

## ESSAY

# SIX REASONS WHY NUCLEAR WEAPONS ARE MORE DANGEROUS THAN EVER

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I have good news for you and bad news. The good news is that in a recent issue of the *American Journal of International Law*, there is a summary of a speech that John Bellinger, the legal advisor of the State Department made in Italy a couple of months ago in which he said that the United States is so totally committed to international law that, quoting his boss, Condoleezza Rice, “the United States has been and will continue to be the world’s strongest voice for the development and defense of international legal norms.”<sup>1</sup>

The bad news is that something gets lost in transition between that statement of commitment to international law and the implementation of that commitment. As all of you undoubtedly know, we do not have the best record of compliance with international law in recent years: consider the Kyoto protocol,<sup>2</sup> the International Criminal Court,<sup>3</sup> the International Covenant on Social and Economic Rights,<sup>4</sup> and any number of other very important developments in international law that the United States opposes.<sup>5</sup>

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1. John R. Crook, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law*, 99 AM. J. INT’L L. 891, 891 (2005).

2. Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (Dec. 10, 1997).

3. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

4. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3.

5. See, e.g., First Committee Res. 394, U.N. Doc. A/C.1/61/L.55 (Oct. 12, 2006), adopted by G.A. Res. 89, U.N. Doc. A/Res/61/89 (Dec. 6, 2006) (indicating

The organizers of this conference have asked me to discuss the U.S. position on Article VI, of the Nonproliferation Treaty (“NPT”).<sup>6</sup> My sense is that the U.S. position is that Article VI is dead. Article VI no longer constitutes a commitment for the United States and, as John mentioned, the 13 steps, which were a great achievement of the 2000 NPT Review Conference, are equally dead.<sup>7</sup>

My thesis here is that in a very real sense the need to do something about ridding the world of nuclear weapons is more urgent today than ever. To show you that this is not a particularly radical position I will give you a quote and then I will tell you where it is from. The quote is:

During the Cold War, the main challenge facing the United States was deterring the former Soviet Union from using weapons of mass destruction against the United States and its allies. Today, the United States faces a greater danger from the expanding number of hostile regimes and terrorist groups that seek to acquire and use weapons of mass destruction.<sup>8</sup>

It is from the just released Quadrennial Defense Review Report of the Pentagon, which evidently thinks the danger posed by weapons

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the U.N. General Assembly’s intent to work towards developing a treaty on the “import, export and transfer of conventional arms”); Salt of the Earth: Your Online Resource for Social Justice, U.S. Stands Alone in Opposing Small Arms Treaty, <http://salt.claretianpubs.org/sjnews/2006/11/sjn0611i.html> (last visited Jan. 15, 2007) (stating that on October 27, 2006, the First Committee of the United Nations adopted a resolution designed to start work on a treaty to control the international arms trade and that the vote was 139 for, twenty-four abstained, twenty-eight did not vote, and the United States cast the sole vote against). *See generally* PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S ILLEGAL WAR* (2005) (detailing the United States’ reluctance to comply with international law, such as actively undermining the International Criminal Court and walking away from new international treaties governing global warming).

6. Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 168 [hereinafter NPT].

7. Podcast: John Burroughs, *The Nuclear Non-Proliferation Treaty: A Legal Framework in Crisis*, held by the Washington College of Law (Feb. 9, 2006) available at <http://www.podcast.net/show/10922#SODE106> (fifth panel discussion).

8. U.S. DEP’T OF DEF., *QUADRENNIAL DEFENSE REVIEW REPORT* 32 (Feb. 6, 2006).

of mass destruction is greater today than at the height of the cold war.<sup>9</sup>

I am going to give you six reasons why the need to take Article VI seriously is greater today than ever before.<sup>10</sup> Number one, nuclear weapons have become a justification for preemptive war. In my view, Congress would never have given the President the authority to invade Iraq if Congress had not believed at the time that they were doing it because of Saddam's nuclear weapons program.<sup>11</sup> And that kind of thinking is now likely to repeat itself. Who knows what we're going to do about Iran or North Korea or the next country that says to the world "if the eight countries that have them now think they need nukes for their security, why not we?" All we know is that "all options are on the table," including, at least in the case of Iran, the nuclear option.<sup>12</sup>

Number two, there is the effect that nuclear weapons have on civil rights and civil liberties. The specter of the mushroom cloud over Manhattan, as alluded to by Condoleezza Rice, has become the justification for every derogation from long accepted "absolute" norms, like the prohibition of torture<sup>13</sup> or of warrantless wiretapping.<sup>14</sup>

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9. *Id.*

10. NPT, *supra* note 6, art. VI, 21 U.S.T. at 490, 729 U.N.T.S. at 173.

11. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002) (authorizing commencement of war against Iraq due to their nuclear weapons program); Press Release, Security Council, Security Council Holds Iraq in 'Material Breach' of Disarmament Obligations, Offers Final Chance to Comply, Unanimously Adopting Resolution 1441 (2002), U.N. Doc. SC/7564 (Nov. 8, 2002) (finding that Iraq was in "material breach" for refusing to submit to inspections for nuclear weapons).

12. See Bush: 'All options are on the table' regarding Iran's nuclear aspirations, USATODAY.COM, Aug. 13, 2005, [http://www.usatoday.com/news/washington/2005-08-13-bush-iran-nuclear\\_x.htm](http://www.usatoday.com/news/washington/2005-08-13-bush-iran-nuclear_x.htm) (reporting that Bush has warned Iran that "all options are on the table" if Iran does not suspend its nuclear program).

13. Not only Alan Dershowitz, the Harvard Law Professor, but Senator Hillary Clinton are now on record as accepting torture in extreme situations, such as the ticking bomb scenario. See Alan M. Dershowitz, Op-Ed., *Torture and Accountability*, L.A. TIMES, Oct. 17, 2006, at B13 (explaining that Dershowitz has proposed that the President or federal judges should determine when the use of torture is appropriate, and take personal responsibility for that decision, so that its use is limited to extreme "ticking bomb" situations); Rosa Brooks, Op-Ed., *Down the Slippery Slope with Hillary*, L.A. TIMES, Oct. 20, 2006, at B13 (quoting

Number three, nuclear weapons have been redefined as virtually conventional weapons. For most of the years since the NPT came into effect, nuclear weapons have been regarded as the very ultimate weapon to be used only in the most extraordinary circumstances.<sup>15</sup> If you read the 2006 Quadrennial Defense Review Report, you will see that nuclear weapons are now part of a triad of deterrent weapons to be used in any number of situations.<sup>16</sup> And not only the United States is taking that position but it is spreading now to other countries. President Chirac made a remarkable statement the other day in which he said that France would not necessarily refrain from using nuclear weapons in reply to terrorist attacks.<sup>17</sup> So all options are now on the table, at the Elysée, as well as at the White House.

The fourth point is that nuclear weapons in the hands of terrorists did not exist during the Cold War.<sup>18</sup> This is a very real problem. Will terrorists use nuclear weapons? Who knows? Terrorists do all kinds of crazy things that they don't consider crazy. Also, President Ahmadinejad of Iran is on record as saying Israel has to be wiped off the map and "with the force of God behind it, we shall soon experience a world without the United States and Zionism."<sup>19</sup> This

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Senator Clinton as saying "that the president should have 'some lawful authority' to use torture or other 'severe' interrogation methods in a so-called ticking bomb scenario").

14. Cf. Peter Weiss & John Burroughs, *Weapons of Mass Destruction and Human Rights*, 3 DISARMAMENT FORUM 24 (2004), available at <http://www.unidir.org/pdf/articles/pdf-art2139.pdf>.

15. Keith B. Payne, *Precise and Powerful*, NATIONAL REVIEW, May 17, 2004, available at <http://www.nationalreview.com/comment/payne200405170730.asp> (recognizing the long-standing principle in the United States that nuclear weapons are not conventional weapons, and therefore, should only be used in the most extreme situations).

16. See U.S. DEP'T OF DEF., *supra* note 8, at 49 (describing how the more tailored approach the Defense Department is now taking, instead of its previous approach of assuming that "one size fits all," may include the use of weapons of mass destruction).

17. See Molly Moore, *Chirac: Nuclear Response to Terrorism is Possible*, WASH. POST, Jan. 20, 2006, at A12.

18. See U.S. DEP'T OF DEF., *supra* note 8, at 32 (emphasizing that during the Cold War, the U.S. goal was to prevent the former Soviet Union, from using weapons of mass destruction, but today the United States is fighting terrorist groups who have the potential to acquire nuclear weapons but who may not be deterred by tactics the United States used to prevent state use of weapons of mass destruction).

19. See *id.* at 32 (quoting Iranian President Ahmadinejad's October 2005

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is a problem that will not go away as long as the nuclear weapon states declare their intention to hold on to their nukes forever.

Number five, which is related to number four, is the unwillingness of the nuclear weapon states to honor their commitments under Article VI and the “unequivocal undertaking” that they gave in the 2000 NPT Review Conference to abolish their nuclear arsenals, an undertaking which, despite its unequivocal nature, they refused to reaffirm at last year’s conference.<sup>20</sup>

I note in this connection that the United States has discovered a weapon of mass destruction which is called the agenda gambit.<sup>21</sup> It works like this. You go to a treaty conference or a treaty review conference which you would prefer not to reach any conclusions. You debate the agenda until almost the end of the conference and voilà, the conference is over and no conclusion has been reached. In the case of the last NPT conference, believe it or not, the agenda discussion lasted for three out of the four weeks scheduled. At the end absolutely nothing came out of it, except the statement by the United States that the achievements of the 2000 conference were political rather than legal in nature.<sup>22</sup>

The capable chair of the 2005 NPT Review Conference, Ambassador Duarte of Brazil, summed it up by stating that the international community had reached a crossroads with regard to nuclear disarmament and proliferation.<sup>23</sup> He also said, “[i]f previous

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statement).

20. See NPT Review Conference, April 24-May 19, 2000, *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, 14, U.N. Doc. NPT/CONF.2000/28 (Parts I and II) (May 19, 2000) (agreeing to thirteen steps to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons including step six, an “unequivocal undertaking” to totally eliminate their nuclear arsenals “leading to nuclear disarmament”).

21. See Claire Applegarth, *Divisions Foil NPT Review Conference*, ARMS CONTROL TODAY, June 2005 at 39 (finding that the United States and other parties argued over the agenda and other procedural issues for nearly three weeks before the substantive debate began).

22. Press Release, United States Mission to the United Nations, Closing Statement by Ambassador Jackie W. Sanders, Special Representative of the President for the Non-Proliferation of Nuclear Weapons, to the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (May 27, 2005), available at [http://www.usunnewyork.usmission.gov/05\\_107.htm](http://www.usunnewyork.usmission.gov/05_107.htm).

23. See Press Briefing, United Nations, Press Conference on Non-Proliferation Treaty (May 27, 2005), available at

commitments made by State Parties are regarded as mere symbolic gestures confidence on the effectiveness of the treaty will certainly erode.”<sup>24</sup>

Finally, my sixth point is the energy crisis. You all heard what the President said in the State of the Union message.<sup>25</sup> We have to reduce our dependence on oil. But ethanol alone is not going to do it. As a result, there is going to be, indeed there is already, a strong push to revive nuclear power and as long as that happens the danger of enriched uranium being diverted to weapons production will not only remain, but it will grow.

Now, what is to be done? In his summary of the 2005 NPT Review Conference, Ambassador Duarte said, “[c]ertainly, the civil society would also have a role to play.”<sup>26</sup> Many of us have had the experience of hanging out in the halls of the United Nations, talking to the delegates and saying do this or do that. Ambassador Duarte, in effect, said you’re wasting your time; you have to go to their bosses, you have to go to the Secretaries of State, and you have to go to the Presidents.

For people who agree that commitment to complete nuclear disarmament is a *sine qua non* for nonproliferation to work there are organizations they can join. There is Abolition 2000, a global network of 2000 organizations in over 90 countries working for a treaty abolishing nuclear weapons, similar to the chemical and biological weapons treaties.<sup>27</sup> There is a new organization called Faithful Security: National Religious Partnership on the Nuclear

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<http://www.un.org/News/briefings/docs/2005/NPTpc050527.doc.htm>.

24. Ambassador Sergio de Queiroz Duarte, President-designate of the NPT 2005 Review Conference, Presentation at the Atlanta Consultation II on the Future of the NPT (Jan. 26-28, 2005) (transcript available at [http://www.middlepowers.org/mpi/pubs/atlanta\\_duarte.pdf](http://www.middlepowers.org/mpi/pubs/atlanta_duarte.pdf)).

25. See Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145 (Jan. 31, 2006) (detailing President Bush’s plan to develop alternative energy sources through new technology).

26. Press Briefing, United Nations, *supra* note 23.

27. Abolition 2000 Global Network, <http://www.abolition2000.org/site/c.cdJIKKNpFqG/b.1315003/k.BCFA/Home.htm> (last visited Jan. 30, 2007) (stating that Abolition 2000 was founded by non-governmental organizations in 1995 after the Non-Proliferation Treaty did not even consider nuclear abolition).

Weapons Danger.<sup>28</sup> There is the Nuclear Age Peace Foundation<sup>29</sup> in California and the Lawyers Committee on Nuclear Policy<sup>30</sup> in New York. Given the stubborn adherence of the growing number of nuclear weapons states to their nuclear arsenals, those organizations, and civil society at large, have to find some way of reaching what the New Yorker writer Malcolm Gladwell calls the tipping point.<sup>31</sup> Nuclear proliferation cannot be discussed simply in terms of export controls and verification without taking into account what the President of the International Court of Justice called nuclear weapons in the Nuclear Weapons Case; he called them “the ultimate evil.”<sup>32</sup>

Discussing nonproliferation simply in terms of whether it works or not is like discussing torture only in terms of whether it produces what Secretary Rumsfeld calls “actionable intelligence” without considering the legal or moral dimensions of torture.<sup>33</sup> Some of the strongest and most credible voices against nuclear weapons come from those who at some point in their careers have had to struggle in the dark of night and reconcile their conscience to the idea that at some point they might order, or be commanded to order, the use of nuclear weapons. One of those is former Defense Secretary Robert McNamara who, now says that nuclear weapons are illegal, immoral, militarily useless, and incredibly dangerous.<sup>34</sup> I think he has it exactly right.<sup>35</sup>

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28. Faithful Security: National Religious Partnership on the Nuclear Weapons Danger, <http://www.faithfulsecurity.org> (last visited Mar. 6, 2007).

29. Nuclear Age Peace Foundation, <http://www.wagingpeace.org> (last visited Jan. 30, 2007) (advocating the elimination of nuclear weapons throughout the world).

30. Lawyers Committee on Nuclear Policy, <http://www.lcnp.org/> (last visited Jan. 30, 2007) (stating their belief that nuclear states have a legal obligation under Article VI of the Non-Proliferation Treaty to abolition nuclear weapons within the established timeframe).

31. MALCOLM GLADWELL, *THE TIPPING POINT* 9 (Back Bay Books 2002) (defining the Tipping Point as that dramatic moment when everything can change at once and explaining that there are three characteristics involved in the Tipping Point including contagiousness, the fact that little causes can have big effects and that change does not happen gradually but immediately).

32. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 93 (July 8) (Declaration of President Bedjaoui) (declaring that nuclear weapons are the “ultimate evil” because they destabilize humanitarian law).

33. Nat Hentoff, *On Rumsfeld's Watch*, VILLAGE VOICE, Nov. 15, 2005 at 24 (describing Rumsfeld condoning torture in order to get “actionable intelligence”).

34. See Press Briefing, United Nations, Press Conference on Non-Proliferation

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Treaty (May 24, 2005), available at <http://www.un.org/News/briefings/docs/2005/NPTpc050524.doc.htm>.

35. See Kofi Annan, U.N. Secretary General, Lecture at Princeton University (Nov. 28, 2006) (transcript available in Press Release, In Lecture at Princeton University, Secretary-General Calls for Progress on Both Nuclear Disarmament, Non-proliferation, U.N. Doc. SG/SM/10767 (Nov. 28, 2006)) (discussing the nuclear dilemma Annan said “I said earlier this year that we are ‘sleepwalking towards disaster.’ In truth, it is worse than that—we are asleep at the controls of a fast-moving aircraft. Unless we wake up and take control, the outcome is all too predictable”).