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US affiliate



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August 10, 2009

The Honorable Michael Nacht
Assistant Secretary of Defense for Global Strategic Affairs
The Department of Defense
1000 Defense Pentagon
Washington DC 20301-1400

Re: Law and the Nuclear Posture Review

Dear Dr. Nacht:

An arresting recent article in the New York Times reports that US cyber war missions have not been carried out due to concerns about collateral effects violating requirements of the law of armed conflict. (John Markoff and Thom Shanker, "[Halted '03 Iran Plan Illustrates U.S. Fear of Cyberwar Risk](#)," New York Times, August 2, 2009).

Also according to the article: "Fears of ... collateral damage are the heart of the debate as the Obama administration and its Pentagon leadership struggle to develop rules and tactics for carrying out attacks in cyberspace."

And: "The government concerns evoke those at the dawn of the nuclear era, when questions of military effectiveness, legality and morality were raised about radiation spreading to civilians far beyond any zone of combat."

If the US government is concerned about whether cyber attacks can comply with the law of armed conflict, it emphatically should address the compatibility of nuclear attacks with that law. That question should be at the core of the Nuclear Posture Review you are now conducting.

Yet Section 1070 of the FY 2008 National Defense Authorization Act setting out the topics for the NPR includes no reference to the question. Nor did the 2001 and 1994 NPRs address the matter. The 2009 Final Report of the Congressional Commission on the Strategic Posture of the United States is similarly lacking. It is almost as if the question is not broached because nobody wants to know what the answer is. But for a government and a nation committed to the rule of law, such evasion is unacceptable.

Although Congress has not specifically mandated that the NPR deal with the legal dimension, it seems to us imperative that this be done. The administration certainly is within its rights, indeed is required, to reach the question; that responsibility is inherent in the operation of the government. **Legal counsel for Defense, State, and Energy, and other legal counsel as appropriate, should therefore participate in the review.**

The Lawyers Committee on Nuclear Policy is a non-profit association of lawyers and legal scholars that since 1981 has devoted itself to analyzing nuclear weapons policy within the framework of national and international law. We have reached the simple conclusion that **nuclear weapons cannot be used in compliance with the requirements of law, notably those of proportionality and discrimination.** The details of our reasoning are set out in the enclosed March 2008 [statement](#).

Given the longstanding US reliance on expansive doctrines of “deterrence,” this may seem a hard truth. Two points are worth making here. One is that the United States can move its policy in the direction of lawfulness by drastically limiting the circumstances in which use of nuclear weapons might be contemplated and the nature of such use (number, targets, yield, etc.), and by emphasizing the extremely high threshold for any such consideration. That approach should be enforced throughout the government, so that various entities stop issuing provocative statements about US readiness to resort to nuclear weapons in a very wide range of circumstances.

The Strategic Posture report includes some useful observations in this regard. It stresses the value of the “tradition of non-use.” It says there is no need to plan for a US nuclear response to a conventional attack. And by indicating that the United States should reserve the option of a nuclear response to a nuclear or biological attack, it tends to exclude other scenarios like a possible nuclear response to a chemical or cyber attack. It thus goes some way toward a no-first-use posture (though it also, contradictorily, endorses ambiguity). However, a no-first-use policy or other limits in the end do not come to grips with the incompatibility of any use of nuclear weapons with the law. What is required is a policy of non-use, and beyond that, a reality of non-use.

Of course, a world in which the use of nuclear weapons is not possible is a world in which the weapons do not exist. That raises the second point, emphasized by President Obama: the imperative of US leadership in the achievement of a nuclear weapons-free world. That too is required by law: the disarmament obligation contained in the Nuclear Non-Proliferation Treaty. And President Obama has referred to this point. In his July 7 [speech](#) in Moscow, he said:

Without a fundamental change, do any of us truly believe that the next two decades will not bring about the further spread of these nuclear weapons?

That's why America is committed to stopping nuclear proliferation, and ultimately seeking a world without nuclear weapons. **That is consistent with our commitment under the Nuclear Non-Proliferation Treaty.** That is our responsibility as the world's two leading nuclear powers. And while I know this goal won't be met soon, pursuing it provides the legal and moral foundation to prevent the proliferation and eventual use of nuclear weapons. (Emphasis added.)

As you would be aware, NPT Article VI obligates all states 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, and on a treaty on general and complete disarmament.” But also important in this regard is the 1996 Advisory Opinion of the International Court of Justice. **The Court unanimously interpreted Article VI as obligating states to “pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international control.”** The enclosed March 2008 statement contains some observations on the policy implications of the disarmament obligation, among them commencement of negotiations on a convention prohibiting and eliminating nuclear weapons globally. In addition, the enclosed [pres-entation](#) to the 2009 NPT PrepCom outlines legal principles of *good faith* to be observed in meeting the obligation.

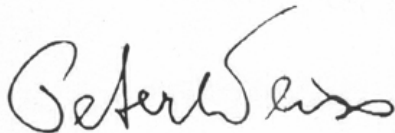
While we are not calling for total unilateral nuclear disarmament by the United States, we are calling for the United States to take the lead in bringing about the nuclear weapons-free world to which the President committed in his April 5 [speech](#) in Prague, and we believe this must be reflected in the NPR.

The NPR Fact Sheet dated August 6, 2009 states that “NPR leadership will seek to become informed by views of nuclear scholars from various think tanks, NGOs and academia.” We welcome this approach and urge that it include face to face discussion. As the leading organization addressing legal aspects of nuclear weapons policy for nearly 30 years, **we therefore request a meeting with you at an early date.**

Sincerely,



Dr. John Burroughs
Executive Director, Lawyers Committee on Nuclear Policy



Peter Weiss
President, Lawyers Committee on Nuclear Policy

cc:

William J. Haynes II, General Counsel, Department of Defense

Harold Hongju Koh, Legal Adviser, Department of State

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Ellen Tauscher, Under Secretary of State for Arms Control and International Security