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February 14, 2012

Thomas E. Donilon  
National Security Advisor  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. Donilon:

The Lawyers Committee on Nuclear Policy, a nonprofit association of lawyers and legal scholars devoted to analyzing nuclear weapons policy in the framework of national and international law, submits this letter with respect to the pending revision of presidential guidance for US nuclear force employment, structure, and deployment.

We urge adherence in preparing the revision to two essential principles and related policy objectives.

**First**, the revision should be guided by applicable principles of international law, including international humanitarian law, and by the wholly consistent US policy objective of the future non-use of nuclear weapons by any state, forever.

**Second**, the revision should be guided by the treaty obligation of the United States, under Article VI of the Nonproliferation Treaty (NPT), to conduct good faith negotiations leading to genuine nuclear disarmament, and by the congruent objective of advancing President Barack Obama's declared goal of United States leadership in achieving the peace and security of a world free from nuclear weapons.

This letter discusses the application of those principles and objectives under headings of nuclear force 1) employment, 2) structure, and 3) deployment.

## Employment

The April 2010 Nuclear Posture Review Report (NPR) states the policy objective with admirable clarity: "It is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever." Then, in their 8 November 2010 joint statement, Indian Prime Minister Singh and US President Obama said that they "support strengthening the six decade-old international norm of non-use of nuclear weapons."

That policy objective is wholly consistent with, indeed compelled by, the application of the law of armed conflict, including international humanitarian law (IHL), to nuclear weapons. The longstanding US position is that nuclear weapons operations, like any military operations, are subject to IHL. That position was adopted by all states participating in the 2010 NPT Review Conference, including the United States and the four other NPT-acknowledged nuclear weapon states. The Final Document expresses the Conference's "deep concern at the catastrophic consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law."

US armed forces' understanding of and application of IHL is of course well advanced and entrenched. The Joint Chiefs of Staff have recognized the obligation to conduct military operations in compliance with IHL, stating that "[a]ttackers are required to only use those means and methods of attack that are **discriminate in effect** and can be **controlled**, as well as take precautions to minimize collateral injury to civilians and protected objects or locations." (Emphasis added.) All branches of the armed forces have adopted regulations for the application of IHL principles. For example, a 2010 US Army manual states: "Distinction requires parties to a conflict to engage only in military operations **the effects of which distinguish** between the civilian population (or individual civilians not taking part in hostilities) and combatant forces, directing the application of force solely against the latter." (Emphasis added.)

The unique nature of nuclear weapons clearly raises grave issues under IHL. As the International Court of Justice noted in 1996, the destructive effect of nuclear weapons "cannot be contained in either space or time," has "the potential to destroy all civilization and the entire ecosystem of the planet," and presents "a serious danger to future generations." In a resolution adopted in 2011, the International Red Cross and Red Crescent Movement: "1. emphasizes the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use, 2. **finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.**" (Emphasis added.)

**As explained in some detail in the publications listed in the attachment, the reality is that nuclear weapons, with their uncontrollable blast, heat, and radiation effects, are indeed weapons of mass destruction whose use in typical scenarios – including reprisal – is inherently incompatible with IHL.** Thus the law and the policy objective of non-use by any state of nuclear weapons are completely in accord.

The revision of the presidential guidance regarding employment should therefore, *first*, emphasize the requirement of compliance with IHL. *Second*, it should highlight the policy objective of non-use and its legal underpinning. *Third*, it should prescribe an extremely high threshold for even considering use of nuclear weapons, including with respect to the option of second use, if such consideration is not ruled out altogether. *Fourth*, it should require that in determining such matters as targets and lethality requirements IHL be complied with to the maximum degree possible. For example, if it is considered necessary to have a US option of second use, targets should be in non-urban areas. *Finally*, it should require that limitations be implemented consistently throughout the government and that officials refrain from provocative statements which appear to indicate a readiness to use nuclear weapons in a wide range of circumstances.

We would like to call attention to one additional point in connection with IHL issues. Scientific studies in the early 1980s suggested that the smoke generated by the firestorms from a nuclear exchange could result in catastrophic climate changes, leading to a collapse of worldwide agriculture and possibly threatening the survival of the human species. These "nuclear winter" studies were sharply contested at the time, with critics pointing to gaps in the data resulting from the limited computer capacity and climate models available at the time, and with the end of the Cold War the subject largely dropped out of sight. However, some scientific studies done during the last few years (see attachment) indicate that earlier predictions may actually have been understated, and that the toxic smoke from a nuclear exchange could linger in the stratosphere for a decade or longer. If valid, these findings would have obvious and critical relevance to the revision of presidential guidance and its implementation. As to the legal dimension, such effects are not compatible with the requirements of discrimination, proportionality in attack, and due care for the environment, including the prohibition of the foreseeable infliction of widespread, severe and long-lasting damage to the environment. **We would urge that the outcome of the current process include an order for further study of the scientific issues involved, perhaps by the National Academy of Sciences.**

#### Structure

Article VI of the NPT obliges state parties "to pursue negotiations in good faith on effective measures relating to the cessation of nuclear arms at an early date and to nuclear disarmament." In 2000 and again in 2010, the United States and other states participating in NPT Review Conferences affirmed the "unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI." The International Court of Justice has unanimously construed Article VI to require states "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

Unquestionably, the global elimination of nuclear weapons will require a global legal, institutional, and technical framework, best pursued, as the UN Secretary-General has said, as a Nuclear Weapons Convention, comparable to the Chemical Weapons Convention. The 2010 NPT Review Conference recognized the need for such a framework, affirming in its Final Document that "all States need to make special efforts to establish the necessary

framework to achieve and maintain a world without nuclear weapons," and noting "the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification."

**In the view of the Lawyers Committee on Nuclear Policy, compliance with the disarmament obligation requires diligent efforts to commence multilateral negotiations on a Nuclear Weapons Convention as soon as possible. As you know, that is not current US policy, as illustrated by the US refusal to support such negotiations within the Conference on Disarmament.**

**Presidential guidance regarding US nuclear force structure should facilitate and encourage US-Russian and multilateral negotiations on reduction and elimination of nuclear weapons. Reduction of US nuclear forces to much lower levels, in the low hundreds or less, in ways reinforcing stability, is essential to success in the bilateral and global nuclear disarmament enterprise. Such reductions should be undertaken regardless of the current state of bilateral or multilateral negotiations, or of considerations of numerical equivalency with Russian forces. Reductions also will reduce the risks of nuclear war and save money.**

**Missile defense planning and deployment must be conducted (or halted) so as not to interfere with compliance with the Article VI obligation, in particular by hindering further US-Russian negotiations.** The 2000 NPT Final Document recognized the connection between missile defenses and disarmament, calling in the Practical Steps for "preserving and strengthening the ABM Treaty as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons." While the ABM Treaty is now history, the principle remains valid.

**Modernization of nuclear forces and the nuclear weapons complex so as to maintain them for many decades to come undermines the good-faith achievement of the Article VI objective, especially in the absence of determined efforts to undertake multilateral negotiations on global elimination. It further has the effect of undermining trust in the disarmament process and in the non-proliferation regime. It is also the case that enhancing military capabilities, with respect not only to warheads but also delivery systems, command and control, etc., is contrary to the Article VI objective of cessation of the nuclear arms race and the commitment to a diminishing role for nuclear weapons in security policies affirmed by the 2000 and 2010 NPT Review Conferences.**

**Also important in this connection is the principle of irreversibility in arms control and disarmament affirmed by the 2000 and 2010 NPT Review Conferences. If nuclear weapons facilities are built or modernized with the purpose or effect of making a build-up of nuclear forces possible, they circumvent this key principle which is inherent in achieving permanent and sustainable elimination of nuclear weapons.**

### Deployment

Deployment of US nuclear forces should be guided by the twin requirements and objectives of non-use of nuclear weapons and their global elimination pursuant to good faith negotiations.

In general, the less the pattern of deployment conveys US reliance on nuclear weapons, the more the negotiation of reductions and elimination as well as non-proliferation are facilitated and encouraged.

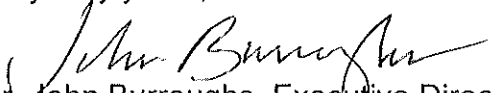
**The requirement of readiness for prompt launch should be dropped within the command and control system. Further, perhaps in coordination with Russia and other nuclear weapon states, changes should be introduced lengthening the timeline in which nuclear forces can physically be launched, for example by demating warheads from missiles.**

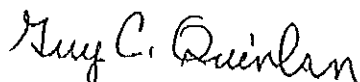
President Obama was clearly right when he stated, in 2008, that maintaining nuclear missiles in a launch on warning posture is a "dangerous relic of the Cold War" which increases the risk of "catastrophic accident or miscalculation." As the International Commission on Nuclear Non-proliferation and Disarmament stated: "The command and control systems of the Cold War years were repeatedly strained by mistakes and false alarms. With more nuclear-armed states now, and more system vulnerabilities, the near miracle of no nuclear exchange cannot continue in perpetuity." The revision process should weigh seriously the observation by Kissinger, Shultz, Nunn and Perry that: "Reliance on launch procedures that deny command authorities sufficient time to make careful and prudent decisions is unnecessary and dangerous in today's environment. Furthermore, developments in cyberwarfare pose new threats that could have disastrous consequences if the command-and-control systems of any nuclear weapons state were compromised by mischievous or hostile hackers. Further steps could be implemented in time, as trust grows in the US-Russian relationship, by introducing mutually agreed and verified physical barriers in the command-and-control sequence."

### Conclusion

**We urge that review of the issues discussed above include participation by White House, Defense, State, and other appropriate legal counsel. We also request the opportunity of a meeting with you at an early date.**

Very truly yours,

  
Dr. John Burroughs, Executive Director



Guy Quinlan, Member, Board of Directors

cc:

Jon Brook Wolfsthal, Special Advisor to the Vice President for Nonproliferation  
Gary Samore, White House Coordinator for Arms Control and Weapons of Mass  
Destruction, Proliferation, and Terrorism  
Rose Gotttemoeller, Acting Under Secretary for Arms Control and International Security  
Kathryn Ruemmler, White House Counsel  
Jeh Charles Johnson, General Counsel, Department of Defense  
Harold Hongju Koh, Legal Adviser, Department of State  
John P. Holdren, Assistant to the President for Science and Technology

## Supporting Publications

"Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty," Charles J. Moxley, Jr., John Burroughs and Jonathan Granoff, Fordham International Law Journal (Vol. 34, 2011)

<http://lcnp.org/wcourt/Fordhamfinaljoint.pdf>

"International humanitarian law and nuclear weapons: irreconcilable differences," Dean Granoff and Jonathan Granoff, Bulletin of the Atomic Scientists (Nov/Dec 2011)

Access at <http://www.gsinstitute.org/gsi/archives/IHL-articles.html>

Vancouver Declaration: Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World (released March 23, 2011)

<http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>

Signatories to the Vancouver Declaration

<http://www.lcnp.org/wcourt/Feb2011VancouverConference/VancouverDeclaration-Signatories-Oct26-2011.pdf>

"Working towards the elimination of nuclear weapons," Resolution of International Red Cross and Red Crescent Movement (November 26, 2011)

<http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>

Nuclear Abolition Forum, Issue No. 1, 2011: International Humanitarian Law and Nuclear Weapons

<http://www.abolitionforum.org/site/wp-content/uploads/2011/10/NAF-First-issue.online-version.pdf>

"The U.S. Nuclear Posture Review and International Law," John Burroughs, Michigan International Lawyer, Summer 2010, pp. 2-8

[http://www.michbar.org/international/pdfs/MIL\\_summer10.pdf](http://www.michbar.org/international/pdfs/MIL_summer10.pdf)

"Local Nuclear War, Global Suffering," Alan Robock and Owen Brian Toon, Scientific American (January 2010)

<http://climate.envsci.rutgers.edu/pdf/RobockToonSciAmJan2010.pdf>

"Catastrophic Climatic Consequences of Nuclear Conflict," Steven Starr, October 2009, Occasional Research Paper for the International Commission on Nuclear Non-proliferation and Disarmament, describing and listing research papers

[http://icnd.org/Documents/Starr\\_Nuclear\\_Winter\\_Oct\\_09.pdf](http://icnd.org/Documents/Starr_Nuclear_Winter_Oct_09.pdf)