. policy, except that the latter does not rule out preemptive nuclear use against biological or chemical threats. There is no indication that India has adopted the U.S. option of nuclear use against an overwhelming conventional attack.

U.S. Influence on Indian Policy

Indian adoption of U.S. nuclear doctrines reflects a negative pattern of U.S. influence on Indian policy. The Comprehensive Test Ban Treaty (CTBT), which bans all nuclear explosions, was signed in 1996 by U.S. President Clinton only on condition of the continuance of the huge "Stockpile Stewardship" program of expanded nuclear weapons laboratory experimental and computing capabilities. This includes the National Ignition Facility, a mammoth laser-driven machine intended to produce thermonuclear explosions reaching ten or more pounds of TNT equivalent, a result facially prohibited by the treaty. In 1999, the U.S. Senate failed to approve ratification of the CTBT. This rejection of the treaty, along with the undermining of its goals inherent in the "Stockpile Stewardship" program, factored significantly in India's decision not to sign it, despite international censure for its nuclear testing in May 1998, and its decades-long history of supporting the test ban and nuclear disarmament.

Also, in 2001 India approved U.S. missile defense plans and U.S. withdrawal from the Anti-Ballistic Missile Treaty. Partly in return, the United States lifted economic sanctions on India for its 1998 nuclear testing. This may contribute to arms racing, as the United States sells and transfers arms and dual-use technology to India.

"Strategic Rationality"?

Deterrence theory is the lens through which the United States views Indian nuclear policy. M. V. Ramana, a physicist and policy analyst at Princeton University, warns that this framework is fundamentally flawed and dangerous. In a February 6 article in the Daily Times (Lahore, Pakistan), Ramana critiques *India's Emerging Nuclear Posture* by Rand analyst Ashley Tellis, whose current role, as senior advisor to the U.S. ambassador to India, makes his views particularly germane in understanding U.S. policy. According to Ramana, Tellis recommends that the U.S. should press for an Indian nuclear arsenal that is "small but safe, survivable and 'reasonably effective', stealthy and surreptitious, and not rapidly useable". Ramana thinks Tellis' outlook is blurred by a "realist brand of strategic analysis" which "forces him to look for strategic rationality where there is none". Ramana concludes that "more dangerous than Tellis' flawed analysis is the faith in nuclear deterrence that underlies the thinking of the nuclear elites. That is a profoundly dangerous belief, the failure of which will have catastrophic consequences."

The nuclear crisis implicit in the tense military stand-off between India and Pakistan that lasted eighteen months—with troops massed along the Line of Control dividing Jammu and Kashmir, following a terrorist attack on the Indian Parliament on December 13, 2001—has now abated somewhat. Violent incidents continue, however, as long-standing and deep-rooted ethnic, religious, and political divisions remain. If the United States invades Iraq, the violence likely will escalate.

As the new Indian doctrine illustrates, U.S. nuclear policies are exacerbating nuclear dangers in South Asia. Further, U.S. prescriptions for nuclear "restraint" in the Tellis mode will ring hollow until the United States changes its own policies. What is needed is a rejection of "deterrence" as a basis for South Asia security. To credibly advocate that course, and to address the Chinese nuclear arsenal that partly motivates Indian policy, the United States will have to renounce its own adherence to nuclear deterrence, and work towards immediate global de-alerting of nuclear forces and their rapid, verifiable reduction and elimination.

Elizabeth Shafer is an attorney in New York City and a member of the LCNP board of directors.

Our Nuclear Talk Gravely Imperils Us

A dangerous world just grew more dangerous. Reports that the administration is contemplating the preemptive use of nuclear weapons in Iraq should set off alarm bells that this could not only be the wrong war at the wrong time, but it could quickly spin out of control....

Nuclear weapons are in a class of their own for good reasons — their unique destructive power and their capacity to threaten the very survival of humanity. They have been kept separate from other military alternatives out of a profound commitment to do all we can to see they are never used again....

In the introduction to his national security strategy last fall, the president declared: 'The gravest danger our nation faces lies at the crossroads of radicalism and technology.' On that he was surely right — and the administration's radical consideration of the possible use of our nuclear arsenal against Iraq is itself a grave danger to our national interests, our nation and all that America stands for.

From Senator Edward Kennedy, "Our Nuclear Talk Gravely Imperils Us," Los Angeles Times, Jan. 29, 2003

International Appeal by Lawyers and Jurists Against the "Preventive" Use of Force

We the undersigned lawyers and jurists from legal traditions around the world are extremely concerned about conflicts in the Middle East regarding the suspected proliferation of weapons of mass destruction, and the possibility that force may be used in response to this situation.

The development of weapons of mass destruction anywhere in the world is contrary to universal norms against the acquisition, possession and threat or use of such weapons and must be addressed. However, the "preventive" use of force currently being considered against Iraq is both illegal and unnecessary and should not be authorized by the United Nations or undertaken by any State.

General principles of international law hold that:

- peaceful resolution of conflicts between States is required,
- the use of force is only permissible in the case of an armed attack or imminent attack or under UN authorization when a threat to the peace has been declared by the Security Council and non-military measures have been determined to be inadequate,
- enforcement of international law must be consistently applied to all States

In further enunciating and applying these principles, we believe that the use of force against Iraq would be illegal for the following reasons:

Peaceful resolution of conflicts required

i) The United Nations Charter and customary international law require States to seek peaceful resolutions to their disputes. Article 33 of the Charter states that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice."

ii) Under Article 51 of the Charter, States are only permitted to threaten or use force "if an armed attack occurs" and only "until the Security Council has taken measures necessary to maintain international peace and security."

iii) In the case of an act of aggression or a threat to the peace, the United Nations Security Council is also required under the Charter (Article 41) to firstly employ "measures not involving the use of armed force." Only when such measures "would be inadequate or have proved to be inadequate" (Article 42) can the Security Council authorize the use of force.

No act of aggression or evidence of imminent threat of such act

iv) In 1991 the Security Council responded to an actual invasion of Kuwait by Iraq by authorizing all means necessary to restore the peace. In the current case, however, there has been no indication by Iraq that it intends to attack another country and no evidence of military preparations for any such attack. In addition, it is generally recognized that Iraq does not have the military capability to attack the key countries in dispute, i.e. the United States and the United Kingdom.

No precedent for preventive use of force

v) There is no precedent in international law for use of force as a preventive measure when there has been no actual or imminent attack by the offending State. There is law indicating that preventive use of force is illegal. The International Military Tribunal sitting at Nuremberg rejected Germany's argument that they were compelled to attack Norway in order to prevent an Allied invasion (6 F.R.D. 69, 100-101, 1946).

vi) The Security Council has never authorized force based on a potential, non-imminent threat of violence. All past authorizations have been in response to actual invasion, large scale violence or humanitarian emergency.

vii) If the Security Council, for the first time, were to authorize preventive war, it would undermine the UN Charter's restraints on the use of force and provide a dangerous precedent for States to consider the "preventive" use of force in numerous situations making war once again a tool of international politics rather than an anachronistic and prohibited action. If the use of force takes place outside the framework of international law and the UN Charter, the structure and authority of international law and the UN Charter which have taken generations and immense human sacrifice to establish, would be severely undermined into the foreseeable future.

Consistency under international law must be maintained

viii) International law must be consistently applied in order to maintain the respect of the international community as law and not the rejection of it as a tool of the powerful to subjugate the weak.

ix) Security Council Resolution 687, setting forth the terms of the ceasefire that ended the Gulf War, acknowledges that the elimination of Iraq's weapons of mass destruction is not an end in itself but "represents steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction."

x) The International Court of Justice has unanimously determined that there is an obligation on all 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." (*Legality of the Threat or Use of Nuclear Weapons, ICJ 1996*). Meaningful steps need to be taken by all States to this end, and States wishing to enforce compliance with international law must themselves comply with this requirement.

xi) Action to ensure the elimination of Iraq's weapons of mass destruction should be done in conjunction with similar actions to ensure elimination of other weapons of mass destruction in the region - including Israel's nuclear arsenal - and in the world – including the nuclear weapons of China, France, India, Pakistan, Russia, United Kingdom and the United States.

Alternative mechanisms are available to address concerns

xii) The UN Security Council has established a number of mechanisms to address the concerns regarding Iraqi weapons of mass destruction. These include diplomatic pressure, negotiations, sanctions on certain goods with military application, destruction of stockpiles of weapons of mass destruction and inspections of facilities with capabilities to assist in production of weapons of mass destruction. Evidence to date is that these mechanisms are not perfect, but are working effectively enough to have led to the destruction and curtailment of most of the Iraqi weapons of mass destruction capability.

xiii) Mechanisms are available to address charges against Iraq and the Iraqi leadership of serious human

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Peace Rallies Against A War on Iraq

By Nya Gregor Fleron

Wars are a poor choice for carving out peaceful tomorrows. - Martin Luther King, Jr.

One early and cold Saturday morning, on January 23, thanks to the great organizational skills of Kathleen Sullivan of Educators for Social Responsibility, a New York group went on a bus - one out of hundreds - to Washington, D.C., for the peace rally commemorating Martin Luther King, Jr., which turned out to be one of the largest in the United States since the Vietnam War. On board were among others: Alice Slater (GRACE), Felicity Hill (UNIFEM), Matthew Dean (Physicians for Social Responsibility), representatives from Hague Appeal for Peace and Educators for Peace, high school students, artists, musicians, teachers, workers, and more. In short, it was a broad crowd from all parts of society, which also met our eyes when we arrived to the capital; after a long, sleepy and yet enthusiastic bus ride, where everybody had an opportunity to speak of their reasons for joining the peace march. It was truly a coming together of the different communities that constitute this country, including the press and governmental representatives, coming from literally all over the country, especially the East Coast. We met a young teacher and mother, who had driven all the way from Binghamton, NY (about eight hours drive) with her eight year-old son just to participate in the march.

Nya Gregor Fleron at the Peace Rally in Washington, D.C., January 23, 2003

Some estimates say there were about 200,000 people, some up to half a million, but no matter, Pennsylvania Avenue, which runs along Capitol Hill, was a sight for sore eyes, completely filled to the brim with a peaceful wave of singing, silent or talking marchers, and their show of colorful and provocative banners and signs. It stretched so far that for a five foot six inch person it was impossible to imagine, let alone see, the end of the march in either direction. It wasn't just that people had come all the way; it was their enthusiasm, their common spirit and hope for a peaceful way to solve the Iraqi conflict, their understanding of the issues, their united voice, and not to forget, their will to withstand the terrible chill of a cold winter.

On February 15, another chilly winter day, New York City hosted another grand peace demonstration organized by United for Peace & Justice, along with cities all over the globe – literally millions of people worldwide were out in the streets voicing their wish for peace, opposing the downward-spiral of the war promulgators. Since the city decided not to give the demonstrators a permit to march, 400,000 people quickly ended up spilling out of the boundaries of the designated area given to the demonstration on First Avenue between 49th and 59th Street.

12 people assembled in the LCNP office and then joined a feeder march starting at 59th St. and Central Park West. When nearing First Avenue on Third and Second Avenues, we were slowed down by the crowds and never actually made it to First where the stage was located. Police barricades blocked our way, and no one knew how or if there was any way to get to the rally. First Avenue ran as far as the 80's with people, and Second and Third Avenues continuously filled with crowds of marching people, who had no where else to go, while the police attempted to herd and control them. Eventually, mounted police were brought in to clear Second Avenue. As a result of one aggressive move like this, about 25 people were arrested according to live WBAI radio reporting. That being said, the demonstration was altogether peaceful, and again a broad spectrum of people showed up, including all the major NGOs, uniting to speak a different truth of how the world can be different - a world without wars as is the main objective of the UN Charter.

It is these moments when people come together joining their best, breaking the boundaries of disbelief, that will be remembered the most, because needless to say however you look at it, we are all voicing our opinion in the name of peace.

A small body of determined spirits fired by an unquenchable faith in their mission can alter the course of history.
- MK Gandhi

Nya Gregor Fleron is LCNP program associate and a fiction writer.

Judge Weeramantry New President of IALANA

Judge Christopher Weeramantry is the new president of the International Association of Lawyers Against Nuclear Arms (IALANA). He is a former vice-president of the International Court of Justice, on which he served for nine years. He is the author of a magnificent dissent in the ICJ's nuclear weapons advisory opinion, available on the ICJ website (www.icj-cij.org). In the dissent he argues convincingly and at length, drawing on many legal traditions, that the threat or use of nuclear arms in any circumstance is contrary to humanitarian and other international law.

Peter Weiss, president of IALANA since its inception in 1989, is now a vice-president. He remains president of the Lawyers' Committee on Nuclear Policy, the U.S. affiliate of IALANA. **Peter Becker**, an attorney in Marburg, Germany, is now secretary of IALANA. **Phon van den Biesen**, an Amsterdam attorney and secretary of IALANA since its inception, is now a vice-president.

IALANA now has three offices: the northern office in Marburg, Germany, directed by Philipp Boos; the southern office in Hamilton, New Zealand, directed by Alan Webb; and the UN office at LCNP in New York, directed by John Burroughs. The former main office in The Hague has been closed. For more on IALANA, see www.ialana.org.

Nonproliferation Treaty Applies to Both North Korea and the United States

By John Burroughs

The Nuclear Nonproliferation Treaty (NPT) is much in the news due to North Korea's January 10, 2003 announcement of withdrawal. What has received no attention is that the United States is also undermining the NPT by ignoring recent political commitments to implement the treaty's disarmament obligation.

The NPT and North Korea

North Korea's violations of the NPT, in the early 1990s, and again now, consist at least in operating programs for production of plutonium and perhaps uranium that are not monitored by the International Atomic Energy Agency (IAEA) to prevent diversion of the materials to weapons. Accordingly, in February, the IAEA reported to the Security Council that North Korea is in breach of the NPT. It is not known whether North Korea has produced any nuclear explosive devices with unaccounted for plutonium from its earlier program, which of course would violate the NPT's basic non-acquisition obligation.

According to North Korea, its announcement of withdrawal from the NPT was effective immediately. However, as the IAEA has recognized, under the treaty's terms it becomes effective only after three months. Moreover, and fundamentally, while North Korea may be able to withdraw from the treaty, it cannot withdraw from the underlying obligation not to acquire nuclear weapons.

First, NPT general obligations are now sufficiently settled, accepted, and longlasting to be customary international law, binding on all states whether or not they are parties to the treaty. The NPT has been in force since 1970, and its membership is nearly universal, with only three states outside the regime, all, however, nuclear-armed, India, Pakistan, and Israel.

Second, the NPT is widely recognized, along with the UN Charter, as a cornerstone of global order. In its resolution on the May 1998 Indian and Pakistani nuclear tests, the Security Council declared that proliferation of weapons of mass destruction is a threat to peace and security. Under Chapter VII of the UN Charter, that means, in principle, that the Security Council is required to respond to any state's efforts to acquire nuclear weapons, at least by making recommendations as to how to reverse such efforts.

Third, based in part on the incompatibility of threat or use of nuclear weapons with humanitarian law forbidding the infliction of indiscriminate harm and unnecessary suffering, the International Court of Justice, interpreting NPT Article VI, concluded unanimously in its 1996 opinion that states are obligated to bring to a conclusion negotiations on nuclear disarmament. The clear implication is that the obligation of non-possession of nuclear arms is universal in scope; that states therefore are not to acquire nuclear weapons; and that possessor states are obligated to eliminate them with all due speed.

None of this is to say that the Security Council should respond to a North Korea nuclear weapons program by authorizing use of force. Security Council practice indicates that use of force is a permissible response only to actual or imminent attacks, large-scale violence, or humanitarian emergency. (See Appeal, p. 6) There is no legal basis for U.S. military action. A political approach combining censure with dialogue, inducements, and, perhaps, limited sanctions is the right course of action.

What Goes Around Comes Around

"There may be good and sufficient reasons to abide by the provisions of a treaty, and in most cases one would expect to do so because of the mutuality of benefits that treaties provide, but not because the United States is 'legally' obligated to do so."

- **John Bolton**, "Is There Really 'Law' in International Affairs," Journal of Transnational Law and Contemporary Problems, Spring 2000

Regarding North Korea, it is "hard to see how we can have conversations with a government that has blatantly violated its agreements."

- **John Bolton**, Undersecretary of State for Arms Control and International Security, quoted in "North Korea Says Nuclear Program Can Be Negotiated," New York Times, Nov. 3, 2002

The NPT and the United States

To balance obligations, Article VI of the NPT requires the nuclear powers 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." In 1978 and again in 1995, the United States and other nuclear powers also formally declared policies of non-use of nuclear arms against non-nuclear NPT states.

In the post-Cold War era, non-nuclear countries have demanded progress on the promised disarmament. In 1995, the year that the NPT was due to expire, the United States and other nuclear states pressed for the treaty to be extended indefinitely. Other states agreed in return for pledges to complete negotiations on a treaty banning all nuclear test explosions by 1996, to begin negotiations on an agreement banning production of plutonium and highly enriched uranium for use in weapons, and to pursue "systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."

Additional commitments made in 2000 include "an unequivocal undertaking to accomplish the total elimination of their nuclear arsenals," preserving the ABM Treaty, applying the principle of irreversibility to nuclear weapons reductions, further developing verification capabilities, reducing the operational readiness of nuclear weapons, and a diminishing role for nuclear weapons in security policies.

Measured against the standards set in 1995 and 2000, the nuclear powers, especially the United States, are not complying with the disarmament obligation. The Senate declined to approve ratification of the Comprehensive Nuclear Test Ban Treaty in 1999. Negotiations on a fissile materials treaty are stalled. The United States withdrew from the ABM Treaty in June 2002. Perhaps most disturbingly, the Defense Department's Nuclear Posture Review submitted to Congress at *continued on page 9*

NPT, North Korea, and U.S. *continued from page 8*

the end of 2001 signals the end, or at least the suspension, of verified and irreversible arms control.

In accordance with the Nuclear Posture Review, the short and starkly simple Moscow Treaty signed in May 2002 with Russia does not require the verified destruction of any delivery systems or warheads. In addition to treaty-permitted deployed strategic warheads, 1700-2200 in 2012, the Defense Department plans to retain many thousands of warheads in reserve. That includes large numbers – probably more than 2000 a decade from now - in a "responsive force" capable of redeployment within weeks or months. A more blatant rejection of the NPT principle of irreversible arms control could hardly be imagined.

Nor is there any indication in the Nuclear Posture Review or elsewhere that the Bush administration will seek to reduce the readiness level of deployed strategic forces, for example by separating warheads from delivery systems. Today, both the United States and Russia each have about 2,000 warheads on high alert, ready to launch within minutes of an order to do so.

The Nuclear Posture Review also ignores the commitment to reduce the military role of nuclear weapons and the longstanding assurances of their non-use against non-nuclear countries. Instead it reveals new trends towards making nuclear arms more usable, notably in response to non-nuclear attacks or threats involving biological or chemical weapons or "surprising military developments." Among the "immediate contingencies" it identifies for possible U.S. nuclear use is "a North Korean attack on South Korea" - not necessarily a nuclear attack.

Indeed, the reference to use of nuclear weapons against North Korea was one of a series of provocative Bush administration statements spurring North Korean nuclearization. They include naming North Korea as a member of the "axis of evil"; strategy documents embracing "preemptive" military actions against states' acquiring of nuclear, chemical, biological, and radiological weapons; and depiction of a potential future North Korean missile deployment as a major basis for withdrawal from the ABM Treaty.

Resolving the Crisis

The right and lawful thing for North Korea to do is to abandon any aspirations for a nuclear arsenal and to remain a member of the NPT. For its part, the United States should provide a formal assurance that it will not use nuclear weapons against North Korea. That step follows from the U.S. commitment already made to all non-nuclear weapon NPT states, and also was promised as part of the 1994 U.S.-DPRK agreement. The United States should also end the state of near war that has existed between the two countries for decades and normalize relations, including economic relations. That is fundamentally what North Korea seeks.

More broadly, if North Korea's hopefully temporary defiance of the NPT is to remain an aberration not imitated by other countries, the United States will have to learn that a viable nonproliferation regime depends crucially on compliance with the obligation to disarm nuclear weapons as well as the obligation not to acquire them.

John Burroughs, LCNP executive director, is the principal author of the chapter on the NPT in Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties (New York: Apex Press, 2003). Another version of this article appeared January 27, 2003 in History News Network, www.hnn.us.

International Appeal *continued from page 6*

rights violations, war crimes, crimes against peace and crimes against humanity. These include domestic courts utilizing universal jurisdiction, the establishment by the Security Council of an ad hoc international criminal tribunal, use of the International Criminal Court for any crimes committed after July 2002, and the International Court of Justice.

The use of force by powerful nations in disregard of the principles of international law would threaten the fabric of international law giving rise to the potential for further violations and an increasing cycle of violence and anarchy. We call on the United Nations and all States to continue to pursue a path of adherence to international law and in pursuit of a peaceful resolution to the threats arising from weapons of mass destruction and other threats to the peace.

Circulated by the International Association of Lawyers Against Nuclear Arms

A list of signers and a 2-page PDF of the appeal suitable for distribution are at www.lcnp.org.

Philip Berrigan: Requiescat in Pacem

Philip Berrigan, former Roman Catholic priest, and lifelong fighter against nuclear weapons, died December 6, 2002 at Jonah House, the Baltimore-based community he founded in 1973. Best known for his opposition to the Vietnam War, especially the 1968 burning of Selective Service files at Catonsville, Maryland, in subsequent years Philip, along with his brother Daniel and others, engaged in numerous brave Plowshares actions aimed at physically disabling nuclear weapon systems. A statement he made in the days before his death includes this ringing affirmation:

"I die with the conviction, held since 1968 and Catonsville, that nuclear weapons are the scourge of the earth; to mine for them, manufacture them, deploy them, use them, is a curse against God, the human family, and the earth itself."

"It's A Sin to Build A Nuclear Weapon"

"What it is wrong to do, it is wrong to intend to do. If it is wrong for me to kill you, it is wrong for me to plan to do it.... The taproot of violence in our society is our intent to use nuclear weapons. Once we have agreed to that all other evil is minor in comparison. Until we squarely face the question of our consent to use nuclear weapons, any hope for improvement of public morality is doomed to failure.... Our possession of [nuclear] weapons is a proximate occasion of sin."

From the article "It's a Sin to Build A Nuclear Weapon" by Fr. Richard McSorley, S.J., as reported in the fall 2002 issue of The Little Way, newsletter of Dorothy Day Catholic Worker, Washington, D.C. Founder of the Dorothy Day community, Fr. McSorley died on October 17, 2002 at Georgetown University Hospital.

Rule of Power or Rule of Law?
Apex Press 2003, $26, 272 pp, soft cover

Rule of Power or Rule of Law? examines U. S. undermining of multilateral treaty regimes on nuclear, chemical, and biological weapons, landmines, global warming, and international justice. Updates 2002 report released by the Institute for Energy and Environmental Research and the Lawyers' Committee on Nuclear Policy.

To order, mail in form below with check or use credit card at www.lcnp.org/pubs/rpbflier.htm

A brilliantly conceived and executed study that documents unflinchingly the dangerous descent of the U.S. government into the bottomless pit of global lawlessness. It also illuminates the benefits for citizens and the world of an alternate law-guided approach based on negotiated treaty regimes.

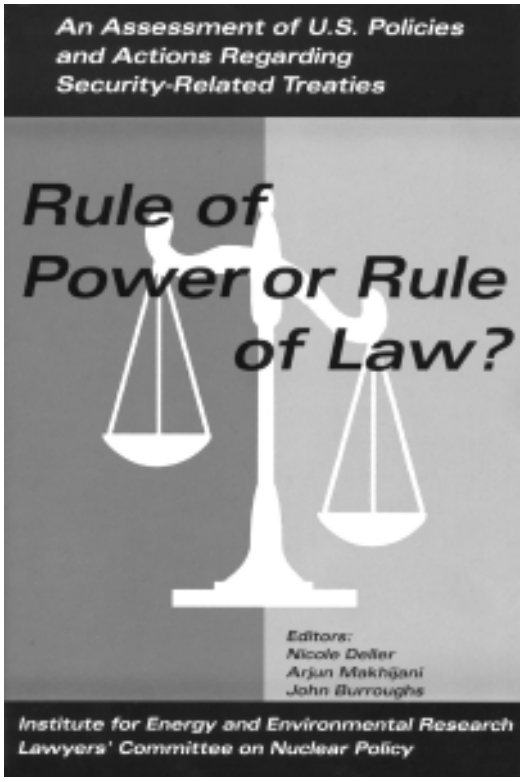
— Richard Falk, Professor of International Law and Practice, Princeton University

This thoughtful book carefully examines the current disturbing U.S. approach to many multilateral treaties. It is essential reading for diplomats, policymakers and everyone else who is interested in global security as it relates to nuclear, chemical, and biological weapons, landmines, global warming, and international justice.

— Pierre Schori, Swedish Ambassador to the UN

This book provides a comprehensive overview of how, at a time when Americans are keenly aware of international threats to peace and security, the United States is systematically undermining the International Criminal Court and other mechanisms that would reduce those threats.

— Jayne Stoyles, former Program Director, NGO Coalition for the International Criminal Court



This study shows that the United States is obligated to reduce greenhouse gas emissions even in the absence of the Kyoto Protocol because of prior treaty commitments made by the first President Bush in 1992. It is a wake up call that unless the United States takes urgent steps to meet its key treaty obligations, the environment and security of its people and the world are in peril. Read this book and act to realize its recommendations.

— Brent Blackwelder, President, Friends of the Earth, USA

To order *Rule of Power or Rule of Law?* please fill in and return to LCNP*

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Noteworthy Books

By John Burroughs

The World Court in Action: Judging Among the Nations
Howard N. Meyer
Rowman & Littlefield, 2002
Pb, 328 pp, $26.95
ISBN 0-7425-0924-9

Nominated for a Pulitzer Price, *The World Court in Action* is a highly readable history of the International Court of Justice. It traces the origins of the Court, highlighting the role of the pre-World War I U.S. peace movement, which saw international adjudication as the path to prevention of war. And it provides fascinating and insightful accounts of major cases decided by the Court. They include the multi-episode struggle over the status of Namibia and the system of apartheid, Nicaragua's challenge to U.S. support of the "contras," and the controversy over how to prosecute Libyan nationals accused of destroying Pan Am Flight 103 over Lockerbie, Scotland. Not least, the book examines the initiative resulting in the Court's seminal 1996 opinion on the legality of threat or use of nuclear weapons.

The author, Howard N. Meyer, is a lawyer and well-regarded social historian. He is a member of the LCNP board of directors.

The World Court in Action is essential – and enjoyable – reading for anyone concerned about the future of the International Court of Justice and a global rule-of-law system.

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Biological Warfare and Disarmament: New Problems/New Perspectives
Susan Wright, editor
Rowman & Littlefield, 2002
Pb, 464 pp, $29.95
ISBN 0-7425-2469-8

Biological Warfare and Disarmament features articles by experts from all over the world. Not distorted by the current U.S. paradigm that sees terrorists and "rogue" states as the only threats, it probes the history of design and production of biological weapons in major states including the United States, United Kingdom, and Soviet Union, and lays bare the obstacles to adequate control of the weapons.

In her chapter on the origins of the Biological Weapons Convention (BWC), the treaty banning possession of biological arms but providing no verification mechanisms, University of Michigan historian of scientist and editor Susan Wright demonstrates, drawing upon recently declassified UK papers, that the United States and Britain saw the ban as a means of denying a weapon of mass destruction to countries of the South while retaining their own ultimate deterrent, nuclear weapons.

Another chapter, by Oliver Thränert of the German Institute for International and Security Affairs in Berlin, describes the seven years of failed negotiations on an agreement that would have created transparency and compliance mechanisms (declarations, inspections, etc.) to give institutional life to the existing simple ban on possession contained in the BWC. In perhaps the single most shocking and irresponsible instance of its irrational hostility to multilateralism, the Bush administration scuttled the nearly completed negotiations in the summer of 2001, and then, incredibly, stuck to this position in the wake of the September 11 attacks and the subsequent anthrax attacks.

Other chapters examine topics including "biodefense" programs and their ambiguous relationship to offensive programs, the Soviet Union's massive biological arms program carried out in blatant violation of the BWC, biological weapons in Iraq and the rest of the Middle East, and the issue as perceived in India and China.

Biological Warfare and Disarmament is highly recommended. For those working for nuclear disarmament, an understanding of the biological weapons arena is vital. Alleged proliferation of biological arms is now serving as a key rationale for the U.S. nuclear threat, as the Pentagon proclaims that U.S. nuclear weapons can be used in retaliation for or even to preempt use of biological weapons. Further, if the United States and the world cannot agree on mechanisms to promote compliance with the existing ban on biological weapons, a very poor precedent indeed is set for the task of building agreements and institutions to implement the elimination of nuclear arsenals.

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How To Use "New" Civil Rights Laws After 9-11
Ann Fagan Ginger, editor
Meiklejohn Civil Liberties Institute (MCLI), 2003
320 pp, $36.95

Information and texts regarding the U.S. "war on terrorism" as implemented at home in violation of the U.S. Constitution and international human rights law, through the Patriot Act, other legislation, and executive orders and directives; and what activists and lawyers can do in response, including sample complaints, local ordinances defending the bill of rights, and relevant international instruments, including human rights treaties. Editor Ann Fagan Ginger is executive director of MCLI, professor at San Francisco State University, longtime lawyer, activist, and writer, and member of the LCNP board of directors.

Order from MCLI, P.O. Box 673, Berkeley, CA 94701-0673, tel 510 848-0599, fax 510 848-6008, mcli@mcli.org, www.mcli.org

Global Action to Prevent War Publishes Program

Since 1998, scholars, diplomats, officials, and activists the world over have contributed to the program statement for Global Action to Prevent War: A Coalition-Building Effort to Stop War, Genocide, & Internal Armed Conflict. In an intentional process of organic growth, the statement has undergone no less than 20 revisions, a tribute to the interest in the project. The latest version among other things has new sections on preventing terrorism and on the role of women in building security.

Now Global Action has decided the time has come to freeze the document for two years and to publish and distribute it widely as a booklet. It will be available to download from the Global Action website, www.globalactionpw.org, or you can order it from LCNP for $4 including shipping (for contact info see p. 2).

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Weapons are instruments of fear; they are not a wise man's tools.
He uses them only when he has no choice.
Peace and quiet are dear to his heart,
And victory no cause for rejoicing.
If you rejoice in victory, then you delight in killing;
If you delight in killing, you cannot fulfill yourself.

From *"Thirty-One", Tao Te Ching*, translated by Gia-Feng and Jane English