

Nuclear Weapons, the NPT, International Law and Implications for Scotland Briefing for Members of the Scottish Parliament

Dr Rebecca Johnson, April 16, 2008

**Background information and intro for Edinburgh Conference on Trident and International Law:
Scotland's Obligations, February 3, 2009.**

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force in 1970 in order to prevent the spread of nuclear weapons. The Treaty covers non-proliferation, nuclear disarmament, civilian uses of nuclear energy for 'peaceful purposes' and nuclear weapon free zones. It recognised differential obligations for the states that joined as non-nuclear weapon states (now 184) – not to seek to acquire nuclear weapons or technologies – and the 5 'nuclear weapon states' (NWS) – not to transfer weapons or technologies and to pursue nuclear disarmament. The NWS were defined as those that had conducted a nuclear explosion and were deemed to have crossed the nuclear threshold – Britain, China, France, the Soviet Union (now Russia) and the United States. Three states remain outside the NPT: India, Israel and Pakistan. North Korea's status after its withdrawal announcement in 2003 is uncertain.

Background on NPT and UK's obligations to eliminate the nuclear arsenal

The NPT was originally given 25 years duration. In 1995 175 states parties and a number of observing states participated in a Review and Extension Conference. After four weeks of intensive negotiating, where many complained that the NWS had not made enough progress to comply with their Article VI obligations on disarmament, the Conference made a deal in which two substantive decisions on Principles and Objectives for Nuclear Non-Proliferation and Disarmament and Strengthening the Treaty were adopted before the decision to extend the NPT indefinitely. These three decisions were linked together, as a package, and passed without a vote. Later the Conference also adopted a Resolution on the Middle East. Building on these decisions, NPT parties now hold three 'Preparatory Committee' (PrepCom) meetings of two weeks duration in the years before the five-yearly review conferences. These meetings are attended by states parties, observers and NGOs. Currently the Review Conferences but not the PrepComs have decision-making powers.

Without these three decisions and the resolution, it is unlikely that the NPT would have been extended indefinitely. Certainly, it could not have been extended by consensus, which was important for maintaining collective "ownership" of the non-proliferation regime, regarded as essential for its sustainability and credibility into the future. The consequence of this, as international lawyers have attested, is that the NPT now in force is the Treaty as extended in May 1995.

Though the Treaty was not formally amended, the way in which the extension decision was taken only after the two decisions on Principles and Objectives and on strengthening the review process had been adopted without a vote, means that they are an integral part of the legal obligation and meaning of the NPT.¹ In other words, the post-1995 NPT, which is now in operation, is not the same as the original NPT that entered into force in 1970. With regard to disarmament in particular, the obligations are stronger and more specific.

In the summer of 1996, the International Court of Justice (ICJ), responding to requests from the UN General Assembly and World Health Organization, delivered an important Advisory Opinion on the use and threat of use of nuclear weapons. This spelled out the Court's unanimous assessment that "*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its*

¹ The Resolution on the Middle East has different, more contingent status, as it was a resolution rather than a decision, and adopted after the Treaty had been extended.

*aspects under strict and effective international control.*²

The Court also established that the use of nuclear weapons would “*generally be contrary to the rules of international law applicable in armed conflict and in particular the principles and rules of humanitarian law*”, though they could not definitively agree whether “*the use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake*”.³

The ICJ drew from Article VI of the NPT, but gave it additional legal force and urgency, first by emphasising that the obligation is not only to negotiate in good faith, but to bring the negotiations to conclusion, and secondly, by not making nuclear disarmament contingent on general and complete disarmament, a linkage that some nuclear weapon states have relied on to justify keeping their nuclear arsenals.

The first Review Conference of the NPT following the 1995 extension took place in May 2000.⁴ After tough negotiations, representatives of 187 countries gave consensus to a very substantial final document containing agreements that covered a range of measures, from deploring the 1998 nuclear tests by India and Pakistan to diplomatic language on Iraqi non-compliance. It reaffirmed the goals of the Resolution on the Middle East, emphasised the importance of the strengthened IAEA safeguards, and mentioned for the first time environmental and safety concerns around issues such as the transshipment of radioactive materials and the nuclear fuel cycle. Most importantly, the States Parties endorsed an “*unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals*”, as part of a 13-paragraph plan of action for the implementation of Article VI.⁵

Other steps included: entry into force of the Comprehensive Test Ban Treaty (CTBT); conclusion of a fissile materials production treaty (fissban); moratoria both on testing and on production of plutonium and highly-enriched uranium (HEU), pending entry into force of those treaties; deeper unilateral and bilateral US-Russian reductions in nuclear forces; transparency (i.e. the provision of more open information on nuclear capabilities and the implementation of disarmament agreements); reductions in non-strategic (tactical) nuclear weapons; concrete measures to reduce the operational status of nuclear weapons (diplomatic euphemism for taking the weapons off alert); diminishing the role of nuclear weapons in security policies (understood to mean abandoning the potential first use of nuclear weapons that underpins NATO and Russian nuclear doctrine and deterrence); the principle of irreversibility to be applied to nuclear arms control; five power disarmament approaches; and further initiatives to put fissile materials (declared “excess”) permanently under safeguards.

Under the NPT Britain is legally required to eliminate all nuclear weapons

On three occasions during 2004-6, eminent British and international lawyers⁶ gave authoritative Advice that

² Decision F, International Court of Justice Reports 1996, p 225. [Reported for July 8, 1996, General List No. 95]. The full decision, documentation and dissenting decisions also formed the Annex to ‘Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons’, Note by the Secretary-General, United Nations General Assembly A/51/218, October 15, 1996 pp 36-37.

³ Decision E, International Court of Justice Reports 1996, op. cit.

⁴ For a detailed examination of the political context and choices before the Sixth Review Conference, see Rebecca Johnson, *Non-Proliferation Treaty: Challenging Times*, ACRONYM 13, The Acronym Institute, London, February 2000.

⁵ 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, adopted May 20, 2000, New York, NPT/CONF.2000/28 (Part I).

⁶ Rabinder Singh QC and Professor Christine Chinkin (Matrix Chambers and London School of Economics) and Philippe Sands QC were consulted by different clients and gave different but consistent Advice regarding the NPT and the British government’s proposed renewal of its nuclear cooperation pact with the United States (the Mutual Defence

the consensus decisions and agreements adopted by NPT states parties in 1995 and 2000 have become part of the legal meaning and interpretation of the Treaty. They argued that Article VI contained legal obligations, consistent with Articles I, II and III, and that strict observance with the letter and the spirit of the NPT is required of all its parties including the nuclear weapon states. This, they said, applies to the disarmament obligation no less than the non-transference and non-acquisition obligations.⁷

Rabinder Singh QC and Professor Christine Chinkin (Matrix Chambers and London School of Economics) asserted in the first Advice (2004) that *“The importance of Article VI to the objects and purposes of the NPT is shown both by the negotiation history of the NPT and by the reaffirmation of its significance by the 2000 Review Conference. The Review Conference also emphasised that strict observance of the NPT is required, that is observance with both the letter and spirit of its articles.”* [para 36] In relation to the specific principles and steps negotiated by states parties and agreed in 1995 and 2000, *“A Declaration of a Review Conference such as that adopted by consensus [in 1995 or 2000] would fall within the wording of article 31 (3) (a) [of the Vienna Convention on the Law of Treaties (VCLT)] and is thus an appropriate source of interpretation of the obligations of the NPT.”* [para 20]⁸

Following on from this interpretation in a further Advice in 2005, Singh and Chinkin concluded that:

- The use of the Trident system would breach customary international law, in particular because it would infringe the “intransgressible” requirement that a distinction must be drawn between combatants and non-combatants;
- Article VI is a provision ‘essential to the accomplishment of the object or purpose of the treaty’.
- The replacement of Trident is likely to constitute a breach of Article VI of NPT; and
- Such a breach would be a material breach of that treaty.⁹

This Advice rested in part on Britain’s active negotiation and the consensus adoption of the 2000 NPT final document, which included the aforementioned *“unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals”*, as part of a 13-paragraph plan of action for the implementation of Article VI. Though recent reductions are of course welcomed, this clarification of Article VI makes clear that the obligation is elimination of the arsenals, not just reductions.

Singh and Chinkin further underscored, *“Enhancing nuclear weapons systems... is, in our view, not conducive to entering into negotiations for disarmament as required by the NPT, article VI and evinces no intention to ‘bring to a conclusion negotiations leading to nuclear disarmament in all its aspects’.* It is

Agreement, originally signed in 1958 and renewed several times thereafter) and procurement of a further nuclear weapon system as a follow-on to Trident. See www.acronym.org.uk

⁷ Under Article I, the defined nuclear weapon states have a set of obligations *“not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”* This paralleled the Article II obligation on states joining the Treaty as non-nuclear weapon states *“not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”*

⁸ Rabinder Singh QC and Prof. Christine Chinkin (LSE), *Mutual Defence Agreement And The Nuclear Non-Proliferation Treaty*, (London: Matrix Chambers, July 20, 2004). Discussion and full text of the legal advice can be found at www.acronym.org.uk/dd78

⁹ Rabinder Singh QC and Professor Christine Chinkin, *The Maintenance and Possible Replacement of the Trident Nuclear Missile System*, Joint Opinion, Matrix Chambers, published by Peacerrights, December 19, 2005.

difficult to see how unilateral (or bilateral) action that pre-empts any possibility of an outcome of disarmament can be defined as pursuing negotiations in good faith and to bring them to a conclusion and is, in our view, thereby in violation of the NPT, article VI obligation.”¹⁰

Although there is no treaty that explicitly and universally prohibits the use and acquisition of nuclear weapons by the 5 states ‘recognised’ in the NPT, there are other laws that apply, including the UN Charter and the law of armed conflict. The fundamental rules of humanitarian law constitute “intransgressible principles of international customary law”.¹¹ According to international humanitarian law, states that use force must do so with discrimination i.e. not make civilians the object of attack. Nor should states cause unnecessary suffering. Even with regard to *combatants*, states are prohibited from causing harm greater than that which is “absolutely unavoidable to achieve legitimate military objectives”.

Though the United States and Britain say they recognise the applicability of the rules of proportionality, discrimination, moderation, and civilian immunity, their nuclear doctrines and policies violate these rules.¹² The doctrine of nuclear deterrence as practised by the United Kingdom, for example, relies on continuous at sea patrols by at least one submarine armed with up to 48 nuclear weapons carrying up to 4,800 kilotonnes of explosive power. The reason given for this is that potential adversaries should take into account that the UK is ready and able to use nuclear weapons at any time. Hence the deployment of Trident constitutes both an ever-present threat and, some would argue, a “use” of nuclear weapons similar to the use a robber makes of a gun when brandishing it in a bank, even if the gun is never actually fired. Moreover, having concluded that the use of nuclear weapons would generally breach international and humanitarian law, the ICJ also confirmed that “it is unlawful to threaten to do that which it is unlawful to do.”¹³

Trident renewal criticised at 2007 NPT Meeting

The international context in which the UK government is seeking to modernise and renew Britain’s nuclear weapons is utterly different from that of the cold war, when Mrs Thatcher over-ruled her navy chiefs to saddle Britain with Trident first time round.¹⁴ The priority security imperative is to find collective ways to mitigate and survive the effects of global warming and climate change. Within that context, most countries also put emphasis on the importance of reducing nuclear dangers and preventing WMD capabilities from falling into the hands of anyone who might use them (labelled ‘terrorists’). The failure of the 2005 NPT Review Conference was deeply troubling, and it was widely recognised that a primary reason for this failure was the repudiation by some of the nuclear powers – most notably the United States – of disarmament commitments agreed by the 2000 Review Conference.¹⁵

¹⁰ Ibid.

¹¹ ICJ Report, op. cit., para 79.

¹² Charles J. Moxley, Jr, *Nuclear Weapons and International Law in the Post Cold War World*, Austin & Winfield, 2000. Moxley specifically raised concerns that the continued pursuit of nuclear deterrence policies introduces “significant risk factors with implications both for security and for compliance with the principles and obligations in the international, US and British legal systems: the danger of precipitating a nuclear war; the fostering of an arms race; the fostering of nuclear proliferation; the risks of terrorism; the risks of human and equipment failure; risks of testing, production, storage and disposal of nuclear weapons materials; the risk of the degradation of conventional weapons capability; jeopardy to rule of law; and overriding risk factors as to the likelihood that the unlikely will occur”.

¹³ Moxley, op. cit.

¹⁴ The First Sea Lord, Sir Henry Leach, dismissed Trident in 1979 as “a cuckoo in the [naval] nest”. See Eric J. Grove, *Vanguard to Trident: British Naval Policy since World War Two* (London: Bodley Head, 1987) pp 347-354.

¹⁵ Rebecca Johnson, ‘Politics and Protection: Why the 2005 NPT Review Conference Failed’, *Disarmament Diplomacy* 80 (Autumn 2005), pp 3-32; and Sergio Duarte, ‘A President’s Assessment of the 2005 NPT Review Conference’, *Disarmament Diplomacy* 81 (Winter 2005), pp 3-5. For further information on the 2000 NPT Review Conference, see Rebecca Johnson, ‘The 2000 NPT Review Conference: A Delicate, Hard-Won Compromise’, *Disarmament Diplomacy* 46

Britain has long presented itself as upholding and strengthening the NPT. From the 1998 Strategic Defence Review to Margaret Beckett's speech before leaving office in June 2007, the Labour government has emphasised its "commitment to a world free of nuclear weapons".¹⁶ Defence Secretary Des Browne told the Conference on Disarmament in Geneva, February 2008, that "the international community needs a transparent, sustainable and credible plan for multilateral nuclear disarmament" and spoke of a "shared vision of a world free of nuclear weapons".¹⁷ But while in statements and conferences – at home and abroad – British representatives portray the UK as taking the lead internationally in non-proliferation, disarmament and verification, the March 2007 decision has forced other countries to see Britain as embedding its nuclear weapon possession and preparing to procure the next generation of nuclear weapons, thereby obstructing and impeding efforts to get meaningful progress towards devaluing and genuinely eliminating nuclear arsenals.

Although many governments have toned down or generalised their public criticisms, the UK's plans to build a new generation of Trident has been deplored by many. At the 2007 Preparatory Committee meeting for the NPT, for example, Ireland, speaking on behalf of the New Agenda Coalition of non-nuclear states, objected that the "replacement or modernization of nuclear weapons" ran "counter to the agreement reached at the 2000 Review Conference ... to eliminate these weapons". A statement on behalf of over 110 non-aligned states parties, was clear where the primary responsibilities lay: "The nuclear weapon states and those states remaining outside the NPT continue to develop and modernize their nuclear arsenals, threatening international peace and security. We must all call for an end to this madness and seek the elimination and ban on all forms of nuclear weapons and testing as well as the rejection of the doctrine of deterrence."¹⁸ South Africa was even more explicit in its condemnation, saying: "We were disappointed to learn about the decision of the UK on the Trident to maintain its nuclear deterrent. This could have been a landmark decision for others to follow, which could have provided the necessary impetus to a disarmament process that desperately needs to be reinvigorated."¹⁹

The UK's response to these criticisms was to declare that the vote in March was only "to begin the concept and design work required to make possible a replacement for our current submarine fleet" together with a decision "to participate in a programme to extend the life of the Trident D5 missile system". This, said Ambassador John Duncan, "does not mean that we have taken an irreversible decision that commits us irrevocably to possessing nuclear weapons in 40 or 50 years' time." He then stated, "Any suggestion that the UK is further developing its nuclear weapons is a misunderstanding. The UK is retaining *not* modernising its deterrent. There is *no* change in the capabilities of the system, *no* move to produce more useable weapons and *no* change in nuclear posture or doctrine. The UK's nuclear weapon system will *not* be designed for war-fighting use in military campaigns. It is a strategic deterrent that we would only ever contemplate using in extreme circumstances or self defence."²⁰

Such assertions were belied by the evidence in documents from civil society. Nongovernmental publications about Trident renewal, including an open letter from the heads of Scotland's Catholic and Protestant

(May 2000), pp 2-21; and Rebecca Johnson, 'Towards Nuclear Disarmament' in W.Huntley, K.Mizumoto and M.Kurosawa (eds.), *Nuclear Disarmament in the Twenty-First Century*, Hiroshima Peace Institute, 2004.

¹⁶ Margaret Beckett, Secretary of State for Foreign and Commonwealth Affairs, *Speech to the Carnegie Endowment of International Peace Non-Proliferation Conference*, Washington DC, June 25, 2007.

¹⁷ Des Browne, Secretary of State for Defence, *Speech to the Conference on Disarmament*, Geneva, February 5, 2008.

¹⁸ Norma Goicochea Estenoz, Ambassador of Cuba on behalf of the Group of Non-Aligned States Parties to the NPT, statement in General Debate, First Preparatory Meeting of States Parties to the NPT, Vienna, April 30, 2007.

¹⁹ Abdul Samad Minty, Special Representative for Disarmament for South Africa, General Debate and Cluster I Statements, First Preparatory Meeting of States Parties to the NPT, Vienna, April 30, 2007.

²⁰ 'UK working paper on disarmament', NPT/CONF.2010/PC.I/WP.59. Emphasis in the original.

Churches, Cardinal Keith Patrick O'Brien and the Right Reverend Alan D. McDonald, were distributed to all delegations, reminding them of Scottish opposition to Trident and civil society protests against Trident deployment at Faslane. The Scottish Church leaders' letter stated, "We consider these weapons of mass destruction to be immoral, inhumane, and contrary to the teachings of all the world's major faiths. Nuclear dangers and human insecurity will increase if nuclear weapons continue to be treated by some countries as a currency of power or as if they were an indispensable part of defence for the foreseeable future." The letter quoted from the 2006 General Assembly of the Church of Scotland that: "To replace Trident would represent a further announcement to the world that safety and security can only be achieved by threatening mass destruction; this is to encourage others to believe the same, and thus to hasten proliferation." Urging the British government "to take this historic opportunity to devalue these 'weapons of terror' and renounce its plans to renew Trident", the letter emphasised that: "Such a step would strengthen the NPT and underline that its core obligation is not just to reduce nuclear arsenals, but to eliminate them. We believe that, instead of perpetuating nuclear proliferation, Britain could show real leadership and humanity."

Despite the UK diplomats' efforts to portray Britain's procurement of the next generation of Trident as a done deal (and also as merely a step to replace the submarine platforms), civil society promoted considerable discussion about the UK debate and developments at Faslane and Aldermaston. NPT delegations showed particular interest in how the Scottish elections of May 3 2007 might affect UK nuclear policy. Many were also astonished when informed in a press release that nuclear warheads had been transported across Edinburgh on the penultimate day of the NPT meeting.

The working paper produced by the Chair of the 2007 PrepCom, Ambassador Yukiya Amano, put on the record: "*Concern and disappointment were voiced about plans to replace or modernize nuclear weapons and their means of delivery or platform, the increased role of nuclear weapons in strategic and military doctrines, and the possibility of lowering the threshold for the use of nuclear weapons.*" In case anyone was in any doubt about which plans were causing such concern and disappointment, paragraph 12 explicitly noted that "In response to those concerns addressed to the United States and the United Kingdom, they provided their clarifications and explanations on their efforts towards nuclear disarmament..."²¹

Rebecca Johnson, April 16, 2008.

The full texts of the NPT and the 1995 and 2000 consensus decisions and agreements, as well as texts of Advice from Rabinder Singh QC and Professor Christine Chinkin in 2004 and 2005 can be obtained from the Acronym Institute website at www.acronym.org.uk. A more detailed discussion of the legal, NPT and political issues can also be found in Rebecca Johnson, Nicola Butler and Stephen Pullinger, '*Worse than Irrelevant? British Nuclear Weapons in the 21st Century*', published in October 2006, also available from www.acronym.org.uk. The text of the legal advice from Philippe Sands QC is available from Greenpeace UK.

²¹ 'Chairman's Working Paper;', NPT/CONF2010/PC.1/WP.78