

## Memorandum from Peacerights

### Introduction and Summary of Advice

1. We are asked to advise Peacerights on the legality under international law of the United Kingdom's actions with respect to the Trident nuclear missile system. The question on which our advice is sought is whether the UK is in breach of international law through maintenance of the Trident system or the replacement of that system by one with a similar yield. More specifically advice is sought on (i) whether Trident or a likely replacement to Trident breaches customary international law and (ii) whether the replacement of Trident would breach the Non-Proliferation Treaty 1967 (NPT), article VI.

2. In our opinion, for the reasons which are set out below:

(1) 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.

(2) The replacement of Trident is likely to constitute a breach of article VI of the NPT.

(3) Such a breach would be a material breach of that treaty.

## The UK's Obligations under customary international law

3. Since there is no immediate question of the use of Trident the question is whether its possession or replacement is contrary to customary international law. Possession of Trident has been justified by the government in the following terms:

*'The justification of Trident is as an instrument of deterrence with the possibility of its use only in the 'extreme circumstances of self-defence.'* (Geoff Hoon MP, written answer, 4 April 2005).

4. The language of 'extreme circumstances of self-defence' is taken from the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion of the International Court of Justice (ICJ) where

the Court concluded by the President's casting vote that:

*'in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;'* (1996 ICJ Reports, *Dispositif*, para 105. 2. E).

5. The Court did not determine that the threat or use of such weapons would be lawful or unlawful but said that it could not definitively rule on the subject. President Bedjaoui, who made the casting vote, explained that para.105. 2. E of the *dispositif* must not *'in any way be interpreted as leaving the way open to the recognition of the lawfulness of the threat or use of nuclear weapons.'* (Declaration of President Bedjaoui, 1996 ICJ Reports, para. 11).

6. The Court emphasised that the *dispositif* must not be read alone for the Court's reply to the question put to it *'rests on the totality of the legal grounds set forth by the Court ... each of which is to be read in the light of the others.'* (1996 ICJ Reports, para. 104).

7. Included within the legal grounds analysed by the ICJ was the affirmation that for a particular instance of the threat or use of force to be lawful it must not be contrary to either the laws regulating the lawfulness of recourse to force (*jus ad bellum*) or the international laws of war (*jus in bello*). It stated that: *'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 which comprise in particular the principles and rules of humanitarian law.'* (1996 ICJ Reports para. 42; see also paras 39, 91 and *dispositif*, paras 2. C and D).

8. The UK did not challenge this legal principle and stated before the Court that:

*'The legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and conduct of hostilities, as is the case with other methods and means of warfare.'* (cited 1996 ICJ Reports, para. 91).

#### **UK obligations under the Jus ad Bellum**

9. UN Charter, article 51 provides that self defence is an

exception to the prohibition of the use of force contained in the UN Charter, article 2 (4). It is also an exception under customary international law. The International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (GA Res. 56/83, 12 December 2001), article 21 reiterates that: *'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence in conformity with the Charter of the United Nations.'*

10. In the *Legality of the Threat or Use of Nuclear Weapons* the ICJ clarified some aspects of the application of the prohibition of the use of force and self-defence to the use or threat of nuclear weapons.

11. First, the Court coupled the threat of force with its use. The Court stated that:

*'Whether a signalled intention to use force if certain events occur is or is not a 'threat' within Article 2, paragraph 4 of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. ... no State, whether or not it defended the policy of deterrence suggested to the Court that it would be lawful to threaten force if the use of force contemplated would be illegal.'* (1996 ICJ Reports, para. 47).

**12.** Thus where a use of force is prohibited under UN Charter, article 2 (4), a threat to use that same force is also prohibited. If a use of force allegedly in self-defence would violate the principles of necessity and proportionality so too would the threat of use of such force. *'In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.'* (1996 ICJ Reports para. 48).

13. Second, this same assertion makes it clear that any use of nuclear weapons in lawful self-defence is subject to the conditions of necessity and proportionality. *'In plain English, the conditions of necessity and proportionality require that the use of nuclear weapons in self-defence could be envisaged only to meet an attack of comparable gravity that could not be neutralized by any other means.'* (Luigi Condorelli, 'Nuclear weapons: a weighty matter for the International Court of Justice' 316 *International Review of the Red Cross* (1997) 9).

14. These requirements of necessity and proportionality have been confirmed by the ICJ to constitute customary international law: *'For example it [the UN Charter] does not contain any 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.'* (*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) (Merits), 1986 ICJ Reports, para. 176; *Oil Platforms* (Islamic Republic of Iran v. US) (Merits), 2003 ICJ Reports, para. 76; *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports, para. 41).

15. Necessity is a justification precluding the unlawfulness of a wrongful act in exceptional circumstances. Under the International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (GA Res. 56/83, 12 December 2001), article 25, necessity may not be invoked unless the act:

(a) is the only means for the State to safeguard an essential interest against a grave and imminent peril;

(b) does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.

16. This article was in draft form at the time of the ICJ decision in the *Gabcikovo-Nagymaros* case. Nevertheless the ICJ relied upon it, reiterated its negative wording and its emphasis on the exceptional nature of the plea. It affirmed the basic principles: the act contrary to an international obligation must have been occasioned by an essential interest of the State which is the author of the act; the interest must have been threatened by a 'grave and imminent' peril; the act being challenged must have been the only means of safeguarding the interest; the act must not have seriously impaired an essential interest of the state towards which the act is directed; and the state the author of the act must not have 'contributed to the occurrence of the state of necessity.' The ICJ also stated that these conditions reflect customary international law. (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, paras 51-2).

17. The assessment of necessity must be made at the time the decision is made to commit the otherwise unlawful act. In the *Legality of Nuclear Weapons* the Court did not elaborate on the requirement of necessity, perhaps because of the abstract nature of the question put to it. In the *Oil Platforms* case the Court construed necessity strictly and with specific application to the facts in question. It determined that US attacks on the oil platforms could not be justified as acts of self-defence and also were not necessary to that state's security interests under the Treaty of Amity, 1955, article XX (1) (d).

18. The assessment of proportionality is ongoing throughout any use of force. It requires determining the amount of force that can be legitimately used to achieve the goal. The ICJ also assessed

the requirement of proportionality strictly in the *Oil Platforms* case. In determining the proportionality of the US attacks the Court held that it could not '*close its eyes to the scale of the whole operation, which involved inter alia the destruction of two Iranian frigates and a number of other naval vessels and aircraft.*' (*Oil Platforms* (Islamic Republic of Iran v. US) (Merits), 2003 ICJ Reports, para. 77).

## **UK obligations under International Humanitarian Law**

19. In the *Threat or Use of Nuclear Weapons* the Court advised that:

*'It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.'* (1996 ICJ Reports, para. 79).

20. The Court affirmed this paragraph in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports, para. 157. The expression 'intransgressible' is not part of the usual vocabulary of customary international law and the ICJ appears to be bestowing these principles with some especially weighty status. Vincent Chetail argues that: '*the Court intended to emphasize the importance of humanitarian norms for international law and order as a whole and the particularity of such norms in comparison with the other ordinary customary rules of international law.*' (Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law', 850 *International Review of the Red Cross* (2003) 235, 251).

21. Condorelli argues that '*the solemn tone of the phrase, and its wording, show that the Court intended to declare something much more incisive and significant, doubtless in order to bring the fundamental rules so described closer to jus cogens*'. Condorelli continues that: '*In other words, the circumstances eliminating unlawfulness that apply in other sectors of the international legal order (such as the victim's consent, self-defence, counter-measures or a state of necessity) cannot be invoked in this particular case.*' (Luigi Condorelli, 'Nuclear weapons: a weighty matter for the International Court of Justice' 316 *International Review of the Red Cross* (1997) 9). Professor Cassese has said in

this context that 'intransgressible' means 'peremptory in nature as the ICJ held in Threat or Use of Nuclear Weapons (at para. 79)': International Law (2<sup>nd</sup> ed. 2005) 206.

22. Clearly the Court regarded the relevant principles of international humanitarian law as of extreme significance. President Bedjaoui stated from this that a use of force even exercised in the extreme circumstances in which the survival of a state is in question cannot allow a state to exonerate itself from compliance with these intransgressible norms of international humanitarian law. (1996 ICJ Reports, Declaration Judge Bedjaoui, para. 22).

**23.** Further in the *Wall* case the Court affirmed the greater authority of these rules by noting that they 'incorporate obligations which are essentially of an *erga omnes* character.' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports, para. 157). Obligations owed *erga omnes* are the 'concern of all states' and all states have a 'legal interest in their protection.' (*Barcelona Traction, Light and Power Company, Ltd, Second Phase*, 1970 ICJ Reports para. 33).

24. The particular rules that are bestowed with this intransgressible nature are:

§ the principle of distinction between combatants and non-combatants (civilians);

§ prohibition of weapons that cause superfluous injury or unnecessary suffering;

§ the residual principle of humanity from the Martens Clause. (1996 ICJ Reports, para. 78).

25. The principle of distinction between combatants and civilians is central to certain international crimes within the jurisdiction of the Rome Statute of the International Criminal Court. Under the Rome Statute of the International Criminal Court, 1998 article 8 (2) (b) (iv): '*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*' is a serious violation of the laws and customs applicable in international armed conflict. So too is: '*Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;*' (Rome Statute, article 8 (2) (b) (v)).

## Legality of the possession or replacement of Trident under the jus ad bellum and jus in bello

26. The Court's inability to give a definitive answer to the question put to it in the *Threat or Use of Nuclear Weapons* was based both on its assessment of the current state of international law and on the 'elements of fact at its disposal.' Its determination was made in the abstract without reference to a specific incident of maintenance or replacement of a specific weapons system in the hands of any particular state. Even then, referring to the '*principles and rules of law applicable in armed conflict*' it found that: '*In view of the unique characteristics of nuclear weapons, . . . , the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.*' 1996 ICJ Reports para. 95).

27. To determine the legality of the possession or replacement of a particular system requires contextual analysis in any particular case. Thus the possession or replacement of Trident must be assessed against the two bodies of treaty and customary law (*jus ad bellum* and *jus in bello*) and in light of the factual circumstances of its capabilities and the context of its possession. The 'intransgressible' principles described above have been distilled into three core questions that need to be asked in making a contextual determination such as that with respect to Trident:

1. 'Would the use of a nuclear weapon in the particular circumstances inflict *unnecessary* suffering upon combatants?
2. Would the use of a nuclear weapon in the particular circumstances be directed against civilians, or indiscriminate, or even if directed against a military target, be likely to cause *disproportionate* civilian casualties?
3. Would the use of a nuclear weapon in the particular circumstances be likely to cause *disproportionate* harmful effects to a neutral state?' (C. Greenwood, 'Jus ad bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion', in L. Boisson de Chazournes and P. Sands, eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 247, 261, emphasis in the original).

28. The UK Trident system currently consists of four Vanguard class nuclear powered submarines each carrying up to 16 US Trident II D 5 missiles. There are around three nuclear warheads mounted on every missile making about 48 warheads carried on each submarine. At least one is on patrol at all times. Trident nuclear warheads are 100 to 120 kilotons each. Even one kiloton, a 'nuclear mini-bomb' '*would flatten all buildings within half a kilometre with up to 50% fatalities up to 1 kilometre*'. (Lord

Murray (Former Lord Advocate of Scotland), 'Nuclear Weapons and the Law', 1998, available at <http://wcp.gn.apc.org/newmurray.html>). '*The fireball of a detonated trident warhead is said to have a diameter of half a mile across while the heat and blast extend miles further.*' '*A low-yield Trident warhead would reduce a whole town to rubble.*' (Ibid). Each warhead can be aimed at a different target and each has at least eight times the explosive power of the bomb which was dropped on Hiroshima on 6 August 1945.

29. The first Trident submarine entered service in 1994 with the others coming into service progressively over the next five years. Its life span is approximately 30 years and so it could remain operational until approximately 2025. In light of the lead time for a replacement for the current Trident system to become operational (about 14 years) a decision is now due. The government has indicated that a decision about replacement will be made during the current Parliament. (Bundle Tab 8). The Defence Secretary, John Reid MP, has said that the options are to replace Trident with another submarine-launched missile system, or a ship or air-launched system, or even a land-based system.

30. In light of the blast, heat and radio-active effects of a detonation of a Trident warhead, in our view, it is impossible to envisage how the intransgressible requirement of the principle of distinction between combatants and non-combatants or the requirement of proportionality in the *jus ad bellum* could be met. The use of a Trident warhead would be inherently indiscriminate. Even if aimed at a military target it cannot distinguish between that and civilians within its range. Radioactive effects are not contained by time or space. Accordingly the use of a single Trident warhead in any circumstance, whether a first or second use and whether targeted against civilian populations or military objectives would inevitably be indiscriminate in effect, inflicting *unnecessary* civilian suffering and disproportionate civilian casualties and *disproportionate* harmful effects to a neutral state.

31. In the *Threat or Use of Nuclear Weapons* the Court stated that: '*If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4.*' The former Defence Secretary, Mr Hoon, has stated that '*in the right conditions we would be willing to use our nuclear weapons.*' (Bundle, Tab 6, para. 237). In the later 4 April 2005 statement he referred to 'extreme circumstances of self-defence' although he omitted the further qualification of the ICJ: '*in which the very survival of a State would be at stake.*' The former statement was made in the context of questions about a UK response to the use of weapons of mass destruction against our forces *in the field*. This assertion was repeated on television

where Mr Hoon stated that the government 'reserved the right to use nuclear weapons if Britain or British troops were threatened by chemical or biological weapons.' (Bundle, Tab 7). In our view, threats to British troops in the field even with weapons of mass destruction could not be said to threaten the survival of the state and thus would not come even within the ICJ's ambivalent *dispositif* in the *Threat or Use of Nuclear Weapons*.

32. Mr Hoon has stated that the government must make clear its willingness to use nuclear weapons: '*for that to be a deterrent, a British government must be able to express their view that ultimately and in conditions of extreme self-defence, nuclear weapons would have to be used.*' And: '*It is therefore important to point out that the Government have nuclear weapons available to them, and that - in certain specified conditions to which I have referred - we would be prepared to use them.*' (Hansard, 29 April 2002, Bundle Tab 6).

33. As he was then Secretary of State for Defence Mr Hoon's words can be taken to be the government's position. In the *Nuclear Tests* cases the ICJ stated that the statements of the President of France '*and members of the French Government acting under his authority up to the last statement made by the Minister of Defence ... constitute a whole. Thus in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.*' (*Nuclear Tests cases* (Australia v. France; New Zealand v. France) 1974 ICJ Reports 253;457, para. 49). It is clear that his various statements represent the UK position. They were repeated, recorded in Hansard and expressed on television. He explicitly stated that he was expressing the position of the UK government.

34. Since it is impossible to envisage how the intransgressible requirement of the principle of distinction between combatants and non-combatants or the requirement of proportionality in the *jus ad bellum* could be met by the use of Trident, even if the strict requirements of necessity for self defence were met, it is hard to see how its use could ever conform with the requirements of international law relating to the *jus ad bellum* or *jus in bello*.

35. As a footnote it is worth noting General Comment No. 14 of the Human Rights Committee on the right to life. In the *Threat or Use of Nuclear Weapons* the Court considered that whether a particular loss of life through the use of a certain weapon in warfare violated the right to life under human rights law would fall to be determined by reference to the law applicable in armed conflict, not the human rights provisions. Nevertheless the words of the Human Rights Committee are strong:

'4. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.' (Human Rights General Comment, No. 14, The Right to Life, 1984).

**Conformity of the Possession or Replacement of Trident with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), article VI**

## **UK obligations under the NPT, article VI**

36. Regardless of the legality under customary international law of the possession or replacement of Trident the UK has entered into treaty obligations with respect to negotiation of disarmament. In particular the NPT, article VI states that:

*'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 control.'*

37. The importance of Article VI has been recognised by commentators. It has been called *'the single most important provision of the treaty, however, from the standpoint of long-term success or failure of its goal of proliferation prevention'*. (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 732).

38. It is necessary to determine the extent of UK obligations under this Article and whether actions to extend the life of Trident or to replace it with another system would be in accordance with it. At the 2005 Review Conference the UK Ambassador asserted that: *'We abide by the undertakings we have given to non-proliferation, to the peaceful uses of nuclear energy*

and, under Article VI of the Treaty, to those on disarmament.' (Statement by Ambassador John Freeman, Head of the UK Delegation, to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, May 2005, available at <http://www.un.org/events/npt2005/statements/npt05unitedkingdom.pdf>.) The UK thus accepts its obligations under the NPT, article VI so determination of whether it is in breach of those obligations requires:

(i) determination of the scope of those obligations through interpretation of Article VI in accordance with principles of treaty interpretation; and

(ii) determination of whether maintaining or seeking to replace Trident are in conformity with those obligations.

## **The Vienna Convention on the Law of Treaties**

39. The principles relating to the law of treaties are largely codified in the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS (VCLT). The United Kingdom is a party to the VCLT (ratified 25 June 1971), which came into force on 27 January 1980. The VCLT does not have retroactive effect (article 4) and therefore does not apply to the original NPT, 1967 which came into force on 5 March 1970.

40. However some provisions of the VCLT have been explicitly accepted by the ICJ as constituting customary international law, including those on material breach and interpretation. (E.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970)* 1971 ICJ Rep. 16, 47; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* 1974 ICJ Rep. 3, para. 36; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 1997 ICJ Reports para. 4).

## **Principles of Treaty Interpretation**

41. The VCLT, articles 31-33 provide the basic principles of treaty interpretation that are widely accepted as constituting customary international law (*Indonesia/Malaysia case*, 2002 ICJ Reports 3, para. 37; *Libya/Chad case*, 1994 ICJ Reports, 6, 21-2; *Qatar/Bahrain case*, 1995 ICJ Reports 6, 18). Interpretation of the NPT, article VI will therefore be in accordance with these articles.

42. VCLT, article 31 (1) provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the

*light of its object and purpose.'*

43. There are two sets of materials that may be relevant to interpreting the terms of the NPT and its object and purpose: the initial negotiation history (*travaux preparatoires*) and the documents and resolutions of the subsequent Review Conferences. The two reflect very different moments in time. The former evidences the intentions of the original Treaty parties and reflects the cold war politics of the time while the latter reflect the ongoing concerns of all the parties to the Treaty, non-nuclear weapon states as well as nuclear weapon states.

44. The VCLT requires that the words of a treaty are interpreted in their context and in the light of its object and purpose. The NPT, article VIII (3), makes explicit that the purposes of the Treaty are to be found in the preamble (five yearly reviews must take place '*with a view to assuring that the purposes of the preamble and the provisions of the treaty are being realised*'). This brings the Preamble more firmly into the obligatory provisions of the Treaty.

45. The preamble of a treaty is in any case part of the treaty's context for the purpose of interpretation. The VCLT, article 31 (2) makes it clear that: '*The context for the purpose of the interpretation of a treaty*' includes '*its preamble and annexes*'. Further VCLT, article 31 (3), specifies that: '*There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ...*' A Declaration of a Review Conference adopted by consensus would come within the wording of article 31 (3) (a) and is thus an appropriate source of interpretation of the obligations of the NPT.

46. Reference to the use that can be made of a treaty's *travaux preparatoires* (preparatory work) is made in VCLT, article 32. Article 32 states that: '*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*'

47. Article 32 makes preparatory work relevant only as a secondary source of interpretation, to be referred to when there is ambiguity, or where the approach under article 31 leads to a

manifestly absurd or unreasonable result. This is a lesser status than that accorded to the preamble and any subsequent agreement between the parties by article 31. This is confirmed by the heading given to each of the two articles. Article 31 is headed '*General rule of interpretation*' while article 32 is headed '*Supplementary means of interpretation.*'

48. Accordingly, if there is any disparity between them greater weight should be given to the Declarations of the Review Conference than to the preparatory work of the NPT in determining the scope of obligations under the Treaty text today.

#### Negotiation History of the NPT

49. Turning first to the negotiation history, a commitment to disarmament was a major concern of non-nuclear weapon states. India, Brazil, Scandinavian states, Canada, the then UAR and Germany '*brought strong pressure upon the Co-chairmen to obtain some statement within the treaty concerning nuclear disarmament.*' (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 733). The August 1967 draft included reference to '*cessation of the arms race*' only in its preamble. An earlier version of Article VI was brought within the body of the Revised Draft Treaty on Nonproliferation of Nuclear Weapons, 18 January 1968. Sweden in particular insisted on strengthening Article VI by broadening the commitment of the nuclear weapon states to seek disarmament agreements. In the General Assembly debate on the draft treaty further objections were made (for example by Brazil, India) to the lack of tangible commitment to nuclear disarmament by nuclear weapon states. Article VI was further revised before its inclusion in the adopted Treaty. (E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 *American Journal of International Law* (1969) 711, 716-721).

50. This drafting history of Article VI is important as it shows the linkage between the commitment to non-proliferation and the obligations of all states to pursue negotiations towards nuclear disarmament. Article VI was an integral part of the NPT package, not just an 'add-on'. Its importance to the objectives of the Treaty is indicated by the preamble, paras 8-12. These include the '*intention to achieve at the earliest possible date the cessation of the nuclear arms race*' and '*to undertake effective measures in the direction of nuclear disarmament.*'

## NPT Review Conference 2000

51. Turning to the Review Conferences it is clear that the commitment to disarmament remains strong. The Review Conferences take place in accordance with the terms of the NPT, article VIII (2) which provides for the holding of a Conference of Parties to the Treaty *'to review the operation of this treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised.'* The provision for a Review Conference is separate from both the articles for amendment (article VIII (1)) and for extension of the Treaty (article X (2)). The objective of the Review Conference is to determine compliance with the purposes of the Treaty as expressed in the preamble and its provisions.

52. The Final Document of the Review Conference 2000 (NPT/CONF.2000/28 (Parts I and II)) reiterated the importance of the commitment to disarmament in a number of its statements. In its Review of the operation of the Treaty the Conference noted that the overwhelming majority of states entered into their legally binding commitments not to acquire nuclear weapons *'in the context, inter alia of the corresponding legally binding commitments by the nuclear weapon States to nuclear disarmament in accordance with the Treaty.'* (Final Document of the Review Conference 2000, Part I, Articles I and II and first to third preambular paragraphs, para. 2). Further the Conference reaffirmed that the *'strict observance'* of the provisions of the Treaty remains central to achieving the shared objectives of preventing under any circumstances, the further proliferation of nuclear weapons and preserving the Treaty's vital contribution to peace and security. (Part I, Articles I and II and first to third preambular paragraphs, para. 5).

53. The 2000 Review Conference also agreed a landmark series of practical steps for the systematic and progressive efforts to implement NPT, Article VI and paras 3 and 4 (c) of the 1995 Decision on *'Principles and Objectives for Nuclear Non-Proliferation and Disarmament'*. Step 6 is especially relevant: *'An unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.'*

54. Step 9 provides the basis for *'Steps by all the nuclear weapon States leading to nuclear disarmament in a way that promotes international stability ...'*

*§ Increased transparency by the NWS with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to Article VI...*

§ *Concrete agreed measures to further reduce the operational status of nuclear weapons systems.* (Final Document of the Review Conference 2000, Part I, Article VI and paras 3 and 4 (c) of the 1995 Decision on 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament', para. 15.9).

55. While NPT, article VI applies to '*Each of the Parties to the Treaty*' these steps adopted by the 2000 Review Conference make explicit that there are particular obligations on the nuclear weapon states.

56. A number of points can be made about the weight to be accorded to the documents of the 2000 Review Conference. First, a Declaration of the Review Conference is not a formal amendment to the NPT in the terms of article VIII (1) and does not have formally legally binding effect. However, Review Conferences are included within the NPT as an integral part of the structure for reviewing state compliance and resolutions adopted represent the expressed will of the states parties. Security Council resolution 1172, 6 June 1998 recalled the '*Principles and Objectives for Nuclear Non-Proliferation and Disarmament*' adopted by the 1995 Review Conference, which are themselves the basis of the steps agreed at the 2000 Conference.

57. Further the ICJ has given weight to the documentation of the NPT Review Conference process when it noted that the 1995 Review Conference had reaffirmed the importance of fulfilling the obligation of the NPT, article VI in its determination that the obligation '*remains without any doubt an objective of vital importance to the whole of the international community today.*' (*Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports, para. 103). These factors all support the conclusion that the documents of such bodies have juridical significance '*as a source of authoritative interpretation of the treaty.*' (B. Carnahan, '*Treaty Review Conferences*', 81 *American Journal of International Law* (1987) 226, 229). This is also in line with the VCLT, article 31 (3) (a) as noted above.

58. Second, the language of the 2000 Review Conference is in many instances strong in its reiteration of the states parties' obligations under the NPT. For example, the Conference notes the '*reaffirmation*' of the states parties' commitment to Article VI (Part I, Article VI, para. 1); the '*unequivocal undertaking by the nuclear weapon states*' (Part I, Article VI, para. 15.6); the agreement for '*concrete agreed measures to further reduce the operational status of nuclear weapons systems*' (Part I, Article VI, para. 15.9). Concreteness of language has been identified as one of the factors for determining when non-binding statements become normative. (G. Abi-Saab, '*Cours General de Droit*

International Public' 207 Rec. Des Cours (1987) 160).

59. Third, the Conference agreed steps for the '*systematic and progressive efforts to implement Article VI.*' This is important as Article VI is imprecise in the nature of the obligation other than the requirement of good faith. There are no specified conditions or qualifications for taking those steps. In the context of obligations under human rights treaties the Committee on Economic, Social and Cultural rights noted that the similar phrase '*progressive realization*' in the Covenant on Economic, Social and Cultural Rights, article 2 '*must be read in the light of the overall objective, ... of the Covenant ... It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant*'. (UN Committee on Economic, Social and Cultural rights, General Comment No. 3, The Nature of States Parties' Obligations, 1994).

60. By analogy the assertion of practical steps for systematic and progressive efforts towards implementation of the NPT, article VI requires positive action towards that end by the nuclear weapon states and implies that retrogressive measures would be contrary to the Treaty's objective and wording. This view is supported by the emphasis given by the ICJ that the Article VI obligation must be carried out in accordance with the basic principle of good faith.

61. Thus the importance of Article VI to the objects and purposes of the NPT and to the reciprocal obligations of nuclear weapon and non-nuclear weapon states is confirmed by the negotiation history of the NPT and reinforced by the reaffirmation of its significance by the 2000 Review Conference. The Security Council too has expressed the importance of this international regime in resolution 1172, 6 June 1998 which reaffirmed '*its full commitment to and the crucial importance of the [NPT] ... as the cornerstones of the international regime on the non-proliferation of nuclear weapons and as essential foundations for the pursuit of nuclear disarmament.*'

62. The inability of the 2005 Review Conference to agree a consensus statement does not detract from the continued applicability of the 2000 Review Conference, especially the practical steps for the '*systematic and progressive efforts to implement Article VI.*' Of particular interest in this regard is the statement by the Head of the UK Delegation. He noted that '*non-proliferation and disarmament are inter-linked in achieving the Treaty's goals*' and that the UK continues '*to implement the*

*decisions of past review conferences, including those taken at the Review and Extension Conference in 1995 and the last Review Conference in 2000.*' He also noted that as a nuclear weapon state the UK has particular obligations under Article VI and that it continued to support the disarmament provisions agreed at the 1995 and 2000 Review Conferences. (Statement by Ambassador John Freeman, Head of the UK Delegation, to the Seventh Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, May 2005, available at <http://www.un.org/events/npt2005/statements/npt05unitedkingdom.pdf> .)

## **Obligation to Negotiate in Good Faith**

63. Between the 1995 and 2000 Review Conferences the ICJ in *The Legality of the Threat or Use of Nuclear Weapons* 1996 advisory opinion unanimously asserted in *dispositif* paragraph 105. 2. F that:

*'There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control.'* (Emphasis added)

64. The Court based this conclusion on NPT, article VI and confirmed that the obligation contained in article VI, as reaffirmed by the 1995 Review Conference *'remains without any doubt an objective of vital importance to the whole of the international community today.'* (1996 ICJ Reports, para. 103). As the words we have emphasised in the quotation in paragraph 63 above make clear, the Court has interpreted the obligation in article VI to include not merely an obligation to pursue negotiations in good faith but also to bring those negotiations to a conclusion.

65. The Court asserted that this obligation goes beyond that of a 'mere' obligation of *conduct* for it is an obligation to achieve a precise result: *'nuclear disarmament in all its aspects ... by the pursuit of negotiations on the matter in good faith.'* (1996 ICJ Reports, para. 99 and 102; see also M. Marin Bosch, *The Non-Proliferation Treaty and its Future*, in L. Boisson de Chazournes and P. Sands, eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375).

66. The Court also noted Security Council resolution 984, 11 April 1995 which reaffirmed the *'need for all States parties to the*

[NPT] to comply fully with all their obligations' (1996 ICJ Reports, para. 103).

67. Commentators have noted the importance of the obligation contained in the NPT, Article VI. *'It is important to note that the NPT is the only existing international treaty under which the major nuclear powers are legally committed to disarmament.'* (T. Rauf, 'Nuclear Disarmament: Review of Article VI', in J. Simpson and D. Howlett (eds), *The Future of the Non-Proliferation Treaty*, 1995, 66, 67). The affirmation and extension of this obligation by the Court has also been noted. Richard Falk asserted that the obligation to negotiate to achieve nuclear disarmament was not necessary for the Court's judgment but that it went out of its way to assert this unanimously. *'This emphasis in the advisory opinion on the obligatory character of Article VI of the Nuclear Proliferation Treaty appears to represent common legal ground between nuclear and non-nuclear weapons states.'* (R. Falk, *Nuclear Weapons, International Law and the World Court : A Historic Encounter*', 91 AJIL (1997) 64, 65). Marin Bosch notes that Article VI is the *'only treaty provision in which NWS have undertaken a legal obligation to negotiate nuclear disarmament agreements'*. (M. Marin Bosch, *The Non-Proliferation Treaty and its Future*', in L. Boisson de Chazournes and P. Sands, eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375).

68. The wording of NPT, article VI, the assertion of the importance of the obligation by the ICJ, and by the 2000 Review Conference along with practical measures for its implementation all make clear that the obligations of nuclear weapon states parties to the NPT, including the UK are:

§ to undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race;

§ to undertake to pursue negotiations in good faith on effective measures relating to nuclear disarmament, and to bring them to a conclusion; and

§ on a Treaty on general and complete disarmament.

69. The Treaty obligation is thus not to disarm as such, but a positive obligation to pursue in good faith negotiations towards these ends, and to bring them to a conclusion. Good faith is the legal requirement for the process of carrying out of an existing obligation. In the *Nuclear Tests cases* the ICJ described the principle of good faith as *'one of the basic principles governing the creation and performance of legal obligations'*. (*Nuclear Tests cases Australia v. France; New Zealand v. France*) 1974 ICJ Reports 253;457, para. 46). The obligation of good faith has been described as not being one *'which obviously requires actual damage. Instead its violation may be demonstrated by acts and*

*failures to act which, taken together, render the fulfilment of specific treaty obligations remote or impossible.*' (G. Goodwin-Gill, 'State Responsibility and the 'Good Faith' Obligation in International Law', in M. Fitzmaurice and D. Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (2004) 75, 84). In the context of an obligation to negotiate in good faith this would involve taking no action that would make a successful outcome impossible or unlikely.

70. Would a UK policy with respect to extend or replace Trident be in accordance with this obligation?

## **Breach of Treaty: Law of State Responsibility**

71. Questions of breach of a treaty are determined both by treaty law and by the principles on state responsibility. The International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (GA Res. 56/83, 12 December 2001), article 12, defines the existence of a breach of an international obligation as occurring '*when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*' The International Court of Justice has asserted that such breach includes '*failure to comply with treaty obligations.*' (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para. 57). Whether there has been such failure is determined by asking whether the behaviour in question '*was in conformity*' with the treaty requirements (J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 125).

72. There are indicators that the UK intends to replace - or extend the life of - its Trident weapon system. Statements have been made that indicate that the government is not looking at the non-nuclear weapon option. For example the Defence White Paper, *Delivering Security in a Changing World* (December 2003) reiterates the conclusion from the Strategic Defence Review 1998 that: '*We should maintain a minimum nuclear deterrent based on the Trident system.*' (Defence White Paper, page 2) At paragraph 3.11 it states that the government's policy on nuclear weapons remains as set out in the 1998 Strategic Defence Review. The Labour Party Manifesto 2005 states that '*We are also committed to retaining the independent nuclear deterrent.*' (Bundle, Tab 8).

73. There have also been actions in conformity with this stance, for example the 2004 renewal of the Mutual Defence Agreement

between the UK and the US. At that time President Bush stated that: *'The United Kingdom intends to continue to maintain viable nuclear forces. ... I have concluded that it is in our interest to continue to assist them in maintaining a credible nuclear force.'* (Bundle, Tab 8).

74. Enhancing nuclear weapons systems, possibly without going through parliamentary processes, 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 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.

### **Breach of Treaty: the VCLT**

75. The analysis has proceeded under the definition of breach provided by the International Law Commission's Articles on State Responsibility. Breach is also included in the VCLT. However the VCLT deals only with 'material' breach. The Articles on State Responsibility provisions are not limited to material breach and are applicable to any breach of a treaty.

76. In addition to determining that the UK is in breach of the obligations of the NPT, article VI under the ILC, Articles on State Responsibility, we also consider whether such behaviour amounts to material breach under the VCLT, article 60.

77. The VCLT, article 60 (3) defines a material breach as occurring in one of two ways: *'A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.'*

78. The UK has not repudiated the NPT and has indeed reaffirmed it as in the words of Ambassador Freeman cited above.

79. Therefore, if there is any material breach it must be under VCLT, article 60 (3) (b), that is whether there is behaviour that violates a provision *'essential to the accomplishment of the object or purpose of the treaty.'* The object and purpose of the

NPT as spelled out in its preamble include *'to undertake effective measures in the direction of nuclear disarmament'*.

80. The linkage between the principles of non-proliferation and the obligation to negotiate towards disarmament shown by the negotiation history (discussed in paras 14-5 above) indicate that Article VI is a provision *'essential to the accomplishment of the object or purpose of the treaty.'* The non-nuclear weapon states required commitments from the nuclear weapon states as part of their willingness to accept non-nuclear status under the NPT and failure to comply with article VI thus, in our view, constitutes material breach.

*19 December 2005*