

**The Law and Nuclear Weapons:
MPI's Track II Diplomacy**

**By Hon. Douglas Roche, O.C.
Chairman, Middle Powers Initiative**

**Address to New York University Symposium
“Existing and Emerging Legal Approaches to
Nuclear Weapons in the 21st Century”**

New York, March 31, 2006

I have been asked to discuss the viability of alternative approaches such as the Middle Powers Initiative (MPI) in this symposium's examination of emerging legal trends to halting nuclear weapons proliferation in the 21st century. I will argue in this address that the Track II diplomacy conducted by MPI, especially through its new Article VI Forum, is a direct contribution to strengthening political resolve not only to honour the existing legal obligations under the Non-Proliferation Treaty but also prepare the ground for a Nuclear Weapons Convention, prohibiting the production as well as use of all nuclear weapons in all circumstances.

* * *

The Middle Powers Initiative www.middlepowers.org was started in 1998 as a consortium of eight prominent international Non-Governmental Organizations specializing in nuclear disarmament issues. Since then, MPI has sent approximately 20 delegations to middle power governments encouraging them to use their access to the Nuclear Weapons States to fulfill their commitments to the Non-Proliferation Treaty. On two occasions (2000 and 2005), MPI held strategy consultations at the Carter Center, Atlanta, where we were addressed each time by former President Jimmy Carter. Referring to these consultations in his book, *Our Endangered Values*, President Carter commended the goal of exerting

leverage on the nuclear powers to take necessary steps to save the Non-Proliferation Treaty. MPI's recommendations have been fed directly into the NPT process. The recommendations are:

1. Balanced implementation of the NPT.
2. Reaffirmation of decisions made at 1995 and 2000 NPT Review Conferences.
3. U.S. and Russia to solidify and enlarge reductions under the Moscow Treaty.
4. Further reductions and elimination of tactical nuclear weapons.
5. U.S. and Russia to take their strategic weapons off "alert" status.
6. No new nuclear weapons; legally binding security assurances to be given by NWS.
7. Negotiations on a fissile material ban to be concluded; multilateral controls on uranium enrichment and plutonium reprocessing.
8. IAEA's Additional Protocol to become universal standard.
9. Subsidiary body at the Conference on Disarmament to deal with nuclear disarmament.
10. Early entry-into-force of Comprehensive Test Ban Treaty; present moratorium on testing to be maintained.
11. Deeper consideration of the legal, political and technical requirements for the elimination of nuclear weapons.

When the 2005 NPT Review Conference ended in disarray, lamentation filled the air. The mood worsened when world leaders at the U.N. 60th Anniversary Summit stripped their declaration of any reference to nuclear disarmament. A general impression developed that the nuclear weapons situation is, if not exactly hopeless, so conflicted that meaningful progress in disarmament is stymied. The ongoing crisis of Iran and the controversial U.S.-India deal on nuclear technology have apparently sapped all the energy, not to mention media attention, out of the system.

The Middle Powers Initiative takes a different view. Not for a moment do we under-estimate the seriousness of the present threat to the viability of the Non-Proliferation Treaty.* But we recognize that the obduracy of a small number of states, important as they are, is obscuring the clear desire of the vast majority of states to advance the nuclear disarmament agenda.

Consider the elements on which there was wide support at the 2005 NPT Review Conference: stop nuclear sharing; prevent nuclear terrorism through total elimination of nuclear weapons; build upon the decisions and commitments of 1995 and 2000; maintain the nuclear testing moratorium; respect negative security assurances; strengthen nuclear weapons-free zones. There is, then, a solid basis for stating that a viable plan for progress in nuclear disarmament exists.

This view led the Middle Powers Initiative to launch the Article VI Forum. As the name suggests, MPI believes that a balanced implementation of the NPT requires states to emphasize the disarmament side of the Treaty

* A full treatment of the present impasse in nuclear weapons discussions is contained in my book, *Beyond Hiroshima* (Novalis, 2005) and in my report "Deadly Deadlock," a Political Analysis of the Seventh Review Conference of the Non-Proliferation Treaty, May 2-27, 2005 <www.douglasroche.ca>

as well as the non-proliferation side. Our aim is to advance international cooperation to prevent the spread of nuclear weapons and to fulfil existing commitments to achieve the reduction and elimination of nuclear arsenals.

The Forum has already held two meetings with a third scheduled for Ottawa, Canada next September.

At the first meeting at the U.N. October 3, 2005, the then Under Secretary-General Nobuyasu Abe welcomed the Forum as an example of “new and creative thinking” on disarmament and non-proliferation called for by General Assembly President Jan Eliasson.

A second, two-day meeting was held March 2-3, 2006 at The Hague. Twenty-one invited states participated: Austria, Belgium, Brazil, Canada, Costa Rica, Germany, the Holy See, Hungary, Ireland, Indonesia, Japan, Malaysia, Mexico, The Netherlands, New Zealand, Norway, Poland, South Korea, Sweden, Switzerland, and Turkey. Two former Primer Ministers – Rudd Lubbers of The Netherlands and Kim Campbell of Canada – addressed the gathering.

The meeting, co-hosted by the Netherlands Institute of International Relations ‘Clingendael,’ opened up a new approach to nuclear disarmament by examining key legal, political and technical issues that need to be addressed to overcome security concerns of the nuclear weapons states.

The forum was attended by the distinguished nuclear physicists, Frank von Hippel and Jose Goldemberg, the co-chairs of the newly-formed International Panel on Fissile Materials, which presented proposals for a Fissile Materials Cutoff Treaty (FMCT) and the ramifications of verifying such a treaty. Despite the position of one major nuclear power, the experts insisted that an FMCT is verifiable. They further argued a treaty would strengthen the NPT because it would create new standards for “international responsibility” and because it would reduce the discriminatory nature of the NPT since the nuclear weapons states would have more political and technical obligations under an FMCT than they now have under the NPT.

The political dilemma explored at the Forum is that while nuclear disarmament is vital, it is not on the agenda of leaders and subsequently not in the public realm. Consequently, the political discussion focused on what mix of policy options had the best chance of being considered by governments, would be effective if implemented and also be able to capture the attention of the general public. Some of those initiatives are implementing the Comprehensive Test Ban Treaty, negotiating a FMCT, de-alerting, implementing norms for transparency and irreversibility in arms control agreements, and reducing the role of nuclear weapons in military

strategies.

The legal session focused on the effect the implementation of international law has on promoting nuclear disarmament. While it takes decades to build respect for international law and to create the institutions that support it, panelists said, much can be done in the near term through improvement of national legal systems, and on the international level through respect for the NPT Article VI disarmament obligations. It was noted that this year is the tenth anniversary of the advisory opinion by the International Court of Justice on the legality of nuclear weapons: “the authoritative interpretation of Article VI of the NPT.” The Court unanimously concluded that under Article VI states are obligated to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament. The disarmament obligations must be interpreted in light of the commitments made in 1995 and 2000. The most important are the principles of irreversibility, verification and transparency, the diminished role for nuclear weapons in security policies, and reduction in operational status of nuclear weapons.

* * *

I now want to make the direct connection between the Article VI Forum and the theme of this Symposium.

It is the position of the Middle Powers Initiative that the threat or use of nuclear weapons is illegal “in any circumstances whatsoever.” This phrase, in fact, is taken from the outstanding document issued by Judge Christopher Weeramantry, who was Vice-President of the ICJ when it issued its Advisory Opinion.

My considered opinion is that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underline the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23 (a) of The Hague Regulation of 1907. It contradicts the fundamental principles of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

While regretting that the Court did not hold that the use or threat of use of nuclear weapons is unlawful “in all circumstances without exception,” Judge Weeramantry said that the Court’s Opinion does “take the law far on the road towards total prohibition.” Since leaving the Court, Judge Weeramantry has consistently upheld his contention that nuclear weapons are illegal under international law – full stop.

Interpreting the law on this matter is a complex process if one takes the view that any means of self-defence is valid. The nuclear proponents have, of course, taken this route. The search for security through

technology led to the nuclear arms race, and the public – everywhere – was told this was necessary for self-defence. Our common humanity was denied, as if the moral problems of the obliteration of huge sections of humanity could be swept aside by technology. In secular cultures, the maintenance of nuclear weapons has been rationalized away. No law expressly forbids the threat or use of nuclear weapons; the absence of such a law enables the nuclear proponents to drive onward. The ICJ felt that it by itself could not *invent*, so to speak, a new law. But it clearly pointed the way to the political development of such a law which would be built on a common understanding that humanitarian law does not permit mass killing. MPI supports a new proposal that the ICJ be seized of the nuclear weapons crisis once more by examining the present level of compliance with the obligation to conclude negotiations on nuclear disarmament.

Humanitarian law must be applied to every use of every nuclear weapon. A return to humanitarian law, not technological refinements of the act of killing, is required for society to deal with the illegality of nuclear weapons. A Nuclear Weapons Convention, prohibiting the production as well as use of all nuclear weapons in all circumstances is urgently needed. Law-makers – i.e., politicians and government officials – must be awakened by public demand to pass such legislation. An iron-clad law prohibiting all

nuclear weapons must be made. This will happen only when the evil nature of nuclear weapons is recognized rather than being denied as it is today. By emphasizing our humanity, not our technological prowess, we can achieve a universal law criminalizing the production and use of all nuclear weapons.

Sadly, the political climate today seems to be inhospitable, to put it gently, to legislating a Nuclear Weapons Convention. A model convention has been sitting on U.N. shelves for nearly a decade. Nonetheless, a working paper submitted to the 2005 NPT Review Conference by six nations, led by Malaysia and Costa Rica, frames its argument to address key legal, political and technical issues in terms of fulfilling the ICJ's 1996 ruling. By taking an "incremental-comprehensive approach – incorporating step-by-step measures within a comprehensive framework – the document take a problem-solving and pragmatic approach rather than a prescriptive or politically-confrontational approach.

The Article VI Forum has adopted this approach. While the debate continues, a salient and often overlooked point needs to be repeated: the vast majority of world public opinion favours nuclear disarmament. The Middle Powers Initiative hopes to tap into the opinion and to work with key governments to make meaningful progress in the implementation of their legal obligations. Indeed, a new spirit of activism by an enlightened civil

society, fed by instant worldwide electronic communication, provides hope that the rule of law may become a hallmark of the 21st century.