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**OBAMA’S NUCLEAR POSTURE REVIEW: AN  
AMBITIOUS PROGRAM FOR NUCLEAR ARMS  
CONTROL BUT A RETREAT FROM THE  
OBJECTIVE OF NUCLEAR DISARMAMENT**

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#### *INTRODUCTION*

President Barack Obama and US political and policy leaders across the political spectrum have in recent years spoken about the need to eliminate nuclear weapons because of the dangers they pose. In 1970, the United States agreed by Article VI of the Nuclear Non-Proliferation Treaty (“NPT”) to negotiate nuclear disarmament in good faith.<sup>1</sup> The International Court of Justice (“ICJ”) in 1996 found that this is an obligation not just to begin but also to “bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>2</sup> International humanitarian law (“IHL”)<sup>3</sup> prohibits the use of weapons whose effects are uncontrollable, indiscriminate, disproportionate, or unnecessary, and further prohibits a state from threatening to use nuclear weapons that would be unlawful to use.<sup>4</sup>

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1. Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

2. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2)(F) (July 8).

3. The body of law applicable to the use of force in armed conflict is variously referred to as international humanitarian law, the law of armed conflict, the law of war, and *jus in bello*. *See id.* ¶ 75.

4. *Id.* ¶¶ 42, 86.

In April 2010, the Obama Administration released its Nuclear Posture Review (“Obama NPR” or “NPR”) setting forth its view of the role of nuclear weapons in US security and its plans for nuclear weapons for the indefinite future. The Obama NPR proposes an ambitious Cold War-style agenda for nuclear arms control. It is essentially a program for managing and reducing nuclear weapons risks, including those appurtenant to the numbers and types of nuclear weapons, the testing of such weapons, the production of fissile materials, the declaratory policy on the circumstances in which nuclear weapons might be used, and the maintenance of strategic relationships with potential adversaries. However, the Obama NPR is fundamentally inconsistent with President Obama’s stated objective of the elimination of nuclear weapons and with the United States’ obligations under the NPT and IHL.

The Obama NPR portrays nuclear weapons as central to US security and as a legitimate means for the United States to address military concerns. It communicates to other states that it is legitimate for states to maintain and potentially use nuclear weapons if they see some potential advantage in doing so. It proclaims that nuclear weapons cannot be eliminated as long as regional strife remains in the world. It eviscerates the very concept of the elimination of nuclear weapons by portraying it as a process whereby states continue to spend billions of dollars to maintain physical infrastructures and personnel for the swift resumption of production and potential use of such weapons. It manifests no willingness to negotiate a convention or other legal instrument for the elimination of nuclear weapons.<sup>5</sup> It leaves the world with nuclear weapons, the effects of which are uncontrollable and indiscriminate and cannot be expected to meet the legal tests of proportionality and necessity under IHL. Because the use of these weapons would be unlawful under international law, it is unlawful for the United States to threaten

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5. The Action Plan adopted by consensus by the Parties to the 2010 NPT Review Conference noted “the proposals for nuclear disarmament of the Secretary-General of the United Nations to inter alia consider negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.” 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3–28, 2010, *Final Document*, ¶ 81, U.N. Doc. NPT/CONF.2010/50 (Vol. I) (2010) [hereinafter *Final Document*].

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to use these weapons, whether through the practice of deterrence or otherwise.

The nuclear policy announced by the Obama NPR is thus inconsistent with the United States' obligation under the NPT to negotiate nuclear disarmament in good faith. The use of the nuclear weapons to be maintained in the US arsenal under the Obama NPR would be unlawful under the law of armed conflict in most if not all circumstances of potential use.

This Essay proceeds in three Parts. Part I describes the effects of nuclear weapons and the many calls in recent years from across the political spectrum for the abolition of nuclear weapons, including such calls by President Obama both as presidential candidate and as president. Part II describes the Obama NPR and the many respects in which it backs away from the avowed objective of abolition by continuing the United States' Cold War posture, which was premised on the putative legitimacy of nuclear weapons and deterrence and in defiance of international law. Part III suggests how a nuclear posture committed to abolition and compliance with international law might differ from the Obama NPR and highlights fundamental inconsistencies between the NPR and the Action Plan of the 2010 NPT Conference supported by the United States.

## I. BACKGROUND

### A. *Effects of Nuclear Weapons*

The ICJ in its 1996 *Nuclear Weapons* advisory opinion described the "unique characteristics" of nuclear weapons that make them dangerous to world security:

The Court . . . notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons

cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

In consequence, . . . it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.<sup>6</sup>

The Final Document of the 2010 NPT Conference (“Final Document”), prepared with the active involvement of the United States,<sup>7</sup> confirmed the extreme risks presented by nuclear weapons. The Final Document notes that there are still “several thousands” of nuclear weapons deployed and stockpiled and expressed the conference’s “deep concern at the continued risk for humanity represented by the possibility that these weapons could be used and the catastrophic humanitarian consequences that would result from the use of nuclear weapons.”<sup>8</sup> In the “Action Plan” adopted by the conference, again with the active support of the United States, the Final Document includes the following as one of its “Principles and Objectives”: “The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with

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6. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, ¶¶ 35–36.

7. See, e.g., Laura Kennedy, U.S. Ambassador to the Conference on Disarmament, Remarks by the U.S. Representative to the Conference on Disarmament (June 24, 2010), available at [http://geneva.usmission.gov/2010/06/24/amb\\_kennedy\\_npt](http://geneva.usmission.gov/2010/06/24/amb_kennedy_npt). With respect to formation of the Final Document, Ambassador Kennedy stated:

We shared with the Chair U.S. proposals for inclusion in this final report in the initial Committee meetings, as did the NAM and numerous other states. It was clear from the beginning that agreement on some issues would be highly problematic, in particular those related to a time-bound nuclear weapons convention.

*Id.*

8. *Final Document*, *supra* note 5, ¶ 80.

applicable international law, including international humanitarian law.”<sup>9</sup>

### B. *Support for Abolition*

The focus in recent years on the goal of a nuclear-weapons-free world received substantial impetus from the January 4, 2007 *Wall Street Journal* article, “A World Free of Nuclear Weapons,” by Henry A. Kissinger, Sam Nunn, William J. Perry, and George P. Schultz.<sup>10</sup> In this article, the authors concluded that the Cold War doctrine of nuclear deterrence among the major powers has become “obsolete” and that reliance on nuclear weapons for deterrence was becoming “increasingly hazardous and decreasingly effective.”<sup>11</sup>

The authors further saw an “historic opportunity” to end nuclear weapons as a threat to the world:

Nuclear weapons today present tremendous dangers, but also an historic opportunity. U.S. leadership will be required to take the world to the next stage—to a solid consensus for reversing reliance on nuclear weapons globally as a vital contribution to preventing their proliferation into potentially dangerous hands, and ultimately ending them as a threat to the world.<sup>12</sup>

The authors “endorse[d] setting the goal of a world free of nuclear weapons” and set forth a number of action steps required to achieve that goal.<sup>13</sup>

A year later, on January 15, 2008, Messrs. Kissinger, Nunn, Perry, and Schultz, authored a second *Wall Street Journal* article, titled “Toward A Nuclear-Free World.” In this article they noted

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9. *Id.* at 19.

10. See Henry Kissinger et al., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15. Mr. Schultz was US Secretary of State from 1982 to 1989. Mr. Perry was US Secretary of Defense from 1994 to 1997. Mr. Kissinger was US Secretary of State from 1973 to 1977. Mr. Nunn was US Chairman of the Senate Armed Services Committee from 1987 to 1995.

11. *Id.* (“Nuclear weapons were essential to maintaining international security during the Cold War because they were a means of deterrence. The end of the Cold War made the doctrine of mutual Soviet-American deterrence obsolete. Deterrence continues to be a relevant consideration for many states with regard to threats from other states. But reliance on nuclear weapons for this purpose is becoming increasingly hazardous and decreasingly effective.”).

12. *Id.*

13. *Id.*

that “[t]he accelerating spread of nuclear weapons, nuclear know-how and nuclear material has brought us to a nuclear tipping point.”<sup>14</sup> They again pointed out that, with nuclear weapons being more widely available, “deterrence is decreasingly effective and increasingly hazardous.”<sup>15</sup> In this second article, the authors quoted Mikhail Gorbachev’s January 2007 statement of the central point that nuclear weapons, rather than being an aid to security, have become a security risk: “It is becoming clearer that nuclear weapons are no longer a means of achieving security; in fact, with every passing year they make our security more precarious.”<sup>16</sup>

As for how this problem may be solved, the article noted the inevitable key role of the United States and Russia: “The U.S. and Russia, which possess close to 95% of the world’s nuclear warheads, have a special responsibility, obligation and experience to demonstrate leadership, but other nations must join.”<sup>17</sup> Among the steps that the article identified that the US and Russia could take to dramatically reduce nuclear weapons were the following:

Take steps to increase the warning and decision times for the launch of all nuclear-armed ballistic missiles, thereby reducing risks of accidental or unauthorized attacks. Reliance on launch procedures that deny command authorities sufficient time to make careful and prudent decisions is unnecessary and dangerous in today’s environment. Furthermore, developments in cyber-warfare pose new threats that could have disastrous consequences if the command-and-control systems of any nuclear-weapons state were compromised by mischievous or hostile hackers. Further steps could be implemented in time, as trust grows in the U.S.-Russian relationship, by introducing mutually agreed and verified physical barriers in the command-and-control sequence.<sup>18</sup>

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14. Henry Kissinger et al., *Toward a Nuclear-Free World*, WALL ST. J., Jan. 15, 2008, at A13.

15. *Id.*

16. *Id.* (quoting Mikhail Gorbachev, *The Nuclear Threat*, WALL ST. J., Jan. 31, 2007, at A13).

17. *Id.*

18. *Id.*

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Barack Obama, as a presidential candidate, endorsed this objective of achieving a nuclear-weapons-free world. In a speech on October 2, 2007, in words against which the Obama NPR must be judged, Mr. Obama stated that the United States' continued focus on maintaining a nuclear weapons capability sufficient to deter the Soviet Union no longer makes sense because the Soviet Union no longer exists:

We need to change our nuclear policy and our posture, which is still focused on deterring the Soviet Union—a country that doesn't exist. Meanwhile, India and Pakistan and North Korea have joined the club of nuclear-armed nations, and Iran is knocking on the door. More nuclear weapons and more nuclear-armed nations mean more danger to us all.<sup>19</sup>

Mr. Obama, as candidate, further recognized that, unless the United States fulfilled its obligations under the NPT to achieve nuclear disarmament, it could not expect non-nuclear states to fulfill their obligations under the NPT to refrain from obtaining nuclear weapons. Mr. Obama stated:

We will not pursue unilateral disarmament. As long as nuclear weapons exist, we'll retain a strong nuclear deterrent. But we'll keep our commitment under the Nuclear Non-Proliferation Treaty on the long road towards eliminating nuclear weapons. We'll work with Russia to take U.S. and Russian ballistic missiles off hair-trigger alert, and to dramatically reduce the stockpiles of our nuclear weapons and material. We'll start by seeking a global ban on the production of fissile material for weapons. And we'll set a goal to expand the U.S.-Russian ban on intermediate-range missiles so that the agreement is global.

*As we do this, we'll be in a better position to lead the world in enforcing the rules of the road if we firmly abide by those rules. It's time to stop giving countries like Iran and North Korea an excuse. It's time for America to lead. When I'm President, we'll strengthen the Nuclear Non-Proliferation Treaty so that*

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19. Barack Obama, U.S. Senator from Illinois and Democratic Candidate for U.S. President, Speech at Depaul University (Feb. 10, 2007), (transcript available at <http://www.cfr.org/us-election-2008/barack-obamas-foreign-policy-speech/p14356?breadcrumb=%2Fcampaign2008%2Fspeeches>).

nations that don't comply will automatically face strong international sanctions.<sup>20</sup>

Mr. Obama, upon becoming president, followed through on his campaign promise to take an initiative with respect to nuclear weapons. In his historic speech on April 5, 2009 in Hradcany Square in Prague, the president stated:

The existence of thousands of nuclear weapons is the most dangerous legacy of the Cold War. No nuclear war was fought between the United States and the Soviet Union, but generations lived with the knowledge that their world could be erased in a single flash of light. Cities like Prague that existed for centuries, that embodied the beauty and the talent of so much of humanity, would have ceased to exist.

Today, the Cold War has disappeared but thousands of those weapons have not. In a strange turn of history, the threat of global nuclear war has gone down, but the risk of a nuclear attack has gone up. More nations have acquired these weapons. Testing has continued. Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold.<sup>21</sup>

President Obama went on to point out the extreme dangers presented by the detonation of even one nuclear weapon, potentially affecting our "ultimate survival":

Now, understand, this matters to people everywhere. One nuclear weapon exploded in one city—be it New York or Moscow, Islamabad or Mumbai, Tokyo or Tel Aviv, Paris or Prague—could kill hundreds of thousands of people. And no matter where it happens, there is no end to what the consequences might be—for our global safety, our security, our society, our economy, to our ultimate survival.<sup>22</sup>

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20. *Id.* (emphasis added).

21. Barack Obama, U.S. President, Remarks at Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered).

22. *Id.*

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President Obama went on to set forth his belief that the fatalism of believing that a nuclear weapons world is inevitable must be overcome:

Some argue that the spread of these weapons cannot be stopped, cannot be checked—that we are destined to live in a world where more nations and more people possess the ultimate tools of destruction. Such fatalism is a deadly adversary, for if we believe that the spread of nuclear weapons is inevitable, then in some way we are admitting to ourselves that the use of nuclear weapons is inevitable.<sup>23</sup>

President Obama then expressed the United States' commitment to seeking a world without nuclear weapons:

So today, I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons. I'm not naive. This goal will not be reached quickly—perhaps not in my lifetime. It will take patience and persistence. But now we, too, must ignore the voices who tell us that the world cannot change. We have to insist, "Yes, we can."<sup>24</sup>

President Obama emphasized the "basic bargain" of the NPT, by which, as he put it, "nuclear weapons [states] will move toward disarmament," and "countries without nuclear weapons will not acquire them."<sup>25</sup> While referring to the enforcement of the obligations of the non-nuclear states, President Obama focused on the binding nature of the NPT commitment. Specifically noting that weapons held in violation of a state's NPT obligations are "illegal," President Obama stated:

Rules must be binding. Violations must be punished. Words must mean something. The world must stand together to prevent the spread of these weapons. Now is the time for a strong international response . . . and North Korea must know that the path to security and respect will never come through threats and illegal weapons. All nations must come together to build a stronger, global regime. And that's

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23. *Id.*

24. *Id.*

25. *Id.* President Obama also referenced the nuclear energy part of the "basic bargain" of the NPT, whereby all countries can access peaceful nuclear energy.

why we must stand shoulder to shoulder to pressure the North Koreans to change course.<sup>26</sup>

## II. *NUCLEAR POSTURE REVIEW*

### A. *Process and Background*

The Obama NPR states that, as mandated by Congress, it was conducted by the Office of the Secretary of Defense and the Joint Staff, in consultation with the secretary of state and the secretary of energy.<sup>27</sup> It states that the president, through presidential guidance, called for a thorough review of US nuclear weapons policies and force structure.<sup>28</sup> President Obama was reportedly involved personally in drafting and revising the NPR.<sup>29</sup>

Aside from references to the requirements of NPT Article VI,<sup>30</sup> the NPR, with one possible exception discussed below,<sup>31</sup> does not refer to or appear to take into consideration the requirements of international law. This a regrettable omission in light of the clear body of international law that the United States, in other contexts, has acknowledged to be applicable to the use and threat of use of nuclear weapons.<sup>32</sup>

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26. *Id.*

27. U.S. DEP'T OF DEFENSE, NUCLEAR POSTURE REVIEW REPORT (2010), available at <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf> [hereinafter NPR].

28. *Id.* at 1.

29. See Jim Hoagland, *The Beginning of a Nuclear Spring*, WASH. POST, Apr. 18, 2010, at A15 ("President Obama was making editing changes in the Nuclear Posture Review right up to the last minutes before it was to go to press," says William J. Perry, defense secretary in the Clinton administration and a member of a quartet of elder statesmen whose advocacy of nuclear disarmament has informed and influenced Obama's thinking.").

30. See NPR, *supra* note 27, at 7.

31. See *infra* notes 102–05, and accompanying text.

32. See, e.g., Charles J. Moxley Jr., et al., *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34 *FORDHAM INT'L L.J.* 595 (2011) (discussing, inter alia, the United States' numerous acknowledgements of the applicability of IHL to the use and threat of use of nuclear weapons, including statements to the ICJ in the Nuclear Weapons advisory opinion and military manuals of the US armed forces).

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### B. *Timeframe*

The NPR focuses principally on steps to be taken in the next five to ten years, but also considers “the path ahead for U.S. nuclear strategy and posture over the longer term.”<sup>33</sup>

### C. *Security Environment*

The Obama NPR identifies nuclear terrorism as “today’s most immediate and extreme danger” and sees “a serious risk that terrorists may acquire what they need to build a nuclear weapon.”<sup>34</sup> The “other pressing threat” is nuclear proliferation, particularly from Iran and North Korea.<sup>35</sup> The NPR further sees a continuing need to ensure strategic stability with potential adversaries, particularly China and Russia.<sup>36</sup>

The NPR sets forth the following hierarchy of nuclear concerns and strategic objectives: (1) “discouraging additional countries from acquiring nuclear weapons capabilities”; (2) “stopping terrorist groups from acquiring nuclear bombs or the materials to build them”; (3) “maintain[ing] stable strategic relationships with Russia and China”; and (4) “counter[ing] threats posed by any emerging nuclear-armed states, thereby protecting the United States and our allies and partners against nuclear threats or intimidation, and reducing any incentives they might have to seek their own nuclear deterrents.”<sup>37</sup>

The NPR does not recognize nuclear weapons themselves—and certainly not the nuclear weapons possessed by the United States and its allies and partners—as a significant security issue. It does not convey the sense that nuclear weapons are in any way excessive or of questionable legitimacy or military value. Completely missing is the point made by Messrs. Kissinger, Nunn, Perry, and Schultz in their 2008 *Wall Street Journal* article, quoting Mikhail Gorbachev, that nuclear weapons, rather than contributing to security, have become a security risk.<sup>38</sup> The Obama NPR, in this regard, seems mired in Cold War thinking.

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33. NPR, *supra* note 27, at iv.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at v.

38. *See supra* notes 14–18

D. *Key Objectives*

Based on the foregoing security environment, the Obama NPR sets forth the following five key objectives of US nuclear weapons policies and posture: (1) preventing nuclear proliferation and nuclear terrorism; (2) reducing the role of US nuclear weapons in US national security strategy; (3) maintaining strategic deterrence and stability at reduced nuclear force levels; (4) strengthening regional deterrence and reassuring US allies and partners; and (5) sustaining a safe, secure, and effective nuclear arsenal.<sup>39</sup>

The NPR does not make the elimination of nuclear weapons a key objective. Nor does it endorse—or even reference—the potential negotiation of a convention or other legal instrument prohibiting the use and threat of use of nuclear weapons (it does not even reference such a binding legal process as part of the long-term goal). The NPR’s key objectives of maintaining strategic deterrence, strengthening regional deterrence, and sustaining an effective nuclear arsenal communicate something far different from elimination.

E. *Role of Nuclear Weapons*

Noting that “[t]he massive nuclear arsenal we inherited from the Cold War era of bipolar military confrontation is poorly suited to address the challenges posed by suicidal terrorists and unfriendly regimes seeking nuclear weapons,” the Obama NPR concluded that the US nuclear policies and posture should be aligned “to our most urgent priorities—preventing nuclear terrorism and nuclear proliferation.”<sup>40</sup>

The question presents itself: What would it mean to align US nuclear policies to the urgent priorities of preventing nuclear terrorism and nuclear proliferation? Such a realignment would seem most centrally to be achieved by making nuclear weapons unavailable to terrorists (most effectively by eliminating such weapons) and convincing potential proliferators that nuclear weapons offer no net military or security benefit (most effectively, by the United States acting on such conviction in its own nuclear policies). It would certainly not mean maintaining

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39. *Id.* at iii.

40. *Id.* at v.

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thousands of nuclear weapons at high alert and arguing that doing so is necessary for security and is therefore legitimate.

The Obama NPR, however, states that focusing on the priorities of preventing terrorism and proliferation does not “mean that our nuclear deterrent has become irrelevant.”<sup>41</sup> It goes on to say, “Indeed, as long as nuclear weapons exist, the United States will sustain safe, secure, and effective nuclear forces. These nuclear forces will continue to play an essential role in deterring potential adversaries and reassuring allies and partners around the world.”<sup>42</sup>

According to the NPR, the role of the US nuclear forces—their “essential role”—is to deter “potential adversaries” and reassure allies and partners. This sounds like the very kind of Cold War thinking—focusing on deterring the Soviet Union and now Russia—that Mr. Obama, as a candidate, abjured when he said, “We need to change our nuclear policy and our posture, which is still focused on deterring the Soviet Union—a country that doesn’t exist.”<sup>43</sup> The Obama NPR, while recognizing that the United States’ Cold War vintage nuclear arsenal is “poorly suited” to addressing terrorism and proliferation, does not send the message to Russia or China or any other state that the United States is seriously interested in fundamentally changing that arsenal or the United States’ overall commitment to nuclear weapons.

The NPR also sets forth what is ultimately a very pro-nuclear standard regarding the size of the nuclear arsenal the United States will retain going forward: “The United States will retain the smallest possible nuclear stockpile consistent with our need to deter adversaries, reassure our allies, and hedge against technical or geopolitical surprise.”<sup>44</sup> This seems like a euphemistic way of saying that the United States will keep as many nuclear weapons as it feels it needs to deter—this time it says “adversaries,” not “potential adversaries”—and to reassure allies. From this, it can be deduced that the United States is still embracing nuclear weapons as legitimate, lawful, and appropriate weapons. This is a nuclear posture that tells other

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44. *Id.*

42. *Id.*

43. Obama, *supra* note 19.

44. NPR, *supra* note 27, at 39.

states that nuclear weapons are allowable, based on a state's perception of its security needs and advantages.

Thus, while the United States is willing to cut back on its nuclear arsenal, such cutbacks are not based on the excessiveness or illegitimacy of the weapons and certainly not on their illegality or a commitment to eliminate them, but rather on the sense that the United States no longer needs as many nuclear weapons as it previously did:

But fundamental changes in the international security environment in recent years—including the growth of unrivaled U.S. conventional military capabilities, major improvements in missile defenses, and the easing of Cold War rivalries—enable us to fulfill those objectives at significantly lower nuclear force levels and with reduced reliance on nuclear weapons. Therefore, without jeopardizing our traditional deterrence and reassurance goals, we are now able to shape our nuclear weapons policies and force structure in ways that will better enable us to meet our most pressing security challenges.<sup>45</sup>

The language, “our traditional deterrence and reassurance goals,” seems to exemplify just how steeped this NPR is in Cold War thinking. President Obama, notwithstanding the political goal of nuclear elimination he has projected, has not been willing (or able) to “operationalize” the vision. Providing for the United States to maintain its Cold War force structure of air-, land-, and sea-based missiles,<sup>46</sup> the Obama NPR does not affirmatively project the notion that, since Russia is no longer an enemy, perhaps the United States should approach the whole issue of nuclear weapons with Russia in a different way, one more informed by the objective of elimination than by the Cold War instincts.

Aside from Russia, other potential adversaries have relatively small nuclear arsenals. Reliable sources show Russia as having a total inventory of approximately 12,000 nuclear weapons, China 240, and North Korea less than 10.<sup>47</sup> If the United States'

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45. *Id.* at v.

46. *Id.* at 19–25.

47. Hans M. Kristensen, Director, Nuclear Information Project, Presentation on Policy Responses to Nuclear Threats: Nuclear Posturing after the Cold War (Nov. 4, 2010), available at [http://www.fas.org/programs/ssp/nukes/publications1/Brief2010\\_NewMexico110410.pdf](http://www.fas.org/programs/ssp/nukes/publications1/Brief2010_NewMexico110410.pdf).

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relationship with Russia could be more deeply reconceptualized and reconfigured, it seems evident that the two countries' arsenals could be reduced much more quickly as part of a process of nuclear elimination.

Also, while the NPR's focus on arms control with Russia is understandable, its failure to embrace such a process with other nuclear weapons states risks sacrificing broader support that might be developed for arms control and abolition. The absence of such a broader effort also undermines the sense that the Obama NPR is genuinely committed to nuclear elimination.

#### F. *Deterrence and Possible Use*

Regarding the continuing role of nuclear weapons, the Obama NPR further states:

The role of nuclear weapons in U.S. national security and U.S. military strategy has been reduced significantly in recent decades, but further steps can and should be taken at this time.

The fundamental role of U.S. nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners.

During the Cold War, the United States reserved the right to use nuclear weapons in response to a massive conventional attack by the Soviet Union and its Warsaw Pact allies. Moreover, after the United States gave up its own chemical and biological weapons (CBW) pursuant to international treaties (while some states continue to possess or pursue them), it reserved the right to employ nuclear weapons to deter CBW attack on the United States and its allies and partners.

Since the end of the Cold War, the strategic situation has changed in fundamental ways. With the advent of U.S. conventional military preeminence and continued improvements in U.S. missile defenses and capabilities to counter and mitigate the effects of CBW, the role of U.S. nuclear weapons in deterring non-nuclear attacks—conventional, biological, or chemical—has declined significantly. The United States will continue to reduce the role of nuclear weapons in deterring non-nuclear attacks.

To that end, the United States is now prepared to strengthen its long-standing “negative security assurance” by declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.<sup>48</sup>

As for the limits of its negative security assurance, the NPR states:

In the case of countries not covered by this assurance—states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations—there remains a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a conventional or CBW attack against the United States or its allies and partners. The United States is therefore not prepared at the present time to adopt a universal policy that deterring nuclear attack is the sole purpose of nuclear weapons, but will work to establish conditions under which such a policy could be safely adopted.<sup>49</sup>

Most striking in this position of the NPR regarding the circumstances in which the United States might potentially use nuclear weapons is the extent to which the United States’ basic posture as to these weapons remains unchanged, notwithstanding the demise of the Soviet Union and end of the Cold War. During the Cold War, the US deterrence policy was addressed primarily against the Soviet Union’s potential use of not only nuclear but also of conventional, chemical, and biological weapons. Today’s US policy is the same: notwithstanding its negative security assurance forswearing use of nuclear weapons against non-nuclear states that are in compliance with their NPT obligations, the Obama NPR continues to threaten the use of nuclear weapons against Russia’s use of not only nuclear but also of conventional, chemical, and biological weapons. Paradoxically, the Obama NPR’s doggedly persistent adherence to Cold War policy is not even in the United States’ interest because, contrary to the Cold War reality, the United States now has a far stronger conventional weapons

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48. NPR, *supra* note 27, at vii–viii.

49. *Id.* at viii.

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capability than Russia. The Obama NPR ignores candidate Obama's recognition that it makes no sense for the United States to still base its nuclear policy and posture on deterring Russia.

As to the circumstances in which the United States might use nuclear weapons, the NPR states:

Yet that does not mean that our willingness to use nuclear weapons against countries not covered by the new assurance has in any way increased. Indeed, the United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners. It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.<sup>50</sup>

Again, it seems evident that the approach of the Obama NPR is that the use of nuclear weapons is perfectly fine and legitimate in extreme circumstances where the United States could not defend its vital interests—as it perceives them—through the use of conventional weapons. How could this not signal to other states that their use of nuclear weapons is perfectly fine and legitimate when their vital interests—as they perceive them—can be served by the use of such weapons? This commitment by the Obama NPR to the usability of nuclear weapons seems devoid of any sense of the excessiveness or illegitimacy and certainly of the potential illegality of such weapons. In a practical sense, the Obama NPR legitimizes nuclear weapons use by all states, based on subjective standards—and does so without any consideration whatsoever of the requirements of international law.

The implications of the US position that the use of nuclear weapons is permissible, based on subjective standards, to defend vital interests are far reaching. As the Obama NPR notes, “[T]he United States today has the strongest conventional military forces in the world. Our close allies and partners field much of the rest of the world’s military power.”<sup>51</sup> Other states may conclude that, if the United States, with its overwhelming conventional weapons capability, still feels it needs nuclear weapons, then they, with

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50. *Id.* at viii–ix.

51. *Id.* at 45.

their far weaker conventional weapons capabilities, have all the more need for such weapons.

The NPR's "strengthen[ing]" of the United States' negative security assurances, "declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations,"<sup>52</sup> ostensibly raises the threshold for the potential use of nuclear weapons. However, the NPR does not provide any objective criteria on what constitutes compliance with a state's nuclear nonproliferation obligations, nor does it establish materiality requirements as to levels of noncompliance. Unfortunately, the ambiguity of this part of the declaration and apparent subjectivity of the underlying determination renders the meaning of the declaration uncertain. While uncertainty and ambiguity can be viewed as enhancing deterrence, the resultant ambiguity can also increase the risks of use.

The Final Document recommends that assurances to non-nuclear states that nuclear weapons will not be used against them be clarified, pursuant to "effective international arrangements," including perhaps "an internationally legally binding instrument."<sup>53</sup> The NPR does not address formalization of the United States negative security assurances in this regard, resulting in a situation in which these assurances are of uncertain or at least debatable legal effect and, at least as a practical matter, could ostensibly be changed unilaterally by the United States at any time.<sup>54</sup>

It also must be recognized that the US deterrence policy is, by its nature, broadly, vaguely, and, often, inconsistently articulated: in a broad but real sense it is simply the threat that the United States has these weapons and may use them if it decides to do so in a particular circumstance. This ambiguity flows in significant part from the wide range of ways of evaluating what is a "vital interest" at a given moment. Nor is it evident that the negative security assurances referenced by the NPR are a

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52. *Id.* at viii.

53. *Final Document*, *supra* note 5, at 22.

54. See John Burroughs, *The U.S. Nuclear Posture Review and International Law*, 22 *MICH. INT'L. LAW.*, Summer 2010, at 2, 6-7 n.16 and accompanying text (arguing that certain of the United States' negative security assurances are legally binding).

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meaningful part of the US policy of deterrence or integrated into its contingent war plans.

Also notable is the NPR's repeated statement that the United States will continue to hold and potentially use nuclear weapons "as long as nuclear weapons exist."<sup>55</sup> Standing alone, this might seem to be merely a statement of reality. However, given the NPR's focus on the continued importance of nuclear weapons to US security for the indefinite future, this statement seems fundamentally to embrace the existence of such weapons.

### G. *Arms Control*

The NPR identifies arms control and limitation steps designed "to bring our nuclear weapons policies and force posture into better alignment with today's national security priorities,"<sup>56</sup> including:

Pursue rigorous measures to reinvigorate the Nuclear Non-Proliferation Treaty (NPT) and the broader non-proliferation regime, and secure vulnerable nuclear materials worldwide against theft or seizure by terrorists;

Seek ratification and entry into force of the Comprehensive Nuclear Test Ban Treaty and prompt commencement of negotiations on a verifiable Fissile Material Cutoff Treaty;

Increase efforts to improve nuclear forensics to attribute the source of any covert nuclear attack, so that the United States can hold accountable any state, terrorist group, or other non-state actor that supports or enables terrorist efforts to obtain or use nuclear weapons;

Adopt a strengthened "negative security assurance" declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapon states that are party to the NPT and in compliance with their nuclear non-proliferation obligations;

Seek ratification and implementation of the New Strategic Arms Reduction Treaty (New START) requiring substantial reductions in deployed U.S. and Russian nuclear forces;

Structure the reduced U.S. force in a way that promotes stability, including "de-MIRVing" U.S. ICBMs;

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55. NPR, *supra* note 27, at iii, v, vii, 1, 6, 15, 40, 47.

56. *Id.* at 45.

Eliminate the Tomahawk, nuclear-equipped, sea-launched cruise missile (TLAM-N);

Strengthen regional security architectures and reinforce security commitments to allies and partners by maintaining an effective nuclear umbrella while placing increased reliance on non-nuclear deterrence capabilities (e.g., missile defenses and conventional long-range missiles);

Work with NATO Allies on a new Strategic Concept that supports Alliance cohesion and sustains effective extended deterrence, while reflecting the role of nuclear weapons in supporting Alliance strategy in the 21st century;

Pursue high-level dialogues with Russia and China to promote more stable, transparent, and non-threatening strategic relationships between those countries and the United States;

Continue to posture U.S. forces and enhance command and control arrangements to reduce further the possibility of nuclear weapons launches resulting from accidents, unauthorized actions, or misperceptions and to maximize the time available to the President to consider whether to authorize the use of nuclear weapons;

Implement well-funded stockpile management and infrastructure investment plans that can sustain a safe, secure, and effective nuclear arsenal at significantly reduced stockpile levels without nuclear testing or the development of new nuclear warheads;

Complete the Presidentially-directed review of post-New START arms control objectives, to establish goals for future reductions in nuclear weapons, as well as evaluating additional options to increase warning and decision time, and to further reduce the risks of false warning or misjudgments relating to nuclear use; and

Initiate a comprehensive national research and development program to support continued progress toward a world free of nuclear weapons, including expanded work on verification technologies.<sup>57</sup>

Many of these measures have the potential to significantly reduce the risks associated with nuclear weapons and could indeed be significant steps on the road to the elimination of

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57. *Id.* at 46–47.

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nuclear weapons. However, others of them seem designed to foster the United States' long-term, continued reliance on nuclear weapons. Still others of them seem to gloss over the real issues.

A significant initiative is pursuing high-level dialogues with Russia and China. What is missing is an initiative for proposing nuclear disarmament to Russia and China, seeking to persuade them of the reasons for such disarmament and to engage them in the actual process. Another initiative of the NPR that falls short is implementing stockpile management and infrastructure investment plans that can sustain an effective nuclear arsenal; "sustaining an effective nuclear arsenal" is a far cry from eliminating the arsenal. The same seems true for the initiative of working with NATO allies to support alliance cohesion and to sustain effective extended deterrence; "sustaining effective extended deterrence" is quite different from eliminating nuclear weapons. Similar questions are raised by the goal of strengthening regional security and reinforcing security commitments by maintaining an effective nuclear umbrella; maintaining "an effective nuclear umbrella" is quite different from eliminating nuclear weapons. Finally, the initiative about structuring a reduced US force seems incomplete. The NPR does not explore whether there might be a way, in connection with potential parallel actions with Russia and China, to structure the US and other nuclear forces in ways that could be conducive to the gradual build-down of such forces as part of a process of nuclear elimination. The foregoing suggests that nuclear weapons are a status quo that will continue for the indefinite future.

#### H. *Failure of the NPR to Change the United States' Fundamental Nuclear Posture*

Robert S. Norris and Hans M. Kristensen described the contemporary composition of the US nuclear arsenal:

The requirement for this many weapons arises from the Nuclear Weapons Employment Policy, signed by then-defense secretary Donald Rumsfeld in 2004, which states in part: "U.S. nuclear forces must be capable of, and be seen to be capable of, destroying those critical war-making and war-supporting assets and capabilities that a potential enemy

leadership values most and that it would rely on to achieve its own objectives in a post-war world.” The most recent military translation of this guidance is Operations Plan (OPLAN) 8010-08 Global Deterrence and Strike, a new strategic war plan put into effect on February 1, 2008. This plan differs significantly from the Cold War-era Single Integrated Operational Plan by including a more diverse “family of plans applicable in a wider range of scenarios” that were first developed for the previous plan, OPLAN 8044 Revision 05, in October 2004. The family of plans is meant to provide national command authorities with “more flexible options to assure allies, and dissuade, deter, and if necessary, defeat adversaries in a wider range of contingencies.” OPLAN 8010 also includes a series of executable, scenario-based strike options, first created in 2003, against regional states with weapons of mass destruction programs, including North Korea and Iran.<sup>58</sup>

They go on to explain that a change in the US nuclear force structure would be necessary to further reduce the size of the US nuclear arsenal:

To achieve further significant reductions—down to say 1,000–1,500 warheads—U.S. nuclear force structure will have to change, as will the guidance that sets out the role of nuclear weapons. This size arsenal would not support a war plan that requires the military to hold at risk all forms of weapons of mass destruction targets; command and control facilities; political and military leadership; and the war-making industries of Russia, China, and a handful of regional states. It would also make it excessive and too expensive to maintain a triad of sea-, land-, and air-based delivery platforms. It will be a formidable challenge, even for a committed executive branch, to bring about the necessary alterations within the military services and combatant commands and gain congressional approval for these changes. Achieving the larger goal of global nuclear disarmament will require other nuclear weapon states to reduce their arsenals as well, an additional hurdle.<sup>59</sup>

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58. Robert S. Norris & Hans M. Kristensen, *Nuclear Notebook: U.S. Nuclear Forces, 2009*, BULL. OF ATOMIC SCIENTISTS, Mar./Apr. 2010, at 59, 60 (internal citations omitted).

59. *Id.* at 60–62 (internal citations omitted).

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The Obama NPR does not appear to have changed the posture of the US nuclear forces to allow the numbers to go to the 1000 to 1500 range. The NPR does not reference OPLAN 8010 Global Deterrence and Strike, which appears to still be in effect.<sup>60</sup> It will be interesting to see what the Obama Administration does with OPLAN 8010.

### I. *Modernization*

The Obama NPR not only suggests that the United States will maintain a robust nuclear weapons capability, but it also makes a substantial commitment to continue and modernize this capability:

In order to sustain a safe, secure, and effective U.S. nuclear stockpile as long as nuclear weapons exist, the United States must possess a modern physical infrastructure—comprised of the national security laboratories and a complex of supporting facilities—and a highly capable workforce with the specialized skills needed to sustain the nuclear deterrent and support the President's nuclear security agenda.<sup>61</sup>

The NPR heralds in stirring terms the need to upgrade the US nuclear infrastructure and attract the best and the brightest scientists and engineers to work in this area, which the NPR laments has fallen into disfavor among scientists.<sup>62</sup> The NPR portrays the US development of a “revitalized” nuclear weapons complex as, in effect, a deterrent against the nuclear aspirations of other states<sup>63</sup>:

[Increased investments in the nuclear infrastructure and a highly skilled workforce], over time, can reduce our reliance on large inventories of non-deployed warheads to deal with technical surprise, thereby allowing additional reductions in the U.S. nuclear stockpile and supporting our long-term path to zero. A revitalized infrastructure will also

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60. Hans M. Kristensen et al., *From Counterforce to Minimal Deterrence: A New Nuclear Policy on the Path Toward Eliminating Nuclear Weapons* 11 (Fed'n of Am. Scientists & The Natural Resources Def. Council, Occasional Paper No. 7, 2009), available at [http://www.fas.org/pubs/\\_docs/OccasionalPaper7.pdf](http://www.fas.org/pubs/_docs/OccasionalPaper7.pdf) [hereinafter Kristensen, *Counterforce*]; see also Norris & Kristensen, *supra* note 58.

61. See NPR, *supra* note 27, at 40.

62. See, e.g., *id.* at 40–41.

63. *Id.* at 41.

serve to reduce the number of warheads retained as a geopolitical hedge, by helping to dissuade potential competitors from believing they can permanently secure an advantage by deploying new nuclear capabilities.<sup>64</sup>

The NPR goes on to characterize a robust, ongoing nuclear weapons complex as a means of deterrence in a nuclear-weapons-free world, should one ever be achieved: “[I]n a world with complete nuclear disarmament, a robust intellectual and physical capability would provide the ultimate insurance against nuclear break-out by an aggressor.”<sup>65</sup> The scope of the physical projects it envisions—such as the construction of a new uranium processing facility at the Y-12 Plant in Oak Ridge and a new Chemistry and Metallurgy Research Replacement Project at Los Alamos National Laboratory<sup>66</sup>—will involve enormous expenditures, as discussed below.

As referenced above, the NPR determines that the United States will retain the “triad” of submarine-launched ballistic missiles (“SLBM”), inter-continental ballistic missiles (“ICBM”), and nuclear-capable heavy bombers.<sup>67</sup> For delivery of SLBMs, the United States currently has fourteen nuclear-capable, Ohio-class strategic submarines (“SSBNs”). Noting that the Ohio-class submarines are old and that the first Ohio-class submarine retirement is planned for 2027, the NPR concludes that the United States needs to continue development of a follow-on to this line of submarines: “[T]he Secretary of Defense has directed the Navy to begin technology development of an SSBN replacement.”<sup>68</sup> Similarly, regarding ICBMs, the NPR states that “[t]he Department of Defense will continue the Minuteman III Life Extension Program with the aim of keeping the fleet in service to 2030, as mandated by Congress.”<sup>69</sup> The NPR goes on to note, “Although a decision on any follow-on ICBM is not needed for several years, studies to inform that decision are needed now.”<sup>70</sup> As to heavy bombers, the NPR notes that both B-52Hs and B-2s will be retained in nuclear roles (some B-52Hs will be

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64. *Id.*

65. *Id.* at 42.

66. *See id.* at 42.

67. *See id.* at ix, 19.

68. *Id.* at 23.

69. *Id.*

70. *Id.*

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converted to a conventional-only role) and that “[t]he Department of Defense (DoD) will invest more than \$1 billion over the next five years to support upgrades to the B-2 stealth bomber.”<sup>71</sup>

The Obama NPR makes similar provisions for “extend[ing] the life of nuclear warheads”:

The Administration will fully fund the ongoing LEP [Life Extension Program] for the W-76 submarine-based warhead for a fiscal year (FY) 2017 completion, and the full scope LEP study and follow-on activities for the B-61 bomb to ensure first production begins in FY 2017.

The Nuclear Weapons Council will initiate a study in 2010 of LEP options for the W-78 ICBM warhead to be conducted jointly by the National Nuclear Security Administration and the Department of Defense. This study will consider, as all future LEP studies will, the possibility of using the resulting warhead also on multiple platforms in order to reduce the number of warhead types.<sup>72</sup>

These plans are not presented in a contingent way to indicate that the US may have to undertake such military projects and expenses if certain milestones towards nuclear elimination cannot be reached. Rather, the ongoing continuation of wide-scale nuclear weapons capability is projected as an ongoing fact of life.

The scope of the NPR’s long-term commitment to nuclear weapons can be seen from the dollars being committed. A “Fact Sheet” released by the White House on November 17, 2010 discloses:

President Obama has made an extraordinary commitment to ensure the modernization of our nuclear infrastructure, which had been neglected for years before he took office. Today, the Administration once again demonstrates that commitment with the release of its plans to invest more than \$85 billion over the next decade to modernize the U.S. nuclear weapons complex that supports our deterrent. This represents a \$4.1 billion increase over the next five years relative to the plan provided to Congress

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71. *Id.* at 24.

72. *Id.* at 39.

in May. This level of funding is unprecedented since the end of the Cold War.<sup>73</sup>

The Obama Administration has also committed additional billions over the next decade to modernize strategic nuclear delivery systems:

In May, the Obama administration committed more than \$100 billion over the next decade to modernizing strategic nuclear delivery systems. The Pentagon is maintaining and replacing its strategic delivery systems, including complete rebuilds of the Minuteman III Intercontinental Ballistic Missile and Trident II Submarine-Launched Ballistic Missile. Minuteman can serve until 2030, and Trident is expected to last until 2042. The service lives of Trident Ohio-class ballistic missile submarines are being extended, and a new fleet of submarines is under development at an expected cost of \$85 billion. The B-2 “stealth” bomber is being upgraded at a cost of \$1 billion over the next 5 years. The Air Force is also planning to replace the Air-Launched Cruise Missile.<sup>74</sup>

These levels of expenditure and the NPR’s enthusiastic embrace of the modernization of the US nuclear capability seem, on the ground, to project a strong belief in the legitimacy and long-term viability of the established nuclear weapons regime, albeit at lower numbers of weapons, resulting, at least in part, from the greatly increased accuracy of delivery systems.<sup>75</sup>

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73. Press Release, The White House, Office of the Press Sec’y, Fact Sheet: An Enduring Commitment to the U.S. Nuclear Deterrent (Nov. 17, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/11/17/fact-sheet-enduring-commitment-us-nuclear-deterrent>.

74. Tom Z. Collina & Daryl G. Kimball, *New START Floor Debate: ACA Rebuttal to Kyl’s 14 Points*, ARMS CONTROL NOW: THE BLOG OF THE ARMS CONTROL ASSOC. (Dec. 17, 2010), <http://armscontrolnow.org/2010/12/17/aca-rebuttal-to-kyl%E2%80%99s-14-points/>

75. A 1991 UN study of nuclear weapons highlighted the relationship between missile accuracy and the level of destructiveness needed for a particular mission:

Missile accuracy is usually given in terms of the circular error probable (CEP), defined as the distance from an aiming point within which, on the average, half the shots aimed at this point will fall. Using this concept, assessments of the efficiency of various missile systems can be illustrated. For example, a 1 Mt nuclear warhead may be needed in order to destroy a particular hardened structure if the CEP of that nuclear weapon is 1 km. The same effect could result from a 125 kt warhead with a 0.5 km CEP accuracy, or a 40 kt warhead with a 0.33 km CEP. Thus, increased accuracy meant that smaller yield warheads could replace high yield warheads as a threat to these types of targets.

The NPR also references that other states, including China and Russia, are engaged in modernization projects.<sup>76</sup> Most conspicuously missing from the NPR, in describing these programs for the wide-scale modernization and expansion of the US nuclear weapons complex, is any suggestion to negotiate an agreement with China, Russia, and other nuclear weapons states to refrain from some of these huge commitments to whole new generations of nuclear weapons. Such an effort at negotiated restraint would seem to be a natural step if the United States is indeed committed to the objective of nuclear elimination—and would appear to be required by the NPT before such vast modernization projects go forward.

#### J. *No New Nuclear Warheads*

The Obama NPR takes the position that the United States will not develop new nuclear warheads, but will limit itself to the refurbishment and reuse of existing warheads—and will not permit replacement of warheads without Congressional approval:

The United States will not develop new nuclear warheads. Life Extension Programs [LEP] will use only nuclear components based on previously tested designs, and will not support new military missions or provide for new military capabilities.

The United States will study options for ensuring the safety, security, and reliability of nuclear warheads on a case-by-case basis, consistent with the congressionally mandated Stockpile Management Program. The full range of LEP approaches will be considered: refurbishment of existing warheads, reuse of nuclear components from different warheads, and replacement of nuclear components.

In any decision to proceed to engineering development for warhead LEPs, the United States will give strong preference to options for refurbishment or reuse. Replacement of nuclear components would be undertaken only if critical Stockpile Management Program goals could

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U.N. Secretary-General, *General and Complete Disarmament: Comprehensive Study on Nuclear Weapons: Rep. of the Secretary-General*, ¶ 118, U.N. Doc. A/45/373 (Sept. 18, 1990).

76. See NPR, *supra* note 27, at 28.

not otherwise be met, and if specifically authorized by the President and approved by Congress.<sup>77</sup>

This sounds like a positive development, but the scope of the modernization projects the NPR supports seems so vast as to raise questions about what distinguishes “new” from “refurbished,” “reused,” or “replaced.” Questions are also raised by the NPR’s statement that the Life Extension Programs “will not support new military missions or provide for new military capabilities.” Reportedly, the LEP for the W76 is adding to its capability to hit hard targets, and the modernization of the delivery systems in some instances increase the weapons’ capability, such as the targeting and command and control of the F-35.<sup>78</sup>

K. *NPR’s Justification for Nuclear Weapons Based on Demands of US Allies*

The NPR argues over and over again that the United States has to continue to maintain its nuclear weapons on a robust basis because its allies and partners demand it, lest they develop their own nuclear weapons:

By maintaining a credible nuclear deterrent and reinforcing regional security architectures with missile defenses and other conventional military capabilities, we can reassure our non-nuclear allies and partners worldwide of our security commitments to them and confirm that they do not need nuclear weapons capabilities of their own.<sup>79</sup>

The NPR further states:

The potential for regional aggression by these states raises challenges not only of deterrence, but also of reassuring U.S. allies and partners. In the Cold War, our allies sought assurance that they would remain safe in the face of Soviet threats because the United States was demonstrably committed to their security. Today’s environment is quite different. Some U.S. allies are increasingly anxious about changes in the security environment, including nuclear and missile proliferation,

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77. *Id.* at xiv.

78. See Greg Mello, *That Old Designing Fever*, BULL. OF THE ATOMIC SCIENTISTS, Jan./Feb. 2000, at 51, 52; see also Burroughs, *supra* note 54, at 5.

79. NPR, *supra* note 27, at vi.

and desire reassurance that the United States will remain committed to their security. A failure of reassurance could lead to a decision by one or more non-nuclear states to seek nuclear deterrents of their own, an outcome which could contribute to an unraveling of the NPT regime and to a greater likelihood of nuclear weapon use.<sup>80</sup>

This position of the NPR is written as if the United States has no influence over the views of its allies and partners on the legitimacy and utility of nuclear weapons. Nowhere does the NPR express the view that nuclear weapons are legally, morally, or pragmatically illegitimate, or propose an initiative whereby the United States might seek to persuade its allies and partners of such problems with the weapons. In fact, there are indications that some major US allies, including Germany and Japan, have a greater interest in nuclear disarmament than the Obama NPR recognizes.<sup>81</sup>

#### L. *Nuclear Non-Proliferation Treaty*

The Obama NPR characterizes the NPT Article VI obligation as being “to make progress towards nuclear disarmament[,]”<sup>82</sup> to “work towards disarmament[,]”<sup>83</sup> to “move toward disarmament,”<sup>84</sup> and “to pursue nuclear disarmament.”<sup>85</sup> Each of these formulations understates the scope of the obligation. Article VI requires each state party to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.”<sup>86</sup> Also, as noted, the ICJ concluded in the *Nuclear*

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80. *Id.* at 4.

81. *See, e.g.*, Ian Traynor, *German Call to Shed Nuclear Arms*, *GUARDIAN* (London), Oct. 15, 2010, at 28 (reflecting Germany's support for nuclear disarmament); Ministry of Foreign Aff. of Japan, Japan's Nat'l Statement at the Washington Nuclear Security Summit (Apr. 12, 2010), *available at* [http://www.mofa.go.jp/policy/un/disarmament/arms/nuclear\\_security/2010/national\\_statement.html](http://www.mofa.go.jp/policy/un/disarmament/arms/nuclear_security/2010/national_statement.html) (reflecting Japan's support for nuclear disarmament); *see also* Permanent Mission of the Kingdom of the Netherlands to the United Nations, Joint Statements by Foreign Ministers on Nuclear Disarmament and Non-Proliferation (Sept. 22, 2010), *available at* <http://www.netherlandsmission.org/article.asp?articleref=AR00001019EN&categoryvalue=statements&subcategoryvalue=2010>.

82. NPR, *supra* note 27, at v.

83. *Id.* at 4.

84. *Id.* at 9.

85. *Id.* at 12.

86. *See* NPT, *supra* note 1, art. VI.

*Weapons* advisory opinion that this is an obligation not just to begin but also to “bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>87</sup> Thus, the obligation is not merely to “work toward” nuclear disarmament but rather to engage in good faith negotiations and actually achieve disarmament.

The NPR argues that the reductions it proposes in the role and number of US nuclear weapons represent movement towards nuclear disarmament and hence put the US in compliance with the NPT.<sup>88</sup> However, this position seems hardly sustainable when the United States is ostensibly not willing to even enter into negotiations for nuclear disarmament and is only cutting back on the nuclear weapons it does not need, while maintaining, developing, and modernizing the nuclear weapons it believes it does need, spending hundreds of billions of dollars for that purpose and for the long-term expansion and maintenance of the physical and human infrastructure for its nuclear weapons complex.

Ultimately, it is hard to see how the US can be in compliance with its NPT obligations unless it is prepared to negotiate nuclear disarmament—to actually sit down with the interested parties and try in good faith to negotiate a nuclear weapons convention or other approach to nuclear disarmament—and to take the steps necessary to cause such negotiations to take place.

No doubt, many of the overt steps the United States would need to take, if it were genuinely committed to achieving nuclear disarmament, would be the same as those set forth in the Obama NPR. Arms-control steps limiting the role and numbers of nuclear weapons certainly could make progress toward nuclear disarmament. Nuclear disarmament would certainly be a process that would involve many steps and take place over many years.

Yet arms control does not necessarily move toward nuclear disarmament. It may just be arms control, an effort to cut back the weapons and limit the risks. Absent a clear and genuine process of nuclear disarmament—a process that the Obama NPR

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87. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 105(2) (F) (July 8).

88. See NPR, *supra* note 27, at 6–7, 17.

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does not commit to creating—arms control, however laudable, is merely arms control.

Quite the opposite of genuinely seeking abolition, the Obama NPR commits to the indefinite maintenance and indeed upgrading and expansion of the United States' nuclear weapons program and espouses the legitimacy of the United States' potential use of nuclear weapons whenever the United States, in its subjective judgment, believes such use would serve its vital interests or those of its partners and allies.

#### M. *Abolition*

In its section “Looking Ahead: Toward a World without Nuclear Weapons,” the Obama NPR sets forth the following objective: “Set a course for the verified elimination of all nuclear weapons and minimize risk of cheating and breakout, through increasing transparency and investments in verification technologies focused on nuclear warheads, rather than delivery vehicles.”<sup>89</sup> The NPR, however, makes it clear that nuclear elimination is not a key objective or concrete initiative. As noted, the NPR is devoid of any suggestion that the United States—or any other nuclear state—enter into negotiations for the elimination of nuclear weapons. As discussed above, it focuses heavily on the non-nuclear weapons states fulfilling their part of the NPT's “grand bargain” and on numerous initiatives to deal with possible efforts by non-nuclear weapons states to obtain nuclear weapons, but it contains no plan or initiative for the nuclear weapons states to actually negotiate disarmament.

The NPR's lack of commitment to negotiating nuclear disarmament is evident from the language the document uses. The elimination of nuclear weapons is described as “an ambitious goal [that] could not be reached quickly—perhaps, [Mr. Obama] said, not in his lifetime.”<sup>90</sup> It is characterized as an “ultimate goal,”<sup>91</sup> an effort to “eventually” eliminate nuclear weapons “over time,”<sup>92</sup> an objective “if international conditions allow,”<sup>93</sup> and as “the long-term goal of U.S. policy.”<sup>94</sup>

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89. *Id.* at 48.

90. *Id.* at iii.

91. *Id.* at xv–xvi, 1, 49.

92. *Id.* at 47.

93. *Id.* at 48.

The Obama NPR set up onerous conditions to this long-term goal of nuclear abolition:

The conditions that would ultimately permit the United States and others to give up their nuclear weapons without risking greater international instability and insecurity are very demanding. Among those are the resolution of regional disputes that can motivate rival states to acquire and maintain nuclear weapons, success in halting the proliferation of nuclear weapons, much greater transparency into the programs and capabilities of key countries of concern, verification methods and technologies capable of detecting violations of disarmament obligations, and enforcement measures strong and credible enough to deter such violations. Clearly, such conditions do not exist today. But we can—and must—work actively to create those conditions.<sup>95</sup>

Perhaps most striking is the condition concerning “resolution of regional disputes.” It seems on its face not only to be unrealistic but also to have the situation exactly backwards. It is because of regional and other disputes that threaten world peace and security—such as those in the Middle East, India-Pakistan, and North Korea-South Korea—that the elimination of nuclear weapons is so important. Of the many that have been recognized as unlawful under international law over hundreds and even thousands of years, no other weapon has had its unlawfulness be subject to the elimination of the bases for conflict. This cynical reversal of the purported goal of elimination seems but an extension of the Obama NPR’s basic attitude that the United States will cut back on nuclear weapons that it does not need—so also, the United States will agree to the elimination of all nuclear weapons once the risk of war has been eliminated, and, until then, it will maintain whatever nuclear weapons it feels, in its own unbridled judgment, it needs. The NPR’s purported promise of elimination “over time” is like a toxic mortgage with the impossibility of the instrument hidden in the fine print. The difficulties of proliferation, verification, and enforcement—difficulties of the highest order—are challenging

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94. *Id.*

95. *Id.* at 48–49; *see also id.* at xv.

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enough obstacles to achieving nuclear elimination without adding the elimination of strife as a condition.

Also sobering is the Obama NPR's view of what nuclear elimination, if ever achieved, would look like: it would not, in this vision, be a world delivered from the threat of nuclear weapons, but rather one in which states were spending billions of dollars annually on inchoate nuclear weapons—nuclear weapons complexes ready to spring into production upon perceived provocation or a change of policy. In language quoted above with reference to the NPR's plans for the reinvigoration and modernization of the US nuclear weapons regime, the NPR states, “[I]n a world with complete nuclear disarmament, a robust intellectual and physical capability would provide the ultimate insurance against nuclear break-out by an aggressor.”<sup>96</sup>

#### N. *Preventing Nuclear Terrorism and Proliferation*

The Obama NPR states that the US approach to preventing nuclear proliferation and terrorism includes three key elements:

First, we seek to bolster the nuclear non-proliferation regime and its centerpiece, the NPT, by reversing the nuclear ambitions of North Korea and Iran, strengthening International Atomic Energy Agency safeguards and enforcing compliance with them, impeding illicit nuclear trade, and promoting the peaceful uses of nuclear energy without increasing proliferation risks. Second, we are accelerating efforts to implement President Obama's initiative to secure all vulnerable nuclear materials worldwide in four years.

And third, we are pursuing arms control efforts—including the New Strategic Arms Reduction Treaty (New START), ratification and entry into force of the Comprehensive Nuclear Test Ban Treaty, and negotiation of a verifiable Fissile Material Cutoff Treaty—as a means of strengthening our ability to mobilize broad international support for the measures needed to reinforce the non-proliferation regime and secure nuclear materials worldwide.<sup>97</sup>

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96. *Id.* at 42.

97. *Id.* at vi–vii.

These are obviously significant and necessary steps. What is missing, as noted above, is a concrete commitment to nuclear abolition, an effort to engage other nuclear states in that commitment, and concrete steps to conceptualizing and implementing the actual process of abolition.

O. *Significance of the United States' Unrivaled Conventional Military Capabilities*

The Obama NPR acknowledges the United States' "unrivaled U.S. conventional military capabilities" and cites them as a reason the United States is able to reduce its reliance on nuclear weapons.<sup>98</sup> Such a reduced reliance by the United States is obviously positive. But beneath the surface of the NPR—and not taken into consideration by the document—is the reality that this US conventional weapons hegemony, standing alone, renders the elimination of nuclear weapons much more difficult—and perhaps impossible. Specifically, nuclear weapons are the "great equalizer." States potentially adverse to the United States that see themselves as substantially weaker in conventional weapons may well feel that it is not a coincidence that the United States, in its various military forays into combat in the post-World War II era, has never initiated military conflict with a state that had nuclear weapons. Such states may find it quite difficult to forswear nuclear weapons absent some redressing of the balance of conventional weapons capabilities.

There is a broader irony here. During the Cold War, the United States, by contemporary accounts, was inferior to the Soviet Union in conventional weapons—and hence relied heavily on the threat of use of nuclear weapons. Now the situation is reversed, and Russia is weaker in conventional weapons and dependent on nuclear weapons. This hard reality reinforces the sense that conventional weapons capabilities will need to be addressed if nuclear abolition is to be achieved.<sup>99</sup>

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98. *Id.* at v.

99. Article VI of the NPT spoke of general as well as nuclear disarmament: "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." NPT, *supra* note 1, art. VI.

*P. A Positive Note: The Establishment of a Comprehensive National Research and Development Program to Foster Nuclear Elimination*

The NPR says the Obama Administration would “[i]nitiate a comprehensive national research and development program to support continued progress toward a world free of nuclear weapons, including expanded work on verification technologies.”<sup>100</sup> This process seems strongly consistent with a good faith effort by the United States to achieve the objective of nuclear disarmament. The implementation of nuclear elimination, under any circumstances, will be challenging and, at best, take many decades to achieve. Obviously an enormous amount of work will be needed to envision, test, and develop how elimination might be achieved. The United States’ experience with the ongoing implementation of the Chemical Weapons Convention may be instructive but will only be a beginning.<sup>101</sup>

*Q. Role of Law/Rule of Law*

Most striking in the Obama NPR’s “thorough” review of US nuclear policies and force structure is the absence of any treatment of the subject of the legal requirements applicable to the use and threat and use of nuclear weapons. The NPR is written as if there are no issues under international law surrounding the lawfulness of the use and threat of use of nuclear weapons. The NPR gives the impression that the US nuclear posture is fundamentally a pragmatic matter of what weapons the United States wants for deterrence or actual use. In reality, there is, as the United States has long recognized, a robust body of international law applicable to the use and threat of use of nuclear weapons—law that severely limits the circumstances, if any, in which nuclear weapons might lawfully be used or threatened. The only law the NPR overtly refers to is the NPT, specifically the obligations imposed on nuclear and non-nuclear states by that convention—and even there, as discussed

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100. NPR, *supra* note 27, at 47.

101. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 45; *see also CWC Treaty*, U.S. BUREAU OF INDUS. & SECURITY, [http://www.cwc.gov/cwc\\_treaty.html](http://www.cwc.gov/cwc_treaty.html) (last visited Mar. 8, 2011) (setting forth various regulations, schedules, and other information as to the implementation by the United States of its compliance with the Chemical Weapons Convention).

above, the NPR substantially understates the legal obligations undertaken by the nuclear weapons states by that convention.

There is one other area in which the NPR appears to be reflecting a view of the requirements of international law regarding the use and threat of use of nuclear weapons. The NPR states repeatedly that “the United States . . . would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners.”<sup>102</sup> The use of the term “extreme circumstances” is curious—and is possibly intended to invoke certain language from the ICJ’s 1996 *Nuclear Weapons* advisory opinion. The ICJ concluded in that case that the use of nuclear weapons is subject to IHL and would generally be unlawful under such law but found itself unable to decide whether or not the use of low-yield nuclear weapons and the use of nuclear weapons in extreme circumstances of self-defense could potentially comply with such law. As to the latter point, the court stated:

Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.<sup>103</sup>

If the Obama NPR’s use of the term “extreme circumstances” is based on a characterization of the ICJ decision as permitting the use of nuclear weapons in extreme circumstances of self-defense, it is misplaced. The ICJ was explicit that it was not determining that the use of nuclear weapons is lawful in extreme circumstances of self-defense in which the very survival of a state is at stake. It determined, quite differently, that it was unable to reach a conclusion on this point.

In addition, while the language of the ICJ decision was unclear at some points, the totality of the ICJ decision was clear that a state’s exercise of its right of self-defense, whether it be in “extreme” or non-extreme self-defense, is subject to IHL. As the ICJ put it, a state’s exercise of the right of self-defense must

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102. See NPR, *supra* note 27, at viii–ix, 16, 17.

103. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 97 (July 8).

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“conform[] to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.”<sup>104</sup>

The ICJ further noted that a state’s exercise of the right of self-defense must also comply with international humanitarian law. The court stated:

The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*): there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. *But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict . . .*<sup>105</sup>

The NPR’s failure to focus on the requirements of IHL and more fully on the requirements of the NPT is lamentable not only as an unfortunate abnegation of the rule of law, but also as a significant lost opportunity. The use and threat of use of nuclear weapons are so clearly and demonstrably unlawful under international law that law offers perhaps the best prospect of convincing the world community that such weapons need to be banned and eliminated. There will always be political, strategic, and military arguments that can be adduced in support of the utility of the use or threat of use of nuclear weapons in particular

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104. *Id.* ¶ 91 (quoting *Legality of the Threat or Use of Nuclear Weapons*, Written Statement of the Government of the United Kingdom ¶ 3.44 (June 16, 1995), available at <http://www.icj-cij.org/docket/files/95/8802.pdf>).

105. *Id.* ¶¶ 40–42 (emphasis added) (quoting *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 176 (June 27)).

situations. Hence, there will always be reasonable sounding arguments for maintaining the nuclear weapons regime, whatever the associated risks. But if the weapons are unlawful, that is potentially a forceful and forward-looking basis for elimination, whatever the putative utility of the weapons in some particular situation. This can be seen from the integration into consciousness of the unlawfulness of the use and threat of use of chemical and biological weapons; this prohibition is basically accepted without even considering the potential usefulness of such weapons in a particular situation.

The fact that nuclear weapons could not be used in deterrence if the use of such weapons was unlawful was acknowledged by the United States in the *Nuclear Weapons* advisory opinion. United States lawyer Michael J. Matheson, in his oral argument to the court, stated:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. If these weapons could not lawfully be used in individual or collective self-defence under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many States.<sup>106</sup>

Nor was this a spontaneous or casual remark. The United States stated in its memorandum to the ICJ:

It is well known that the Permanent Members of the Security Council possess nuclear weapons and have developed and deployed systems for their use in armed conflict. These States would not have borne the expense and effort of acquiring and maintaining these weapons and delivery systems if they believed that the use of nuclear weapons was generally prohibited. On the contrary, the

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106. *Legality of the Threat or Use of Nuclear Weapons*, Verbatim Record, 62–63 (Nov. 15, 1995, 10 a.m.), available at <http://www.icj-cij.org/docket/files/95/5947.pdf>.

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possible use of these weapons is an important factor in the structure of their military establishments, the development of their security doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense.<sup>107</sup>

The Obama NPR leaves the United States with essentially its current nuclear arsenal, subject to some cutbacks per New START and, potentially, to the contemplated follow-up negotiations to take place between Russia and the United States. Review of the known effects of the nuclear weapons in that arsenal reveals that the use and threat of use such weapons is unlawful under IHL.<sup>108</sup> Specifically, applying the legal requirements of IHL—the rules of distinction, proportionality, and necessity and the corollary requirement of controllability—to the known facts of nuclear weapons, including such facts as stated by various judges of the ICJ, it seems evident that nuclear weapons cannot be used consistently with IHL.<sup>109</sup>

### III. WHAT A GENUINELY PRO-ABOLITION NUCLEAR POSTURE REVIEW WOULD LOOK LIKE

The above discussion acknowledges the many positive arms control initiatives of the Obama NPR but criticizes the NPR's failure to establish nuclear disarmament as a concrete objective and to initiate steps to conceptualize and move forward on the process of disarmament in a timely manner. A genuinely pro-abolition NPR would conceptualize its arms control and other initiatives with reference to their potential contribution to achieving abolition. A genuinely pro-abolition NPR would also acknowledge—indeed, highlight—the applicable rules of international law governing the use and threat of use of nuclear weapons and integrate the requirements of such law into the nuclear plans and policies it established. Most centrally, a genuinely pro-abolition NPR would compellingly provide the rationale—moral, practical, and legal—for abolition and

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107. *Legality of the Threat or Use of Nuclear Weapons*, Written Statement of the United States, 14 (June 20, 1995), available at <http://www.icj-cij.org/docket/files/95/8700.pdf> (citing U.N. Secretary-General, *General and Complete Disarmament: Comprehensive Study on Nuclear Weapons: Rep. of the Secretary-General*, ¶¶ 44–81, U.N. Doc. A/45/373 (Sept. 18, 1990)).

108. See Charles J. Moxley Jr. et al., *supra* note 32.

109. See *id.*

acknowledge that nuclear weapons, rather than being a means to security, have become the greatest threat to security, and that deterrence, as stated by Messrs. Kissinger, Nunn, Perry, and Schultz, has become “obsolete” and “decreasingly effective.”

A. *Contrast between the Obama NPR and the Action Plan of the NPT Conference*

As noted above, the Action Plan adopted by consensus, with the support of the United States, as part of the Final Document of the 2010 NPT Conference, recognizes the risks of nuclear weapons and the NPT obligation of the nuclear weapons states to disarm. The Conference provided, as “Action 1,” that “[a]ll States parties commit to pursue policies that are fully compatible with the [NPT] and the objective of achieving a world without nuclear weapons.”<sup>110</sup> The Obama NPR’s overall assertion of the utility and legitimacy of the threat and use of nuclear weapons and commitment to the long-term expansion and modernization of the United States’ nuclear weapons arsenal and program seem wildly incompatible with this NPT commitment of the United States.

B. *A Dose of Realism Moderated by Vision*

A genuine effort by the United States and other nuclear weapons states to “operationalize” President Obama’s vision of a world without nuclear weapons would no doubt be difficult and challenging—and would certainly not be assured of success. What is certain is that, absent a serious effort to achieve this fundamental alteration of the status quo, the risk of nuclear disaster on what could be a cosmic scale remains.

*CONCLUSION*

With significant cut-backs, promises of more, and a commitment to limiting nuclear weapons, the Obama NPR presents a good Cold War, arms-control nuclear posture. As such, it is a significant step forward from America’s previous nuclear posture. At the same time, this NPR continues the United States’ core commitment to nuclear weapons as essential to US national

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110. *Final Document*, *supra* note 5, at 20.

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defense and the defense of its friends and allies: the United States will retain nuclear weapons—as many of them as it thinks it needs at any particular time—for the indefinite future. In the process, it will spend hundreds of billions of dollars upgrading and modernizing its nuclear arsenal for decades to come.

This is not a nuclear posture that moves towards abolition. The NPR's unmistakable premise of the utility, legitimacy, and effectiveness of these weapons is the very antithesis of a commitment to their abolition. As long as this US nuclear policy remains, there will be no nuclear abolition—and the continued proliferation of nuclear weapons can be expected except to the extent the United States or other states are able to stop it in individual instances through pressure, threat, or force.

Profoundly missing in the Obama NPR is any recognition that these weapons threaten human existence. The ultimate premise of the posture is that a state may—without legal or moral restraint—risk the annihilation of human life to foster its own national objectives. Equally troubling is the Obama NPR's utter failure to acknowledge, let alone consider, the requirements of international law applicable to the use and threat of use of nuclear weapons—requirements that the United States knows to be legally binding and applicable to its nuclear posture, including its day-to-day policy of deterrence. The Obama Administration is continuing the monumental risk to human health and survival that nuclear weapons represent.