

# Follow-up to the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

Legal, technical and political elements required for the establishment and maintenance of a nuclear weapons free world

Working paper for the 2005 NPT Review Conference

*Costa Rica, Malaysia...*

## Introduction

The purpose of this paper is to;

- build on the Working Paper submitted by Malaysia and Costa Rica to the 2000 NPT Review Conference “Follow-Up to the International Court of Justice Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*” (NPT/Conf2000/MC.1/SB.1/WP.4);
- re-affirm the obligation of States parties to the NPT to pursue negotiations leading to complete nuclear disarmament, and the unequivocal undertaking made in 2000 by all States parties to implement this obligation;
- urge the fulfillment of this obligation through the commencement of negotiations which would lead to the conclusion of a nuclear weapons convention - or a framework of mutually reinforcing instruments - prohibiting the development, testing, production, stockpiling, transfer, use and threat of use of nuclear weapons and providing for their elimination under strict and effective international control;
- continue to explore the legal, technical and political elements required for a nuclear weapons convention or framework of instruments, and integrate this exploration into the development of a program for action at the 2005 NPT Review Conference, encompassing and extending the practical steps agreed in 2000 for systematic and progressive efforts to implement Article VI of the Treaty.

## Background

### (a) Obligation to achieve the elimination of nuclear weapons

At the 1995 NPT Review and Extension Conference, Parties to the Treaty on the Non-Proliferation of Nuclear Weapons agreed to pursue systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons,

On 8 July 1996, the International Court of Justice delivered an Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which it concluded, inter alia, that:

*“the threat or 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;”*  
and 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 international control”.*

It is significant that the ICJ opinion affirmed that the obligation to negotiate for nuclear disarmament requires:

- i) negotiations on complete nuclear disarmament, i.e. the complete abolition and elimination of nuclear weapons
- ii) negotiations to be not only pursued, but to be brought to a conclusion
- iii) international control of the disarmament process.

It is also significant that the ICJ did not confine the disarmament obligation only to States parties to the NPT, but rather affirmed that this is a universal and customary obligation.

The 2000 NPT Review Conference affirmed *“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.”*

The 2000 NPT Review Conference also called for *“The engagement as soon as appropriate of all the nuclear weapon States in the process leading to the total elimination of their nuclear weapons,”* and began the process of considering some of the requirements for *“the achievement and maintenance of a nuclear weapon free world”*, in particular the *“development of the verification capabilities that will be required to provide assurance of compliance.”*

#### **(b) Proposal for a nuclear weapons convention or framework of mutually reinforcing instruments**

The United Nations General Assembly has called for implementation of the ICJ opinion through the commencement of multilateral negotiations leading to the early conclusion of a nuclear weapons convention (General Assembly resolutions 51/45 M of 10 December 1996, 52/38 O of 9 December 1997, 53/77 W of 4 December 1998, 54/54 Q of 1 December 1999, 55/33 X of 20 November 2000, 56/24 S of 29 November 2001, and 57/84 of 22 November 2002 entitled *“Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons,”*)

The United Nations General Assembly has also adopted resolutions affirming that: *The maintenance of a world free of nuclear weapons will require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments.* (A/53/77 Y adopted 4 December 1998 and A/57/59 adopted 22 November 2003, entitled Towards a nuclear-weapon-free world: the need for a new agenda)

The Non-Aligned Movement, at its XIII Summit from 20-25 February 2005, *“emphasised the necessity to start negotiations on a phased programme for the complete elimination of nuclear weapons with a specified framework of time, including a Nuclear Weapons Convention.”*

#### **(c) Model Nuclear Weapons Convention**

In 1997 Costa Rica submitted to the Secretary-General of the United Nations a Model Nuclear Weapons Convention drafted by an international consortium of lawyers, scientists and disarmament experts, setting forth the legal, technical and political issues that should be considered in order to obtain an actual nuclear weapons convention.

The Model Nuclear Weapons Convention was circulated as UN Doc A/C.1/52/7, along with the recommendation of Costa Rica that this be used to assist the deliberative process for the implementation of UN General Assembly resolutions entitled “*Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.*”

#### **(d) 2000 NPT Review Conference**

At the 2000 NPT Review Conference Malaysia and Costa Rica submitted a Working paper on “Follow-Up to the International Court of Justice Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*” (NPT/Conf2000/MC.1/SB.1/WP.4).

The Working paper:

- i) *Underlined* the unanimous conclusion of the International Court of 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 international control,
- ii) *Called on States Parties* to commence multilateral negotiations leading to the conclusion of a nuclear weapons convention and *to invite* those States that have not acceded to the Treaty on the Non-Proliferation of Nuclear Weapons to join in such negotiations;
- iii) *Called on States Parties to agree* to give consideration to the legal, technical and political elements required for a nuclear weapons convention or framework convention

The practical steps agreed by States Parties in 2000 for systematic and progressive efforts to implement Article VI of the Treaty included a number of legal, technical and political steps which could provide a basis for some of the elements required for a nuclear weapons free world.

These include steps 1: entry into force of the Comprehensive Test Ban Treaty, 3: negotiations culminating in a fissile-material cut-off treaty, 5: application of the principle of irreversibility to nuclear arms control and disarmament measures, 9: steps by all the nuclear weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all, including unilateral reductions, transparency, reducing operational status and a diminishing role for nuclear weapons in security doctrines, 12: regular reports on implementation of Article VI, and 13: development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear weapon free world.

In addition, a number of working papers submitted to Preparatory Committee Meetings for the 2005 Review Conference provide a deeper exploration of specific steps agreed in 2000 and other steps relevant to the achievement and maintenance of a nuclear weapons free world. These include, *inter alia*, papers submitted on security assurances reductions of non-strategic nuclear weapons, compliance mechanisms, overcoming the institutional deficit of the NPT and verification.

A comprehensive overview of the legal, technical and political requirements for a nuclear weapons free world would be able to affirm such elements which already exist, assess those which are currently being developed, evaluate and link those which have been proposed, and identify additional elements which would also be required.

#### **The path towards nuclear disarmament: step-by-step, comprehensive or incremental-comprehensive**

There are three general approaches towards achieving nuclear disarmament. The first, a step-by-step approach, entails negotiations on a limited number of initial steps towards nuclear disarmament, with

additional steps being considered once the first steps are achieved. The step-by-step approach has achieved a number of concrete disarmament agreements. However, these have been limited in scope, have failed to illuminate the requirements necessary for the complete elimination of nuclear weapons, and have not brought the world much closer to the final goal of nuclear disarmament than when the NPT was adopted in 1970.

A divergent perspective calls for comprehensive negotiations on the complete prohibition and elimination of nuclear weapons. Most States are ready for such comprehensive negotiations, as evidenced by strong support for United Nations resolutions calling on the Conference on Disarmament to “commence negotiations on a phased program of nuclear disarmament leading to the eventual total elimination of nuclear weapons.” (United Nations General Assembly Resolution 58/56, adopted December 3, 2003). However, there is some opinion that a comprehensive approach could prevent progress due to the myriad of issues and disarmament requirements that would have to be addressed before any agreement could be reached. In addition, the fact that some of the States possessing nuclear weapons do not yet accept comprehensive negotiations precludes the possibility of such an approach in the near future.

An alternative path forward, which combines the advantages of the first two approaches, has been described as incremental-comprehensive. Such an approach incorporates step-by-step measures within a comprehensive framework. This is an approach suggested – but not fully developed - by the program of action agreed at the 2000 NPT Review Conference.

While it is important to concentrate international attention on concrete steps towards nuclear disarmament which are achievable in the short term, it is also important to simultaneously consider the requirements for a comprehensive nuclear disarmament regime in order to develop an international understanding of the final destination of nuclear disarmament steps. It can be difficult to construct a path to nuclear disarmament if we do not know more precisely what will be the end goal. Considering the elements of a nuclear disarmament regime at this stage could help give direction to intermediate steps and to overcome some of the roadblocks in the current disarmament fora.

Thus, the further development of an incremental-comprehensive approach would assist in the implementation of the program of action agreed at the 2000 NPT Review Conference, and lead more quickly to the complete elimination of nuclear weapons. This can be best done by further exploration of the legal, technical and political elements required for the establishment and maintenance of a nuclear weapons free world, and by the commencement of negotiations towards that end.

### **Consideration of the legal, technical and political elements required for the establishment and maintenance of a nuclear weapons free world**

Consideration should be given at the 2005 NPT Review Conference to the legal, technical and political elements required for the establishment and maintenance of a nuclear weapons free world, with the aim to integrate such thinking into the development of a program for action at the 2005 NPT Review Conference based on the practical steps agreed in 2000 for systematic and progressive efforts to implement Article VI of the Treaty. These elements may include:

- a) Non-discriminatory general obligations, applicable to States and non-State actors, prohibiting the acquisition, development, testing, production, stockpiling, transfer, use and threat of use of nuclear weapons,
- b) Interim control, protection and accounting of nuclear weapons and fissile material holdings,

- c) Phases and steps for the systematic and progressive destruction of all nuclear warheads and their delivery vehicles,
- d) Mechanisms for verifying the destruction of all nuclear weapons, including, *inter alia*:
  - a. Agreements on data sharing with States and existing agencies;
  - b. An international monitoring system comprising facilities and systems for monitoring by photography, radionuclide sampling, on-site and off-site sensors and other data collection systems;
  - c. Consultation and clarification procedures;
  - d. On-site inspections;
  - e. A registry including information gained from State declarations, the international monitoring system, national technical means, inspections, other international organizations, non-governmental organizations and publicly available sources;
- e) Mechanisms for ensuring compliance including, *inter alia*:
  - a. Technical assistance in destruction of nuclear weapons, delivery systems and facilities
  - b. Procedures for national implementation
  - c. Dispute resolution procedures
  - d. Penalties for non-compliance
  - e. Recourse to the UN Security Council, UN General Assembly and International Court of Justice for further action
- f) An international organisation to coordinate verification, implementation and enforcement under strict and effective international control;
- g) Disarmament education to ensure that key sectors of society understand the importance of achieving and maintaining a nuclear weapons free world and how they can contribute to this goal.

As noted above, some of these elements may already be in existence, albeit in an under-developed form or with limited application. This includes, for example, disarmament measures applied to a limited number of weapons, or fissile material controls and delivery system controls applied only to certain countries. Other elements have been proposed or are being developed, but again mostly on a limited basis relating more to non-proliferation and disarmament steps but not to complete abolition. Consideration of the elements required for the complete prohibition and elimination of nuclear weapons would enable gaps to be identified, preparatory work undertaken and further steps completed, whether unilaterally, bilaterally, regionally, pluri-laterally or multi-laterally.

**Negotiations towards a Nuclear Weapons Convention or a framework of instruments for the complete abolition and elimination of nuclear weapons.**

For nuclear disarmament to occur, security for all will need to be maintained and enhanced. Thus, there are a number of political issues, in addition to those outlined above, that will need to be addressed. These include, *inter alia*, building confidence in each of the phased disarmament steps in order to proceed to the next steps, how to diminish the role of nuclear weapons in security doctrines pending nuclear abolition, building regional and international security without nuclear deterrence, development of security assurances, achieving a balance between transparency and protection of sensitive information, the role of societal verification, how to build individual responsibility and protection into the disarmament process

while respecting State sovereignty, and how to deal with delivery systems and dual use materials – particularly plutonium and highly enriched uranium.

In addition there are a number of economic and environmental issues which will need to be addressed including the possible need for financial assistance for disarmament and the harmonizing of environmental standards for destroying weapons systems and disposing of fissile materials.

The best way to address these issues and to make progress towards complete nuclear disarmament is to commence negotiations within an incremental-comprehensive framework. Such an approach would allow for all relevant issues to be raised and addressed, and would also facilitate the completion of disarmament steps in areas where agreement can be reached within a short to medium time-frame. More difficult issues requiring more complex arrangements would be resolved through continuing negotiations and achieved in subsequent steps. This is what is envisaged in the call for the commencement of negotiations leading to the conclusion of a nuclear weapons convention or a framework of instruments for the complete abolition and elimination of nuclear weapons.

### **Recommendations:**

*States Parties agree* to a program of action based on the program agreed at the 2000 NPT Review Conference and the legal, technical and political elements outlined in this paper required for the establishment and maintenance of a nuclear weapons free world;

*States Parties agree* to give further consideration to the legal, technical and political elements required for a nuclear weapons convention or a framework of instruments;

*States Parties agree* to commence multilateral negotiations leading to the conclusion of a nuclear weapons convention and *invite* those States that have not acceded to the Treaty on the Non-Proliferation of Nuclear Weapons to join in such negotiations.