

THE LEGAL STATUS OF U.S. NEGATIVE SECURITY ASSURANCES TO NON-NUCLEAR WEAPON STATES

by George Bunn¹

George Bunn is Consulting Professor at Stanford University's Institute of International Studies and Center for International Security and Arms Control. From 1961 to 1969, he served as general counsel of the Arms Control and Disarmament Agency (ACDA) and was one of the negotiators of the Non-Proliferation Treaty.

Has the United States committed itself not to use nuclear weapons against countries that forswear them? This article summarizes the gradual change in how this question has been answered from the 1960s, when the United States would not even say that it had no "intention" of using nuclear weapons against such countries, to 1995, when President Clinton made a formal but qualified declaration that it would not do so. It then describes why this declaration (a so-called "negative security assurance") is *binding*—"legally binding" to some and "politically binding" to others—and discusses whether it precludes the use of nuclear weapons to counter a biological or chemical weapon attack.

President Clinton's declaration in 1995 was made to over 170 non-nuclear weapon countries that by

then had forsworn nuclear weapons by adhering to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).² These countries now include all those in the world having nuclear reactors except for the four other avowed nuclear weapon states (Britain, China, France, and Russia) and four major states that have refused so far to join the NPT—Brazil, India, Israel, and Pakistan. Brazil has joined the Latin American nuclear-weapon-free zone and has become the beneficiary of a related U.S. non-use promise as a result.³ With the exception of India, Israel, and Pakistan (each of which is believed to have a nuclear weapon capability), and the five nuclear weapon states (often referred to here as the "Five"), the U.S. negative security assurance covers essentially the whole world.

In 1996, in a non-binding advisory

opinion, the International Court of Justice (I.C.J.) held unanimously that any use of nuclear weapons "should...be compatible" with the negative security assurances given by the United States and the other four nuclear weapon states to non-weapon NPT parties in 1995.⁴ On the other hand, the U.S. State Department's Office of Legal Adviser concluded that the U.S. undertaking does not constitute an "international agreement." Can the I.C.J. and the State Department both be correct? After years of debate on the legality of using nuclear weapons, has a norm been created that justifies the I.C.J.'s conclusion even though there is no "international agreement" within the State Department's definition? This article will discuss these questions after first describing the history leading up to the 1995 U.S. undertaking.

EARLY PROPOSALS TO BAN NUCLEAR WEAPONS

U.S. opposition to banning the use of nuclear weapons began as the Cold War was beginning. In 1946, when the United States had the only nuclear weapons in the world, it proposed to destroy what it had if other countries would agree not to acquire such weapons. The 1946 U.S. Baruch plan would have given a U.N. agency a monopoly on conducting research on how to make nuclear explosives—to prevent others from doing so—as well as strong inspection authority free of a veto. The United States, however, offered to give up its own weapons only after U.N. inspections—backed if necessary by military force—were underway in other countries.⁵ Not yet having nuclear weapons, the Soviet Union countered with a proposal to destroy those held by the United States and to ban future production and use by treaty, but not to limit national research on nuclear explosives, which its scientists had already begun.⁶ The Soviet position in the U.N. debate over these proposals was the first step in what became a worldwide campaign to “ban the bomb” and to declare any government that “would be the first to use the atom weapon against any country” to be a war criminal.⁷ This campaign was opposed by the West, led by the United States.⁸

By 1949, the year the Soviet Union tested its first nuclear weapon and the North Atlantic Treaty became effective, the Cold War was in full swing. In due course, the United States and its North Atlantic Treaty Organization (NATO) allies, fearing an overwhelming attack on Western Europe by large Warsaw Pact conventional forces led by the Soviet

Union, declared their intention to use nuclear weapons first, if faced by such an attack.⁹ By 1954, so many options for nuclear use were considered realistic by U.S. military strategists that President Dwight Eisenhower announced that nuclear weapons “have today achieved conventional status in our armed forces.”¹⁰

By 1961, the campaign to ban the bomb had produced a U.N. General Assembly Resolution declaring that any use of nuclear weapons would be a violation of the U.N. Charter and an international war crime. The vote was 55 to 20, with the United States and most of its major allies dissenting. In addition, 26 countries, including most Latin American and Scandinavian states, abstained.¹¹ At that time, the United States opposed adding any ban on first use of nuclear weapons beyond the U.N. Charter’s limitation of force to self-defense or actions authorized by the Security Council.¹² Thus, in opposing the resolution’s call for a conference to draft a treaty prohibiting first use, Secretary of State Dean Rusk said:

The United States Government can and does offer the fullest assurances that it will never use any weapon, large or small, with aggressive intent. But the United States, like other free nations, must be fully prepared to exercise effectively the inherent right of individual and collective self defense as provided in the United Nations Charter.¹³

In the U.S. view, the North Atlantic Treaty and other U.S. military alliances assured U.S. allies against the use of nuclear weapons by other countries. The alliance erected a U.S. nuclear “umbrella” over them—a meaningful threat of retaliation which would deter the use of

nuclear weapons on its members by others.¹⁴

FIRST U.S. ASSURANCES SPECIFIC TO NUCLEAR WEAPONS

As the Soviet Union, Britain, and then France acquired their own nuclear weapons, the United States began seeking international agreement to prevent further nuclear proliferation.¹⁵ China’s first nuclear test in 1964 increased U.S. concern that India would push its long-standing nuclear research project farther toward building weapons. The United States had begun supporting an Irish idea for a global treaty in which non-nuclear weapon countries would promise not to acquire nuclear weapons, and the Chinese test gave new energy to the effort that eventually produced the NPT in 1968.¹⁶

Non-weapon countries considering proposals for such a treaty asked the United States: If we give up nuclear weapons, will you promise not to use such weapons against us and come to our assistance if someone else does?¹⁷ The first public U.S. response to this question was given by President Lyndon Johnson on the day of the Chinese test: “The nations that do not seek national nuclear weapons can be sure that, if they need our strong support against some threat of nuclear blackmail, then they will have it.”¹⁸

The statement contained no negative assurance for the benefit of countries forswearing nuclear weapons. But on that same day, China announced “that China will never at any time under any circumstances be the first to use nuclear weapons.”¹⁹

Americans assumed that the In-

dian government, a rival of China's with a nuclear research program that had begun before that of China, would not rely on this any more than the United States would rely on similar Soviet promises.²⁰ Moreover, the United States still opposed any limit on the first use of nuclear weapons.²¹ President Johnson's statement, therefore, promised assistance and did not make a pledge such as China's. Other forms of a U.S. assurance had been debated within an interagency committee, but the actual text used was drafted to meet the occasion of the Chinese test.²² Not equivalent to the promise of a military alliance with India or any other threatened country, it was nevertheless a strong statement and came to be called a "positive" nuclear assurance in contrast to a "negative" assurance such as China's.²³

India minimized the significance of Johnson's statement.²⁴ Later, while in London to seek help in dealing with China's nuclear threat, India's prime minister told the press: "If all the non-nuclear countries united, they could create the climate necessary for the non use of nuclear weapons."²⁵ India was allied with neither side in the Cold War, and seemed hesitant to seek an alliance to deal with China.²⁶ While U.S. and Soviet negotiators cooperated to produce a positive assurance for India that would substitute for (but not constitute) an alliance, what they proposed did not satisfy the Indians.²⁷ Meanwhile, India and other non-aligned countries that had supported the Soviet ban-the-bomb campaign began demanding that non-use assurances be made to countries not having nuclear weapons. During a U.N. Disarmament Commission conference in 1965, an In-

dian proposal for a promise "not to use nuclear weapons against countries who do not possess them" received support from other non-aligned countries.²⁸

Responding to this proposal, the U.S. Arms Control and Disarmament Agency (ACDA) urged acceptance of such a limitation on first use—with a modification to fit the perceived needs for nuclear deterrence of NATO and other allies. Within the U.S. government, ACDA urged approval of the following clause for a proposed draft for the NPT:

Each of the Parties to this Treaty now owning nuclear weapons undertakes not to use nuclear weapons against any other Party that does not own nuclear weapons, *except in defense against an act of aggression in which a State owning nuclear weapons is engaged.*²⁹

ACDA argued that U.S. nuclear use was highly unlikely anywhere in the world unless China or the Soviet Union was engaged on the other side, in which case the italicized exception would permit nuclear use. ACDA also argued that India had sought a norm to this effect and that the clause could be an important inducement to gaining the agreement of non-nuclear weapon countries to the proposed nonproliferation treaty.³⁰ The Joint Chiefs of Staff, however, though supporting the idea of an NPT, opposed this limitation on U.S. nuclear options. The final U.S. treaty draft approved by an interagency committee for submission to the Geneva disarmament conference did not contain such a clause.³¹

When this draft was made public in September of 1965 at the Geneva conference, several non-aligned countries, including India and Nige-

ria, complained that it did not contain a non-use promise for their benefit.³² In 1966, the Soviet government responded to this complaint with a proposal for a treaty clause to prohibit "the use of nuclear weapons against non-nuclear States parties to the treaty which have no nuclear weapons on their territory."³³ This language, however, would have excluded from protection NATO allies such as West Germany, Italy, and Turkey that had American or British nuclear weapons on their territories. For this reason in addition to the Joint Chiefs' desire to keep their nuclear options open, the United States opposed the Soviet suggestion—though many non-aligned countries supported it.³⁴

Later in 1966, the eight non-aligned countries that were members of the Geneva disarmament conference joined in a memorandum to the conference that recited their various individual NPT-related proposals including "the banning of the use of nuclear weapons and assurance of the security of non-nuclear-weapon States." They suggested that these "could be embodied in a treaty as part of its provisions or as a declaration of intention."³⁵

During the U.N. General Assembly debates on disarmament in the fall of 1966, 46 non-aligned countries introduced a draft resolution that invited the nuclear weapon states "to give an assurance that they will not use, or threaten to use, nuclear weapons against non-nuclear-weapon States."³⁶ ACDA sought authority from President Johnson for the U.S. representative to the United Nations to vote for the resolution and to announce during the debate that the United States:
...declares its intention to re-

frain from the threat or use of nuclear weapons against any non-nuclear weapon state that is party to a general non-proliferation treaty and that is not engaged in an act of aggression supported by a nuclear weapon State.³⁷

The Joint Chiefs of Staff opposed ACDA's draft: According to a State Department cable sent to President Johnson and Secretary of State Rusk, who were abroad when the issue arose, the Chiefs' "opposition was based on the reason that such a non-use assurance could provide an impetus toward total prohibition of nuclear weapons and the total impact could alter the current military balance to the detriment of the U.S."³⁸ Once again, the Chiefs were concerned about any new norm limiting nuclear deterrence options. The State Department cable, in support of ACDA's request, argued that, because of the exception for aggression supported by a nuclear weapon state, the proposed declaration "would not apply in the event of any war in Europe in which Soviets gave their support; for declaration to apply to North Korea and North Vietnam, they would have to become parties to NPT and would have to keep Chicoms [China] and Soviets from giving them support in any hostilities...."³⁹

Despite the Joint Chiefs' opposition, Secretary of Defense Robert McNamara agreed to ACDA's proposal, and it was approved.⁴⁰ But, by then, the language of the draft U.N. General Assembly resolution had been changed to eliminate the call for a simple statement of assurances that nuclear weapons would not be used against non-weapon countries. Thus, the approved U.S. statement of intention was then not used. With U.S. acquiescence, the

Assembly overwhelmingly adopted a resolution that called on the weapon countries "to refrain from the use, or the threat of use, of nuclear weapons against States which may conclude treaties" not to acquire nuclear weapons. The resolution also requested the Geneva disarmament conference to consider non-use treaty provisions, including the Soviet proposal.⁴¹ During the final stages of negotiation of the NPT in Geneva during 1968, U.S. negotiators sounded out their Soviet counterparts on whether the Soviet government would modify its non-use proposal to make American allies such as Germany, Italy, and Turkey beneficiaries of the Soviet promise not to use nuclear weapons against non-nuclear weapon NPT parties, even though these countries still had American nuclear weapons deployed on their territories. By then, the idea was to find common language on non-use that might go into a U.N. resolution dealing with security assurances for NPT parties, rather than in the treaty itself.⁴²

When the Soviets declined, ACDA and the State Department nevertheless again sought authority from President Johnson to state U.S. intentions on non-use of nuclear weapons during that year's U.N. debate. They proposed the following declaration:

The United States affirms its intention to refrain from the threat or use of nuclear weapons against any non-nuclear-weapon state, Party to the Treaty on the Non-Proliferation of nuclear weapons, that is not engaged in an armed attack assisted by a nuclear-weapon State.⁴³

Once again, the Joint Chiefs were opposed. According to a memorandum to President Johnson, they

stated that such a declaration "weakens the credibility of the U.S. nuclear deterrent, reduces military flexibility, and establishes a precedent that could lead to further restrictions on U.S. nuclear options."⁴⁴ McNamara had recently been succeeded by Secretary of Defense Clark Clifford, who did not take a position on the request, and President Johnson did not approve it.⁴⁵ Later, without any non-use commitment in its text or in a separate declaration or resolution, the NPT was overwhelmingly recommended for signature by a vote of the U.N. General Assembly.⁴⁶

Efforts to achieve agreement on a negative security assurance for non-weapon NPT parties thus came to nothing in 1968. But, these countries helped to lead the way to a 1968 promise not to use nuclear weapons against parties to a nuclear-weapon-free zone created in Latin America and the Caribbean Sea.

FIRST U.S. NUCLEAR NON-USE PROMISE

After the Cuban Missile Crisis and the deployment of Soviet nuclear missiles in Cuba, the presidents of Bolivia, Brazil, Chile, Ecuador, and Mexico called for a treaty that would declare Latin America and the Caribbean to be a zone free of nuclear weapons.⁴⁷ On November 27, 1963, the U.N. General Assembly voted without dissent for a resolution noting this initiative and suggesting that other countries, particularly the nuclear weapon states, cooperate in achieving its goals when the Latin Americans had reached agreement.⁴⁸

The United States supported the idea from the beginning.⁴⁹ Early treaty drafts did not contain nuclear non-use promises, and early U.S.

statements, therefore, did not comment on that idea.⁵⁰ After the Soviet and non-aligned proposals for such a provision in the NPT, however, Brazil and Colombia began seeking one for their treaty. Their proposal of May 4, 1966, called upon the nuclear weapon countries to promise “that they will not take the initiative in the use of nuclear weapons of any kind against any part of the territory” included within the nuclear-weapon-free zone.⁵¹ The United States did not respond to this proposal because the agreed penultimate draft treaty of the negotiating commission contained no such provision.⁵² Then the negotiating commission approved a revision of the Brazil-Colombia proposal for the final draft: The nuclear weapon states would be asked to adhere to a separate protocol to the nuclear-weapon-free zone treaty containing a promise “not to use or threaten to use nuclear weapons” against any non-nuclear weapon party to the zone.⁵³

Strongly supporting a nuclear-weapon-free zone for this region, the United States accepted this language in 1968. It added, however, a unilateral “understanding” (interpretation) of the non-use promise both at the time of its signature and of its ratification. The understanding included an exception to permit nuclear response to a Soviet-assisted attack in the region like the exception in the earlier ACDA proposals. It stated that:

an armed attack by a Contracting Party [a non-weapon party to the zone] *in which it was assisted by a nuclear-weapon state*, would be incompatible with the Contracting Party’s corresponding obligations under Article 1 of the Treaty [not to possess or acquire

nuclear weapons itself or on behalf of anyone and not to encourage others to control or possess them].⁵⁴

Davis Robinson, the ACDA lawyer who helped negotiate this understanding with lawyers for the State and Defense Departments (including the Joint Chiefs), explained that its purpose was to encompass cases “in which a nuclear-weapon state assisted a Contracting Party in an armed attack by providing a ‘nuclear umbrella’ or conventional armed support.... Assistance by a nuclear-weapon state in an armed attack carries with it an implicit threat that nuclear weapons might, if necessary, be used.”⁵⁵

With this understanding, the United States made its first non-use commitment. A formal ACDA statement for the executive branch to the Senate Foreign Relations Committee explained why it had done so for the Latin American treaty and not, for example, for the NPT:

Assessment of the non-use undertaking at the time the Treaty was signed by the United States resulted in agreement within the government that it was acceptable in this particular case in view of (a) the special historic relationship which the United States has maintained with hemispheric neighbors, and (b) the difficulty of conceiving of circumstances in which the United States would find it in its interest to use or threaten to use nuclear weapons against a Latin American party to the Treaty which was abiding by its obligations thereunder, as understood by the United States and clarified in the foregoing statement [the U.S. “understanding”].⁵⁶

The Joint Chiefs of Staff submitted a letter to the Foreign Relations

Committee stating that they had no objection to the ratification of the non-use protocol in light of their belief that the U.S. understanding had “received general international acceptance.”⁵⁷ Based on these statements and other information, the Senate consented to ratification of the protocol.⁵⁸

FIRST U.S. NUCLEAR NON-USE PROMISE TO NON-WEAPON NPT PARTIES

After the United States agreed to a non-use promise for Latin American nuclear-weapon-free zone members but did not agree to one for non-nuclear-weapon NPT members, non-aligned countries pushed for one at a special disarmament conference they convened just for non-weapon countries.⁵⁹ That conference failed by one vote to get the necessary two-thirds approval for a non-aligned proposal to convene another conference to negotiate a separate treaty in which the nuclear weapon countries would be asked to promise not to use or threaten nuclear weapons against non-weapon countries.⁶⁰ Instead, the conference reaffirmed the Western position that the use of nuclear or any other weapons was prohibited by the U.N. Charter except in individual or collective self-defense or when authorized by the U.N. Security Council.⁶¹

At about the same time, the regular Geneva disarmament conference established “non-use of nuclear weapons” as an agenda item, and the Soviet Union again urged negotiation of a new treaty prohibiting the use of nuclear weapons.⁶² At the 1972 U.N. General Assembly session, a resolution was adopted calling for a “permanent prohibition of the use of nuclear weapons.” The

vote was 73 to four with 46 abstentions, including the United States and most of its friends and allies.⁶³ Later the Soviet Union and its allies submitted a draft treaty that would have prohibited any first use of nuclear weapons by those that joined it.⁶⁴ In the next years, non-aligned countries repeated their long-standing demands for promises from the nuclear weapon countries not to use nuclear weapons against non-weapon countries.⁶⁵ At a 1975 NPT review conference, for example, their support was strong enough to produce acquiescence by the United States and its allies to a statement that “determined efforts must be made especially by the nuclear-weapon States Party to the [NPT], to ensure the security of all non-nuclear-weapon States Parties.”⁶⁶ The conference agreed to the “particular importance of assuring and strengthening the security of non-nuclear-weapon States Parties which have renounced the acquisition of nuclear weapons.”⁶⁷ Finally, at a special session of the U.N. General Assembly to debate disarmament in 1978, each of the weapon states issued separate and different non-use “declarations” for the benefit of non-weapon NPT parties.⁶⁸ The U.S. declaration, made in the name of President Carter, stated:

The United States will not use nuclear weapons against any non-nuclear-weapon state party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, *except in the case of an attack on the United States, its territories or armed forces, or its allies, by such state allied to a nuclear-weapon state or associated with a nuclear-weapon state in carrying out or sustaining the attack.*⁶⁹

This declaration was an outgrowth of the earlier U.S. drafts described above that were proposed by ACDA, as well as of the U.S. treaty promise to the Latin American nuclear-weapon-free zone parties. At first glance, the declaration seemed to be a stronger commitment than the declarations proposed by ACDA that were considered but not used during the NPT debates; those declarations described the U.S. statement as one of “intention” and this declaration did not.

At the same time, the italicized exception was broader than those proposed but not used earlier, or than the one contained in the U.S. understanding to the Latin American protocol on non-use. At first following the pattern of these texts, it excepts an attack by a non-weapon NPT party in which that party is “associated with a nuclear-weapon state in carrying out or sustaining the attack.” (The earlier ones had excepted any non-weapon state engaged in “an armed attack,” or “act of aggression,” upon the United States or its allies “supported” or “assisted” by a nuclear weapon state.) But the 1978 language then went beyond this to except an attack by a non-weapon state if it were simply “allied” with a nuclear weapon state at the time of the attack, whether or not the nuclear weapon state assisted in the attack, and whether or not it was even aware of the attack. Based on an off-the-record background briefing for reporters by three senior U.S. officials, this added scope to the exception was intended.⁷⁰

This and the other 1978 declarations failed to satisfy the demands of the non-weapon countries. In the end, a special session of the U.N. General Assembly urged (with U.S.

acquiescence) that the weapon states again consider other proposals to prevent the use of nuclear weapons. It concluded:

[W]hile noting the declarations made by nuclear-weapon States, *effective* arrangements, as appropriate, to assure non-nuclear-weapon States against the use or the threat of use of nuclear weapons could strengthen the security of those States and international peace and security.⁷¹

Dissatisfied both with the variations in the language of the 1978 declarations from one weapon state to another, and with the idea of relying upon unilateral declarations rather than a treaty, non-aligned countries proposed draft treaties with promises to non-weapon countries of nuclear non-use that had no exceptions.⁷² The Soviet Union also offered such a treaty.⁷³ To counter these suggestions, the United States proposed that the “individual unilateral pledges” of the five nuclear powers be quoted in a single U.N. General Assembly resolution that would recognize the desire of the non-weapon countries to be assured that they will never be attacked with nuclear weapons. A U.S. working paper argued that finding common language to cover the differing policies of the five nuclear weapon countries was probably impossible. However, it continued, “noting” the language of all five declarations in one resolution in which each was quoted separately would “give international status to the individual assurances by the nuclear weapon States, thereby enhancing their character as solemn commitments.”⁷⁴

The American representative said:

[T]he vote of the five powers for the resolution would indicate that the five themselves consider that this

General Assembly resolution is one which has *international status and a binding character*.⁷⁵

This U.S. proposal was not adopted in 1979, but one quite like it was adopted by the U.N. Security Council in 1995, shortly before the NPT was extended. In 1979, however, with the United States and many of its allies abstaining, the U.N. General Assembly adopted two resolutions suggesting negotiation of a treaty to assure non-weapon states against the use or threat of nuclear weapons.⁷⁶ During the 1980s, the non-aligned countries continued to ask for such a treaty, and the Geneva disarmament conference continued to try to find common language for one.⁷⁷ Matters were further complicated by India's and Pakistan's demands that they be included among the beneficiaries of such a treaty, even though neither would join the NPT and thereby forswear nuclear weapons. India had already conducted a nuclear explosion, and Pakistan was believed to be pursuing nuclear weapons.⁷⁸ Many NPT parties wanted to limit the benefits of a non-use treaty to countries that, unlike India and Pakistan, had forsworn nuclear weapons. But, because the Geneva disarmament conference included both India and Pakistan as members, and because conference practice required consensus decisions, the conference could not recommend a treaty that did not include India and Pakistan as beneficiaries.

At the 1990 conference of NPT parties to review implementation of that treaty, U.S. representatives had authority to support a separate conference only for NPT parties in order to negotiate a non-use treaty that did not include India and Pakistan as beneficiaries.⁷⁹ However, because

of disagreement on other matters, the NPT review conference failed to agree on a report containing substantive recommendations, including one to call such a conference.⁸⁰ The debate continued along these lines until the dissolution of the Soviet Union in 1991 produced new incentives for the nuclear weapon states to provide stronger non-use promises to the former Soviet republics of Belarus, Kazakstan, and Ukraine, each of which had Soviet nuclear weapons on its soil when it became independent.

SECOND U.S. NUCLEAR NON-USE PROMISE TO NON-WEAPON NPT PARTIES

To persuade Ukraine, as well as Kazakstan and Belarus, to relinquish the nuclear weapons within their territories, new negotiations over a common non-use promise took place between Russia, the United States, and Ukraine. These negotiations later included Britain, Kazakstan, and Belarus.⁸¹ In these negotiations, the 1978 British form of non-use declaration was followed rather than the American.⁸² The British alternative was much like the early ACDA proposals and the understanding for the Latin American non-use protocol in that the exception for attacks by any non-weapon NPT party assisted by a weapon state was narrower than in the 1978 American form discussed earlier: The "attack" itself had to be "in...alliance with a nuclear-weapon State" in order to be excepted from the promise not to use nuclear weapons against the non-weapon state.⁸³ Thus, the exception would not apply if the other weapon state, though in an alliance with the beneficiary non-weapon state, was ignorant of the attack or did not support the attack. For example, if

Ukraine ultimately joined NATO and later attacked Russia without NATO involvement, Russia could not use nuclear weapons on Ukraine without violating the agreement made in 1994 with Ukraine.⁸⁴

In the final memorandum of agreement, Britain, Russia, and the United States (together rather than unilaterally):

reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, *except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a state in association or alliance with a nuclear weapon state*.⁸⁵

Though by its terms this simply "reaffirms" the 1978 commitments, its exception clearly narrows that stated in 1978 by the United States. In addition, its form is that of a legally binding "memorandum of agreement" though not of a treaty.

Later, to help secure the support of the many non-aligned non-weapon NPT parties for the extension of the NPT at the 1995 Review and Extension Conference, the United States began negotiating with Britain, China, France, and Russia about possible new security-assurance texts for the non-weapon NPT parties.⁸⁶ The international agreement with Ukraine was a precedent for these negotiations. The text of the agreement Ukraine had received was public, and many non-aligned, non-weapon NPT parties could be expected to demand as much. Moreover, at the end of 1994, the U.N. General Assembly had adopted a resolution calling for negotiation of "an instrument of legally binding

character” to “assure non-nuclear-weapon states against the use or threat of use of nuclear weapons.” The resolution recited the failure of the Geneva disarmament conference to negotiate such an agreement and called upon the nuclear weapon states and the 1995 NPT Extension Conference to work toward producing one.⁸⁷

In the interagency negotiations to produce new negative security assurances, ACDA proposed—but the Defense and State Departments opposed—making a legally binding commitment to all non-weapon NPT parties. Finding common language for a text to be declared by all of the Five also presented great obstacles. The final result resembled the 1978 commitment in that each of the Five made a separate declaration, and the texts were not identical. But, it was significantly different in that all five declared weapon states (not just Britain, Russia, and the United States) made declarations and the American, British, French, and Russian non-use declarations were almost identical—and generally followed the Ukrainian text (cited above) except that they were in the form of unilateral declarations rather than a multilateral memorandum of agreement. The Chinese declaration to the non-weapon NPT parties contained no exception such as that in the declarations of the other four, and it included a promise not to use nuclear weapons first against any other country, including the declared nuclear weapon states.⁸⁸

In the U.S. declaration:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon [NPT parties] except in the case of an invasion or any other attack on the United States, its ter-

ritories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.⁸⁹

Like the promise to Ukraine, this statement ostensibly “reaffirms” U.S. non-use statements to NPT non-weapon parties made first in 1978, yet narrows the exception from that used in 1978. Just as the 1994 multilateral agreement with Ukraine would prohibit a Russian nuclear response to a conventional attack by Ukraine on Russia, even if Ukraine were a member of NATO (if NATO had no part in the attack), so the 1995 U.S. statement would prohibit an American nuclear response to a conventional attack, for example, by North Korea (a Chinese ally) on South Korea (an American ally) if China had no part in the attack.⁹⁰

All the 1995 non-use statements of the five weapon countries were provided to the U.N. Security Council before it adopted a resolution on both negative and positive security assurances. The vote was unanimous even though the resolution was criticized for not being stronger by Indonesia, a leader of the non-aligned non-weapon NPT parties. While not quoting the declarations, the resolution took note of each of them by citing its document number.⁹¹

Thereafter, at the April 1995 conference at which the NPT was extended, the statements were repeated, and they were described as assurances available to non-weapon NPT parties—if they extended the NPT.⁹² The weapon states thus gave the declarations as much status as they could without agreeing on a common text or negotiating the

treaty that the non-nuclear weapon NPT parties wanted. That neither the Five nor the non-weapon parties then regarded the assurances as legally binding seems evident from the conference recommendation adopted without dissent “that further steps should be considered to assure non-nuclear-weapon States not party to the Treaty [NPT] against the use or threat of use of nuclear weapons. These steps could take the form of an *internationally legally binding instrument*.”⁹³

IS THE 1995 U.S. NON-USE UNDERTAKING ALREADY BINDING?

The conventional wisdom of international lawyers is that, to form a legally binding international commitment, the parties involved in creating it must intend that it be legally binding.⁹⁴ The statement just quoted suggests that the Five did not intend their negative security assurances to be legally binding and that the non-weapon parties accepted that conclusion. However, there are differing views on whether states making unilateral declarations can become bound without originally intending to be bound and on whether, if bound, they are “legally” or “politically” bound.⁹⁵

In presenting its 1995 non-use undertaking to the non-weapon parties to the NPT, the United States tried to enhance its character as a solemn commitment, yet satisfy the Defense and State Departments’ requirement that the undertaking not be “legally binding.” As shown above, the undertaking was made in the name of President Clinton, and, unlike some ACDA proposals of the 1960s and unlike the 1995 *positive* assurance, it did not say it was only

a declaration of "intention." Moreover, its presentation seemed to satisfy U.S. Representative Fisher's 1979 proposal for a "binding" negative security assurance. As shown above, the United States proposed a U.N. General Assembly resolution that would "take note" of the unilateral non-use statements by the five nuclear weapon powers and that would quote all of them. In 1995, each of the non-use statements was before the U.N. Security Council when it voted and was cited in the resolution, although not quoted there. In the resolution, the Council took note "with appreciation" of the statements. All five of the nuclear weapon parties voted for the resolution.

In 1979, Fisher argued that "the vote by the five powers for the resolution [each thereby noting the declaration of the others] would indicate that the five themselves consider [the result] one which has international status and a binding character."⁹⁶ He was not only the representative of the United States in making this statement but an expert on international law with a previously stated rationale for such a conclusion.⁹⁷ Given the U.S. views of 1979, the 1995 U.S. declaration should be "binding."

There is a stronger argument that the 1995 undertaking is binding than Fisher's proposal in 1979. In 1995, reciprocity by the non-weapon as well as the weapon parties was requested and received. Before the negative security assurance, the 1995 U.S. undertaking said:

The United States considers the indefinite extension of the [NPT] without conditions as a matter of highest priority and will continue to pursue *all appropriate efforts* to achieve this out-

come.... [P]arties to the [NPT] must be in compliance with these undertakings [of the NPT] in order to be eligible for any *benefits* of adherence to the Treaty. Bearing the above considerations in mind, the President declares: [the negative security assurance].⁹⁸

The assurance was one of the U.S. "efforts" to add to the NPT's "benefits" in order to produce the assent of a majority of the NPT's parties as required to achieve the treaty's extension.⁹⁹ The U.S. effort went farther than Fisher had proposed in 1979 in that the non-use assurances of the Five were offered to the non-weapon NPT parties if they would agree to extend the NPT in 1995, and they reciprocated by supporting that extension.¹⁰⁰

After considering the reciprocated 1995 actions, the I.C.J. described the 1995 negative assurances as "undertakings" and advised the U.N. General Assembly that they "should" be observed. The Court apparently concluded that they were as legally binding as the nuclear-weapon-free zone and other admittedly legally binding requirements relating to nuclear weapons that "should" also be observed.¹⁰¹ Indeed, the I.C.J. summarized these elements of the negotiating situation or package deal that resulted in the NPT's extension.¹⁰²

There are three theories that could support the I.C.J.'s conclusion that the negative security assurances are now legally binding. The *first* is that a unilateral declaration made in a negotiating situation in which other parties rely on the declaration to take irrevocable action requested by the declarer can become binding on the declarer even if not so intended.

The I.C.J.'s predecessor ruled on a unilateral statement by Norway's foreign minister that Norway would not object to a territorial claim by Denmark if Denmark did not object to another territorial claim by Norway. When Denmark then refrained from objecting, Norway was held to be bound by its foreign minister's statement, even though Norway apparently did not intend to be bound because it had, despite the foreign minister's statement, later disputed Denmark's claim.¹⁰³ Here, the reply by the United States to the longstanding requests of non-nuclear weapon NPT parties for binding negative assurances would seem to be binding upon the United States because the non-weapon parties, in response to U.S. requests and in reliance upon the U.S. statement, supported the extension of the NPT, a result which is now irrevocable.

A *second* theory favoring the binding nature of the 1995 negative assurances is that a state may be *barred* (lawyers use the word "estopped") from taking action that it has unilaterally said it would not take if other states have relied upon the unilateral declaration to their detriment—even though the other states did not provide reciprocal action requested by the declaring state. Thus, the I.C.J. held that France was legally bound to end its atmospheric nuclear weapon testing in the Pacific before 1975 by the statements of its president and other officials that it intended to stop them by then.¹⁰⁴ Though this result and the theory have been criticized, they have also been described as supporting the proposition that a unilateral declaration upon which other states have relied can become a legal obligation when, under all the circumstances,

the declaring state is barred by principles of “good faith” or “estoppel” from reneging on it.¹⁰⁵

Like France, the U.S. government probably did not intend to create a legally binding undertaking through a unilateral declaration.¹⁰⁶ Nevertheless, the declaration was designed to give the non-weapon NPT parties something like the binding commitment they had been requesting for decades. To say that the United States can now renege on its promise without suffering serious consequences seems wholly inconsistent with this theory.

The *third* theory on which the 1995 negative assurances have become binding is that they have helped produce a limited norm of “customary” international law against the use of nuclear weapons on states that have forsworn them. Customary international law comes from consistent and general state practice taken because of a felt obligation—from the action and reaction of states thinking that there is or ought to be a rule requiring such a practice.¹⁰⁷ The I.C.J.’s decision on the legality of nuclear weapons summarized the arguments and evidence concerning whether customary law now prohibited *all* uses or threats of nuclear weapons.¹⁰⁸ Largely because nuclear weapon states had for years openly depended upon nuclear weapons to deter attacks by other states, the I.C.J. held that there was no such prohibition even though nuclear weapons had not been used since World War II and several U.N. resolutions had condemned their use. The I.C.J. did not say explicitly that customary law had created a lesser prohibition to the extent of the NPT declarations of the Five and the protocols to the nuclear-weapon-free

zone treaties but, as shown above, it did say that these “should” be obeyed. The “lowest common denominator” of the declarations and the protocols is a norm against use of nuclear weapons against any state that has forsworn them except in response to an attack by such a state that has the support of a weapon state. Over the years, the Five would appear to have limited their deterrence policies at least to the extent of this norm. As the Court put it:

(a) a number of states [the Five] have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon states which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons); (b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances [the reservations or exceptions described above]; and (c) these reservations met with no objection from the parties to the Tlatelolco [Latin American] or Rarotonga [South Pacific] Treaties or from the Security Council [in the case of the NPT].¹⁰⁹

Thus, under the I.C.J.’s rationale, the practice of the Five in possessing nuclear weapons for deterrence does not stand in the way of a customary non-use norm that includes these exceptions protecting states that have forsworn nuclear weapons. As described earlier in this article, the non-use norm grew over the years from 1968 to the present as: 1) more and more non-weapon states became beneficiaries of the declarations and protocols, 2) the exceptions in the declarations became narrower and more uniform, 3) non-use of nuclear weapons continued,

and 4) the non-weapon states accepted the declarations to the extent of supporting overwhelmingly the extension of the NPT. In 1995, all of this came together as the NPT gained new members (now more than the U.N. Charter), as the declarations were noted with appreciation by the Security Council, and as the NPT parties made the treaty permanent. These factors have produced a customary prohibition on nuclear use against states that have forsworn nuclear weapons—with the exception described above.

There are thus three separate theories under which the negative security assurances are now legally binding under I.C.J. decisions even though, in 1995, the NPT parties did not so regard them. The current practice of the U.S. State Department Legal Adviser, however, is different from that of the I.C.J. It is to treat declarations such as President Clinton’s as not creating any legal obligation. This comes in part from the way the U.S. Constitution deals with treaties and in part from longstanding differences between the Executive and the Congress, particularly the Senate, over what constitutes a binding international agreement that must be reviewed by the Senate (a treaty); or, in some cases, by Congress as a whole (not a treaty).¹¹⁰ These differences produced the Case-Zablocki Act of 1972 that requires the Secretary of State to transmit to the Congress the text of “any international agreement...other than a treaty, to which the United States is a party.”¹¹¹

State Department regulations defining “international agreement” for the domestic law purpose of this statute state:

The parties must intend their undertaking to be legally binding, and not merely of political or personal effect....*While unilateral commitments on occasion may be legally binding*, they do not constitute international agreements. For example, a statement by the President promising to send money to Country Y to assist earthquake victims would not be an international agreement....Care should be taken to examine whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings.¹¹²

Note that under the italicized phrase the 1995 negative security assurance need not be submitted to the Congress even if it is legally binding since it is not an "international agreement" under State Department practice. It has not been submitted. It would seem to fit the last sentence since, under the first theory, it is part of a "multilateral set of undertakings" resulting from a negotiation between the Five and the non-weapon NPT parties. The third or customary law theory for the existence of a legal commitment is just as strong. But, the United States has not yet accepted either view.

A memorandum by the State Department's Assistant Legal Adviser for Treaty Affairs, written after Case-Zablocki regulations were issued, describes State Department practice with respect to international documents of a "non-legally binding nature," which is how the 1995 declaration is classified by the United States.¹¹³ It quotes with approval from a Library of Congress study of declarations called "political undertakings" for which there are "no applicable rules pertaining to compliance, modification or with-

drawal":

Until and unless a Party extricates itself from its 'political' undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a party contravenes a political commitment, it will be subject to an appropriate political response.¹¹⁴

Whether the 1995 U.S. undertaking is regarded as "legally binding" (as the I.C.J. opinions suggest), or "politically binding" (as State Department practice suggests), the United States is bound to observe it. Which type of obligation it is could make a difference to nuclear strategists planning possible future uses of nuclear weapons or making recommendations for nuclear use to a president in time of war. But, whichever it is, its violation would produce major political responses by the non-nuclear weapon NPT parties that relied upon it in giving their support to the extension of the NPT. If the United States used nuclear weapons against a non-weapon NPT party that had not attacked the United States or its allies with the assistance of a weapon state or, without such assistance, had not attacked using nuclear or other weapons of mass destruction (see below), it could not hope to keep together the widespread support that the NPT had when it was extended in 1995. Indeed, insistence that the non-use commitment can be changed or ignored because it is non-binding could have serious consequences for continued support by non-aligned countries in particular. They constitute the great majority of the NPT parties, and their widespread support is essential to the health of the treaty when it is re-

viewed periodically and when consensus or something close to it is necessary to deal with threats to its observance, such as those in the past by Iraq and the Democratic People's Republic of Korea.¹¹⁵ Given the non-aligned countries' concerns and the resistance of the United States to accepting a legally binding obligation not to use nuclear weapons against states that are observing the NPT but do not have nuclear-weapon-free zones available to join, the time has come for negotiation of the treaty on negative security assurances the non-aligned countries have sought for almost 30 years.

DETERRENCE OF BIOLOGICAL OR CHEMICAL ATTACK WITH NUCLEAR WEAPONS

One reason Department of Defense officials have opposed legally binding negative security assurances is because they did not wish to preclude use of nuclear weapons to deter non-weapon parties to the NPT or to nuclear-weapon-free zones from attacking the United States, its allies, or their armed forces with biological or chemical weapons. When the United States recently signed a treaty non-use protocol to the African nuclear-weapon-free-zone treaty, promising not to use nuclear weapons against the parties to the zone, the White House made a statement that U.S. adherence to this protocol would not eliminate a U.S. option to use nuclear weapons in self-defense against a biological or chemical attack by one of those parties.¹¹⁶ U.S. and NATO strategies contemplate the use of nuclear weapons as a last resort against an armed attack using any weapons.¹¹⁷ James Baker says that when he was Secretary of State he made clear to Iraq

that its use of biological or chemical weapons during what became the Gulf War could produce a nuclear response from the United States.¹¹⁸ His purpose, of course, was to deter an attack by Iraq using biological or chemical weapons. Since such an attack would violate the Geneva Protocol of 1925, which prohibits the use of biological and chemical weapons, it could legitimize a response by the United States with biological or chemical weapons in breach of the same treaty, provided innocent third countries did not suffer collateral damage.¹¹⁹ But the United States has destroyed its bacteriological weapons and is now destroying its chemical weapons. As a result, Pentagon officials do not wish to rule out using nuclear weapons against Libya, for example, if it should attack U.S. or allied forces in the Mediterranean with chemical weapons.

Accepting the 1995 declaration as legally binding may not, however, preclude *any* use of nuclear weapons in response to a biological or chemical attack. An old rule of international law is like that just discussed in connection with the Geneva Protocol, except that it applies when the weapons used on each side are not covered by the same treaty or other prohibition. This rule can, for example, justify retaliation by the victim of an attack that violates one treaty even though the victim will violate another treaty to carry out the retaliation. Referred to as the rule of "belligerent reprisal," it was the basis for the White House statement dealing with U.S. signature to the African nuclear-weapon-free zone protocol.¹²⁰

Many authorities believe that, under this rule, reprisals using force can only be justified as self-defense

against an armed attack.¹²¹ If force in self-defense is justified, the belligerent reprisal rule may permit that force to violate a treaty or rule prohibiting certain weapons when the attack itself violates a second treaty or rule, with two additional limitations: First, the reprisal must be necessary to stop the illegal attack or to prevent further violation; retaliation simply to punish the offender is not sufficient justification.¹²² Second, the reprisal must not be out of proportion to the injury suffered. (From the first requirement, of course, the reprisal must also not be out of proportion to what is needed to stop the attack or prevent further attacks).¹²³

How difficult would it be to meet these requirements? Suppose, for example, that Libya used poison gas to attack U.S. armed forces in the Mediterranean. The use of gas would violate the Geneva Protocol of 1925.¹²⁴ A nuclear response likely would be unnecessary to defend against the attack; gas masks and conventional weapons would be more appropriate. Moreover, such a response probably would not be proportional to the attack. On the other hand, a biological attack (also a violation of the Geneva Protocol) that threatened to kill hundreds of thousands of people might justify a nuclear response if the attacker could be identified (and a state rather than autonomous terrorists were responsible), there was not a significantly less dangerous way to prevent further violation, the response was reasonably proportional to both the injury and the future threat from the attacker and, of course, the nuclear use did not violate other rules of international law defining war crimes.¹²⁵

CONCLUSION

This article has summarized the 50-year history of resistance, then grudging but limited acceptance, by the United States of the demands by countries that have forsworn nuclear weapons for a commitment not to use nuclear weapons against them. It has described the gradual growth of a limited norm in international law against such use. It concludes that the United States is now bound not to use nuclear weapons against a non-nuclear weapon NPT party unless that party attacks the United States or its allies and the attack "is carried out or sustained...in association or alliance with" another nuclear-weapon state, the exception stated in the U.S. nuclear non-use declaration of 1995.

While the United States takes the position that this declaration does not constitute an "international agreement," the I.C.J. concluded unanimously that it should be observed. Even though the United States regarded the declaration as a "political" commitment when made, it may not now renege on that commitment without suffering serious losses to its long-standing efforts to prevent the spread of nuclear weapons to additional countries. Given U.S. refusal to accept the declaration as legally binding, the time has now come to meet the demands of non-nuclear weapon countries for the negotiation of a negative assurances agreement in treaty form.

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² Treaty on the Non-Proliferation of Nuclear Weapons of July 1, 1968. The text of President Clinton's declaration is set forth below.

³ Treaty for the Prohibition of Nuclear Weapons in Latin America of February 14, 1967, Additional Protocol II. Cuba is not a party to the NPT, has signed but not yet ratified the Latin American treaty, and has only a never-completed Soviet reactor structure. The Latin American treaty is also referred to often as the Treaty of Tlatelolco. Other nuclear-weapon-free-zone treaties with such protocols, not all yet in force, cover the rest of the Southern Hemisphere and part of the Northern Hemisphere. See George Bunn, "Expanding Nuclear Options: Is the U.S. Negating its Non-Use Pledges?" *Arms Control Today* 26 (May/June 1996), pp. 8-9.

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion to the U.N. General Assembly, July 8, 1996, p. 36, par. 105 (D), *International Legal Materials* 35 (1996), pp. 809, 831.

⁵ Statement by U.S. Representative Baruch to the U.N. Atomic Energy Commission, June 14, 1946, U.S. Department of State, *Documents on Disarmament, 1945-59* (1960), p. 7. (This volume and its successors published by the U.S. Arms Control and Disarmament Agency (ACDA) will be cited as Department of State (or for years starting with 1961, ACDA), *Docs. on Disarm.*, using as volume numbers the years covered by the volumes. For histories of the Baruch plan, see Richard G. Hewlitt and Oscar E. Anderson, *The New World, 1939-1946: A History of The Atomic Energy Commission* (University Park, PA: Pennsylvania State University Press, 1962), pp. 531-619; Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: New American Library, 1970), p. 214; MacGeorge Bundy, *Danger and Survival: Choices about the Bomb in the First Fifty Years* (New York: Random House, 1988), pp. 158-176; David Holloway, *Stalin and the Bomb* (New Haven: Yale University Press, 1994), pp. 161-65; Michael Mandelbaum, *The Nuclear Question: The United States and Nuclear Weapons, 1946-76* (New York: Cambridge University Press, 1979), pp. 23-28.

⁶ See Address by Soviet Representative Gromyko to the U.N. Atomic Energy Commission, June 19, 1946, Department of State, *Docs. on Disarm.*, v. 1945-49, pp. 17-18, 21. As an analogy to what he was proposing, Gromyko suggested the Geneva Protocol of June 17, 1925. It prohibits the use in

war of poisonous gases, but contains no limitation on the manufacture or possession of such gases by states and no inspection provisions. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925. For a summary of the reasons why the Baruch plan failed, see George Bunn, *Arms Control by Committee: Managing Negotiations with the Russians* (Stanford: Stanford University Press, 1992), pp. 59-61. For the history of the Soviet pursuit of nuclear weapons, see Holloway, *Stalin and the Bomb*.
⁷ Stockholm Appeal of the World Peace Council, March 19, 1950, Department of State, *Docs. on Disarm.*, v. 1945-59, p. 232. For U.S. opposition, see "Statement of Secretary of State Acheson Regarding Stockholm Peace Appeal," July 12, 1950, *Docs. on Disarm.*, v. 1945-59, p. 239-40.

⁸ See, e.g., "Statement of Secretary of State Acheson Regarding Stockholm Peace Appeal."

⁹ Office of the Historian, U.S. Department of State, *Pub. No. 9511, The North Atlantic Treaty Organization* (Washington, D.C.: Government Printing Office, 1987), pp. 2-3; Mandelbaum, *The Nuclear Question*, pp. 46-54; David Alan Rosenberg, "The Origins of Overkill: Nuclear Weapons and American Strategy, 1945-1960," *International Security* 7 (Spring 1983), pp. 17, 25-27, 33-35.

¹⁰ *Public Papers of the Presidents 1954* (Washington, D.C.: Government Printing Office), pp. 261-62. For a later description of the significance of Eisenhower's statement at the time it was made and changes in the way the United States looked upon nuclear weapons thereafter, see "Statement by ACDA Director Ikle, First Use of Nuclear Weapons, March 25, 1976," *ACDA, Docs. on Disarm.*, v. 1976, pp. 1, 20-21.

¹¹ U.N. General Assembly Resolution 1653 (XVI), November 28, 1961, *ACDA, Docs. on Disarm.*, v. 1961, p. 648.

¹² U.N. Charter Arts. 2(4) and Chap. VII.

¹³ Letter of Secretary Rusk to Acting UN Secretary General U Thant, June 30, 1962, U.N. Doc. A/5174, annex II, pp. 78-80; *ACDA, Docs. on Disarm.*, v. 1962, pp. 629, 630.

¹⁴ Office of the Historian, *U.S. Department of State Pub. 9511*; Scott D. Sagan, *Moving Targets* (Princeton: Princeton University Press, 1989), pp. 11, 37-42, 73-74; Mandelbaum, *The Nuclear Question*, pp. 46-54.

¹⁵ See Bunn, *Arms Control by Committee*, pp. 62-3, 71. For reasons states seek nuclear weapons, see, e.g., Scott D. Sagan, "Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb," *International Security* 21 (Winter 1996/97), p. 54; Stephen Meyer, *The Dynamics of Nuclear Proliferation* (Chicago: University of Chicago Press, 1984); William Potter, *Nuclear Power and Nonproliferation* (Cambridge, MA: Oelgeschlager, Gunn and Hain, 1982), pp. 131-97.

¹⁶ Bunn, *Arms Control by Committee*, pp. 71-80; Bunn, "Security Assurances Against Nuclear Attack: The Legal Framework for Non-Aligned NPT

Parties" in Virginia Foran, ed., *Missed Opportunities? The Role of Security Assurances in Nuclear Non-Proliferation Policy* (Washington, D.C.: Carnegie Endowment, forthcoming, 1997).

¹⁷ See Bunn, "Security Assurances Against Nuclear Attack."

¹⁸ "Statement by President Johnson, October 16, 1964," *Department of State Bulletin*, November 2, 1964, p. 612; *ACDA, Docs. on Disarm.*, v. 1964, p. 451.

¹⁹ "Chinese Statement on Nuclear Weapons, Oct. 16, 1964," *ACDA, Docs. on Disarm.* v. 1964, pp. 448, 449.

²⁰ A. G. Noorani, "India's Quest for a Nuclear Guarantee," *Asian Survey* 7 (July 1967), p. 490; Bunn, "Security Assurances against Nuclear Attack"; Sagan, "Why Do States Build Nuclear Weapons?" pp. 65-66.

²¹ See, Bunn, Memorandum for Director and Deputy Director, ACDA, "Security Guaranties and Non-Proliferation of Nuclear Weapons," December 31, 1964, LBJ Library, NSF Collection, Committee File, Committee on Nuclear Proliferation, Boxes 1 & 2.

²² Bunn, "Security Assurances against Nuclear Attack."

²³ *Ibid.*

²⁴ Glenn T. Seaborg with Benjamin S. Loeb, *Stemming the Tide: Arms Control in the Johnson Years* (Lexington, MA: Lexington Books, 1987), pp. 135-36.

²⁵ *The Hindu* (New Delhi), December 4, 1964.

²⁶ "Statement by Indian Prime Minister Shastri," *Delhi Statesman*, December 21, 1964.

²⁷ Noorani, "India's Quest for a Nuclear Guarantee," pp. 490-502; Bunn, "Security Assurances against Nuclear Attack." On July 30, 1966, a representative of the Indian defense ministry who was a senior member of the Indian delegation to the Geneva disarmament conference told a member of the U.S. delegation that India had become convinced that assurances in any politically possible form from the United States and/or the Soviet Union were unacceptable to India as a *quid pro quo* for joining the NPT. India was not prepared to rely on any of the offered Soviet or U.S. security assurances and would instead take its chances with China on its own—which would be more consistent with its non-aligned position. U.S. Mission Geneva telegram to State Department, Geneva's No. 547, July 30, 1966, LBJ Library, NSF Collection, NSC History, vol. II, Box 2, Doc. 49(d). Later, after Soviet-American agreement on most of the text of a NPT, the Indian foreign minister stated that India supported such a treaty, but only if it met the needs of all the countries involved in the Geneva negotiation. "India has a special problem of security against nuclear attack or nuclear blackmail," he said. "This aspect, which hardly needs elaboration, must necessarily be taken into full account before our final attitude to a non-proliferation treaty is determined." He also repeated India's opposition to "a discriminatory or unequal treaty." He did not inform his listeners that the treaty under negotiation was viewed by his government as intrinsically "discrimina-

tory" because it would permit some countries (America, Britain, China, France, and the Soviet Union) to keep nuclear weapons but required other parties to forswear their acquisition. "Statement by Indian External Affairs Minister Chagla to Parliament, March 27, 1967," ACDA, *Docs. on Disarm.*, v. 1967, pp. 177-78.

²⁸ "Statement by Indian Representative Chakravarty, May 4, 1965," U.N. Disarmament Commission, Official Records, 75th Meeting, pp. 2-6, ACDA, *Docs. on Disarm.*, v. 1965, pp. 142, 148.

²⁹ ACDA, "Position Paper on a Non-Proliferation Agreement, July 15, 1965, Annex C," LBJ Library, NSF Agency File (ACDA), vol. II, Box 6 (emphasis added).

³⁰ *Ibid.*

³¹ See ACDA, *International Negotiations on the Treaty on the Nonproliferation of Nuclear Weapons* (Washington, D.C.: Government Printing Office, 1969) pp. 133-35.

³² *Ibid.*, p. 21.

³³ *Ibid.*, p. 32.

³⁴ *Ibid.*, pp. 42-43; George Bunn and Roland Timerbaev, "Security Assurances to Non-Nuclear Weapon States," *The Nonproliferation Review* 1, (Fall 1993), pp. 11, 12-13; "Memorandum of Conversation," George Bunn and Yuli M. Vorontsov, February 15, 1968, declassified under U.S. Freedom of Information Act.

³⁵ "Eight Nation Joint Memorandum Submitted to the Eighteen Nation Disarmament Committee, August 19, 1966," Doc. ENDC/178, ACDA, *Docs. on Disarm.*, v. 1966, pp. 576, 578.

³⁶ ACDA, *International Negotiations*, p. 59.

³⁷ "Dept of State Telegram 76255 to U.S. Embassy, Seoul, Oct.31, 1966," LBJ Library, NSF Collection, NPT Folder, Box 26, v. 2.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.* This cable to President Johnson and Secretary Rusk stated that if they did not reply, Acting Secretary of State Nicholas deB. Katzenbach would approve the ACDA request. No reply appears in the file.

⁴¹ U.N. General Assembly Resolution 2153 (XXI) (1966), ACDA, *Docs. on Disarm.*, v. 1966, pp. 748-49.

⁴² Bunn and Timerbaev, "Security Assurances to Non-Nuclear-Weapon States," pp. 12-13 and note 8.

⁴³ "Memorandum, National Security Advisor Rostow to President Johnson, April 23, 1968," LBJ Library, NSF Collection, NPT Folder, Box 26, v. 2.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* No record of approval appears in the LBJ Library file, and the declaration was not used in the General Assembly debate.

⁴⁶ U.N. General Assembly, 22nd Sess., Resolution 2373, June 12, 1968, Doc. A/RES/2373, June 18, 1968; ACDA, *Docs. on Disarm.*, v. 1968, pp. 431-32.

⁴⁷ U.N. General Assembly, 18th Sess. Official Records, Agenda Item 74, Annexes, Doc. A/5415/Rev.1, November 14, 1963. The Declaration had been circulated first at the Geneva disarmament

conference as ENDC/87, May 6, 1963, ACDA, *Docs. on Disarm.*, v. 1963, pp. 182-83. The history of the negotiation of the Latin American nuclear-weapon-free-zone treaty appears in Davis Robinson, "The Treaty of Tlatelolco and the United States: A Latin American Nuclear Free Zone," *American Journal of International Law* 64 (April 1970), p. 282. For drafts and negotiating statements, see Alfonso Garcia Robles, *The Denuclearization of Latin America* (New York: Carnegie Endowment, 1967).

⁴⁸ U.N. General Assembly, 18th Sess., Official Records, Doc.A/Res/1911 (XVIII), November 29, 1963.

⁴⁹ During the debate in the General Assembly, U.S. Ambassador Adlai Stevenson said "that a Latin American nuclear free zone, under appropriate circumstances, would be a most constructive contribution to the cause of peace." U.N. General Assembly, 18th Sess., Doc. A/C.1/PV.1335, November 13, 1963, pp. 32-33, ACDA, *Docs. on Disarm.*, v. 1963, pp. 582-83.

⁵⁰ See, e.g., "Letter of Dec. 10, 1965 from ACDA Director Foster to Garcia Robles," ACDA, *Docs. on Disarm.*, v. 1965, pp. 626-27.

⁵¹ Draft Treaty on the Denuclearization of Latin America, May 4, 1966, U.N. General Assembly, 20th Sess., Doc.A/6328, May 12, 1966, pp. 13-38, and Corr. 1, June 7, 1966; ACDA, *Docs. on Disarm.*, v. 1966, pp. 255, 273. The drafting commission had proposed instead a U.N. General Assembly resolution in which supporters, including the nuclear-weapon states, would "undertake [by voting for the resolution] to refrain from taking any action that might jeopardize faithful compliance with the provisions of the treaty." The next paragraph of the resolution would then say that all those voting for it "will be automatically assuming the commitment referred to in the preceding paragraph." Britain and the United States opposed this manner of assuming international obligations in their comments on the Commission's draft. Garcia Robles, *The Denuclearization of Latin America*, pp. 146, 151.

⁵² "Department of State telegram to U.S. Embassy in Mexico City," August 28, 1966, National Archives at College Park, MD, General Record of Department of State, file Def. 18-9, Demilitarized Nuclear Free Zones, Latin America, July 1, 1966, Box 1655. This was cleared by the Deputy Secretary of Defense. From this telegram, the U.S. Ambassador to Mexico wrote a letter containing U.S. comments on the Latin American drafts. "Letter of Amb. Freeman to Garcia Robles," August 29, 1966. See *Docs. on Disarm.*, v. 1966, pp. 622, 626-27; see also Garcia Robles, *The Denuclearization of Latin America*, p. 151.

⁵³ Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, February 14, 1967.

⁵⁴ "U.S. Statement on Signature of Protocol II to the Latin American Denuclearization Treaty, April 1, 1968," *Department of State Bulletin*, April 29, 1968, pp. 555-56; ACDA, *Docs. on Disarm.*, v. 1968, pp. 204-205 (emphasis added). The purpose of the understanding, of course, was to relieve the United States of the obligation not to

use nuclear weapons against a Latin American party that attacked the United States or another Latin American country (almost all are allies of the United States) with the assistance of the Soviet Union.

⁵⁵ Robinson, "The Treaty of Tlatelolco," pp. 304 Robinson became Legal Adviser to the State Department during the first Reagan administration.

⁵⁶ "ACDA Statement to the Senate Foreign Relations Committee: Additional Protocol II to the Tlatelolco Treaty and the Non-Use of Nuclear Weapons, Sept. 22, 1970" in *Additional Protocol II to the Latin American Nuclear Free Zone Treaty: Hearings before the Senate Committee on Foreign Relations*, 92nd Cong., 2nd Sess. 20-21 (1970).

⁵⁷ No Latin American party formally objected to the U.S. understanding. Robinson, "The Treaty of Tlatelolco," p. 304. The Chiefs also said that their support for the Latin American non-use protocol was a special exception that should not be construed as a willingness to accept similar assurances in other cases.

⁵⁸ A brief history of Senate consideration appears in ACDA, *Arms Control and Disarmament Agreements: Texts and Histories of the Negotiations* (Washington, D.C.: Government Printing Office, 1996), pp. 45-47.

⁵⁹ The conference had been called for by a U.N. General Assembly Resolution adopted toward the end of 1966, and its date had been set for August 1968 by a similar resolution adopted toward the end of 1967. U.N. General Assembly, 21st Sess., Doc. A/RES/2153B Rev.1, January 5, 1967; ACDA, *Docs. on Disarm.*, v. 1966, pp. 749-50; U.N. General Assembly, 22nd Sess., Doc. A/RES/2346B, December 19, 1967; ACDA, *Docs. on Disarm.*, v. 1967, p. 733.

⁶⁰ See Seaborg with Loeb, *Stemming the Tide*, p. 382.

⁶¹ "Final Document of the Conference of Non-Nuclear-Weapon States, October 1, 1968," Doc. A/CONF.35/10; ACDA, *Docs. on Disarm.*, v. 1968, pp. 668, 672.

⁶² "Recommendations by the Co-Chairmen on the Agenda," Doc. ENDC/PV.390, pp. 29-30 (1968); ACDA, *Docs. on Disarm.*, v. 1968, pp. 583-84; "Statements of Soviet Representative Roshchin," ACDA, *Docs. on Disarm.*, v. 1969, pp. 164, 239, 141-42, 301, 304, 420, 422.

⁶³ U.N. General Assembly Resolution 2936 (XXVII), December 4, 1972, ACDA, *Docs. on Disarm.*, v. 1972, p. 848-49 and note 1. Albania, China, Portugal, and South Africa opposed.

⁶⁴ "Warsaw Pact Draft Treaty To Prohibit First Use Of Nuclear Weapons," ACDA, *Docs. on Disarm.*, v. 1976, p. 856.

⁶⁵ Thomas Bernauer, *Nuclear Issues on the Agenda of the Conference on Disarmament* (New York: UNIDIR, 1991), p. 5.

⁶⁶ "Final Declaration of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 30, 1975," NPT/CONF/30/Rev.1, Annex 1; ACDA, *Docs. on Disarm.*, v. 1970, pp. 146, 155.

⁶⁷ *Ibid.*

⁶⁸ See Bernauer, *Nuclear Issues on the Agenda*, pp. 3-9.

⁶⁹ "Statement of Secretary of State Vance: U.S. Assurance on Non-Use of Nuclear Weapons, June 12, 1978," *Department of State Bulletin*, August 1978, p. 52, ACDA, *Docs. on Disarm.*, v. 1978, p. 384 (emphasis added).

⁷⁰ One reporter asked the difference between "allied" and "associated with a nuclear weapons state in carrying out or sustaining the attack." The reporter said: "[Y]ou're saying that if a treaty exists on paper making the country which is carrying out the attack an ally of a nuclear-weapon state, then it's not really pertinent whether that ally is actually involved in the actual fighting. It's just the existence of that piece of paper." Senior Official: "That's correct." Question: "But in the latter phrase then, you're dealing with a case in which there's no piece of paper, but we have reason to believe that the nuclear state is somehow involved behind the scenes or somewhere along the way?" Senior Official: "That's a fair statement..." Department of State, Transcript of Special Briefing, June 12, 1978, 5:06 P.M. See also "Department of State Telegram 149147," June 12, 1978 to U.S. Missions in New York and Geneva and to several embassies explaining the new non-use declaration. Both provided pursuant to Freedom of Information Act request.

⁷¹ "Final Document of the Special Session of the General Assembly devoted to Disarmament," ACDA, *Docs. on Disarm.*, v. 1978, pp. 411, 418 (emphasis added).

⁷² See, e.g., "Conclusion of an International Convention to Assure Non-Nuclear-Weapon States Against the Use or Threat of Use of Nuclear Weapons, Mar. 27, 1979," submitted to the Geneva disarmament conference by Pakistan, Doc. CD/10, ACDA, *Docs. on Disarm.*, v. 1979, pp. 90, 92. See also Bernauer, *Nuclear Issues on the Agenda*, pp. 10-26 for a history of the complaints about the 1978 declarations and a description of various proposals for reform.

⁷³ "Strengthening of Guaranties of the Security of Non-Nuclear States, Sept. 8, 1978," U.N. General Assembly, 33rd Sess., Doc.A/33/241, September 20, 1978, ACDA, *Docs. on Disarm.*, v. 1978, p. 558.

⁷⁴ "Proposal to the Committee on Disarmament for Recommendation to the U.N. General Assembly Concerning the Security of Non-Nuclear-Weapon States Against Nuclear Attack, Jul. 2, 1979," Doc. CD/27, ACDA, *Docs. on Disarm.*, v. 1979, pp. 328, 329.

⁷⁵ "Statement by U.S. Representative Fisher to the Geneva Committee on Disarmament," ACDA, *Docs. on Disarm.*, v. 1979, pp. 303, 306 (emphasis added).

⁷⁶ U.N. General Assembly Resolutions 34/84 and 34/85, ACDA, *Docs. on Disarm.*, v. 1979, pp. 785, 787.

⁷⁷ See Bernauer, *Nuclear Issues on the Agenda*, pp. 10-23.

⁷⁸ See, e.g., Leonard Spector with Jacqueline R. Smith, *Nuclear Ambitions* (Boulder, CO:

Westview Press, 1990), pp. 67-117.

⁷⁹ George Bunn, "The Non-Proliferation Treaty Review Conference for 1990," in David D. Newsom, ed., *The Diplomatic Record, 1990-91* (Boulder, CO: Westview Press, 1992), pp. 195, 199-202.

⁸⁰ *Ibid.*

⁸¹ See Sherman Garnett, "The Role of Security Assurances in Ukrainian Denuclearization" and Bunn, "Security Assurances," both in Foran, ed., *Missed Opportunities*.

⁸² See Office of the White House Press Secretary, "Trilateral Statement by the Presidents of the United States, Russia and Ukraine, Jan. 14, 1994." This communique contained the model for the exception in the later agreement: "except in the case of an attack on [a nuclear-weapon state or its allies] in association or alliance with a [another] nuclear weapon state."

⁸³ See Bernauer, *Nuclear Issues on the Agenda*, p. 9.

⁸⁴ See Bunn, "Security Assurances," in Foran, ed., *Missed Opportunities*. A State Department cable discussed earlier in this paper gave the same interpretation to an earlier draft with an exception like this one.

⁸⁵ Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, December 4, 1994 (emphasis added). Similar agreements were made with Belarus and Kazakhstan. China and France later gave assurances to the three former republics that were different in form.

⁸⁶ ACDA, "Fact Sheet: A Declaration by the President on Security Assurances for Non-Nuclear Weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 5, 1995;" "1994 Report of the Ad Hoc Committee on Effective International Arrangements to Assure Non-Nuclear-Weapon States against the Use or Threat of Use of Nuclear Weapons," Geneva Conference on Disarmament, Doc. CD/1275, August 30, 1994.

⁸⁷ U.N. General Assembly Resolution 49/73, December 15, 1994. Britain, France, and Russia did not support the resolution.

⁸⁸ 51 U.N. Security Council Official Records (April 11, 1995, 3514th meeting) at U.N. Docs. S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265 (1995).

⁸⁹ "Statement of Secretary of State Christopher regarding a Declaration by the President of the United States on Security Assurances for Non-Nuclear-Weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 5, 1995." This statement was repeated to U.N. Security Council in connection with the adoption of S/RES/984, U.N. Security Council Official Records (3514th meeting, April 11, 1995), the resolution noting with appreciation the security assurances of the Five.

⁹⁰ This is consistent with the promise (without an exception) that the United States made to North Korea in 1994: "The U.S. will provide formal assurances to the DPRK against the threat or use of nuclear weapons by the U.S." See "Agreed Frame-

work between the United States of America and the Democratic Peoples Republic of Korea, Geneva, Oct. 21, 1994," par. III(1).

⁹¹ U.N. Security Council Resolution 984 (1995).

⁹² The assurances were limited to NPT non-nuclear weapon parties. Thus, if the NPT were not extended, the assurance would end.

⁹³ "Principles and Objectives for Nuclear Non-Proliferation and Disarmament," par. 8, NPT/CONF. 1995/32 (Part I), Decision 2 (emphasis added).

⁹⁴ See, e.g., American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute, 1987), Sec. 301(1).

⁹⁵ See American Law Institute, *Restatement (Second) of the Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute, 1965), Comment c. to Sec. 301.

⁹⁶ "Statement of U.S. Representative Fisher to the Committee on Disarmament, June 28, 1979," ACDA, *Docs. on Disarm.*, v. 1979, pp. 303, 306.

⁹⁷ Fisher had been Legal Adviser to the U.S. State Department and chief reporter of the American Law Institute's authoritative review of international law as perceived by the United States. *Restatement (Second)*, p. iii. This *Restatement* said unilateral "declarations of heads of state or government, foreign ministers, or other officials engaged in the conduct of foreign relations" could create "international legal agreements as distinguished from statements of policy..." p. 365. It also said that a binding agreement could be produced without an instrument signed by the parties when one acted in anticipation of the other's reciprocal action and the other responded as anticipated. "It is not necessary that the instruments be direct exchanges between the parties. Unilateral declarations of acceptance of the compulsory jurisdiction" of the I.C.J. by two parties for the purpose of litigating a dispute between them was given as an example. p. 363. Thus, as Fisher apparently saw it, in the U.S. proposal that he put forward, each of the five nuclear weapon states would, in effect, say to the others: "We will make our declaration of negative security assurances to non-nuclear weapon NPT parties and vote for the U.N. resolution if you will do the same." Each would then act in reliance upon the other doing so, and each would then be bound by the resolution and its own declaration. See "U.S. Working Paper Submitted to the Committee on Disarmament," ACDA, *Docs. on Disarm.*, v. 1979, pp. 328-30.

⁹⁸ "Statement of Secretary of State Christopher, Apr. 5, 1995" (emphasis added).

⁹⁹ NPT Art. X.2.

¹⁰⁰ ACDA, the lead government agency in the campaign to secure the NPT's extension in May of 1995, issued a press release on April 5, 1995, the day the president's declaration was issued. It said: "It is the Administration's view that the national statements being issued by all five NPT nuclear-weapon states, their co-sponsorship of a Security Council resolution on security assurances which is under consideration in New York, and the common negative security assurance achieved by the

five—together comprise a substantial response to the desire of many NPT non-nuclear-weapon states for strengthened security assurances. This outcome reinforces the international nuclear non-proliferation regime and deserves the support of all NPT parties.” ACDA, “Fact Sheet: A Declaration by the President on Security Assurances for Non-Nuclear Weapon States Party to the Treaty on the Non-Proliferation of nuclear Weapons,” April 5, 1995, p. 2. Thus, these “strengthened security assurances” were offered to the non-nuclear-weapon NPT parties if they would vote to extend the NPT.

¹⁰¹ Legality of Nuclear Weapons, p. 36, par. 105.D. In this paragraph, the Court unanimously concluded that any threat or use of nuclear weapons “should...be compatible with the requirements of the international law applicable in armed conflict...as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.” The opinion had earlier made clear that “specific obligations under treaties” meant the non-use treaty commitments provided to nuclear-weapon-free zone parties and that “other undertakings” meant the 1995 negative security assurances provided to non-nuclear weapon NPT parties. See pp. 22-25. Thus, the 1995 negative security assurances were treated in the same way as the treaties and customary international law applicable to war crimes trials and the non-use treaty commitments for nuclear-weapon-free zone parties. These are without question “legally binding,” and that appears to be the I.C.J.’s conclusion for the negative security assurance undertakings. However, its opinion is only advisory; it does not bind the United States or any other government.

¹⁰² Legality of Nuclear Weapons, p. 23.

¹⁰³ Legal Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J., ser. A/B, No. 53. Relying on this and other sources, an international law expert concluded that “ostensibly unilateral declarations have been considered binding when made in the context of a larger negotiating situation”—for example, when the declaration is made to secure action by another state or states and it or they, in reliance upon the declaration, take the action requested. Alfred P. Rubin, “The International Legal Effects of Unilateral Declarations,” *American Journal of International Law* 71, No. 1(1971), p. 1. See to the same effect, Louis Henkin, Richard C. Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials* (St. Paul, Minn.: West, 2nd ed. 1987), p. 393.

¹⁰⁴ Nuclear Test Cases (Australia and New Zealand v. France), *International Court of Justice*, v. 1974, pp. 253, 267, 457, 472.

¹⁰⁵ American Law Institute, *Restatement (Third)*, Sec. 301, comment c and reporter’s note 3; Sec. 321, reporters’ note 1; Oscar Schachter, “Twilight Existence of Nonbinding International Agreements,” *American Journal of International Law* 71 (1977), pp. 296, 301, 304. For the contrary view, see Alfred P. Rubin, “The International Legal Effects of Unilateral Declarations,” *American*

Journal of International Law 71 (1977), p. 1, 4, 7.

Henkin, Pugh, Schacter, and Smit, *International Law*, p. 393, after pointing out that the I.C.J. in the Nuclear Tests case did not require any reciprocal action or *quid pro quo* by the countries relying upon the French statements, said that the I.C.J. opinion could be interpreted as holding that a state making such a declaration “is precluded by principles of good faith or estoppel from repudiating it.”

¹⁰⁶ In the Nuclear Tests case, France had not intended to create a legally binding commitment; before the Court’s decision, it did not “recognize that it was bound by any rule of international law to terminate its tests....” 1974 I.C.J. at 270. Indeed, the Australian attorney general had earlier told the Australian Senate that the French statements fell short “of an understanding that there will be no more atmospheric tests conducted by the French Government at its Pacific Test Center....” *Id.* at 270.

¹⁰⁷ *Restatement (Third)*, Sec. 102; 301, comment c.

¹⁰⁸ Legality of Nuclear Weapons, pp. 25-33, 36 (par. 105 B).

¹⁰⁹ Legality of Nuclear Weapons, p. 25.

¹¹⁰ See *Restatement (Third)*, Sec. 303 (1987). See also the comments and notes to this section for many examples of U.S. practice resulting from the U.S. Constitution and differences between the Congress and the executive branch.

¹¹¹ United States Code, v. 1, Sec. 112b.

¹¹² U.S. Code of Federal Regulation, v. 22, Sec. 181.1-2.

¹¹³ See Robert Dalton, Assistant Legal Adviser for Treaty Affairs, Memorandum of March 18, 1994, reprinted in Marian Nash (Leich), “International Acts Not Constituting Agreements,” *American Journal of International Law* 88, No. 3 (1994), pp. 515-19.

¹¹⁴ *Treaties and Other International Agreements: The Role of the United States Senate*, S. Comm. Print 103-53, 103rd Cong., 1st Sess. (1993), pp. 34-35, quoted in Leich, “International Acts,” at 518.

¹¹⁵ The NPT provides for review every five years, and the next review will be in the year 2000. NPT Art.VIII.3. There will be preparatory committee meetings of the parties dealing with substantive complaints each of the three years before the review meetings. See “Strengthening the Review Process for the Treaty,” NPT/CONF. 1995/ Dec. 1, par. 4. For the U.N. Security Council to deal effectively with Iraq’s efforts to make nuclear weapons required, of course, a consensus of the Five as well as the votes of at least four out of the 10 remaining members. U.N. Charter Art. 27. The Security Council is the only effective enforcement body for any NPT violator that defies the NPT-based inspection requirements of the International Atomic Energy Agency (IAEA) and economic sanctions of NPT members seeking to enforce the treaty—as the Democratic People’s Republic of Korea (North Korea) did for the first six months of 1994. Had there been significant support for the DPRK’s defiance of the IAEA and the NPT

from other developing countries, the DPRK’s temporary withdrawal from the NPT might well have become permanent, and the negotiations with it unsuccessful. Thus, widespread support is needed to enforce the NPT. See, e.g., Gordon Goldstein, “Nonproliferation and the U.N. Security Council, A Conference Report of the UNA-USA Project on the Security Council and Nonproliferation” (1996); Arms Control Association, “Fact Sheet on North Korea’s Nuclear Facilities,” July 21, 1994; Michael R. Gordon, “White House Asks Global Sanctions on North Koreans,” *The New York Times* (national edition), June 4, 1994, p. A1; David I. Sanger, “The Pyongyang Puzzle,” *The New York Times* (national edition), June 1, 1994, p. A1; Michael R. Gordon, “Out of Bounds: Iraq Played ‘Catch Me if You Can.’ North Korea Says, ‘What if You Do?’” *The New York Times*, June 5, 1994, “The Week in Review,” p. 1; Michael R. Gordon, “U.S. Finds it Hard to Win Consensus over North Korea,” *The New York Times* (national edition), June 10, 1994, p. A1.

¹¹⁶ “Under Protocol I, which we signed, each party pledges not to use or threaten nuclear weapons against an ANFZ [African Nuclear-weapon Free Zone] party. However, Protocol I will not limit options available to the United States in response to an attack by an ANFZ party using weapons of mass destruction. [nuclear, biological or chemical].” White House, Press Briefing by Robert Bell, Special Assistant to the President and Senior Director for Defense Policy and Arms Control, National Security Council, April 11, 1996. Subsequently, it became clear that the basis for this statement was the international law rule of belligerent reprisal. See Bunn, “Expanding Nuclear Options,” pp. 7, 9.

To gain support in the Senate for the Chemical Weapons Convention, the Clinton administration made a formal commitment to carry out “overwhelming and devastating” retaliation against any enemy that attacked U.S. troops with poison gas. A senior official is reported to have stated that “our response would draw on the whole range of weapons in the U.S. inventory.” Thomas Lippman, “Clinton Presses Chemical Pact: Promise of Fierce Response Offered to Gain GOP Support,” *The Washington Post* (final edition), February 15, 1997.

¹¹⁷ See “The Alliance’s Strategic Concept, NATO Summit Agreement,” Rome, par. 40, 55-57 (1991). In a briefing to explain the results of the 1994 U.S. Department of Defense nuclear posture review, then Deputy Secretary of Defense John Deutch was asked about the possible use of nuclear-armed Tomahawk missiles to respond to chemical weapons in a regional crisis. He said that those threatening biological or chemical weapons would have to take the existence of U.S. nuclear weapons “into account.” “U.S. Dept. of Defense Briefing of Sept. 22, 1994,” p. 20. In testifying in support of Senate approval of the Chemical Weapons Convention, then-Secretary of Defense William Perry was asked how the U.S. would respond to a chemical attack if it destroyed all its chemical weapons as it is now doing. He

described a range of possible conventional responses and added: "and then there are nuclear weapons." Reuter's, "U.S. May Use Nuclear Force Against Chemicals," March 28, 1996; Defense Department News Briefing of April 23, 1996, excerpted in "For the Record," *The Washington Post* (final edition), April 24, 1996, editorial page.

¹¹⁸ In 1991, Baker threatened Iraq, a non-nuclear-weapon NPT party, with the destruction of its regime, not just its removal from Kuwait, if it used biological or chemical weapons against coalition forces in the Gulf War. He said he "left the impression that the use of chemical or biological agents by Iraq could invite nuclear retaliation." Baker, *The Politics of Diplomacy: Revolution, War and Peace, 1989-1992*, pp. 58-59 (1995). From this book and other statements to the press by Baker, by his Iraqi interlocutor and by a U.N. official, I.C.J. Vice-President Schwebel concluded that the United States had threatened nuclear weapons if attacked with biological or chemical ones and that the threat had been effective in preventing Iraqi use of chemical or biological agents. See Legality of Nuclear Weapons, Dissenting Opinion of Vice-President Schwebel, pp. 840-841. See also William M. Arkin, "Weapons of Mass Destruction in the Gulf War," *The Washington Quarterly* 19 (Autumn 1996), pp. 3-18.

¹¹⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (1969), Art. 60.2(b). The United States signed but did not ratify this treaty; it accepts most of its provisions as reflecting customary international law. *The Restatement (Third)*, accepts and follows this article of the Vienna Convention, Sec. 335. In any event, many view the Geneva Protocol of 1925 as only prohibiting the first use of chemical weapons. See Frits Kalshoven, *Belligerent Reprisals* (Leyden: Sythoff, 1971), pp. 347-48.

¹²⁰ Bunn, *Expanding Nuclear Options*, pp. 7, 9.

¹²¹ In this view, the U.N. Charter prohibits the use of force except in self-defense against an armed attack or when force is authorized by the U.N. Security Council. Forcible reprisals not so authorized must therefore be individual or collective self defense to an armed attack. See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), *International Court of Justice*, v. 1986, pp. 14, 119-127; *Restatement (Third)*, Sec. 905 (2) and comment g; Louis Henkin, *International Law: Politics and Values* (Dordrecht, The Netherlands: Mortinus Nijhoff, 1995), pp. 122-23. For discussions comparing reprisals using force under the Charter with such reprisals under customary international law, compare Derek Bowett, "Reprisals Involving the Recourse to Armed Force," *American Journal of International Law* 66, No. 1 (1972), p. 1 with Robert Tucker, "Reprisals and Self-Defense: The Customary Law," *American Journal of International Law* 66, No. 3 (1972), p. 586. For a related argument that self defense against an armed attack is not a necessary prerequisite to the use of force not authorized by the U.N. Security Council, see Alfred P. Rubin, "Review Essay: Looking Out from Inside," *The Fletcher Forum* (Winter/

Spring 1995), pp. 171, 172-73.

The U.N. General Assembly's consensus Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States provides: "States have a duty to refrain from acts of reprisal involving the use of force." 25 U.N. General Assembly OR Supp. No. 28, at 122 (1970). This, however, does not prohibit a reprisal using force in self-defense in response to an armed attack because the Declaration did not change the U.N. Charter. But it does support the view that the old customary law authorizing reprisals that would not qualify as self defense against an armed attack under the Charter is no longer valid. In explanation of its support for the Declaration's prohibition of forcible reprisals, the State Department said that it was "desirable to endeavor to maintain the distinction between acts of lawful self-defense and unlawful reprisal." *Digest of U.S. Practice in International Law* (Washington, D.C.: Government Printing Office, 1974), p. 700. Thus, if a "reprisal" can be justified as self-defense against an armed attack, it is permissible under U.S. practice. See *Restatement (Third)* Sec. 905(2), comment g, and reporter's note 8.

¹²² On nuclear reprisal to a biological or chemical attack, see Kalshoven, *Belligerent Reprisals*, pp. 377-78. On necessity, see Tucker, "Reprisals and Self-Defense," p. 593.

¹²³ *Restatement (Third)*, Sec. 905 and note 8.

¹²⁴ Even if this treaty had not been joined by the attacker, its rule has become customary international law applicable to all countries. See, e.g., Bunn, "Banning Poison Gas and Germ Warfare: Should the United States Agree?" *Wisconsin Law Review* 1969, No. 2 (1969), pp. 375, 388-89. Libya is in any event a party to the 1925 Geneva Protocol. ACDA, *Arms Control and Disarmament Agreements*, p. 9.

¹²⁵ See Legality of Nuclear Weapons, pp. 25-30 for a summary of the rules defining war crimes that may relate to nuclear weapon use.