

NEGOTIATIONS FOR A NUCLEAR WEAPONS CONVENTION: DISTANT DREAM OR PRESENT POSSIBILITY?

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At the 2005 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, states parties failed to adopt a final declaration. Unlike at previous meetings, there was disagreement 'across all frontlines'.¹ Today, multilateral negotiations on nuclear disarmament remain at a standstill. The apparent failure of the current step-by-step approach has prompted some states to call for a comprehensive approach involving the negotiation of a legally binding nuclear weapons convention ('NWC'). This article examines whether states are required, under the NPT and customary international law, to negotiate such a treaty and, if so, whether that obligation is time-bound. It then identifies potential obstacles to the commencement of negotiations and steps which, if taken, might make negotiations more likely. It concludes that, if much greater pressure is placed on nuclear-armed states by the public and by other states, negotiations for an NWC could begin soon after the 2010 NPT Review Conference.

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¹ Harald Müller, *The 2005 NPT Review Conference: Reasons and Consequences of Failure and Options for Repair* (The Weapons of Mass Destruction Commission Paper No 31, August 2005) 1.

I INTRODUCTION

In 1996, the International Court of Justice held, unanimously, that '[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects'.² This obligation, like any legal obligation, must be performed within a reasonable time and cannot be postponed indefinitely.³ But today — four decades after states concluded the *Treaty on the Non-Proliferation of Nuclear Weapons*,⁴ which includes an obligation to disarm — the goal of a world without nuclear weapons remains elusive. Former United Nations Secretary-General Kofi Annan has described the current state of play as one of 'mutually assured paralysis', where nuclear-armed states argue that the global environment is not conducive to disarmament because the risk of proliferation is too high, and states without nuclear weapons refuse to support nonproliferation measures because the nuclear-weapon states have been unwilling to sacrifice them.⁵

In fact, so dire is the current situation that in 2007 the *Bulletin of the Atomic Scientists* decided to move the minute hand of its Doomsday Clock two minutes closer to midnight.⁶ The board of directors delivered a sobering warning to humanity: '[w]e stand at the brink of a second nuclear age. Not since the first atomic bombs were dropped on Hiroshima and Nagasaki has the world faced such perilous choices'.⁷ It cited North Korea's nuclear test in October 2006, Iran's 'nuclear ambitions', and a 'renewed emphasis' in the United States 'on the military utility of nuclear weapons' as reasons for the decision.⁸ These developments, among others, have placed the *NPT* under great strain.⁹ At the last Review Conference for the treaty, held in 2005, states could not agree on any

² *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 267 ('*Nuclear Weapons Advisory Opinion*').

³ All treaty obligations must be performed in 'good faith': see, eg, *Charter of the United Nations* art 2(2); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('*Vienna Convention*'); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Supp No 28, UN Doc A/RES/2625 (XXV) (24 October 1970). As part of the good faith requirement, treaty obligations must be performed within a reasonable time: see below Part II(B).

⁴ Opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*NPT*').

⁵ Kofi A Annan, 'Role of Disarmament, Non-Proliferation Examined in Princeton Lecture' (Press Release, 28 November 2006).

⁶ Board of Directors, 'It Is Five Minutes to Midnight' (2007) 63(1) *Bulletin of the Atomic Scientists* 66, 66–71.

⁷ *Ibid* 66.

⁸ *Ibid*.

⁹ For a discussion on the current state of the *NPT*, see, eg, Adel M Ali, 'Treaty on the Non-Proliferation of Nuclear Weapons and Its Recent Issues: A Legal Perspective' (2007) 1 *International Journal of Nuclear Law* 305; Daryl G Kimball, 'NPT: Past, Present, and Future' (2008) 38(5) *Arms Control Today* <<http://www.armscontrol.org/node/2933>>.

plan of action.¹⁰ Last year, on a historic visit to Hiroshima, Australian Prime Minister Kevin Rudd described the treaty as ‘fragmenting’.¹¹

With these bleak realities in mind, it is perhaps unsurprising that some observers consider a nuclear-weapon-free world to be little more than a distant dream.¹² Several commentators have argued that it would be counterproductive to focus on the end goal of abolition at this stage.¹³ However, a growing number of states, individuals and civil society groups have begun to assert that, in fact, the opposite is true: the dire state of the present situation requires us to focus our attention squarely on elimination, not merely arms control.¹⁴ They also believe that a step-by-step approach cannot succeed unless it takes place within a comprehensive framework. In January last year, four former American statesmen — George P Shultz, William J Perry, Henry A Kissinger and Sam Nunn — co-authored an essay in the *Wall Street Journal* in which they argued that ‘[w]ithout the vision of moving toward zero, we will not find the essential cooperation required to stop our downward spiral’.¹⁵ In December, a group of approximately 100 prominent political, military, business, faith and civic leaders from around the world launched Global Zero, a major international campaign aimed at building public awareness and political support for a new nuclear

¹⁰ For an analysis of that conference, see Müller, above n 1; Rebecca Johnson, ‘Politics and Protection: Why the 2005 NPT Review Conference Failed’ (2005) 80 *Disarmament Diplomacy* <<http://www.acronym.org.uk/dd/dd80/80npt.htm>>; Marianne Hanson, ‘The Future of the Non-Proliferation Treaty’ (2005) 59 *Australian Journal of International Affairs* 301.

¹¹ Kevin Rudd, ‘Building a Better World Together’ (Speech delivered at Kyoto University, Kyoto, Japan, 9 June 2008).

¹² See, eg, Harold Brown and John Deutch, ‘The Nuclear Disarmament Fantasy’, *Wall Street Journal* (New York, US) 19 November 2007, A19.

¹³ *Ibid.*

¹⁴ See generally International Association of Lawyers against Nuclear Arms (‘IALANA’), International Network of Engineers and Scientists against Proliferation (‘INESAP’) and International Physicians for the Prevention of Nuclear War (‘IPPNW’), *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention* (2007). See also Joseph Rotblat, Jack Steinberger and Bhalchandra Udgaonkar (eds), *A Nuclear-Weapon-Free World: Desirable? Feasible?* (1993); Jonathan Schell, *The Gift of Time: The Case for Abolishing Nuclear Weapons Now* (1998).

¹⁵ George P Shultz et al, ‘Toward a Nuclear-Free World’, *Wall Street Journal* (New York, US) 15 January 2008, A13. Shultz was US Secretary of State 1982–89; Perry was US Secretary of Defence 1994–97; Kissinger was Secretary of State 1973–77; and Nunn was Chairman of the Senate Armed Services Committee 1987–95. They had co-authored a similar essay for the *Wall Street Journal* in January 2007: George P Shultz et al, ‘A World Free of Nuclear Weapons’, *Wall Street Journal* (New York, US) 4 January 2007, A15. More recently, four former English statesmen made a similar plea (Douglas Hurd et al, ‘Start Worrying and Learn to Ditch the Bomb’, *The Times* (London, UK) 30 June 2008) as did four former German statesmen (Helmut Schmidt et al, ‘Für eine Atomwaffenfreie Welt’, *Frankfurter Allgemeine Zeitung* (Frankfurt, Germany) 8 January 2009) and six eminent Australians (Malcolm Fraser et al, ‘Imagine There’s No Bomb’, *The Age* (Melbourne, Australia) 8 April 2009).

disarmament treaty.¹⁶ They reason that:

Only in pursuing a treaty for zero nuclear weapons ... will governments be galvanized to undertake the monumental effort, dedicate the resources and mobilize the international cooperation necessary to negotiate and resolve the critical issues for eliminating nuclear weapons.¹⁷

In 1997,¹⁸ the year after the ICJ's *Nuclear Weapons Advisory Opinion*, a consortium of experts in law, science, disarmament and negotiation drafted a model treaty for zero nuclear weapons.¹⁹ Known generally as a nuclear weapons convention,²⁰ it is similar in form to existing conventions outlawing biological weapons,²¹ chemical weapons,²² anti-personnel mines²³ and certain types of cluster munitions.²⁴ Unlike the *NPT*, it explicitly prohibits the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons, and provides for their elimination.²⁵ Many states and most antinuclear civil society groups now see negotiations for an NWC in the near future as politically feasible and indeed necessary if we are to move beyond the current disarmament stalemate.²⁶ UN Secretary-General Ban Ki-moon urged states last October to consider such a treaty as a possible path forward, describing the

¹⁶ See Global Zero, *Paris Conference* <<http://www.globalzero.org/en/paris-conference>>.

¹⁷ Compact to Eliminate Nuclear Weapons, *Compact to Eliminate Nuclear Weapons* (2008) 3.

¹⁸ *Letter Dated 31 October 1997 from the Chargé d'affaires ad interim of the Permanent Mission of Costa Rica to the United Nations Addressed to the Secretary-General*, UN GAOR, 52nd sess, Agenda Item 71, UN Doc A/C.1/52/7 (17 November 1997) Annex ('1997 Model Nuclear Weapons Convention'). An updated version of the model treaty may be found in *Model Nuclear Weapons Convention: Working Paper*, 1st sess, UN Doc NPT/CONF.2010/PC.I/WP.17 (2 May 2007) ('2007 Model Nuclear Weapons Convention').

¹⁹ IALANA, INESAP and IPPNW, above n 14.

²⁰ Some groups have chosen to use different terms for what is essentially an NWC. For example, the Weapons of Mass Destruction Commission ('Blix Commission') used the term 'nuclear disarmament treaty': *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms* (Weapons of Mass Destruction Commission Final Report, 1 June 2006) 109. On the other hand, the Compact to Eliminate Nuclear Weapons uses the term 'treaty for zero nuclear weapons': above n 17, 3.

²¹ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975) ('*Biological Weapons Convention*').

²² *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997) ('*Chemical Weapons Convention*').

²³ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999) ('*Mine Ban Treaty*').

²⁴ *Convention on Cluster Munitions*, opened for signature 3 December 2008, [2008] ATNIF 24 (not yet in force).

²⁵ See *1997 Model Nuclear Weapons Convention*, above n 18, art IA(1)–(2). Although the *NPT* includes a disarmament obligation (art VI), its chief purpose is to prevent the wider dissemination of nuclear weapons (arts I–III) and to facilitate the use of nuclear energy for peaceful purposes (arts IV–V). Article VI states that the possession of nuclear weapons should only be temporary, but this foundation of the treaty was damaged in 1995 when states parties chose to extend the treaty indefinitely and unconditionally: K Subrahmanyam, 'Elimination or Irrelevance' (2008) 38(5) *Arms Control Today* <http://www.armscontrol.org/act/2008_06/Subrahmanyam>.

²⁶ See, eg, IALANA, INESAP and IPPNW, above n 14; Blix Commission, above n 20.

model NWC drafted by civil society as ‘a good point of departure’ for negotiations.²⁷

The introduction of this article assesses the significance of the growing support for an NWC and explores the role that the Australian Government might play in advancing such a treaty. Part II examines the potential role of international legal obligations in propelling states towards an NWC. Part III identifies what a number of states perceive to be key obstacles to the commencement of negotiations, and how they might be overcome. Part IV outlines some steps which, if taken, would make the early commencement of negotiations more likely. It concludes that, with greater pressure placed on nuclear-armed states by their publics and by states without nuclear weapons, formal negotiations could begin shortly after the next *NPT* Review Conference, due to take place in 2010. The article does not consider how long it might take to conclude such negotiations or when a nuclear-weapon-free world can be achieved; nor does it seek to make the case for an NWC, as that has been done in detail elsewhere.²⁸

A *Growing International Support for an NWC*

A majority of states, and most civil society groups promoting nuclear disarmament, have come to accept that the pursuit of an NWC — which would entail a comprehensive or ‘incremental–comprehensive’²⁹ approach to disarmament — is our best or only hope of moving beyond the current situation of ‘mutually assured paralysis’.³⁰ The call for negotiations on an NWC has intensified in response to the *Nuclear Weapons Advisory Opinion* and, more recently, the failure of the 2005 *NPT* Review Conference,³¹ as well as several events indicating that the step-by-step approach is faltering. These include in particular the nuclear tests carried out by India and Pakistan in 1998; clandestine exchanges in nuclear weapons technology involving Pakistani scientist Abdul Qadeer Khan; and the withdrawal of North Korea from the *NPT* and its subsequent nuclear test.³² An NWC is now the central aim and a key rallying point of most international non-governmental organisations working in the field

²⁷ Ban Ki-moon, ‘The United Nations and Security in a Nuclear-Weapon-Free World’ (Address delivered at the East–West Institute, New York, US, 24 October 2008).

²⁸ See especially IALANA, INESAP and IPPNW, above n 14. See generally (2002) 3 *Nuclear Weapons Convention Monitor*.

²⁹ For discussion on the distinction between a comprehensive approach and an incremental–comprehensive approach, see IALANA, INESAP and IPPNW, above n 14, 25–9.

³⁰ See Annan, above n 5.

³¹ For example, the *Nuclear Weapons Advisory Opinion* prompted the drafting of the 1997 *Model Nuclear Weapons Convention*, above n 18, and the adoption by the UN General Assembly of *General and Complete Disarmament: Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 51/45, UN GAOR, 1st Comm, 51st sess, UN Doc A/RES/51/45 pt M (10 January 1997). The failure of the 2005 *NPT* Review Conference prompted the publication of a revised version of the *Model Nuclear Weapons Convention*: IALANA, INESAP and IPPNW, above n 14.

³² See IALANA, INESAP and IPPNW, above n 14, 15.

of nuclear disarmament,³³ and it is perhaps only a matter of time before it also becomes a central objective of states, including those with nuclear weapons. Whilst most states already support the idea of an NWC in principle, few have become active champions of it, perhaps partly for fear of appearing too idealistic.³⁴ But the deterioration of the *NPT* and a growing risk that nuclear weapons will one day be used again, either by design or accident,³⁵ are drawing more and more states to the unavoidable conclusion that an NWC must be part of the solution.

Every year since 1996, the UN General Assembly has passed a resolution calling on states immediately to fulfil the disarmament obligation articulated in the *Nuclear Weapons Advisory Opinion* ‘by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention’.³⁶ In December 2008, 127 states voted in favour of the resolution, 30 voted against and 23 abstained.³⁷ Four nuclear-armed states — China, India, Pakistan and North Korea³⁸ — supported it, while the other five,³⁹ along with all European countries that host US nuclear weapons on their soil as part of a North American Treaty Organization nuclear-sharing arrangement,⁴⁰ voted against it. The US, Russia, France and Israel have all argued that it is premature even to think about

³³ For a discussion of the centrality of an NWC at the 2008 *NPT* review meeting, see Tim Wright, *Towards a Nuclear Weapons Convention: A Report on Australia and the Second Session of the Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 28 April – 9 May 2008* (International Campaign to Abolish Nuclear Weapons Report, May 2008) 5–9.

³⁴ Blix Commission, above n 20, 109.

³⁵ For a discussion on the growing risks associated with nuclear weapons, see especially *ibid* 36–40.

³⁶ The most recent version of the resolution, passed during the 63rd session, is *Follow-Up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 63/49, UN GAOR, 1st Comm, 63rd sess, 61st plen mtg, UN Doc A/RES/63/49 (23 August 2008) [2].

³⁷ UN GOAR, 63rd sess, 61st plen mtg, UN Doc A/63/PV.61 (28 November 2008) 12. Later, the delegation of Saint Kitts and Nevis ‘advised the UN Secretariat that it had intended to vote in favour’. Note that some states support the idea of an NWC but not the immediate commencement of negotiations. For example, Japan has articulated its position as follows:

we must take concrete measures to achieve steady, step-by-step progress in nuclear disarmament and non-proliferation. In that context, we believe it is premature to call on ‘all States immediately to ... [commence] multilateral negotiations leading to an early conclusion of a nuclear weapons convention ...’ [per the draft resolution].

We believe that such steady, incremental progress should be made prior to our embarking upon the negotiations that the draft resolution calls upon all States to commence.

UN GAOR, 1st Comm, 62nd sess, 22nd mtg, Agenda Items 88–105, UN Doc A/C.1/62/PV.22 (30 October 2007) (citation omitted).

³⁸ However, none of these states has taken any real steps to promote the commencement of negotiations on an NWC: IALANA, INESAP and IPPNW, above n 14, 11, 24.

³⁹ Those states are the US, Russia, the UK, France and Israel: UN GAOR, 63rd sess, 61st plen mtg, UN Doc A/63/PV.61 (28 November 2008) 12.

⁴⁰ Those states are Belgium, Germany, Italy, the Netherlands and Turkey: see, eg, Hans M Kristensen, *US Nuclear Weapons in Europe: A Review of Post-Cold War Policy, Force Levels, and War Planning* (Natural Resources Defense Council Report, February 2005) 8. For a discussion on the legality of the NATO nuclear-sharing arrangement, see Otfried Nassauer, *NATO’s Nuclear Posture Review: Should Europe End Nuclear Sharing?* (Berlin Information-Center for Transatlantic Security Policy Note No 02.1, April 2002).

negotiating an NWC,⁴¹ while the UK has accepted the end goal of an NWC but believes that it is too early to commence negotiations.⁴²

This annual General Assembly resolution gives us the clearest indication we have of the breadth of support among states for negotiations on an NWC. In the years since it was first introduced, the number of states supporting it has not grown substantially.⁴³ However, the call for an NWC has arguably become louder. In 2007, for the first time, support among states for the idea of an NWC was noted in the outcome document of the *NPT* review meeting.⁴⁴ In the margins of that meeting, three civil society groups had launched *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention*,⁴⁵ which included an updated version of the model NWC originally drafted in 1997.⁴⁶ Costa Rica and Malaysia tabled the updated model convention as an official document of the meeting,⁴⁷ and subsequently as an official document of the 62nd session of the UN General Assembly.⁴⁸

Several major initiatives supportive of an NWC have also taken place outside the regular disarmament forums. For instance, the Middle Powers Initiative, a program of the Global Security Institute, has on four occasions brought together like-minded states to explore, inter alia, ways to begin negotiations on disarmament steps leading to an NWC.⁴⁹ The Non-Aligned Movement — a group of more than 100 states which consider themselves not to be formally aligned with or against any major power bloc — held a high-level summit in 2004 at which participating states ‘emphasized the necessity to start negotiations on a phased programme for the complete elimination of nuclear weapons’ including an NWC.⁵⁰ In 1998 the foreign ministers of all eight states comprising

⁴¹ None of these four states has been willing to provide a time reference for commencing, let alone concluding, negotiations on an NWC: IALANA, INESAP and IPPNW, above n 14, 11.

⁴² Ibid.

⁴³ Compare the voting records in UN GOAR, 63rd sess, 61st plen mtg, UN Doc A/63/PV.61 (28 November 2008) and UN GAOR, 51st sess, 79th plen mtg, UN Doc A/51/PV.79 (10 December 1996).

⁴⁴ Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Chairman’s Working Paper*, 1st sess, UN Doc NPT/CONF.2010/PC.I/WP.78 (11 May 2007) [10]. It was also mentioned at the meeting of parties in 2008: Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Chairman’s Working Paper*, 2nd sess, UN Doc NPT/CONF.2010/PC.II/WP.43 (21 May 2008).

⁴⁵ IALANA, INESAP and IPPNW, above n 14.

⁴⁶ Ibid 44–105. The original version was *1997 Model Nuclear Weapons Convention*, above n 18.

⁴⁷ *2007 Model Nuclear Weapons Convention*, above n 18.

⁴⁸ *Letter Dated 2007/12/17 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations Addressed to the Secretary-General*, 62nd sess, Agenda Item 98, UN Doc A/62/650 (18 January 2008).

⁴⁹ The most recent meeting took place in Vienna in 2007. See Middle Powers Initiative, ‘Forging a New Consensus for the NPT’ (Briefing Paper presented at the Fourth Meeting of the Article VI Forum, Vienna, Austria, 29–30 March 2007).

⁵⁰ Non-Aligned Movement, ‘Final Document’ (14th Ministerial Conference of the Non-Aligned Movement, Midterm Review, Durban, South Africa, 17–19 August 2004) 17. In 1998, the Non-Aligned Movement had proposed that the Conference on Disarmament call for the entry into force of an NWC by 2010: Non-Aligned Movement, ‘Final Document’ (12th Summit of the Non-Aligned Movement, Durban, South Africa, 2–3 September 1998) [114].

the New Agenda Coalition — Brazil, Egypt, Ireland, Mexico, New Zealand, Slovenia, South Africa and Sweden — released a joint statement in which they affirmed ‘that a nuclear-weapon-free world will ultimately require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments’.⁵¹

States remain, of course, the principal actors in any treaty negotiation process. Therefore, the level of state support for an NWC provides a good indication of when negotiations for such a treaty might begin. However, civil society groups and parliaments are playing an increasingly important role,⁵² not only in influencing the negotiating positions of states, but also in bringing about negotiations in the first place. For example, it is unlikely that negotiations for the *Mine Ban Treaty* would have taken place when they did had it not been for the effective lobbying coordinated by the International Campaign to Ban Landmines.⁵³ Therefore, for the purposes of this article, it is worth considering the potential influence of non-state forces in bringing about negotiations on an NWC. One major initiative aimed at promoting support for an NWC is the recently initiated International Campaign to Abolish Nuclear Weapons (‘ICAN’), which models itself on the landmines campaign. Mayors for Peace, a major network whose membership comprises over 2926 mayors in 134 countries,⁵⁴ has adopted the idea of an NWC as part of its vision to eliminate nuclear weapons by 2020.⁵⁵ And members of many national parliaments, as well as the European Parliament, have introduced resolutions calling for the negotiation of an NWC.⁵⁶

All of these civil society initiatives reflect widespread public support for an NWC. In 2007, The Simons Foundation in Canada commissioned an opinion poll which asked 1000 adults in each of six countries — Britain, France, Italy, Germany, the US and Israel — whether they support or oppose ‘eliminating all nuclear weapons in the world through an enforceable agreement’.⁵⁷ No country had more than 15 per cent of respondents moderately or strongly opposing the idea.⁵⁸ Support was strongest in Italy and Germany, the only two countries

⁵¹ *Nuclear-Weapon-Free World: Need for a New Agenda*, GA Res 53/77, UN GAOR, 1st Comm, 53rd sess, 79th plen mtg, Agenda Item 71, UN Doc A/RES/53/77 pt Y (12 January 1999).

⁵² See, eg, Tom Farer, ‘New Players in the Old Game: The De Facto Expansion of Standing to Participate in Global Security Negotiations’ (1995) 38 *American Behavioral Scientist* 842; Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders* (1998).

⁵³ See generally Maxwell A Cameron, Robert J Lawson and Brian W Tomlin (eds), *To Walk without Fear: The Global Movement to Ban Landmines* (1998); Jody Williams, ‘Nobel Lecture’ (Lecture delivered at Nobel Awards, Oslo, 10 December 1997). Similarly, the Cluster Munitions Coalition played an important role in bringing about negotiations on the *Cluster Munitions Convention*: Suzanne Tice, ‘Cluster Munitions: The Ban Process’ (2008) 12(1) *Journal of Mine Action* <<http://maic.jmu.edu/JOURNAL/12.1/sp/tice/tice.htm>>.

⁵⁴ Mayors for Peace, *Mayors for Peace* (2009) <<http://www.mayorsforpeace.org>>.

⁵⁵ Mayors for Peace 2020 Vision Campaign, *Annual Report 2008* (Mayors for Peace Report, 2008).

⁵⁶ See Marian Hobbs, Alexa McDonough and Alyn Ware, ‘Parliamentarians and a Nuclear Weapons Convention’ (2008) 3 *PNND Notes* 13.

⁵⁷ The Simons Foundation, *Global Public Opinion on Nuclear Weapons* (The Simons Foundation Report, September 2007) 3, 15.

⁵⁸ *Ibid* 15.

without any nuclear weapons of their own,⁵⁹ where 94.6 per cent and 95.4 per cent of respondents, respectively, indicated that they supported the idea.⁶⁰ More recently, Global Zero released a poll of 21 countries, including every nuclear-armed nation except North Korea, which also ‘found that global public opinion overwhelmingly favours’ the negotiation of a time-bound international agreement for the elimination of nuclear weapons: 76 per cent of respondents worldwide, 77 per cent in the US and 69 per cent in Russia.⁶¹ The last authoritative survey in Australia on the question of a treaty to ban nuclear weapons was conducted by Roy Morgan Research in 1998, which found 92 per cent support.

B *The Potential Role of Australia in Advancing an NWC*

While in Opposition, the Australian Labor Party promised that, if elected to government, it would drive the international agenda for an NWC.⁶² The party’s then foreign affairs spokesperson, Robert McClelland MP,⁶³ argued that the proposal to establish an NWC is ‘timely and responsible’,⁶⁴ and that ‘[u]ltimately the question to be asked is not why there should be a nuclear weapons convention but why the international community has not yet agreed to start negotiating one’.⁶⁵ He envisaged such a treaty to be used both as ‘a tool to assist short-term disarmament goals’ and ‘a concrete long-term political objective’.⁶⁶ However, the Labor Government has not yet affirmed its commitment to an NWC⁶⁷ other than in a highly qualified statement to last year’s *NPT* meeting in Geneva: ‘at an appropriate time, the international community will likely need to consider complementary legal frameworks, including a possible nuclear weapons convention, for the eventual abolition of nuclear weapons’.⁶⁸

⁵⁹ Both countries, however, host US nuclear weapons on their soil as part of a NATO nuclear-sharing arrangement: see Kristensen, above n 40, 8.

⁶⁰ The Simons Foundation, above n 57, 15.

⁶¹ Global Zero, *Public Opinion* (2009) <<http://www.globalzero.org/en/public-opinion>>.

⁶² Robert McClelland, ‘Foreign Affairs Debate’ (Speech delivered to the National Press Club of Australia, Canberra, 15 November 2007). On 16 August 2007, Australian Democrats Leader Senator Lyn Allison introduced a motion into the Senate urging the Government to actively pursue multilateral negotiations leading to an NWC, but it did not receive Labor Party support: Commonwealth, *Parliamentary Debates*, Senate, 16 August 2007, 11–12 (Lyn Allison).

⁶³ He is now the Commonwealth Attorney-General.

⁶⁴ Robert McClelland, ‘A New Agenda for Australia in Nuclear Non-Proliferation and Disarmament’ (Speech delivered to the United Nations Association of Australia and the Medical Association for Prevention of War, Canberra, 14 August 2007) 10.

⁶⁵ *Ibid* 11. His words were borrowed from IALANA, INESAP and IPPNW, above n 14, 19.

⁶⁶ McClelland, above n 64, 10.

⁶⁷ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 3 September 2008, 3970–1 (John Faulkner).

⁶⁸ Craig McLachlan, ‘Cluster I Statement’ (Speech delivered at the 2nd session of the Preparatory Committee for the 2010 Review Conference of the Parties to the *NPT*, Geneva, Switzerland, 30 April 2008) 1. Australia made a similar statement at this year’s review meeting in New York: ‘The eventual abolition of nuclear weapons may require, at an appropriate time, complementary legal frameworks, including a possible nuclear weapons convention’: Valerie Grey, ‘Cluster One Issues’ (Speech delivered at the 3rd session of the Preparatory Committee for the 2010 Review Conference of the Parties to the *NPT*, New York, US, 6 May 2009) 3.

This cautious stance is consistent with Labor Party policy, which supports ‘the exploration of potential legal frameworks for the abolition of nuclear weapons’, including an NWC,⁶⁹ and regards the commencement of negotiations for such laws as part of a ‘longer-term’ goal.⁷⁰ It stands in stark contrast to McClelland’s pre-election proclamations, which indicated a view that an NWC is a near-term possibility, not a distant dream.⁷¹

If Labor is indeed committed to advancing an NWC, then the Prime Minister’s International Commission on Nuclear Non-Proliferation and Disarmament, established in Hiroshima in June 2008, would provide an ideal vehicle for setting the process in motion.⁷² Australia’s representative on the Commission, and one of its two chairs,⁷³ is former Foreign Minister Gareth Evans, who suggested in a radio interview at the time that the body might focus on the need for ‘a whole new nuclear weapons treaty’ that would allow the involvement of the nuclear-armed states currently not parties to the *NPT*.⁷⁴ Such a treaty could be in the form of an NWC and, according to Mr Evans, might take 20 years to negotiate, ‘[b]ut every journey requires a first step’.⁷⁵ However, more recently he presented quite a different view to members of the Commonwealth Parliament’s Joint Standing Committee on Treaties:

The problem [with an NWC] is that, while it is very intellectually attractive and actually quite emotionally attractive for many people, the notion of even negotiating a starting point treaty that enough countries are satisfied with to get out and seriously endorse will be a labour of Hercules, extraordinarily time consuming, and there is a real question about what the utility of that approach will be.⁷⁶

The Prime Minister has expressed an expectation that the Commission will focus largely on the *NPT* review process.⁷⁷ In Kyoto, he called on the community of nations to ‘exert every global effort to restore and defend the treaty’, which remains ‘[t]he cornerstone’ of nuclear disarmament efforts.⁷⁸ This article argues

⁶⁹ Australian Labor Party, *National Platform and Constitution* (2007) 237. Labor is currently in the process of updating their national platform, but their policy regarding an NWC looks to remain substantially the same: see Australian Labor Party, *Consultation Draft National Platform* (2009) 123.

⁷⁰ *Ibid.*

⁷¹ McClelland, above n 64, 10. According to another Labor spokesperson, consideration of an NWC ‘should not be put aside for the distant future, but must be undertaken alongside the other step-by-step disarmament measures’: Laurie Brereton, ‘Labor and Nuclear Disarmament’ (Address delivered at the Medical Association for Prevention of War Conference, Australia, 5 August 2000).

⁷² The Prime Minister announced his intention to establish the commission during a visit to Japan on 9 June 2008: Rudd, ‘Building a Better World Together’, above n 11.

⁷³ The other chair is Yoriko Kawaguchi, a member of the Japanese Parliament and former foreign minister and environment minister: Kevin Rudd, ‘International Commission on Nuclear Non-Proliferation and Disarmament’ (Press Release, 9 July 2008). However, none of the commissioners represent the government of their state; all are independent.

⁷⁴ Radio National Breakfast Program, Interview with Gareth Evans, Co-Chair International Commission on Nuclear Non-Proliferation and Disarmament (Sydney, Australia, 10 June 2008). Those states are Israel, India, Pakistan and North Korea.

⁷⁵ *Ibid.* He added that it would be ‘extraordinarily ambitious’.

⁷⁶ Joint Standing Committee on Treaties, Commonwealth of Australia, *Reference: Nuclear Nonproliferation and Disarmament* (2009) 9.

⁷⁷ Rudd, ‘Building a Better World Together’, above n 11.

⁷⁸ *Ibid.*

that the commencement of negotiations for an NWC, rather than being contingent upon greater compliance with the *NPT*, would facilitate compliance.

While Australia has declared, unambiguously, an intention to play ‘a new, more active role in multilateral affairs’,⁷⁹ including in relation to nuclear nonproliferation and disarmament, it is a matter of speculation whether the Rudd Government will become a leading proponent of an NWC.⁸⁰ Its promise ‘to work creatively’ in partnership with other states ‘to advance and strengthen the nuclear non-proliferation and disarmament architecture’⁸¹ might not extend to promoting a new treaty which, at this point, lacks the backing of key players such as the US and Russia.⁸² Whatever the case may be, Australia is certainly well positioned — as a member of the Seven-Nation Initiative,⁸³ a major exporter of uranium and a generally well-respected middle power⁸⁴ — to play a central role in bringing about negotiations for an NWC.

II AN NWC AND INTERNATIONAL LAW

Before examining perceived obstacles to the commencement of negotiations for an NWC, it is relevant to consider whether there is a legal obligation on states to negotiate such a treaty and, if so, whether that obligation is time-bound. Despite some disagreement on these questions, international law has, to date, proven a powerful tool for nuclear disarmament campaigners,⁸⁵ and it will perhaps prove even more useful in years to come, especially by adding credence to the call for negotiations on an NWC.

A *Whether There Is an Obligation to Disarm*

In 1994, the UN General Assembly requested that the ICJ ‘urgently’ render an advisory opinion on whether ‘the threat or use of nuclear weapons [is] permitted in any circumstances under international law’.⁸⁶ The Court affirmed ‘that the

⁷⁹ Caroline Millar, ‘Opening Statement’ (Speech delivered at the 2nd session of the Preparatory Committee for the 2010 Review Conference of the Parties to the *NPT*, Geneva, Switzerland, 28 April 2008) 2.

⁸⁰ At the 2007 and 2008 UN General Assembly session, Australia abstained from voting on *General and Complete Disarmament: Follow-Up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, UN GAOR, 1st Comm, 62nd sess, UN Doc A/C.1/62/L.36 (10 October 2007); UN GAOR, 61st plen meeting, 63rd sess, UN Doc A/63/PV.61 (2 December 2008) 12.

⁸¹ Millar, above n 79.

⁸² IALANA, INESAP, IPPNW, above n 14, 11.

⁸³ The Seven-Nation Initiative is a program of Australia, Chile, Indonesia, Norway, Romania, South Africa and the UK aimed at promoting consensus among states following the divisive 2005 *NPT* Review Conference.

⁸⁴ See Allison, above n 62, 11–12; McClelland, above n 64, 10. However, some have argued that Australia’s international reputation was damaged under former Prime Minister John Howard and it must be restored before we are to regain our influence: see, eg, John Langmore, ‘No Easy Seat at This Table’, *The Age* (Melbourne, Australia) 1 April 2008; John Langmore, *Dealing with America: The UN, the US and Australia* (2005).

⁸⁵ See, eg, Alyn Ware, ‘Nuclear Disarmament: Views and Efforts of NGOs’ (Speech delivered at the 19th UN Conference on Disarmament Issues, Sapporo, Japan, 27 August 2007); Pierre-Marie Dupuy, ‘Between the Individual and the State: International Law at a Crossroads’ in Laurence Boisson de Chazournes and Phillipe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 449, 459.

⁸⁶ *General and Complete Disarmament*, GA Res 49/75, UN GAOR, 49th sess, 90th plen mtg, Agenda Item 62, UN Doc A/RES/49/75 pt K (15 December 1994) 16.

threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law',⁸⁷ but it was unable to reach a definitive answer on the legality of the use of nuclear weapons by a state in an extreme circumstance of legitimate self-defence.⁸⁸ Importantly, it also unanimously recognised the existence of 'an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects'.⁸⁹ Judge Mohammed Bedjaoui, President of the Court at the time, noted in an address last year that this 'new and critical point ... is still fragile in that a sizeable portion of legal doctrine continues to contest the validity of [it]', but the law is nevertheless firmly on the side of the ICJ's unanimous conclusion.⁹⁰ A rejection of the statement by some states and scholars has certainly mitigated the effect it has had in propelling the world closer to complete nuclear disarmament, but the statement, by virtue of its unanimity, still bears considerable weight, and has no doubt contributed to the evolution of a global norm against the possession of nuclear weapons.

Under art VI of the *NPT*, states parties commit 'to pursue negotiations in good faith on effective measures relating to ... nuclear disarmament'. The Court argued in its advisory opinion that:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct.⁹¹

A common criticism of the Court's interpretation of art VI is that those who drafted the article never intended that the disarmament obligation should involve the achievement of any specific result, as is evident in records of the negotiating history and the text of the *NPT* itself.⁹² However, international case law supports a strong interpretation,⁹³ as does the strategic bargain underlying the *NPT* — that

⁸⁷ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 266. For analysis of the ICJ's advisory opinion, see especially Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999); John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (1997). See also the special issue of the *International Review of the Red Cross* on the advisory opinion: (1997) 316 *International Review of the Red Cross*.

⁸⁸ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 266.

⁸⁹ *Ibid.* See also 263–6.

⁹⁰ Mohammed Bedjaoui, 'Good Faith, International Law and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice' (Speech delivered at IALANA, Geneva, Switzerland, 1 May 2008) 11.

⁹¹ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 264.

⁹² See especially Christopher A Ford, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' (2007) 14 *The Nonproliferation Review* 401.

⁹³ For example, the ICJ held that '[t]he principle of good faith obliges the Parties to apply [the treaty] ... in such a manner that its purpose can be realized': *The Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 79. In the *North Sea Continental Shelf Cases (Germany v Denmark; Germany v The Netherlands)* [1969] ICJ Rep 3, 47, the Court said that the parties must conduct themselves so as to make the negotiations 'meaningful, which will not be the case when either insists upon its own position without contemplating any modification of it'. Clearly, however, the *Nuclear Weapons Advisory Opinion* goes further than these two cases.

is, ‘forswearing [the] acquisition of nuclear weapons in the expectation that states possessing them would eliminate them’.⁹⁴ In any event, the disarmament obligation affirmed by the ICJ does not derive solely from the *NPT*: it has achieved customary status.⁹⁵ A further criticism of the use of the Court’s opinion to support an obligation to disarm is that the pronouncement has minimal, if any, legal authority, for it was made in obiter⁹⁶ and the Court was acting *ultra vires*.⁹⁷ However, the support for the statement by all 14 judges, along with its subsequent near-unanimous affirmation by the General Assembly, surely gives it high legal value.⁹⁸

The Court did not provide much insight on how or when nuclear disarmament could be achieved, so it is unclear whether the disarmament obligation it articulated amounts to an obligation to negotiate an NWC. If it could be said that the successful negotiation of such a treaty were the only realistic way of achieving nuclear disarmament, then it would be logical to conclude that states are required to negotiate an NWC. However, not all states supportive of abolition regard the ‘single treaty’ approach as the most likely to succeed — much less the only approach with any reasonable chance of succeeding. Indeed, some states have warned that, by focusing political attention on an NWC, we would detract from intermediate measures that are more likely to succeed, while other states envision nuclear disarmament as being achieved through a ‘framework encompassing a mutually reinforcing set of instruments’.⁹⁹ Significantly, however, the UN General Assembly, in its follow-up resolution on the ICJ advisory opinion, considers an NWC to be a logical way of implementing the nuclear disarmament obligation articulated by the Court.¹⁰⁰ This is because the ICJ, in its advice, effectively called for a comprehensive approach dealing with all of the requirements of complete nuclear disarmament, as well as the establishment of international control mechanisms to achieve that goal.

Five further points about the advisory opinion are relevant to the question of when states might be prepared to commence negotiations for an NWC. First, as already noted briefly, it is likely that the obligation extends to states outside the

⁹⁴ John Burroughs, ‘Debating Disarmament: Interpreting Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons*’ (Speech delivered at the James Martin Center for Nonproliferation Studies, Washington DC, US, 29 November 2007) 2.

⁹⁵ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 264–5.

⁹⁶ That is, it was not directly responsive to the question posed in *General and Complete Disarmament*, GA Res 49/75, UN GAOR, 49th sess, 90th plen mtg, Agenda Item 62, UN Doc A/RES/49/75 pt K (15 December 1994) 16. See *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 329 (Dissenting Opinion of Schwebel V-P).

⁹⁷ Ford, above n 92, 402.

⁹⁸ This view is supported by Bedjaoui, above n 90, 11. See *Follow-Up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 63/49, UN GAOR, 1st Comm, 63rd sess, Agenda Item 89(u), UN Doc A/RES/63/49 (23 August 2008). Note that a separate vote is taken on the first operative paragraph of the resolution, which affirms the unanimous conclusion of the ICJ. This paragraph receives near-unanimous support from states.

⁹⁹ For example, the states that comprise the New Agenda Coalition consider this an alternative to an NWC: see *Nuclear-Weapon-Free World: Need for a New Agenda*, above n 51. Others have argued that this approach could result in ‘inordinate delay’: see, eg, IALANA, INESAP and IPPNW, above n 14, 9.

¹⁰⁰ *General and Complete Disarmament: Follow-Up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, above n 80, 3.

NPT. This is indicated by the use of the words ‘[t]here exists an obligation’ rather than ‘[s]tates parties are required to’.¹⁰¹ In a declaration appended to the opinion, President Bedjaoui argued that it is ‘not unreasonable’ to conclude, given the formal unanimity in this field, that the twofold obligation to negotiate in good faith and to achieve the desired result has now ‘acquired a customary character’.¹⁰² This point puts pressure on Israel, India, Pakistan and North Korea to work towards the commencement and conclusion of negotiations on an NWC. Second, the Court de-linked the nuclear disarmament obligation in art VI from ‘the objective of comprehensive demilitarisation’ — that is, ‘general and complete disarmament’.¹⁰³ This means that the achievement of the former need not await the achievement of the latter.¹⁰⁴ Third, the Court held that the obligation is to achieve nuclear disarmament ‘in all its aspects’, which means that states must eliminate nuclear weapons altogether rather than simply reduce arsenals to a certain size.¹⁰⁵ Fourth, the Court held that nuclear disarmament must be achieved ‘under strict and effective international control’.¹⁰⁶ Therefore, it envisages that international law will play an integral role in bringing about the abolition of nuclear weapons. Finally, the Court held that the obligation to fulfil art VI of the *NPT* ‘remains without any doubt an objective of vital importance to the whole of the international community today’.¹⁰⁷ This affirmation is useful in an environment where states considered at risk of violating the nonproliferation provisions of the *NPT* are subject to great criticism while those in blatant violation of the disarmament article — currently all five of the nuclear-weapon states parties¹⁰⁸ — are criticised only mildly.

¹⁰¹ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 267. Schwebel V-P, in his dissenting opinion at 329, conveyed doubts about this part of the majority’s opinion:

If it applies to States not party to the *NPT*, it would be a dubious holding. It would not be a conclusion that was advanced in any quarter in these proceedings; it would have been subjected to no demonstration of authority, to no test of advocacy; and it would not be a conclusion that could easily be reconciled with the fundamentals of international law.

¹⁰² *Ibid* 269. More recently he argued that art VI of the *NPT* ‘merely crystallizes, that is to say codifies, what certainly already existed as a customary obligation — one whose constituent elements began to take shape starting in the earliest months of existence of the UN’: Bedjaoui, above n 90, 10.

¹⁰³ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 267; IALANA, INESAP and IPPNW, above n 14, 8. The Court rejected the argument made by the US and the UK during the proceedings that the obligation to make progress towards nuclear disarmament was linked to progress on conventional disarmament and developing alternative security systems to nuclear deterrence.

¹⁰⁴ Roger S Clark, ‘International Court of Justice: Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons (Question Posed by the General Assembly): The Laws of Armed Conflict and the Use or Threat of Use of Nuclear Weapons’ (1996) 7 *Criminal Law Forum* 265, 294–5.

¹⁰⁵ *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 267.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid* 265.

¹⁰⁸ For example, according to the Stockholm International Peace Research Institute, all five nuclear-weapon states are modernising and enhancing their nuclear arsenals and the systems used for their delivery, which is considered to be inconsistent with the disarmament obligation: see Shannon N Kile, Vitaly Fedchenko and Hans M Kristensen, ‘Appendix 8A: World Nuclear Forces, 2008’ [2008] *SIPRI Yearbook: Armaments, Disarmament and International Security* 366, 366.

The Court's opinion has arguably brought us closer to a world free of nuclear weapons, if only slightly. For example, it no doubt contributed to the consensus achieved among states parties to the *NPT* in agreeing, in 2000, on 13 'practical steps' for nuclear disarmament, including an 'unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals'.¹⁰⁹ The advisory opinion also certainly influenced the UK's decision to take its nuclear weapons off high alert status and to commence studies on what would be required to verify the elimination of nuclear weapons.¹¹⁰ In the US, charges against numerous antinuclear activists were dropped in light of the advisory opinion, and in Scotland it led to the acquittal of three antinuclear activists who had caused damage to a floating nuclear research laboratory moored in the harbour of Faslane.¹¹¹

However, one cannot ignore the fact that, despite the Court's clear and unanimous pronouncement in respect of nuclear disarmament, none of the nuclear-armed states — including those outside the *NPT* — appear to be preparing for a future without nuclear weapons.¹¹² Indeed, most are modernising their nuclear forces or the systems for their delivery,¹¹³ and none have come close to abolishing their arsenal. All states with nuclear weapons are, therefore, in breach of their disarmament obligation.¹¹⁴ Nevertheless, an optimist might conclude that the Court's advisory opinion has at least 'chipped away' at the acceptability of nuclear weapons and, in so doing, made it more likely that negotiations for nuclear disarmament will be concluded in the foreseeable future. According to one scholar, '[t]he Court's opinion is surely a call to go urgently and with gusto into the next stage — the final negotiation of a comprehensive treaty ... aimed at total abolition'.¹¹⁵

B *Whether the Obligation to Disarm Is Time-Bound*

The ICJ's advisory opinion provides no insight as to whether states must achieve nuclear disarmament within a particular timeframe. However, earlier and

¹⁰⁹ 2000 Review Conference of the Parties to the *NPT*, *Final Document*, UN Doc NPT/CONF.2000/28 (Parts I and II) (1 January 2000) 14.

¹¹⁰ See UK Ministry of Defence, *Strategic Defence Review: Modern Forces for the Modern World* (White Paper, July 1998) [68], [73]. For examples of such studies, see, eg, James Acton and Joanna Little, *The Use of Voluntary Safeguards to Increase Trust in States' Nuclear Programmes: The Case of Iran* (Verification Matters, VERTIC Research Report No 8, May 2007); James Acton and Carter Newman, *IAEA Verification of Military Research and Development* (Verification Matters, VERTIC Research Report No 5, July 2006).

¹¹¹ See, eg, Angie Zelter, 'People's Disarmament' (2001) 58 *Disarmament Diplomacy* <<http://www.acronym.org.uk/textonly/dd/dd58/58zelt.htm>>.

¹¹² IALANA, INESAP and IPPNW, above n 14, 11–12. The Blix Commission argued that all nuclear-armed states 'should start preparing for the outlawing of nuclear weapons through joint practical and incremental measures that include definitions, benchmarks and transparency requirements for nuclear disarmament': Blix Commission, above n 20, 109.

¹¹³ IALANA, INESAP and IPPNW, above n 14, 11, 15.

¹¹⁴ See, eg, Bedjaoui, above n 90, 20, who states that to observe good faith, states 'must therefore abstain from performing any act which would deprive the treaty on general and complete disarmament of its object and its aim. It is obvious that any act bolstering its nuclear arsenal by a state party to the *NPT* would be such an act'. Note also that, for those states which are parties to the *NPT*, the breach would probably be considered 'material' in terms of art 60 of the *Vienna Convention*, above n 3, and entail the attached legal consequences provided by art 60(2).

¹¹⁵ Clark, above n 104, 295.

subsequent decisions of the Court that touch on on the principle of ‘good faith’,¹¹⁶ as well as the wider international jurisprudence on this subject,¹¹⁷ indicate that the obligation must be fulfilled within a reasonable time.¹¹⁸ Arguably, it is impermissible for states to proceed towards complete nuclear disarmament at a snail’s pace, and it is certainly impermissible for them to make no progress at all, as is currently the case: ‘Without denying the great technicality and complexity of the negotiations in process, the impression that emerges is that these negotiations are not progressing. There is even reason to fear that they are regressing’.¹¹⁹

A group of international NGOs has begun to lobby states to seek a further advisory opinion from the ICJ clarifying what exactly the ‘good faith’ obligation to achieve nuclear disarmament requires of states.¹²⁰ It is likely that the Court would find that states must achieve nuclear disarmament within the foreseeable future, and perhaps also that progress towards nuclear disarmament has been, to date, unsatisfactory. It would recognise that, at the very least, the nuclear-weapon states are required to commence negotiations aimed at achieving nuclear disarmament: hitherto they have thwarted attempts in the Conference on Disarmament, at the UN General Assembly and during the *NPT* review cycle to bring about such negotiations.¹²¹ While experience indicates that the nuclear-weapon states would not necessarily act upon the ICJ’s advice immediately, it would at least ‘become part of the environment for responsible officials and diplomats in those and other states’,¹²² and provide an additional tool for campaigners.

The ICJ has said that the principle of ‘good faith’ is a fundamental principle governing international legal obligations.¹²³ According to one commentator, it ‘can be eradicated from international law at the price of the destruction of international law itself’.¹²⁴ In the context of the *NPT*, it ‘illuminates the entirety

¹¹⁶ See *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, 268; *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457, 473. See also Boisson de Chazournes and Sands, above n 87; Burroughs, *The Legality of the Threat or Use of Nuclear Weapons*, above n 87.

¹¹⁷ See, eg, Robert Kolb, *La bonne foi en droit international public: contribution à l’étude des principes généraux de droit* (2000); Elisabeth Zoller, *La bonne foi en droit international public* (1977); Romain Yakemtchouk, *La bonne foi dans la conduite internationale des Etats* (2002). See also Michael P Van Alstine, ‘The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection’ (2005) 93 *Georgetown Law Journal* 1885; John Burroughs, ‘Good Faith: A Fundamental Principle of International Law’, *News in Review: Civil Society Perspectives on the Second Session of the Preparatory Committee for the 2010 Nuclear Non-Proliferation Treaty Review Conference 28 April–9 May 2008*, Geneva (2008) <http://www.inesglobal.com/_Conferences/2008/Geneva/John_Burroughs_Summary.pdf>.

¹¹⁸ See also IALANA, INESAP and IPPNW, above n 14, 18, which states that ICJ’s decision affirms that the obligation must be fulfilled ‘within an appropriate timeframe’.

¹¹⁹ Bedjaoui, above n 90, 15.

¹²⁰ IALANA, *Return to the International Court of Justice: A Strategy to Break the Stalemate* (2007); George Farebrother (ed), *Freedom from Nuclear Weapons: Through Legal Accountability and Good Faith* (World Court Coalition Conference Report, June 2007).

¹²¹ See, eg, Douglas Roche, ‘Turning Pessimism into Optimism: A Growing Consensus on Nuclear Disarmament’ (Speech delivered at the German Foreign Policy Conference, Berlin, Germany, 4 March 2007) 2–3.

¹²² IALANA, above n 120, 5.

¹²³ *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, 268 and *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457, 473.

¹²⁴ Georg Schwarzenberg, cited in Bedjaoui, above n 90, 18.

of the negotiations called for by Article VI,¹²⁵ and imposes both a positive and negative obligation on states. The positive obligation involves taking specific steps, individually or in concert with other states, towards nuclear disarmament, such as removing nuclear weapons from deployment or participating in negotiations for an NWC.¹²⁶ The negative obligation involves refraining from the performance of any act that would deny the achievement of nuclear disarmament, for example, the bolstering of one's nuclear forces or the testing of a new type of nuclear weapon.¹²⁷ Furthermore, negotiations for nuclear disarmament must be 'meaningful' and 'not merely consist of a formal process'.¹²⁸

Importantly, any obligation undertaken in good faith 'is incontestable and [may attract] sanctions' if there are 'abnormal delays' in fulfilling it.¹²⁹ Today, four decades after the *NPT* opened for signature and perhaps more than six decades since the obligation to disarm evolved,¹³⁰ most states — particularly those which, under the *NPT*, foreswore the acquisition of nuclear weapons — have expressed some degree of dissatisfaction with the lack of progress made towards complete nuclear disarmament.¹³¹ Although some tens of thousands of nuclear weapons have been destroyed since the end of the Cold War, nuclear disarmament appears to be quite some way off. Of course, the time required to fulfil any treaty obligation will vary and, in the case of nuclear disarmament — where the task is complex and much is at stake — it is bound to be long.¹³² But arguably it has taken too long to arrive where we are today. After decades of minimalist steps and the stalling of negotiations for complete nuclear disarmament, we find ourselves standing 'on the precipice of a new and dangerous nuclear era'.¹³³ States have failed to carry out their nuclear disarmament obligation 'in good faith', and surely it is beyond time that they began a genuine process for abolition by commencing negotiations for an NWC.

III OBSTACLES TO THE NEGOTIATION OF AN NWC

The most significant obstacles to the commencement of negotiations for an NWC are political rather than technical in nature. Some exist because decision-makers have not yet properly considered the feasibility of such a treaty or because they remain unconvinced that it is the approach most likely to succeed. Others exist because of a perceived self-interest of particular states in maintaining the status quo. None of these obstacles are insurmountable. The Blix

¹²⁵ Bedjaoui, above n 90, 20.

¹²⁶ Ibid 22.

¹²⁷ Ibid 21.

¹²⁸ *Claims arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal Set Up under Article 304 in Part X of the Treaty of Versailles (Greece v Germany)* (1972) 19 RIAA 27, 56–7, 64.

¹²⁹ *Lac Lanoux (Spain v France)* (1957) 12 RIAA 281, 306–7. The translation is excerpted from Bedjaoui, above n 90.

¹³⁰ See above n 95 and accompanying text.

¹³¹ See *Nuclear-Weapon-Free World: Need for a New Agenda*, above n 51. The 111 states which voted in favour of the *Resolution* in 1999 expressed concern 'at the prospect of the indefinite possession of nuclear weapons' and the 'lack of progress in disarmament negotiations'.

¹³² Bedjaoui, above n 90, 24.

¹³³ Shultz et al, 'A World Free of Nuclear Weapons', above n 15.

Commission argued in its report, *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms*, that:

A key challenge is to dispel the perception that outlawing nuclear weapons is a utopian goal. A nuclear disarmament treaty is achievable and can be reached through careful, sensible and practical measures. Benchmarks should be set; definitions agreed; timetables drawn up and agreed upon; and transparency requirements agreed.¹³⁴

Jody Williams, who won the Nobel Peace Prize for leading the successful campaign to ban antipersonnel landmines in 1997, remarked at the launch of ICAN in Vienna in 2007: ‘We are told by some governments that a nuclear weapons convention is premature and unlikely — don’t believe it — we were told the same thing about a mine ban treaty.’¹³⁵

This part of the article identifies, and then seeks to rebut, seven common arguments made by states in support of the proposition that consideration of an NWC at this stage is premature: first, that it would put further strain on the *NPT* and contribute to its disintegration; second, that an NWC would not succeed given the failure of the *Comprehensive Test Ban Treaty*;¹³⁶ third, that other multilateral treaties, such as a fissile materials cut-off treaty, must be concluded before an NWC can even be considered; fourth, that an NWC is possible only once the US and Russia have reduced their arsenals to a size comparable with the arsenals of other nuclear-armed states; fifth, that so long as chemical and biological weapons remain in the world, it is unreasonable to expect states to give up nuclear weapons; sixth, that negotiations for an NWC cannot commence so long as the risk of nuclear proliferation remains high; and, finally, that negotiations on an NWC cannot commence until all nine nuclear-armed states have expressed a desire to participate in such negotiations.

A *A Crisis of Confidence among NPT Parties*

Some states have expressed concern that negotiations for an NWC would undermine the *NPT*, a treaty already under great strain from what the Blix Commission described as a ‘serious malaise’¹³⁷ among states parties and what Annan called ‘a major crisis of confidence’.¹³⁸ A specific concern is that, by concentrating political attention on a new process, the nuclear-weapon states would no longer feel pressure to fulfil the promise of art VI of the *NPT*. This is not likely to be the case, however, as negotiations for an NWC would focus political attention squarely on the failure of the nuclear-weapon states to live up to that obligation (although this would, of course, not be the main purpose of negotiations). Less likely still is that negotiations for an NWC would prompt some of the nuclear-weapon states to withdraw from the *NPT* in order to avoid the obligation, for even states not party to the *NPT* are required, under customary international law, to disarm, and moreover, the withdrawal of any one of the

¹³⁴ Blix Commission, above n 20, 109.

¹³⁵ Jody Williams, *Statement by Nobel Laureate Jody Williams on the Launch of ICAN* (Speech delivered at ICAN, Vienna, Austria, 30 April 2007).

¹³⁶ Opened for signature 24 September 1996, 35 ILM 1439 (not yet in force) (‘*CTBT*’).

¹³⁷ Blix Commission, above n 20, 64.

¹³⁸ Annan, above n 5.

nuclear-weapon states could provoke non-nuclear-weapon states to withdraw — a scenario clearly not in any country's security interests.¹³⁹

It is worth recalling that in 1968, when the *NPT* was drafted, few, if any, states imagined that it would provide an adequate legal framework with which to achieve the complete abolition of nuclear weapons. They foresaw the need at some future point for complementary agreements both to curb proliferation and to bring about disarmament.¹⁴⁰ Treaties such as those requiring bilateral arms reductions by the US and Russia,¹⁴¹ the *CTBT*, the regional nuclear-weapon-free zone treaties¹⁴² and the *International Convention for the Suppression of Acts of Nuclear Terrorism*¹⁴³ have complemented the *NPT* by bringing us closer to realising its object. They certainly have not undermined it, and an NWC should be no different in this respect. Indeed, it might be said that, if the *NPT* is the 'cornerstone' of the nuclear nonproliferation and disarmament regime, every treaty subsequently concluded has provided the mortar with which we can now secure an NWC as the regime's 'capstone' — that final agreement which would allow realisation, at long last, of the decades-old promise of a world in which nuclear weapons are no more.

At the most recent Review Conference of the *NPT* in 2005, Malaysia, Costa Rica, Bolivia, Timor-Leste, Nicaragua and Yemen submitted a working paper describing the relationship between the *NPT* and the model NWC.¹⁴⁴ They

¹³⁹ Alyn Ware, *A Nuclear Weapons Convention and the NPT: Is It a Diversion or an Enabler?* (Aotearoa Lawyers for Peace Policy Brief, 2008) 8.

¹⁴⁰ This is evident in the Preamble to the *NPT*, above n 4, where states parties have declared their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament' ... [and] to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control. (emphasis added).

¹⁴¹ See, eg, *Limitation of Anti-Ballistic Missile Systems Treaty*, signed 26 May 1972, US-USSR, 23 UST 3435 (entered into force 3 October 1972).

¹⁴² *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961); *Treaty for the Prohibition of Nuclear Weapons in Latin America*, opened for signature 14 February 1967, 634 UNTS 326 (entered into force 22 April 1968); *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967); *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof*, opened for signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972); *South Pacific Nuclear Free Zone Treaty*, opened for signature 6 August 1985, 24 ILM 1442 (entered into force 11 December 1986); *Treaty on the Southeast Asia Nuclear Weapon-Free Zone*, opened for signature 15 December 1995, 35 ILM 635 (entered into force 28 March 1997); *African Nuclear-Weapon-Free Zone Treaty*, opened for signature 11 April 1996, 35 ILM 698 (not yet in force).

¹⁴³ Opened for signature 13 April 2005, 44 ILM 815 (entered into force 7 July 2007). See also Christopher C Joyner, 'Countering Nuclear Terrorism: A Conventional Response' (2007) 18 *European Journal of International Law* 225.

¹⁴⁴ *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons: Legal, Technical and Political Elements Required for the Establishment and Maintenance of a Nuclear Weapon-Free World*, UN Doc NPT/CONF.2005/WP.41 (18 May 2005). See also the working paper submitted to the 2007 Preparatory Committee session: *2007 Model Nuclear Weapons Convention*, above n 18.

argued that the conclusion of an NWC — or, alternatively, a framework of mutually reinforcing instruments — would be a way of fulfilling the disarmament obligations under art VI and making good on the ‘unequivocal undertaking’ by nuclear-weapon states in 2000 to accomplish the total elimination of their arsenals.¹⁴⁵ The paper noted that the model NWC includes disarmament steps agreed upon by states parties in 1995, such as a prohibition on nuclear testing and an end to the production of fissile materials for military purposes,¹⁴⁶ and steps agreed upon in 2000, such as measures to reduce the operational status of nuclear weapons systems and adherence to the ‘principle of irreversibility’ in respect of nuclear disarmament.¹⁴⁷

Alyn Ware, a leading proponent and drafter of the model NWC, has likened the relationship between the *NPT* and an NWC to that between the *Geneva Gas Protocol*¹⁴⁸ and the *Chemical Weapons Convention*.¹⁴⁹ The former treaty, negotiated in 1925, prohibited the use of chemical weapons but provided no mechanism for implementing that prohibition; the latter, negotiated in 1993, established such mechanisms.¹⁵⁰ Without the *Chemical Weapons Convention*, chemical weapons would have ‘remained in the stockpiles and military doctrines of a number of countries for many years’.¹⁵¹ Similarly, art VI of the *NPT* is not ‘self-implementing’ and will require the negotiation of a clear prohibition on the possession of nuclear weapons, as well as mechanisms for verified compliance.¹⁵² Rather than diverting political attention from steps agreed at *NPT* review conferences, an NWC would enable those steps to be achieved more quickly. Indeed, the crisis of confidence in the *NPT* has perhaps encouraged some states to adopt a grander vision for dealing with the problem, encompassing the negotiation of an NWC.¹⁵³

Furthermore, it has often been said that a major shortcoming of the *NPT* is that the five original nuclear-weapon states enjoy benefits that would not be

¹⁴⁵ *Legal, Technical and Political Elements Required for the Establishment and Maintenance of a Nuclear Weapon-Free World*, above n 144, [1.2]. For the ‘unequivocal undertaking’, see 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document*, UN Doc NPT/CONF.2000/28 (Parts I and II) (1 January 2000) 14.

¹⁴⁶ 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Principles and Objectives for Nuclear Non-Proliferation and Disarmament: Draft Decision Proposed by the President*, UN Doc NPT/CONF.1995/L.5 (12 May 1995).

¹⁴⁷ The 2000 Review Conference had called for ‘[t]he engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons’: 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document*, above n 109, 15.

¹⁴⁸ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, opened for signature 17 June 1925, 94 LNTS 65 (entered into force 9 May 1926) (‘*Geneva Gas Protocol*’).

¹⁴⁹ Ware, above n 139, 41; *Chemical Weapons Convention*, above n 22.

¹⁵⁰ *Chemical Weapons Convention*, above n 22, pts I–XI (Verification Annex).

¹⁵¹ Ware, above n 139, 4.

¹⁵² *Ibid.*

¹⁵³ See, eg, *Legal, Technical and Political Elements Required for the Establishment and Maintenance of a Nuclear Weapon-Free World*, above n 144.

available to the other nuclear-armed states were they to accede to the treaty.¹⁵⁴ Under the terms of the *NPT*, only states which tested nuclear weapons before 1970 could join as ‘nuclear-weapon States’. The nuclear-weapon states parties — which are the US, Russia, the UK, France and China — are not subject to the same restrictions as ordinary states parties: they may possess nuclear weapons (although not indefinitely) and are not required to accept International Atomic Energy Agency safeguards on all of their nuclear facilities. Because the *NPT* is discriminatory, there is little incentive for the so-called de facto nuclear-weapon states — Israel, India, Pakistan and North Korea — to join. The general obligations under an NWC would, by contrast, apply equally to all states parties.¹⁵⁵ For this reason, it has attracted the support of India, Pakistan and North Korea (although not Israel). Therefore, the reluctance of the four de facto nuclear-weapon states to become parties to the *NPT* does not indicate opposition by those states to efforts aimed at multilateral disarmament, and it would make no sense to argue that the commencement of negotiations for an NWC should depend on their accession to the *NPT*.

B *The Failure of the CTBT to Enter into Force*

The *CTBT* was concluded in 1996 but has not yet entered into force.¹⁵⁶ Some states have argued that it is too early to embark on a new treaty as monumental and ambitious as an NWC in light of the failure of the *CTBT*. However, this argument is simplistic, as it neglects to consider why it is that the *CTBT* has yet to secure the requisite number of ratifications. Many of the Annex II states — those whose ratification is necessary for entry into force — appear to have held off ratifying because of the refusal of the US to do so.¹⁵⁷ In light of US President Barack Obama’s commitment to ‘aggressively pursue US ratification of the Comprehensive Test Ban Treaty’¹⁵⁸ it is likely that the treaty will enter into force in the none-too-distant future. However, entry into force of the *CTBT* is certainly not a precondition for the negotiation of an NWC.

C *The Prioritisation of Other New Multilateral Treaties*

Proponents of a step-by-step process to nuclear disarmament believe that other multilateral treaties — such as one to cut off the production of fissile materials and one to provide negative security assurances to non-nuclear-weapon

¹⁵⁴ See, eg, David S Jonas, ‘Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?’ [2005] *Michigan State Law Review* 417.

¹⁵⁵ See *1997 Model Nuclear Weapons Convention*, above n 18, pt I.

¹⁵⁶ The treaty ‘shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2’: *CTBT*, above n 136, art XIV(1). Annex 2 contains all states with nuclear power reactors or nuclear research reactors.

¹⁵⁷ See Keith Hansen, ‘*CTBT*: Forecasting the Future’ (2005) 61(2) *Bulletin of the Atomic Scientists* 50. Angelique R Kuchta, ‘A Closer Look: The US Senate’s Failure to Ratify the *Comprehensive Test Ban Treaty*’ (2001) 19 *Dickinson Journal of International Law* 333; Harsh V Pant, ‘India and Nuclear Arms Control: A Study of the *CTBT*’ (2002) 21 *Comparative Strategy* 91.

¹⁵⁸ Barack Obama, ‘Remarks by President Barack Obama’ (Speech delivered at Hradčany Square, Prague, Czech Republic, 5 April 2009) <http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered>.

states — should be concluded before states consider negotiating an NWC.¹⁵⁹ In their view, disarmament is a delicate process which cannot be achieved quickly through one treaty. To date, the step-by-step approach has achieved several important agreements, including the *CTBT*, nuclear-weapon-free-zone treaties covering much of the world, and the *START*¹⁶⁰ and *SORT*¹⁶¹ treaties between the US and Russia. At review meetings of the *NPT*, the nuclear-weapon states cite such agreements as evidence that they are meeting their obligations under art VI. However, according to some states, these treaties

have been limited in scope, have failed to illuminate the requirements necessary for the complete elimination of nuclear weapons, and have not brought the world much closer to the final goal of nuclear disarmament than when the *NPT* was adopted in 1970.¹⁶²

The Global Zero campaign has expressed concern that the conventional step-by-step approach, ‘unable to muster significant public or political support’, will ‘get bogged down and derailed by any one of the incremental measures in line, while the historic opportunity to achieve elimination passes by’.¹⁶³ It has argued that ‘[i]t is not realistic to continue with the same approach that has been tried for years and expect it to yield new results’.¹⁶⁴ The question to be asked is whether new treaties dealing with fissile materials and providing negative security assurances, for example, will propel us closer to an NWC or whether they will simply delay progress on disarmament by diverting attention from the failure of the nuclear-weapon states to disarm. According to Global Zero,

proclaiming the goal of elimination as a far-off vision though not pursuing it until or unless a series of sequenced arms control measures have all been achieved ... is not a politically feasible strategy for eliminating nuclear weapons and carries significant risks that could undermine progress even on incremental measures and current non-proliferation efforts.¹⁶⁵

In other words, not only is the comprehensive approach the most likely to succeed, it will also bring us to a nuclear-weapon-free world in the shortest time. Another criticism of the step-by-step approach is that nuclear-weapon states have supported the negotiation of new treaties only when it suits them: for example, the *CTBT* was negotiated once key players had developed non-explosive methods for testing nuclear weapons, and only those nuclear-weapon states with large stockpiles of fissile materials currently support a fissile materials cut-off treaty.

¹⁵⁹ IALANA, INESAP, IPPNW, above n 14, 22–5.

¹⁶⁰ *Treaty on the Reduction and Limitation of Strategic Offensive Arms*, signed 31 July 1991, available from <<http://www.state.gov/www/global/arms/starhtml/start/start1.html>> (entered into force 5 December 1994) (*‘START’*).

¹⁶¹ *Treaty between the Russian Federation and the United States of America on Strategic Offensive Reductions*, signed 24 May 2002, US–USSR, 2350 UNTS 415 (entered into force 1 June 2003) (*‘SORT’*).

¹⁶² *Legal, Technical and Political Elements Required for the Establishment and Maintenance of a Nuclear Weapon-Free World*, above n 144, [13].

¹⁶³ Compact to Eliminate Nuclear Weapons, above n 17, 3.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

D *Slow Progress on Disarmament by the US and Russia*

The US and Russia together possess 95 per cent of all nuclear weapons in the world.¹⁶⁶ Their stockpiles dwarf those of the other nuclear-armed states,¹⁶⁷ and because of this asymmetry some states have argued that steps towards nuclear disarmament are best pursued bilaterally between the US and Russia. For many years, the Australian Government argued that '[t]he premature multilateralisation of the disarmament process would serve only to complicate and slow down the existing process of bilateral nuclear disarmament between the US and Russia'.¹⁶⁸ It speculated that, once the US and Russia had reduced their nuclear stockpiles to 'levels roughly comparable' with the other nuclear-weapon states, the process would 'become a plurilateral one — among all of the recognised [nuclear-weapon states]'.¹⁶⁹ Then, once they had each reduced their nuclear weapon holdings to 'quite low levels', an NWC 'might become appropriate'.¹⁷⁰ It is unclear whether this remains Australia's position.¹⁷¹ It is in line with the view expressed by the Canberra Commission in 1996, which saw an NWC as useful only in the final stages of achieving abolition:

As nuclear disarmament nears the elimination stage, consideration should be given to whether the legal obligations to sustain a nuclear weapon free world would be best given effect by the incremental approach of a number of separate instruments or through a comprehensive approach which would combine all relevant instruments into a single legal instrument — a nuclear weapons convention.¹⁷²

However, it also remarked that preparations for negotiations involving all nuclear-weapon states 'need not await the achievement by the United States and Russia of the appropriate force levels'.¹⁷³ In their 2008 *Wall Street Journal* opinion article, Shultz et al proposed that the US and Russia negotiate an agreement to undertake 'further substantial reductions' in their nuclear forces beyond those recorded in the bilateral *SORT*, as this would allow other nuclear-armed states to become involved in the disarmament process.¹⁷⁴ They argued that the two countries with the largest arsenals 'have a special responsibility, obligation and experience to demonstrate leadership, but other

¹⁶⁶ See Kile, Fedchenko and Kristensen, above n 108, 367.

¹⁶⁷ According to the Stockholm International Peace Research Institute, Russia possesses 5 189 nuclear warheads; the US, 4 075 (or 5 300 if reserve warheads are included); China, 176; France, 348; the UK, 185; Israel, 80; Pakistan, 60; and India, 60–70. The number of nuclear warheads possessed by North Korea cannot be verified due to lack of public information.

¹⁶⁸ Department of Foreign Affairs and Trade (25 August 2000) as cited in Merav Datan (ed), 'NWC Resolutions, Statements and Analyses: Australia, Canada, China, Costa Rica, Japan, Malaysia, United Kingdom, United States and More Responses to the *Model Nuclear Weapons Convention*' (2001) 2 *Nuclear Weapons Convention Monitor* 3.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ For the most detailed articulation of the Australian Government's position, see Faulkner, above n 67, 3970–1. See also McClelland, above n 64.

¹⁷² Canberra Commission on the Elimination of Nuclear Weapons ('Canberra Commission'), *Report of the Canberra Commission on the Elimination of Nuclear Weapons* (Canberra Commission Report, 1996) 66.

¹⁷³ *Ibid.* 64.

¹⁷⁴ Shultz et al, 'Toward a Nuclear-Free World', above n 15.

nations must join'.¹⁷⁵ This April, US President Barack Obama and his Russian counterpart, President Dmitry Medvedev, committed to negotiate a new bilateral treaty to further reduce their stockpiles of strategic offensive arms.¹⁷⁶ Their leadership must involve not only a reduction in the size of their nuclear arsenals, but also a reduction in the range of potential scenarios for the use and threat of use of their nuclear weapons. Since the end of the Cold War, the two countries' nuclear doctrines have only expanded.

E *The Failure to Eliminate Other Weapons of Mass Destruction*

As noted above, the two other types of weapons of mass destruction ('WMDs') — biological and chemical weapons — have already been outlawed by comprehensive treaties similar in form to the model NWC. However, biological and chemical weapons have not yet been eliminated from the arsenals of all states.¹⁷⁷ One explanation for their continued existence despite the conventions is that they are the 'poor man's nuclear weapons': whilst most developing states cannot afford to build nuclear bombs, biological and chemical weapons are within their means and could, according to the logic of these states, deter a nuclear attack.¹⁷⁸ Thus, the elimination of nuclear weapons could be a prerequisite for the elimination of biological and chemical weapons. An NWC would build on and reinforce the *Biological Weapons Convention* and *Chemical Weapons Convention*, and it would 'complete the triad' of WMD abolition treaties.¹⁷⁹

There is other explanations for the failure to eliminate biological and chemical weapons. The *Biological Weapons Convention* lacks a verification mechanism,¹⁸⁰ and many of the agents used to produce both biological and chemical weapons have legitimate non-military purposes or are found in nature.¹⁸¹ By contrast, the materials used to create a nuclear explosion — highly enriched uranium or separated plutonium — are generally not needed for civilian purposes,¹⁸² and it is comparatively easy to detect their production.¹⁸³ The difficulties in verifying the *Biological Weapons Convention* and *Chemical Weapons Convention* have hindered their implementation. An NWC would be

¹⁷⁵ Ibid.

¹⁷⁶ White House, 'Joint Statement by President Dmitry Medvedev of the Russian Federation and President Barack Obama of the United States' (Press Release, 1 April 2009).

¹⁷⁷ Blix Commission, above n 20, 40–3. However, no state admits possessing biological weapons or having programs to develop them.

¹⁷⁸ See, eg, Michael P Scharf, 'Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through Sanctions, Use of Force, and Criminalization' (1999) 20 *Michigan Journal of International Law* 477, 479; Scott Keefer, 'International Control of Biological Weapons' (1999) 6 *ILSA Journal of International and Comparative Law* 107, 107; Brad Roberts, 'Controlling Chemical Weapons' (1992) 2 *Transnational Law and Contemporary Problems* 435.

¹⁷⁹ IALANA, INESAP and IPPNW, above n 14, 9.

¹⁸⁰ For a discussion on the move to create a verification mechanism, see Nahal Kazemi, 'Ill at Ease: The Precarious State of the *Biological Weapons Convention's* Proposed Enforcement Regime' (2005) 17 *Florida Journal of International Law* 137.

¹⁸¹ Blix Commission, above n 20, 112, 128.

¹⁸² Ibid 77. However, some warships and nuclear research reactors use highly enriched uranium, and some nuclear reactors use plutonium.

¹⁸³ Ibid 74.

easier to verify and therefore implement. This removes a significant barrier to commencing negotiations on an NWC.

F *Abiding Concerns about Nuclear Proliferation*

Nuclear-weapon states often justify their resistance to negotiating comprehensive nuclear disarmament on the basis that the global security environment is not, at present, conducive to disarmament. However, this proposition denies the obvious reality that the continued existence of some 26 000 nuclear weapons in the arsenals of nine states is a great source of global instability. The Canberra Commission rightly noted in 1996 that ‘[a]s long as any state has nuclear weapons, there will be others ... who will seek to acquire them’.¹⁸⁴ It is unlikely that progress on nonproliferation will occur unless nuclear-armed states take meaningful steps towards disarmament.¹⁸⁵

Former US Secretary of Defense Robert McNamara warned in 2005 that, ‘[i]f the United States continues its current nuclear stance, over time, substantial proliferation of nuclear weapons will almost surely follow’.¹⁸⁶ Like many former American statesmen, he believes that the only strategy for averting nuclear catastrophe is to move towards the complete elimination of nuclear weapons.¹⁸⁷ Shultz et al concluded in their two *Wall Street Journal* opinion articles in 2007 and 2008 that reliance on nuclear weapons for deterrence purposes is becoming ‘increasingly hazardous and decreasingly effective’,¹⁸⁸ and that ‘[t]he accelerating spread of nuclear weapons, nuclear know-how and nuclear material has brought us to a nuclear tipping point’.¹⁸⁹

Former Russian leader Mikhail Gorbachev has expressed similar views, remarking in 2007 that ‘with every passing year [nuclear weapons] make our security more precarious’.¹⁹⁰ Indeed, new and diverse global security challenges, such as the rise of international terrorism, have arguably propelled us closer to the abolition of nuclear weapons rather than making abolition a more distant dream. In the current security environment, abolition is ‘both an attractive and logical means of reducing and eliminating the dangers of accidents, sabotage or deliberate use of a nuclear device’.¹⁹¹ The negotiation of an NWC is therefore both ‘timely and necessary’.¹⁹²

G *A Lack of Support from the Nuclear-Weapon States*

As noted above, four of the nine nuclear-armed states — China, India, Pakistan and North Korea — support the commencement of negotiations for an

¹⁸⁴ Canberra Commission, above n 172, 58.

¹⁸⁵ See Annan, above n 5.

¹⁸⁶ Interview with Robert McNamara by Giovanni Cubeddu, ‘Nuclear Weapons Are Immoral’ (2005) *Thirty Days* <<http://www.30giorni.it/us/articolo.asp?id=9590>>.

¹⁸⁷ Ibid. See also Jimmy Carter, ‘A Nuclear Crisis’, *Washington Post* (Washington DC, US) 23 February 2000, A21; Lee Butler, ‘Abolition of Nuclear Weapons’ (Speech delivered at the National Press Club, Washington DC, US, 4 December 1996).

¹⁸⁸ Shultz et al, ‘A World Free of Nuclear Weapons’, above n 15.

¹⁸⁹ Shultz et al, ‘Toward a Nuclear-Free World’, above n 15.

¹⁹⁰ Mikhail Gorbachev, ‘The Nuclear Threat’, *Wall Street Journal* (New York, US) 31 January 2007, A13.

¹⁹¹ IALANA, INESAP and IPPNW, above n 14, iii.

¹⁹² See McClelland, above n 64.

NWC, while the others prefer continuing the step-by-step approach to nuclear disarmament.¹⁹³ Some states and commentators have argued that there would be no point in commencing negotiations for an NWC unless all of the nuclear-armed states, or at least the US and Russia, were willing to participate, for none of them have indicated a willingness to disarm unless it is in concert with the others.¹⁹⁴ However, some of the nuclear-armed states might be prepared to join negotiations on the condition that the final treaty would not enter into force until it is ratified by all of them.¹⁹⁵ Furthermore, as Alyn Ware has argued, the very fact of commencing negotiations would put ‘considerable pressure’ on reluctant nuclear-armed states to join,¹⁹⁶ in much the same way that the Ottawa process for a mine ban treaty put pressure on key landmine users to join¹⁹⁷ and, more recently, the Oslo process for a cluster munitions convention put pressure on the UK to join.¹⁹⁸

Negotiations for an NWC would also ‘provide a process for developing some of the mechanisms — particularly in verification and compliance — that will be required for the implementation of a NWC’,¹⁹⁹ just as negotiations for the *CTBT* created ‘the impetus for developing a global monitoring and verification system’.²⁰⁰ Finally, negotiations for an NWC would help to strengthen the global norm against the possession of nuclear weapons and ‘help create the political environment that would move remaining States to join’.²⁰¹ It is worth recalling that the *NPT* was concluded without the involvement of two nuclear-weapon states, China and France, and as such there is no reason why negotiations for an NWC could not at least commence without the support of all nuclear-armed states.

IV THE PATH TOWARDS THE NEGOTIATION OF AN NWC

In a declaration appended to the ICJ advisory opinion on nuclear weapons, President Bedjaoui argued that the goal of nuclear disarmament ‘is no longer utopian’, and ‘it is the duty of all to seek to attain it more actively than ever’.²⁰² The next few years present a historic window of opportunity to move towards a world free of nuclear weapons. There is stronger popular support for elimination than ever before, and there has been a ‘dramatic shift among conservative leaders’ to the belief that nuclear weapons must be banished from global

¹⁹³ IALANA, INESAP and IPPNW, above n 14, iii.

¹⁹⁴ The UK, for example, has said that it will support negotiations for an NWC, but only once the US and Russia have made further progress in reducing their stockpiles: *ibid* 34.

¹⁹⁵ Such states might include China, India and Pakistan: Ware, above n 139, 8.

¹⁹⁶ *Ibid*.

¹⁹⁷ See, eg, Shawn Roberts, ‘No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction’ (1998) 9 *Colorado Journal of International Environmental Law and Policy* 371, 376–82.

¹⁹⁸ See, eg, Raphael Satter, ‘UK’s Brown Says Britain to Scrap Cluster Bombs’, *International Herald Tribune* (Paris, France) 29 May 2008.

¹⁹⁹ Ware, above n 139, 8.

²⁰⁰ *Ibid*.

²⁰¹ IALANA, INESAP and IPPNW, above n 14, 5.

²⁰² *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 274 (Declaration of President Bedjaoui).

arsenals.²⁰³ Shultz et al remarked in January 2008 that the ‘growing political space that has been created to address these issues over the past year has been extraordinary’.²⁰⁴ Indicative of this shift in thinking was US President Obama’s declaration in April that his administration, unlike those of his predecessors, is firmly committed to ‘a world without nuclear weapons’.²⁰⁵ There is now widespread agreement that nuclear weapons are mere remnants of the Cold War which must be outlawed.²⁰⁶

This article argues that formal negotiations for an NWC could commence as early as 2011 provided that, first, pressure on states to pursue such a treaty intensifies substantially in the lead-up to the *NPT* Review Conference in 2010; second, one or more important steps towards disarmament take place before the conference; third, states agree at the conference to commence negotiations for an NWC; and, finally, the UN General Assembly adopts a resolution based on the outcome document of the conference urging all states to commence negotiations. Each stage or step is discussed in turn.

It appears that nuclear-armed states will be prepared to pursue an NWC only if there is substantial pressure on them to do so. Such pressure must come not only from other states but also from civil society. Several recent initiatives offer considerable hope. One is the international commission established by Australian Prime Minister Rudd last June. The commission is due to report to a ‘major information conference of experts’ in late 2009 ‘to pave the way’ for the *NPT* Review Conference. ICAN and Global Zero — two civil society campaigns with different but complementary strategies for advancing an NWC²⁰⁷ — might also move us closer to the commencement of negotiations. Each initiative aims to influence states directly through lobbying and indirectly by mobilising popular support for the abolition of nuclear weapons.

It would also be worthwhile for ‘a group of like-minded states to initiate a series of preparatory conferences for an NWC’,²⁰⁸ perhaps before the *NPT* Review Conference in 2010. They could ‘provide a forum for examining the political, legal, technical and institutional requirements’ for an NWC as a precursor to the commencement of negotiations.²⁰⁹ By demonstrating the feasibility of nuclear disarmament, such meetings would inspire states ‘to take on the difficult but necessary and increasingly urgent task of commencing, and bringing to a conclusion, nuclear disarmament negotiations’.²¹⁰

If states were prepared to take one or more easy but significant steps towards disarmament before the 2010 *NPT* Review Conference, this would greatly improve the chances that negotiations for an NWC would commence soon after the Conference. Examples of such steps would be a decision by the US and

²⁰³ Compact to Eliminate Nuclear Weapons, above n 17, 2.

²⁰⁴ Shultz et al, ‘Toward a Nuclear-Free World’, above n 15.

²⁰⁵ Obama, above n 158.

²⁰⁶ See, eg, Blix Commission, above n 20, 109.

²⁰⁷ ICAN’s focus is on building a groundswell of popular support for an NWC: see ICAN <<http://www.icanw.org/about-ican>>. By contrast, the Compact to Eliminate Nuclear Weapons’s focus is on generating support among political leaders, past and present, for an NWC: see above n 17.

²⁰⁸ Ware, above n 139, 9.

²⁰⁹ Ibid.

²¹⁰ IALANA, INESAP and IPPNW, above n 14, iii.

Russia to reduce the operational readiness of their nuclear forces,²¹¹ a reversal of the decision by the UK to rebuild its fleet of nuclear-armed Trident submarines,²¹² a withdrawal of support by NATO for nuclear-sharing in Europe,²¹³ and a commitment by all nuclear-armed states — preferably enshrined in a treaty — not to use their nuclear weapons unless in self-defence against a nuclear attack.²¹⁴ On the campaign trail, US President Obama expressed support for realising the vision of a nuclear-weapon-free world by taking important steps such as de-alerting and adopting a ‘no-first-use’ policy.²¹⁵ Negotiations for an NWC are unlikely to commence at a time when all of the most recent nuclear developments have been negative, as is currently the case.

If negotiations for an NWC are to begin as early as 2011, states would need to agree at the *NPT* Review Conference in 2010 to commence such negotiations. Concerns about maintaining the integrity of the *NPT* regime mean that it is unlikely that many states would agree to begin negotiations on an NWC without an *NPT* review meeting specifically calling for such action. The UN General Assembly would then need to adopt a resolution noting the outcome of the *NPT* Review Conference and calling on all states, whether parties to the *NPT* or not, immediately to commence negotiations for an NWC. It would differ in context from the current resolution on the ICJ advisory opinion.

V CONCLUSION

Former UN Secretary-General Annan warned in 2007, in relation to nuclear weapons, that ‘we are asleep at the controls of a fast-moving aircraft. Unless we wake up and take control, the outcome is all too predictable’.²¹⁶ Negotiations on an NWC would enable the world to do just that. There can be no excuse for continuing to delay progress on nuclear disarmament. The model NWC and the *Wall Street Journal* opinion articles, as well as numerous studies by civil society, have helped to build confidence among states that a nuclear-weapon-free world is achievable and can be maintained. Any remaining uncertainty about the verification of an NWC should not prevent work on such a treaty; rather, it

²¹¹ See UN General Assembly, *Decreasing the Operational Readiness of Nuclear Weapons Systems*, UN GAOR, 1st Comm, 62nd sess, Agenda Item 98, UN Doc A/C.1/62/L.29 (17 October 2007).

²¹² See, eg, J Paul Dunne and Sam Perlo-Freeman, ‘Aggressive Militarism or Security: The Opportunity Cost of Trident Replacement and the Aircraft Carrier Programme’ (2007) 10 *Journal of Peace, Conflict and Development* <<http://www.peacestudiesjournal.org.uk/docs/Trident%20Guest%20Essay%20FINAL%20EDIT.pdf>>. However, the UK has set up a ‘nuclear disarmament laboratory’ to explore the political and technical requirements for a nuclear-weapon-free world. See, eg, UK, *Verification of Nuclear Disarmament: Final Report on Studies into the Verification of Nuclear Warheads and Their Components*, UN Doc NPT/CONF.2005/WP.1 (18 April 2005).

²¹³ See Acronym Institute, *NATO’s Nuclear Sharing: A Cold War Anachronism that Undermines the NPT* (2007) <<http://www.acronym.org.uk/nato/npt2007.htm>>.

²¹⁴ China and India already adhere to ‘no-first-use’ policies: Joseph Kahn, ‘Chinese General Threatens Use of A-Bombs If US Intrudes’, *International Herald Tribune* (Paris, France) 15 July 2005; National Security Advisory Board on Indian Nuclear Doctrine, *Draft Report* (National Security Advisory Board on Indian Nuclear Doctrine Report, 17 August 1999) [2.4].

²¹⁵ David Krieger, Nuclear Age Peace Foundation, US, *Comparing the Positions of Senators Obama and McCain on Nuclear Disarmament* (2008), available from <<http://www.wagingpeace.org>>.

²¹⁶ Annan, above n 5.

should stimulate it.²¹⁷ States are required, under the *NPT* and customary international law, not only to pursue negotiations for complete nuclear disarmament, but also to attain that goal. An NWC would allow them to fulfil their obligation. Former ICJ Vice-President Christopher Weeramantry remarked in 2007 that '[n]ations large and small, rich and poor, strong and weak must all agree on the unassailable logic of the proposition that [an NWC] is perhaps the most imperative need of our time'.²¹⁸ Continuing down the current path of nuclear proliferation is not a realistic option. We must seek an alternative path if we are to avert nuclear catastrophe and cast off the nuclear shadow burdening humanity.

²¹⁷ IALANA, INESAP and IPPNW, above n 14, iii.

²¹⁸ Christopher Weeramantry, 'Foreward', in IALANA, INESAP and IPPNW, *Securing Our Survival (SOS): The Case for a Nuclear Weapons Convention* (2007).