

# Science FOR Democratic Action

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## Nuclear Weapons and International Law



*First meeting of the NATO Nuclear Planning Group, Washington D.C. This photograph, taken April 6, 1967, shows U.S. President Lyndon B. Johnson and Secretary of Defense Robert McNamara receiving defense ministers\* at the White House. (\*We think they are defense ministers. See the Atomic Puzzler on page 15 for details.)*

BY MERAV DATAN<sup>1</sup>

By their very nature, their physical characteristics, nuclear weapons are not compatible with a rule of law society; they defy the spirit, the letter, and the concept of law. But they continue to exist in the arsenals and policies of a minority of powerful states because they have come to represent power, influence, and status. For the states that possess nuclear weapons, they are expressions of sovereignty.

Ironically, nuclear weapons not only undermine the sovereignty of states because they defy any national borders, nuclear weapons also conflict directly with the principles of an international legal order. Nuclear weapons reveal the cracks in the existing international legal system, and suggest the changes necessary for a more just world order to emerge.

International law and nuclear weapons intersect in a number of ways, including specific treaties (Non-Proliferation Treaty, Strategic Arms Reduction Treaties, Comprehensive Test Ban Treaty), general treaty structures that form the basis of international law today (United Nations Charter), and the law of armed conflict, or humanitarian law and the law of neutrality.

Comprehensive studies of international law and nuclear weapons exist.<sup>2</sup> Here the focus is on the law relevant to nuclear disarmament in the form of treaty and the

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## Nuclear Sharing in NATO: Is it Legal?

BY OTFRIED NASSAUER<sup>1</sup>

Historical evidence indicates that, at the time of negotiating the Nuclear Non-Proliferation Treaty (NPT) in the 1960s, many countries did not fully understand what implications nuclear sharing had and/or did not know that the North Atlantic Treaty Organization (NATO) interpreted nuclear sharing to be legal under the NPT. According to the current understanding of most non-NATO parties to the NPT, NATO nuclear sharing probably violates Articles I and II of the Treaty.

Article I of the NPT prohibits nuclear weapon states that are parties to the NPT from sharing their weapons with non-nuclear states:

"Each nuclear-weapon State Party to the Treaty undertakes 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."

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international legal system, both its structure and jurisprudence. This includes the following:

1. Non-Proliferation Treaty obligation
2. United Nations Charter (*jus ad bellum*)
3. International Court of Justice (ICJ) opinion (interpretation of existing law, particularly the law of armed conflict *jus in bello*, but limited by the political system of today)
4. Judge Weeramantry's dissenting opinion (as the authoritative interpretation of the law, following through on the logical and legal conclusions that – for political reasons – the Court could not)

### The Non-Proliferation Treaty

The NPT<sup>3</sup>, opened for signature in 1968 and entered into force in 1970, was among other things a deal between five nuclear weapons states (NWS) and the rest of the world (182 non-NWS today) that the latter are not to acquire nuclear weapons, in exchange for the former negotiating nuclear disarmament.

NPT Article VI obligation:

"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control."

"Each of the Parties" suggests this obligations goes beyond the bilateral START (Strategic Arms Reduction Treaties) process and requires multilateral negotiations. This obligation is backed up by numerous resolutions of the UN General Assembly, dating back to the very first resolution.

### United Nations Charter

The UN Charter<sup>4</sup> provides the framework for modern international law, though much of it is the codification of pre-existing customary international law.

Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The combination of these two provisions means that a state may engage in the threat or use of force only in collective or individual self-defence, if an armed attack occurs, and only when the Security Council has not exerted control. Of course, the result has been, in part, that states claim their own threat or use of force as an act of self-defence, and see aggression on the part of others who act and speak similarly in the name of self-defence. Nuclear weapons raise

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this irony to the level of absurdity.

But implicit in these principles of law is the aspiration for a just and effective international legal order. That it does not function smoothly is due largely to the psychological mindset of human mistrust, and the ways that fear, greed, and the drive for power have been infused into political structures. At the same time, these structures are being challenged today in ways that do not necessarily promise but do allow for the possibility of a transition to a more just world order based on the force of law rather than the law of force.

### The International Court of Justice

The 1996 Advisory Opinion of the ICJ<sup>5</sup> on the threat or use of nuclear weapons reflects this moment of transition. The Court was caught between the political power structures that have shaped it, and the potential legal and political system that might emerge. Politically, the Court went as far as it could in affirming the illegal nature of nuclear weapons, but it could not directly state the logical and legal conclusions suggested by its own reasoning. The separate opinion of Judge Weeramantry (offered as a dissent) is in this sense the authoritative interpretation of the law, completing the legal reasoning suggested by the Court.

The International Court of Justice in its Advisory Opinion of July 8, 1996, held 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." [para. 105(2)(E)]

The Court as a whole could not, however,

"reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake." [para. 105(2)(E)]

This "exception" portion of the judgment was the subject of specific comment by the President of the Court, Judge Bedjaoui.<sup>6</sup> He stressed this exception could not be interpreted as "leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons."

Judge Bedjaoui stated that:

"...self-defence – if exercised in extreme circumstances in which the very survival of a State is in question – cannot engender a situation in which a State would exonerate itself from compliance with the 'intransgressible' norms of international humanitarian law."

Indeed, he added that: "[I]t would thus be quite foolhardy unhesitatingly to set the survival of a State

Nuclear weapons reveal the cracks in the existing international legal system, and suggest the changes necessary for a more just world order to emerge.

above all other considerations, in particular the survival of mankind itself."

Thus, even a situation of extreme self-defence does not constitute an exception to the other applicable rules of international law. The Judges all agreed that the rules of international humanitarian law apply at all times.

Furthermore, the Court unanimously concluded that any threat or use of nuclear weapons whatsoever,

"...should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons..." [para. 105(2)(D)]

The lack of a definitive conclusion regarding extreme circumstances of self-defence was likely a political bargain struck in order to gain enough votes for general illegality, given the political constraints on the judges. (Five of 15 judges are traditionally from the five official nuclear weapon states, also the permanent members of the Security Council.)

Three of the seven negative votes on general illegality, however, dissented because they disagreed with the possible exception in extreme circumstances of self-defense, arguing that nuclear weapons were illegal under all circumstances. Weeramantry's dissent falls into this category and will be discussed further below.

With respect to the principles of humanitarian law, the Court observed that:

"...the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons...the use of such weapons in fact seems scarcely reconcilable with respect to such requirements." (para. 95)

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Thus the Court confirmed that the Hague and Geneva Conventions, which codify the law of armed conflict, apply to nuclear weapons and make their use generally illegal. The principles of this law establish that the use of any weapon:<sup>7</sup>

- a. must be proportional to the initial attack,
- b. must be necessary for effective self-defence,
- c. must not be directed at civilians or civilian objects,
- d. must be used in a manner that makes it possible to discriminate between military targets and civilian non-targets,
- e. must not cause unnecessary or aggravated suffering to combatants,
- f. must not affect States that are not parties to the conflict, and
- g. must not cause severe, widespread, or long-term damage to the environment.

The Court also confirmed that if a particular use of weapons is illegal, so is the threat of such use. With respect to possession, the Court said specifically: "[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, para 4 [of the UN Charter]." This being the case, the Court observed that "[p]ossession of nuclear weapons may indeed justify an inference of preparedness to use them." It added that:

"Whether there is a 'threat' contrary to Article 2, para 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality." (para. 48)

Since first use of nuclear weapons would necessarily violate the principles of necessity and proportionality, it is arguable that mere possession of such weapons by a state that maintains a foreign policy of first use would constitute a threat to use those weapons under the Charter.

With regard to the obligation under the NPT for good faith negotiations on nuclear disarmament, the Court found that:

"The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (para. 99)

*The Court saw nuclear disarmament as the remedy to the lack of clarity in the law*

The Court saw this obligation as the *remedy* to the current state of instability in international law created by the "exception" regarding an extreme circumstance of self-defense. This was not an incidental reminder to negotiate nuclear disarmament, but the solution to lack of clarity in the law.

In this context, the Court held unanimously 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." [para. 105(2)(F)]

The Advisory Opinion reflects the changing role of global society and international law. The Court was caught between the framework of the past and indeterminate power structures yet to emerge. What kind of system will emerge and what the power structures will be is not yet clear, but Weeramantry's opinion offers some guidance.

### Judge Weeramantry's dissenting opinion<sup>8</sup>

Weeramantry's dissenting opinion functions as the accurate, authoritative statement of the law, statement of transition, and a guide to discerning positive signs of the emergent system.

Weeramantry's dissent<sup>9</sup> is based in large part on his fundamental disagreement with the concept of "general" illegality and the possible self-defence exception. He believes that the existing law is sufficiently clear on this matter. His interpretation should and will most likely be the prevailing opinion in years to come, as he was not bound, like the Court, by current politics and the

jurisprudence of the past.

Under the nation-state system of the past 350 years, the international actors are sovereign, territorial states, and the international security system depends on the role of a few dominant states. Warfare and economic disparity are seen as inevitable.

It is something of a cliché to point out that the world is going through a period of transition, or globalization, which includes centralization and integration of non-territorial social and economic forces, and globally organized media and communication, at governmental and non-state levels. This transition can be labeled a move from *geopolitics* to *geogovernance*.

Whether the emergent system will be human rights based or statist and market centered depends greatly on the nature of participation of transnational civil society and on our ability to discern emergent structures and to reinforce those we view as humane. The guiding principles of *humane geogovernance*, both analytical and normative, include economic well-being, social justice,

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non-violence, ecological stability, and positive identity. Weeramantry foreshadows positive signs by affirming the role of law in society as a guide to interpreting the law. His opinion on nuclear weapons offers a reading of the current state of the law that brings us into the "shadowland" of a nuclear weapons free world.

"Shadowland" is a term used by Richard Falk in an essay entitled, *The Grotian Quest*.<sup>10</sup> He argues that our endeavors to create a better world necessitate "a special sort of creativity that blends thought and imagination without neglecting obstacles to change." Falk continues:

"We require, in effect, an understanding of those elements of structure that resist change, as well as a feel for the possibilities of innovation that lie within the shadowland cast backward by emergent potential structures of power. Only within the shadowland, if at all, is it possible to discern 'openings' that contain significant potential for reform, including the possibility of exerting an impact on the character of the emergent political realities."

Grotius, often referred to as the father of international law, lived in the shadowland of a transition from feudalism to the modern nation-state system. His contributions to the laws of war and peace (1625) provided the basis for a new normative order for the nation-state system, which was then emerging. Today's "Grotian Quest" faces a set of obstacles that includes widespread abuse of human rights, scarcity of basic material needs, environmental degradation, and global militarization, including the threat of nuclear weapons. Judge Weeramantry foreshadows a globalization that moves the state system from geopolitics to humane geogovernance. Finding that "international law has clearly a commitment to the Grotian vision," he brings the shadowland into focus by coding the instruments of international law that are both normatively grounded and oriented toward a nuclear weapon free world.

Weeramantry uses an updated Grotian methodology to build his case, relying on positive legal instruments as well as the historical and jurisprudential bases of these instruments, and fundamental humanitarian principles shared by cultures and authorities throughout the world. He also ranges far afield both in a macro-historical and multi-cultural fashion, opening up a range of topics that the other judges do not get into

and inviting us to think about the world in which we live, how law presently affects that world, and how it should.

In his analysis of past reliance on nuclear weapons, Weeramantry keeps in sight the role of the Court in guiding global society:

"A global regime which makes safety the result of terror and can speak of survival and annihilation as twin alternatives makes peace and the human future dependent on terror. This is not a basis for world order which this Court can endorse. This Court is committed to uphold the

rule of law, not the rule of force or terror, and the humanitarian principles of the laws of war are a vital part of the international rule of law which this Court is charged to administer."

Weeramantry also reminds us why, in today's increasingly interdependent world, the admittedly difficult task of analyzing and explaining international law is essential, as illustrated by the example of South Africa:

"The Court's decision on the illegality of the apartheid regime had little prospect of compliance by the offending government, but helped to create the climate of opinion which dismantled the structure of apartheid. Had the Court thought in terms of the futility of its decree, the end of apartheid may well have been long delayed, if it could have been achieved at all. The clarification of the law is an end in itself, and not merely a means to an end. When the law is clear, there is a greater chance of compliance than when it is shrouded in obscurity."

Seeking security through arms  
races and the capacity for mass  
destruction is incompatible  
with a legal system that has  
prohibited the threat or use of  
force, as the UN Charter does

Weeramantry reminds us that a viable social organization contains rules of conduct that allow for its continued existence. Thus, international law — flexible as it might often appear — cannot be manipulated to permit any conclusion that tolerates the possibility of self-destruction. Seeking security through arms races and the capacity for mass destruction is

incompatible with a legal system that has prohibited the threat or use of force, as the UN Charter does.

The Court was also bound by a tradition of jurisprudence inherited from its predecessor, the Permanent Court of International Justice (PCIJ). In a 1927 criminal jurisdiction case, *Lotus*, the PCIJ held that "restrictions upon the independence of States cannot...be presumed."<sup>11</sup> This "permissive theory" of international law provides that what is not specifically

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prohibited is permitted. *Lotus* was the brooding omnipresence in the ICJ's advisory opinion, causing it to look for explicit prohibitions of nuclear weapons, for example. Weeramantry moves beyond this extreme deference to state sovereignty, noting also that in times of war, when humanitarian law applies, there can be no presumption of permissibility.

The Advisory Opinion also serves to highlight the gaps in the law of self-defence, itself a manifestation of the concept of sovereignty. Given the range of opinions on the meaning and application of self-defence, it should come as little surprise that the ICJ could not reconcile extreme circumstances of self-defence with the most extreme means of warfare to date — nuclear weapons. If the law is unclear and inconsistent on the use of force in self-defence, it would be all the more indeterminate when juxtaposing weapons of mass destruction with the “very survival of a state.”

The Court could not resolve the question of self-defence in relations to state survival because the emerging system of geogovernance threatens the very survival of statehood as an institution. The concept of “extreme circumstances of self-defence” underscores the futility of attempting to draw a line between legitimate and illegitimate uses of nuclear weapons. The Court did not recognize that self-defence as a *right* should carry a *duty*: an obligation of restraint.

Weeramantry's analysis of *Lotus* foreshadows a fundamentally different interpretation of sovereignty and permissible state behavior than that espoused by the nuclear weapon states. He recognizes that the law contributes to and functions within the premise of continued existence of the community served by that law. Legal systems are postulated upon the continued existence of society.

### Conclusion

Nuclear law cannot be only an exercise in jurisprudence. Law must take into account the unique nature

of nuclear weapons and the political/social context that enables their continued development and improvement.

The policies and practices of defence establishments and weapons laboratories help to shape society and law. Considerations of the role of law in society must therefore take into account the functioning of the machinery that produces nuclear weapons, other weapons of mass destruction, and newer and more sophisticated weapons that cannot even be easily classified.

Our law is failing us as a society if it allows us to continue putting enormous quantities of resources and talent into the science of destruction. Weeramantry offers a framework for reversing this trend.



- 1 Merav Datan is the director of the United Nations office of the International Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, located in New York. She presented this paper at IEER's *Conference on Nuclear Disarmament, the NPT, and the Rule of Law* at the United Nations in New York on April 25, 2000.
- 2 See for example Charles Moxley, *Nuclear Weapons and International Law in the Post Cold War World*. Lanham, Maryland & Cumnor Hill, Oxford: Austin & Winfield, 2000; Elliott Meyrowitz, *Prohibition of Nuclear Weapons: The Relevance of International Law*. Dobbs Ferry, New York: Transnational Publishers, Inc., 1990.
- 3 Treaty on the Non-Proliferation of Nuclear Weapons, 21 U.S.T. 483, 729 U.N.T.S. 161, 7 I.L.M. 811 (1968). On the web: <http://www.un.org/Depts/dda/WMD/npttext.html>.
- 4 Charter of the United Nations, entered into force 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153. On the web: <http://www.un.org/Overview/Charter/contents.html>.
- 5 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of the International Court of Justice, July 8, 1996), UN Doc. A/51/218 (1996), 35 I.L.M. 809 & 1343 (1996). On line at <http://www.icnp.org/wcourt/opinion.htm> and <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>. (Hereinafter “ICJ Advisory Opinion.”)
- 6 ICJ Advisory Opinion, Declaration of President Bedjaoui.
- 7 Thanks to Lawyers for Social Responsibility for the wording of this list.
- 8 This section is adapted from Saul Mendlovitz & Merav Datan, “Judge Weeramantry's Grotian Quest” in *Transnational Law & Contemporary Problems* Vol. 7 No. 2, Fall 1997.
- 9 ICJ Advisory Opinion, Dissenting Opinion of Judge Weeramantry.
- 10 Richard Falk, “The Grotian Quest,” in R. Falk et al., eds., *International Law: A Contemporary Perspective*. Boulder, CO: Westview Press, 1985 (Studies on a Just World Order, No. 2).
- 11 S.S. *Lotus* (Fr. V. Turk.) (1927), Permanent Court of International Justice Publications, Series A, No. 9, at 18 (Sept. 7). On the web: <http://www.law.berkeley.edu/faculty/ddcaron/Courses/il/il02005.htm>.

## E R R A T A

On page 12 of SDA vol. 8 no. 2 (February 2000) and page 7 of SDA vol. 7 no. 4 (July 1999), we misstated the numbers of countries party to the NPT. As of

September 18, 1998, there are 187 States parties to the NPT, with four States remaining outside: Cuba, India, Israel, and Pakistan.



# Cogéma on Trial for Illegal Radioactive Waste Storage

BY ANNIE MAKHIJANI AND DIDIER ANGER

France's commercial reprocessing plant at La Hague, operated by the company Cogéma, separates by far the largest quantity of plutonium in the world today. The plutonium comes from commercial spent fuel generated in French reactors as well as in the reactors of the reprocessing company's foreign clients, the largest of which are Germany and Japan. The government of France owns a majority share of Cogéma.<sup>1</sup>

In the late 1980s, as large scale reprocessing was becoming commercially established, the French government began looking for a repository site for its high-level commercial radioactive waste. As has been the experience elsewhere, there was intense protest when the preliminary list of sites selected for study was announced.<sup>2</sup> The process had to be shut down and France started over with a new nuclear waste law, passed in 1991. We will refer to the law as the Bataille Act, in reference to the parliamentarian who authored it, Christian Bataille, a member of the ruling Socialist Party.

The Bataille Act requires simultaneous research on three methods of high-level radioactive waste management (storage, transmutation, and repository disposal). Article 3 of the law requires the return of foreign radioactive wastes to their country of origin after the reprocessing of their spent fuel has been completed. Another crucial feature of the law is that it forbids the storage of foreign nuclear wastes on French soil beyond the limited time necessary for the reprocessing requirements.<sup>3</sup> Implicit in this idea was that Cogéma (a) would not accept foreign spent fuel for storage in France if it was not intended for reprocessing, (b) would not store spent fuel for long periods of time before reprocessing, and (c) would not store the reprocessed wastes from the spent fuel for long periods of time.

Most of the radioactivity in the reprocessing waste is contained in liquid high level wastes, which are vitrified and stored in specially constructed structures at the La Hague site, located near Cherbourg in the northwest of France. Low and intermediate level radioactive wastes generated by reprocessing are due to be compacted and stored in containers at La Hague. While Cogéma has returned some vitrified waste generated from the reprocessing of foreign spent fuel to Germany and Japan, the majority remains and continues to pile up at La Hague. None of the low and intermediate level waste has been returned, and Cogéma and its clients are not resolved on its final destination. Liquid low level wastes are discharged into the English Channel.



**Vitrification facility storage hall, COGEMA La Hague reprocessing plant, France.** This building stores highly radioactive waste, generated from the reprocessing of spent nuclear fuel, after it is vitrified and packaged in stainless steel canisters. The waste canisters are not visible in the photograph because they are stored under the floor in air-cooled dry wells.

## Illegal Shipments?

Cogéma has accepted:

- ▶ close to 50 metric tons of German MOX spent fuel – that is, spent fuel resulting from the irradiation of mixed plutonium dioxide-uranium dioxide fuel in German reactors – between 1988 and 1998. Cogéma does not have a permit to reprocess this spent fuel and has not applied for one. Such a permit is necessary since MOX spent fuel contains far more plutonium and other transuranic radionuclides than spent uranium fuel. It is being stored in violation of the spirit 1991 law, as Bataille, the author of the law, has noted:

"The [1991] law allows storage of wastes after reprocessing only for the time needed to cool the wastes. It did not foresee storage of un-reprocessed spent fuel for an extended period, awaiting reprocessing. This practice is contrary to the spirit of the law. Storage of wastes not intended for commercial reprocessing is not allowed. As the author of the law, I declare that the spirit of the law is being flouted by this practice." (*Le Monde*, Bataille interview, by Hervé Kempf, 6 March 2001)

- ▶ four shipments to La Hague during the summer of 2000 of German non-irradiated MOX fuel scrap from the Hanau MOX fuel fabrication plant which is being dismantled. This fuel is slated to be reprocessed. However, Cogéma would need a special authorization from the DSIN (Direction de la sûreté des installations nucléaires, equivalent to the Nuclear

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# Nuclear Law:

## Excerpts from Legal Documents Relevant to Nuclear Weapons

### International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

July 8, 1996

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

— passed unanimously

It follows from the above mentioned requirements 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.

— seven votes to seven,  
passed by the President's casting vote

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.

— passed unanimously

### Treaty on the Limitation of Anti-Ballistic Missile Systems

Signed by the United States and the Union of Soviet Socialist Republics May 26, 1972; entered into force October 3, 1972

1. Each Party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.
2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

— Article I

Each Party undertakes not to deploy ABM systems or their components except that:

- (a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no

more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

- (b) within one ABM system deployment area having radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

— Article III

### Treaty on the Non-Proliferation of Nuclear Weapons

Ratified by 187 states (all countries except Cuba, India, Israel, and Pakistan); entered into force March 5, 1970; indefinitely extended in 1995

Each nuclear-weapon State Party to the Treaty undertakes 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.

— Article I

Each non-nuclear weapon State Party to the Treaty undertakes 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.

— Article II

Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production, and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

— Article V paragraph 1



Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

— Article VI

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**

*Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts; entered into force 7 December 1979*

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

— Article 35 paragraph 3

The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.

[C]ivilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Indiscriminate attacks are prohibited [including an] attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

— Article 51 paragraphs 1, 2, 4 and 5 (excerpts)

**Charter of the United Nations**

*Signed June 26, 1945; came into force October 24, 1945*

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

— Article 2 paragraph 3

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

— Article 2 paragraph 4

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

— Article 51

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms and integral part of the present Charter.

— Article 92

All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

— Article 93 paragraph 1

The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

— Article 96 paragraph 1

**United States Constitution**

*Adopted September 17, 1787*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

— Article VI Clause II

Sources: ICJ Advisory Opinion at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>; ABM Treaty at <http://www.state.gov/www/global/arms/treaties/abm/abm2.html>; NPT at <http://www.un.org/Depts/dda/WMD/npttext.html>; Geneva Conventions Protocol at <http://www.unhchr.ch/html/menu3/b/93.htm>; UN Charter at <http://www.un.org/aboutun/charter/index.html>; US Constitution at <http://www.house.gov/Constitution/Constitution.html>



Regulatory Commission in the United States) to reprocess it and has not applied for one. Furthermore, these shipments have occurred without the knowledge of the French Ministry of Environment and in spite of the fact that for the last two years the French government has declared that no more imports of spent fuel from Germany would be accepted until Germany takes back its wastes from La Hague. The Ministry of Industry claims that the shipments were legal since the fuel is not irradiated and the contract was signed in 1997, before the 1998 ban on transports from Germany to France. Eleven more shipments from Hanau are scheduled for this year.

- three hundred sixty rods of irradiated MTR (Material Testing Reactor) fuel from the Australian Lucas Height research reactor. This fuel, which arrived in March in the port of Cherbourg, is also slated to be reprocessed but, again, Cogéma would need a special authorization from the DSIN.

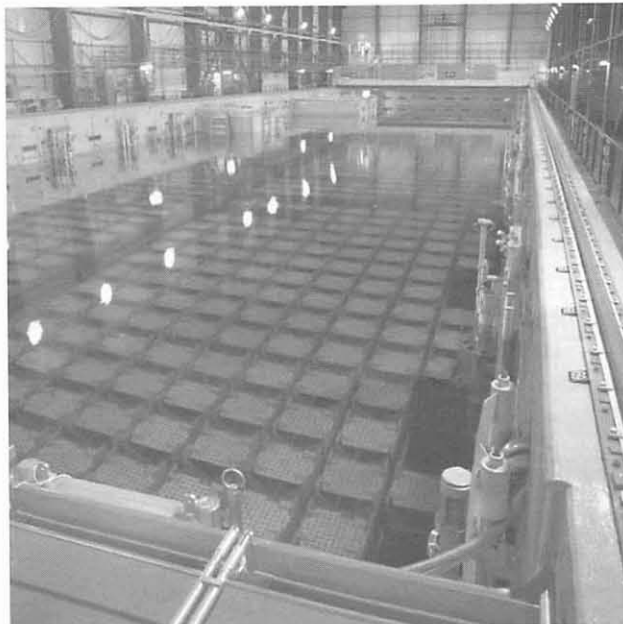
### **The CRILAN/Anger case against Cogéma**

A lawsuit filed in 1994 by a non-governmental organization in Normandy, the Committee for Reflection, Information, and Anti-Nuclear Struggle (Comité de Réflexion, d'Information, et de Lutte Anti-Nucléaire or CRILAN, for short), alleges that Cogéma is violating the Bataille Act. The complaint was amended in 1997 to include a charge of endangerment of public safety, since a law passed in that year allowed individuals to file suit if they believed their safety was being endangered due to illegal activities. Didier Anger (pronounced *aahn-zhay*), who represents CRILAN on the Commission Hague and the Commission Flamanville<sup>4</sup> and was also a former parliamentarian to the European Union, is the plaintiff for this new charge. The activities alleged to cause public endangerment are the (illegal) storage of foreign nuclear waste at La Hague and the releases to the environment resulting from reprocessing.

Article 3 of the 1991 waste law is very specific in requiring the return of foreign wastes. CRILAN's position is that the law requires the return of all wastes that were generated at La Hague as a result of reprocessing foreign spent fuel. Besides vitrified high level wastes, Cogéma must also return other reprocessing wastes.

Before the lawsuit was filed in 1994, Cogéma appeared to have no plans to return the foreign waste to the countries where the spent fuel originated, including Germany, Japan, Switzerland, Belgium and the Netherlands, and these countries had no plans to take back their wastes. In fact, a review of the older contracts indicates that Cogéma's foreign customers hoped that they could abandon their wastes in France under cover of sending spent fuel there for reprocessing.

Based on the testimony of Monsieur Bataille,



*Spent fuel storage pool, COGEMA-La Hague reprocessing plant, France. Irradiated fuel assemblies are placed in baskets and stored underwater for at least two years before they are reprocessed.*

reprocessing a batch of spent fuel takes five to eight years (including the time for high level waste vitrification). Reprocessing operations on the batches of spent fuel that resulted in the large amount of vitrified high level waste that is currently stored at La Hague have long been completed. One of the central arguments of CRILAN's lawsuit is that this waste is being stored at La Hague in violation of French law.

CRILAN's goals in filing the lawsuit are:

1. To have it officially confirmed that Cogéma's La Hague site has become the nuclear dump for Europe and Japan.
2. To demonstrate that Cogéma has used illegal tactics to obtain contracts.
3. To have highlighted the fact that the government has allowed Cogéma to transgress the law, notably by not specifying that penalties would be incurred in case of infraction, and thus not fully implementing the Bataille Act.<sup>5</sup>
4. To promote the return of foreign waste to the country of origin and thereby to help stem or stop reprocessing.
5. To make the French and German governments accountable and to force them to resolve the difficulties confronting the repatriation of the waste. Not only Cogéma but also the governmental agencies are responsible for the failure of the lawful return of the waste to Germany.

Besides the environmental and legal aspects of this case, the matter should be of considerable interest to all other countries concerned with the management of nuclear materials and nuclear waste. If Cogéma, the world's top plutonium handling and processing com-

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pany, is found to be routinely in violation of the laws of France, should it raise the question of whether much of the world's commercial separated plutonium is in the "wrong hands"?

### Progress to date

Before CRILAN's 1994 lawsuit, wastes from foreign spent fuel reprocessing were not returned to their countries of origin. Since then, there have been six shipments to Japan, two to Belgium, and three to Germany. However, Germany does not have enough storage space at its power plants for the vitrified logs of radioactive waste. Further, shipments of vitrified logs to the Gorleben repository in Germany have encountered stiff opposition from anti-nuclear activists.

The widespread publicity attracted by the CRILAN lawsuit played a role in the suspension of spent fuel shipments from Germany to France in May 1998, pending a resolution of resuming repatriation of German vitrified high level wastes now stored in France. An agreement between the French and German governments was reached in January 2001 to resume the shipments in both directions. A shipment from La Hague to Gorleben took place in March 2001. It caused enormous protest in Germany, with thousands of activists blocking the transport route, which was escorted by thousands of police.<sup>6</sup> In the other direction, 1,000 metric tons of spent fuel are due to arrive at La Hague between now and 2005 for reprocessing. Repatriation is a central issue in the lawsuit.

In January 1999, the judge Frédéric Chevallier, who has investigative powers under French law, decided that there was enough merit in Didier Anger's charge to put Cogéma under investigation. In May of that year, the judge visited Cogéma's La Hague site and Anger accompanied him. Since Cogéma did not meet the judge's demand for documents, Judge Chevallier carried out a search of Cogéma's headquarters in Vélizy in September 1999 to obtain these documents in person.


Cogéma petitioned the court to dismiss the CRILAN case after an official report by the IPSN (Institut de protection et de surveillance nucléaire, an institute under both the Ministry of Industry and Ministry of Environment) claimed — contrary to the findings of a paper published in a British medical journal — that cases of leukemia near the La Hague site were likely not attributable to reprocessing activities. In October 2000, the Court of Criminal Appeal rejected Cogéma's appeal.

In October 2000, the Cherbourg judge granted CRILAN's lawyer, Maître Tilbault de Montbrial, and

## LEGAL ACTIONS AGAINST COGEMA

- ▶ CRILAN took Cogéma to the Cherbourg court in 1994 for the illegal storage of highly radioactive foreign waste. (See accompanying article for details.)
- ▶ Greenpeace France took Cogéma to court for shipping irradiated nuclear fuel from Australia. On March 15, 2001, the court ruled in favor of Greenpeace, forbidding Cogéma to unload the fuel. To make its judgment stick, the court imposed a fine of 100,000 francs (about \$15,000) per rod unloaded, to be renewed every week until the fuel is either shipped back or the authorization to reprocess obtained. The court also ordered Cogéma to pay 20,000 francs to Greenpeace for lawyers' fees, but Cogéma got the fee overturned on appeal. The case is still underway.
- ▶ In March 2001, CRILAN took Cogéma to court for accepting German non-irradiated MOX fuel scraps. Although the arguments were the same as those put forward by Greenpeace, the case was not judged on the validity of the arguments. It was dismissed on the grounds that CRILAN did not have the standing to bring forth such a case. CRILAN has referred the case to the environmental group Manche-Nature, which appears to have the standing to file the complaint.

Didier Anger access to the documents that were confiscated during the judge's search at Cogéma headquarters, in particular the German reprocessing contracts that had been translated. There were several types of contracts. The oldest, made with France's Commissariat à l'énergie atomique, covering at least 1,700 metric tons, has no explicit return clause. Others have a return and a no return option. Some provide for return but with no date attached.

Judge Chevallier has named an expert to provide him with a report on the case. The expert is expected to file his report to the court around June 2001. There will be a judicial hearing after that, in which plaintiffs and defendants will participate, and upon which the judge will make his findings. Cogéma may appeal the findings of the judge. The process of judicial hearing, appeals, and concurrent organizing and media work by CRILAN is expected to extend into the year 2002. 

- 1 Cogéma is 77% owned by the French government, with almost all the rest being owned by the oil conglomerate Total/FINA/Elf.
- 2 For more information on the search for a French repository site, see Mary Byrd Davis, "Deep Underground Storage in France?," *Science for Democratic Action* vol. 7, no. 4 (July 1999), on the Web at [http://www.ieer.org/sdfiles/vol\\_7/7-4/france.html](http://www.ieer.org/sdfiles/vol_7/7-4/france.html).
- 3 The law does not specify the duration of this certain period of time, referred to as "technical delays imposed by the reprocessing." However, in an interview with the French newspaper *Le Monde*, Christian Bataille said that it is understood that the wastes could be kept between five and ten years.
- 4 The commissions are the US equivalent of stakeholders' committees.
- 5 The French legal system requires an enforcement decree from the concerned ministries — the Ministry of Industry, the Ministry of Health, and the Ministry of Environment — specifying the modes of implementation of the law and, in the case of criminal provisions, the penalties for infraction of the law. While the Ministry of Industry has issued implementing and enforcement orders, setting in motion the research provisions of the 1991 waste law, enforcement provisions and specified penalties for violation of the waste storage provision have not been issued.
- 6 This one shipment included waste generated from the reprocessing of approximately 250 metric tons of German spent fuel.



Article II contains a parallel commitment on the part of non-nuclear states parties not to receive them:

"Each non-nuclear weapon State Party to the Treaty undertakes 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."

This is complicated treaty language. I will separate my analysis into four sections. First, I would like to clarify what NATO nuclear sharing means. Second, I will talk about the history of the NPT and nuclear sharing. Third, I will address the European Union and nuclear sharing, which is one question that might come up in the future. Finally, I will conclude with some suggestions on how the problem might be addressed.

### **The meaning of nuclear sharing**

Six non-nuclear NATO countries currently host U.S. nuclear weapons on their territories. Up to 180 freefall bombs of the type B-61, Modification 10 may be deployed in Europe. These are nuclear weapons designed to be dropped from aircraft. Some of these bombs are designated for possible use in wartime by non-nuclear NATO members. The air forces of these countries operate so-called dual-capable aircraft, which allow them to drop conventional as well as nuclear bombs. The dual capability of these fighter-bombers allows the militaries of these non-nuclear states to participate in NATO nuclear operations, should the Alliance decide to use nuclear weapons and the U.S. President order their use.

The pilots for these aircraft are provided with training specific to use nuclear weapons. The air force units to which these pilots and aircraft belong have the capability to play a part in NATO nuclear planning, including assigning a target, selecting the yield of the warhead for the target, and planning a specific mission for the use of the bombs.

Under NATO nuclear sharing in times of war, the U.S. would hand control of these nuclear weapons over to the non-nuclear weapon states' pilots for use with aircraft from non-nuclear weapon states. Once the bomb is loaded aboard, once the correct Permissive Action Link code has been entered by the U.S. soldiers guarding the weapons, and once the aircraft begins its mission, control over the respective weapon(s) has been transferred. That is the operational, technical part of what is called nuclear sharing.

Nuclear sharing has also a political side. All non-

nuclear weapon states that are members to the NATO treaty are eligible to participate in NATO's nuclear-planning and consultation processes. This means they are eligible to participate in drawing up target plans, in discussing the use of nuclear weapons in war time, in consultations on whether NATO should ask the U.S. for the use of nuclear weapons, and in consultations when the NATO nuclear weapon states should decide to use nuclear weapons, whether NATO as a whole would agree to do so. All of these tasks are accomplished in NATO's Nuclear Planning Group and its subsidiary bodies.

NATO nuclear sharing, as far as the technical part is concerned, was described in 1964 by one member of the U.S. National Security Council in what was at that time a highly classified memorandum as meaning that "the non-nuclear NATO-partners in effect become nuclear powers in time of war."<sup>2</sup> The concern is that, at the moment the aircraft loaded with the bomb is on the runway ready to start, the control of the weapon is turned over from the U.S., a nuclear weapon state, to non-nuclear weapon states. The control over this weapon is, at that moment, with the pilot from the non-nuclear weapon state in both the physical and legal sense. Control remains with the United States until that point. To my understanding, this is in violation of the spirit, if not the text, of Articles I and II of the NPT.

During the negotiations for the NPT, NATO's member states used a rather tricky approach to get around a prohibition of their established system of jointly deciding and implementing specific aspects of NATO's nuclear strategy. Once the text of Articles I and II was known, the U.S. (in coordination with its allies) worked on a unilateral interpretation of Articles I and II, which they agreed upon internally and then consulted with some of the other countries negotiating the NPT. Who was consulted was not widely known until recently. We now know that the Soviets had been shown the text of these interpretations and that some key members of the Eighteen-Nation Committee negotiating the NPT had been consulted. However, it is still not known which nations were among the "key" members. Most of the States that signed the NPT on July 1, 1968, did not have a chance to see the text of these interpretations at that time.

The normal way to make reservations known to all future and current parties of an international treaty would be to deposit them jointly with the signature of the treaty. Thus they would be in the public domain. However, the U.S. government at the time decided to not deposit any reservation, but make its unilateral interpretations to the NPT public in a different way. They were presented during the Senate ratification hearings in 1968 and later printed in the hearing's

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transcript. Thus most initial signatories of the NPT got the chance to learn of the reservations when looking at the transcripts of the U.S. Senate hearings, which were held after they had already signed the treaty.

Because most, if not all, non-NATO countries did not fully understand what NATO nuclear sharing meant in detail, this procedure in effect assured that no early questions about NATO nuclear sharing would be raised by countries not privy to the limited NPT consultations among a few of the parties.

The unilateral U.S. interpretations of the NPT were described in an undated letter from then-U.S. Foreign Secretary Rusk, in answers to 'hypothetical' questions asked by the European NATO allies.<sup>3</sup> The first three questions dealt with nuclear sharing, the fourth one with the future of the European Union. In this letter, the United States tried to legalize under the NPT what NATO had been doing anyway.

The Rusk letter argues that the NPT does not specify what is allowed, but only what is forbidden. In this view, everything that is not forbidden by the NPT is allowed. Since the treaty doesn't explicitly forbid the U.S. or other nuclear-weapon states to sell nuclear-weapons-capable carrier systems, such as aircraft, missiles, etc., to non-nuclear weapon states, it is allowed to sell them. Since the treaty doesn't explicitly talk about the deployment of nuclear warheads in countries that are non-nuclear weapon states, such deployments are considered legal under the NPT. And since the treaty doesn't talk explicitly about whether it applies or is binding in times of war, a very specific argument has been developed so NATO can argue that this treaty is not binding in times of war.

### Limits of NPT applicability?

The question of whether the treaty applies in times of war is a very crucial one to the interpretation of the legality of nuclear sharing.

Adrian Fisher, the U.S. diplomat who developed this U.S. negotiating concept, suggested, referring to the NPT's preamble, that the treaty should have the purpose of prohibiting not only proliferation but also war. Fisher went on to argue that, if such a formula was contained in the preamble, the U.S. could claim that, once a war had begun, the treaty had failed to fulfill its function of prohibiting war and thus was no longer binding on the United States and its allies.<sup>4</sup> The suggestion was adopted and is now contained in the treaty text, which declares that the treaty is intended to "to make every effort to avert the danger of such a war," meaning nuclear war.<sup>5</sup>

The Rusk letter also reflects this view. It states that the United States and its NATO allies will feel bound to the NPT, "unless and until a decision were made to go

to war, at which time the treaty would no longer be controlling."<sup>6</sup> The provision allows NATO to argue that both a policy that includes possible first use of nuclear weapons and nuclear sharing is legal in times of war.

The question of what type of war it might take to suspend the NPT arose during the Senate hearings. The Johnson Administration replied that they were talking about "general war."<sup>7</sup> However, while general war is defined in U.S. military strategy, the term is not used or defined by NATO. Wars between two minor powers were excluded from the definition of "general war" during the hearing. Rather the term applied to an East-West conflict during which NATO wouldn't be bound to the treaty.<sup>8</sup> Such a view allowed NATO some flexibility to decide itself when the NPT should apply and when not, and when NATO might undertake a first use of nuclear weapons.

Recent developments in NATO make things even more complicated. NATO is currently working on a new classified military strategy document called MC-400/2, in which some want the Alliance to retain the option to assign to nuclear weapons a role in deterring biological and chemical weapons owners as well as those having the means of delivery for such weapons. The document was approved by NATO's North Atlantic Council in May 2000. To my knowledge, it does not contain a clear approval of deterring all types of weapons of mass destruction by nuclear weapons. However, it also does not contain language clearly restricting the use of nuclear weapons to situations, where nuclear weapon states are involved in the conflict. Since the exact language is unknown to the public it remains an open question whether, like in the case of NATO's "first use policy," the option for a wider role of nuclear weapons is kept open via the argument of "allowed is what is not explicitly forbidden."

Retaining the option to use nuclear weapons against opponents armed with biological and/or chemical weapons would increase the number of occasions under which NATO might consider nuclear sharing and under which non-nuclear weapon states may participate in nuclear missions. This is a logical consequence of the Alliance's policy of shared risks, roles and responsibilities.

### Nuclear sharing and the European Union

At some point in the future, the EU's members will have to decide whether to integrate their military forces into a collective defense structure or even whether they are going to become a unified state with unified armed forces. In both cases, the question remains of how current or possible future EU members will address the use of nuclear weapons that belong to the two European Union members that are nuclear powers, Britain and France.

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European integration often seems to happen on a slippery slope towards integration. This might prove true again, when it comes to discussing Europe's nuclear future. A one-time decision to hand over control from the national, i.e. British and French, level to the European level is very unlikely. Interim steps, e.g. some version of nuclear sharing modeled after NATO, could be used to avoid a clear-cut decision on a highly complicated issue such as the future control over British and French nuclear weapons.

At present the fate and the legality of EU nuclear sharing would appear to depend in part on the resolution of the NATO nuclear sharing question. One should try to ensure that the European Union doesn't run the risk of causing suspicions about the EU violating the NPT in a manner similar to NATO.

### Conclusions

1. The issue of the legality of NATO nuclear sharing has never been fully and thoroughly addressed by the parties to the NPT. They need to do so. Unless NATO does not deliberately end nuclear sharing, the parties to the NPT should develop a joint understanding on whether it is legal or not.
2. NATO's non-nuclear countries should consider whether they would take the unilateral initiative to give up the technical capability to use nuclear weapons. This could be a very, very positive step for strengthening the NPT because it eliminates all ambiguity on whether these countries are in compliance with Article II.<sup>9</sup> After all, these countries are parties to the NPT and they have an obligation not to receive nuclear weapons or plan for taking control of them in the future, directly or indirectly. The U.S. should consider whether it is not in its vital interest to end nuclear sharing in order to avoid any ambiguity on compliance with Article I of the treaty.
3. Both the non-nuclear as well as the nuclear State Parties to the NPT should consider strengthening and reiterating a formula from the 1985 Third Review Conference final document: that the treaty is controlling under "any circumstances"<sup>10</sup> This approach would make it clear that the NPT is

binding in times of war. This would end the ambiguity created by the U.S. and its NATO allies in regard to nuclear sharing.

4. Non-nuclear and nuclear members of the EU should assure the other members of the NPT that the EU is not going to develop at any time a nuclear sharing model that might violate or create ambiguity over their compliance with Articles I and II of the NPT. This would make clear its very strong commitment to strengthening the non-proliferation regime.

1 Otfried Nassauer is the Director of the Berlin Information-center for Transatlantic Security (BITS). This article is based on the transcript of a talk he gave at IEER's *Conference on Nuclear Disarmament, the NPT, and the Rule of Law* at the United Nations in New York on April 25, 2000. (The original transcript is on-line at <http://www.ieer.org/latest/nptotfri.html>.) His talk was based on research done for a report published in March 2000 by BITS and BASIC entitled "Questions of Command and Control," on-line at <http://www.bits.de/frames/publib.htm>.

2 Charles E. Johnson, "U.S. Policies on Nuclear Weapons," Washington, December 12, 1964, partially declassified in 1991 (Lyndon B. Johnson Library).

3 "Questions on the Draft Non-Proliferation Treaty Asked by U.S. Allies Together with Answers Given by the United States," in: "Non-Proliferation Treaty" Hearings before the Committee on Foreign Relations, U.S. Senate, Executive H 90th Congress 2nd Session, Washington, 1968, pp. 262-263. This letter was part of the ratification documents, sent by the President to the Senate on July 2, 1968 – one day after the signing ceremony for the treaty. The initial public hearings on these documents were held on July 10, 11, 12 and 17, 1968.

4 Adrian Fisher, "Memorandum for Mr Bill Moyers, Subject: Working Group Language for the Non-Proliferation Treaty: Relationship to Existing and Possible Allied Nuclear Arrangements," September 30, 1966, Original Classification Secret-Exdis, pp. 4-5.

5 "Non-Proliferation Treaty"-Hearings before the Committee on Foreign Relations, U.S. Senate, Executive H 90th Congress 2nd Session, Washington, 1968, p. 258.

6 op. cit.

7 "Non-Proliferation Treaty"-Hearings before the Committee on Foreign Relations, U.S. Senate, Executive H 90th Congress 2nd Session, Washington, 1968, p. 60.

8 "Non-Proliferation Treaty"-Hearings before the Committee on Foreign Relations, U.S. Senate, Executive H 90th Congress 2nd Session, Washington, 1969, p. 424.

9 For a longer description of the pros and cons of this proposal see Otfried Nassauer and Markus Nitschke, "Die NATO, Europa und das Ende der technischen nuklearen Teilhabe," BITS-Policy Note 00.7, Berlin, December 2000, available at <http://www.bits.de/frames/publib.htm>.

10 Final Declaration of the Third Review Conference of the NPT, reprinted in: Jozef Goldblat, "Twenty Years of Non-Proliferation Treaty – Implementation and Prospects," Oslo, 1990, p. 138.

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## Sharpen your technical skills with Dr. Egghead's Atomic Puzzler

In helping the editor to prepare graphics for this issue of SDA, Gamma — Dr. Egghead's canine friend — found out that record-keeping at NATO's photo archives in the early days was doggone inadequate. It seems that no one could dig up the identities of the ten men in the photograph on page 1 and reprinted here.<sup>1</sup>

NATO's Media Library Web site describes the photo as "First meeting of the Nuclear Planning Group." It is one of several photos listed under "Meeting of Defence Ministers." According to its Final Communiqué, the first meeting of the NATO Nuclear Planning Group was attended by NATO Secretary General Manlio Brosio plus the defense ministers of seven NATO countries: Paul Hellyer of Canada, Dr. Gerhard Schroeder of Germany, Roberto Tremelloni of Italy, Willem den Toom of the Netherlands, Ahmet Topaloglu of Turkey, Denis Healey of the United Kingdom, and Robert McNamara of the United States.<sup>2</sup>



But after hours of Web sniffing and pawing around military history books, Gamma could not find confirmation that all of these defense ministers are present in the photograph. Even if he did, he would still need to figure out who was whom. And who is the tenth person?

In the end, Gamma managed to identify three of the ten: US President Johnson (fourth from right), McNamara (third from right), and Brosio (far left).

We are challenging SDA readers to identify, with confirmation, each of the seven unidentified men in the photo. Include their names and titles. Confirm your answers by, for example, citing the publication in which the photograph identifying the men appears. Please provide a copy of the relevant source page(s) with your answer.

<sup>1</sup> Gamma found the photograph at the NATO Media Library at <http://www.nato.int/structur/medialib/database/caption/t00935.htm>.

<sup>2</sup> The Final Communiqué is also on-line: <http://www.nato.int/docu/comm/49-95/c670406a.htm>.

Send us your answer via fax (1-301-270-3029), e-mail ([ieer@ieer.org](mailto:ieer@ieer.org)), or snail mail (IEER, 6935 Laurel Ave., Suite 204, Takoma Park, Maryland, 20912, USA), postmarked by June 29, 2001. IEER will award a maximum of 25 prizes of \$10 each to people who send in a complete answer (by the deadline), right or wrong. One \$25 prize will be awarded for a confirmed correct entry, to be drawn at random if more than one correct answer is submitted. International readers submitting answers will, in lieu of a cash prize (due to exchange rates), receive a copy of the proceedings from the *IEER Conference on Nuclear Disarmament, the NPT, and the Rule of Law*, held at the United Nations in New York on April 24-26, 2000.

### Answers to Atomic Puzzler from SDA volume 9 number 2, February 2001

1. D
2. C
3. A
4. False
5. True
6. False
7. a. Commercial plutonium: 215 metric tons on December 1, 2000; 225 metric tons on December 1, 2001; 235 metric tons on December 1, 2002.  
Military plutonium: 251 metric tons on December 1, 2000; 252 metric tons on December 1, 2001; 253 metric tons on December 1, 2002.  
b. December 2004  
c. 50,000 nuclear weapons (rounded)  
d. 31,000 nuclear weapons (rounded)  
e. 81,000 nuclear weapons (rounded)

### Answers to Atomic Puzzler from SDA volume 9 number 1, December 2000

1. 192 Bq
2.  $1.32 \times 10^5$  Bq
3. 806 mrem
4.  $5.56 \times 10^5$  mrem
5. 12.4 times





Dear Arjun:

The statement "It presumes the people," etc.\* is deserving of a very special article.

Since 1972, [I] have been an advocate for justice for Atomic Veterans having worked with NAAV [National Association of Atomic Veterans], NARS, [National Association of Radiation Survivors], DAV [Disabled American Veterans], American Legion and VFW [Veterans of Foreign Wars] and on one occasion around 1986 met you at an appearance with then Representative Simon of Illinois.

On many occasions at meetings of the above named organizations and at committees and individuals meetings with members of Congress, [I] stated that it had always concerned me that the Marine Corps never trusted us enough to warn of the dangers of radiation before assigning us to Nagasaki in late 1945. It was as though we would have revolted or refused to accept the assignment.

It happened that I was 32 years old at that time and deeply resented the fact that young men 18-21 years old etc. who were good enough to send to such places as Tarawa, Saipan, Tinian, Iwo Jima, Okinawa, etc., could not be trusted with words of precaution about the possibility of exposure while on duty in Nagasaki.

The result was that many drank from the reservoir, went sightseeing all over the Urakami District, and I for one helped Bishop Paul Yamaguchi during Novem-

ber 1945 crawl through the wreckage of his Cathedral looking for items he could salvage. He even gave me a large wooden cross that had been an ornament over the choir loft. I brought it home with me and it is now in the Hiroshima-Nagasaki collection — museum at a college in Ohio. On New Year's Day 1946 two Marine football teams even played the "Atomic Bowl" game at Ground Zero the only clear space.

This secrecy and distrust of our citizens has probably been going on for years but evidently with the advent of World War II, it became an every day occurrence. One only has to read such books as "Day of Deceit," "Making of the Atomic Bomb," "The Decision to Use the Bomb," plus of course Carole Gallagher's excellent book "American Ground Zero," etc. to note how this policy of life and death decisions should only be made by the various Presidents involved and a few key advisors without the informed consent of the people. The message is, "They cannot be trusted."

You are to be commended for stressing this concept in your article and truly the subject is deserving of a detailed study by your fine group.

Sincerely,

Walter G. Hooke  
Cambridge, New York

\* The writer is referring to the following statement, taken from "A Global Truth Commission on Health and Environmental Damage from Nuclear Weapons Production," *Science for Democratic Action* vol. 9 no. 2, February 2001. (The entire article is online at [http://www.ieer.org/sdfiles/vol\\_9/9-3/truth.html](http://www.ieer.org/sdfiles/vol_9/9-3/truth.html).)

"The pattern of keeping health and environmental abuses of their own people secret in the name of national security is anti-democratic to the core. It presumes that the people would not make sacrifices for the security of their countries. It presumes that top nuclear bureaucrats can make life or death decisions in defiance of established laws, norms, and regulations without the informed consent of the people."

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