Nuclear Weapons in International Law and Politics

10th Anniversary of the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons

16 March 2007
Session I

Revisiting the Advisory Opinion: Substantive Law

PROFESSOR GILLIAN TRIGGS: Good afternoon everybody. I’m Gillian Triggs, Director of the British Institute and I’m really delighted to welcome you all this afternoon, this glorious spring afternoon when I suspect were it not for the interesting topic we would prefer to be in the sunshine, but we are delighted that you are able to be here and to take part in this symposium. The stimulant for our afternoon on nuclear weapons in international law and politics was in fact the 10th anniversary of the advisory opinion of the International Court of Justice in the legality of nuclear weapons case that I am sure you are all familiar with. This is perhaps not necessarily a case for celebration but it certainly is one for reflection on the contribution of that opinion to contemporary issues.

The predominant concerns of the International Court 10 years ago were with self-defence and the limits perceived, the lacuna in the law that the majority of the Court was not really prepared to fill. The ICJ could not then really have understood the kinds of threats that we see 10 years later. Not only the problem of States’ withdrawal from the NPT [Nuclear Non-Proliferation Treaty] itself but also the concern that non-State actors will develop a nuclear capacity to explode bombs, a concern obviously heightened by the rise of international and national terrorism. As we speak, of course, the Security Council is looking at strengthening the current economic sanctions against Iran and all consequences that will doubtless flow from that, but we are also concerned about environmental and humanitarian consequences from an explosion of any kind, peaceful or otherwise.

When planning this event we were also thinking not only about the ICJ advisory opinion and earlier matters, but we were also taking into account the lecture given by Dr Hans Blix who came to the Institute last year and gave a major public address, talking about the role of the IAEA [International Atomic Energy Agency] and the effect of the regime and inspection system, and he emphasized in particular the importance of ratifying the comprehensive Test-Ban Treaty and talked about the proliferation security initiative and interdiction on the high seas; all fairly important developments. Well today we are very pleased indeed to welcome our speakers, but perhaps you'll excuse me if I particularly welcome Sir Elihu Lauterpacht and Lady Lauterpacht who are here today.

Some of our speakers, however, have been struck with some illness. Gerry Simpson, Matthew Happold and Fiona Simpson are not able to be here at the last minute but they do send their apologies and we’ve slightly rearranged the programme so that we will have two speakers for each of the three sessions. Perhaps I might at this early stage give particular thanks to the two people who have been responsible for putting this programme together. One, Dr Dan Joyner, whom you will hear from later today, and also Dr Aphrodite Smagadi who is the Dorset Fellow in international law here at the Institute. So with those very few remarks, I hand over to Sir Michael Wood whom you also will know was formally the legal advisor to the Foreign Commonwealth Office and is now a barrister at 20 Essex Street Chambers and he will Chair this session. Thank you Michael.

SIR MICHAEL WOOD: Thank you very much Gillian. It's a great pleasure to Chair this first session. Without more ado I will introduce the two speakers, Sir Eli needs no introduction. He was certainly one of the most inspiring lecturers and supervisors during my time in Cambridge. He’s been counsel in many cases, especially before the International Court and he also has extensive judicial experience. To highlight just two matters, as an ad-hoc judge on the International Court and currently as President of the Eritrea/Ethiopia Boundary Commission. Sir Eli is going to set the scene for us by addressing us on the subject of the Nuclear Tests cases, which do introduce many of the feelings of today’s meeting. Then the second speaker in this session will be Bob Cryer. The most important thing to say about him, I think, is that he’s just about to move to the University of Birmingham where he will
be Professor of International and Criminal Law, and I'm told the word 'and' is very important in this
title. I should also mention that he is just about to publish with Elizabeth Wilmshurst and others what is
going to be the best book on international criminal law. So without more ado I would like to hand over
to Sir Eli for the first address of this session.

PROFESSOR SIR ELIHU LAUTERPACHT: Thank you very much Michael. It's always a pleasure to return to
the British Institute and to see so many friends here. Whether they will share that pleasure is a
different question. In the words which the Institute has used to describe this meeting, we are here to
discuss the regulation of the use of nuclear weapons by reference to contemporary international law.
The heading given to this opening session is 'Revisiting the Advisory Opinion: Substantive Law'. In
relation to my own contribution, specific reference is made to the 1974 Nuclear Tests cases brought
against France by Australia and New Zealand and the 1994 request by New Zealand for an
examination of the 1974 judgment. Of course these were contentious cases not advisory opinions.
Nonetheless, they still have some relevance as part of the history and in providing a convenient peg
on which to hang this brief introduction. However, we should not expect to find in them more than a
limited contribution to the debate on the law relating to the production, stockpiling and use of nuclear
weapons. This subject has generated a vast literature which I will not for a moment pretend that I
have properly penetrated, so I must at the outset apologize for the sketchiness of what I am about to
say.

It is indeed necessary at the very beginning of this meeting to emphasize that discussion of the
legality of the prohibition and use of nuclear weapons cannot be limited to a discussion of the use of
nuclear bombs. Bombs, of course, are the largest nuclear weapons and are potentially the most lethal
of such weapons, but it is important to bear in mind such distinctions as those between tactical and
strategic bombs, between so-called dirty bombs and so-called clean ones, and between closely
guided missiles and ones which fall more freely. A discussion that fails to relate to the specific
character of the particular weapon which is its subject and the conditions in which its use is
contemplated is bound to be superficial and to some extent misleading. A notable exception, however,
is the attention given to it by Judge Weeramantry in his remarkable dissenting opinion to the 1996
advisory opinion, of which more later.

Nonetheless, significant judicial consideration and much of the remainder of the discussion has
hitherto been limited to bombs or missiles in general. That being said we can turn to the two Nuclear
Test cases of 1973/74. The judgments in both were practically identical and it is therefore convenient
to refer only to the Australian initiative. It arose from the fact that France had been conducting
atmospheric nuclear tests on the Island of Mururoa in French Polynesia in the Pacific. Australia
contended that these tests had lead to the deposit of radioactive fallout in Australian territory as well
as involving substantial infringement of the freedom of the seas by reason of the closure to shipping of
large areas of the Pacific Ocean.

When the Whitlam Government—a labour government—was elected in Australia in 1972, Australia
decided to challenge the French actions and to seek from the International Court a declaration that
the continuation of similar tests would be contrary to international law, as well as an order that no
more should be carried out—a declaration and an order. The jurisdiction of the Court was invoked on
the basis both of the General Act for the Pacific Settlement of Disputes of 1928 and Article 36.2 of the
Statute of the Court, the so-called optional clause. France did not appear in the proceedings but
issued a document that made it plain that it objected both to the jurisdiction of the Court and to the
admissibility of the case. The issues were evidently divisive of the Court. I shall limit myself to those
bearing on the legality of the use of nuclear weapons. So I omit any reference to the Court’s decision
to indicate interim measures of protection by a vote of eight to six, which it did without prejudice to the
significant jurisdictional issues raised by the Australian invocation of the General Act and the optional
clause. An application by Fiji for permission to intervene was also held to presuppose that the Court
had jurisdiction, so consideration of that was deferred until the Court had decided on the first question.
The application was in due course dismissed.

Consideration of the legality of the use of nuclear weapons did not enter into the Court’s decision on
either interim measures or in the next, and what turned out to be the final, phase of the case. The
Court heard extensive argument by Australia on the question of jurisdiction but disposed of the matter
in a rather unexpected manner. During the later stages of Australia’s jurisdictional argument, the
President of France made a public declaration which was echoed by other high French officials to the
effect that France had reached a stage in the development of its nuclear defence programme which enabled it to pass on to the stage of underground explosions as soon as the series of tests planned for that summer was completed. The Court treated these statements as a public and unconditional statement of the intention of France to cease testing in the atmosphere. The Court then determined the status and scope of those declarations in a paragraph which has been widely welcomed as having broad general utility in international law, and I quote:

[A]n undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. Interested States may take cognisance of unilateral declarations and have confidence in them and are entitled to require that the obligation thus created be respected.

The Court concluded that as a matter of law, the French statements constituted an engagement of the State addressed to the international community as a whole. On this basis the Court reached a decision by a majority of nine to six that the Australian objective had in effect been accomplished by the French undertaking to desist from further atmospheric testing. The Court was therefore not called upon to give a decision on the Australian application, not even on the issue of jurisdiction. The Court added one important caveat. If the basis of the judgment was subsequently to be affected, and that basis was of course the French declaration that it was going to desist from further atmospheric tests, if the basis of the judgment were subsequently to be affected, Australia or New Zealand could request an examination of the situation in accordance with the provisions of the statute.

Now this liberty was invoked by New Zealand some 10 years later, but even though the Court said nothing in its judgment about the legality of the use of nuclear weapons, the case remains pertinent because a number of judges, in separate or dissenting opinions, expressed themselves in terms indicating that they did not consider the production and testing of such weapons to be illegal. Thus Judge Forster saw in the French statement nothing that involved, as he said, the least abandonment of their absolute sovereignty, which France, like any other State, possesses in the domain of national defence. He was saying, in effect, that the conduct of France was not justiciable. The French judge, Judge Gros, reached the same conclusion but by a different route. He did not say that the claim by Australia was not justiciable, that is outside legal review. He relied, instead, on a fact that for a score of years prior to 1973 Australia had not invoked the illegality of the atmospheric tests that had been carried out by the United Kingdom and the United States, but rather had made available various forms of aid and support. He said active participation in repeated atmospheric tests over several years in itself constitutes admission that such tests were in accordance with the rules of international law. He rejected the excuse that in those earlier days, and he was quoting from argument, that in those earlier days awareness of the danger of fallout had not yet reached the acute stage, and he could find no proof that a change in the law from non-prohibition to prohibition had occurred between 1963, the date of the earlier tests, and 1972. He did not see in the 1963 treaty banning atmospheric tests any support for the view that nuclear testing was otherwise illegal. Similarly, he saw in the provision of the 1974 treaty between the US and the Soviet Union on the limitation of underground nuclear testing, which acknowledges the right of each party to withdraw from the treaty if extraordinary events jeopardize its supreme interests, a further acknowledgement of the legality of such tests. In short, the conflict between Australia and France was, as he saw it, a clash of political interests. This, he considered, was but one element inseparable from the whole range of problems to which the existence of nuclear weapons gives rise. There is much else in the speech of Judge Gros dealing with important legal points but they do not touch on the legality of nuclear weapons and need not detain us now.

The main line of the opinion of Judge Gros was followed by Judge Petren, the Swedish judge. He started from the position that the admissibility of the claim was dependent on whether there existed a rule of customary international law prohibiting States from carrying out atmospheric tests. Let me make that a bit plainer. For the case to be held to be inadmissible, he felt that it was necessary to show that there was a rule of international law prohibiting nuclear tests. He found that no such prohibitive rule existed. In part this was because a number of States had also conducted atmospheric nuclear tests thus proving that, as he put it, their governments have not been of the opinion that customary international law forbade atmospheric nuclear tests. Moreover, the fact that the 1963 Test Ban Treaty contained a provision permitting a party to denounce it, showed that the parties were still of the opinion that customary international law did not prohibit atmospheric nuclear testing. Judge Petren also attached significance to the fact that the many States on whose territory radioactive fallout must have occurred had not protested against the tests. The many resolutions passed by the General
Assembly of the United Nations could not be regarded as the equivalent of legal protests. They merely indicated the existence of a strong current of opinion in favour of prohibiting atmospheric nuclear tests and Judge Ignacio-Pinto, though agreeing with the Court’s recognition that the Australian application no longer has any object, added his own significant rider, namely that for him the case had never had any object and ought to have been declared inadmissible in limine litis and removed from the list. So we must place him amongst those who did not perceive any objection, per se, to nuclear tests. For him this was a non-justiciable case.

For their part, the four signatories of the joint dissenting opinion, Judges Onyeama, Dillard, Arechega and Waldock, while not entering into the substance of the question whether an allegation that the nuclear tests was justiciable, certainly did not rally to the point of view advanced by Judge Gros, nor did they agree with the Court that the conclusion of the case had become without object. They took the view, as they put it, that it is difficult to imagine a dispute which in its subject-matter and in its formulation is more clearly a legal dispute than the one submitted to the Court by Australia. And the same may be said of the dissenting opinion of Judge Dicastro, who took the view that there was no law relevant to the determination of the issues raised by Australia. So the slender contribution made up to that point, that is 1974, by the International Court to the question of a legality of the use of nuclear weapons may be summarized thus. Only three of the judges were prepared to say anything on the matter, Judges Forster, Gros and Petren. Of the remaining nine, six supported the approach adopted in the majority judgment, thus taking the easy way out.

At the time there was much surprise at the Court’s conclusion, in part, and because of the fact, that the point on which the Court decided the case had not been argued by either party and the Court had not given the parties any opportunity to comment on the approach which it had itself generated. But there is reason to believe that the President, Manfred Lachs from Poland, took this route because he had formed the view that if the substantive issues raised by the Australian request, namely the effect of the tests on the territory of the State and on the freedom of the seas, had actually come to a vote, the majority of the Court would have declared that the conduct of nuclear tests was not unlawful or did not give rise to liability. A conclusion which in his view would have been a major set back to denuclearization in the world.

Following the 1974 judgment, the legality of nuclear tests found no place in the Court's docket until 1995. In that year, New Zealand invoked the terms of paragraph 63 of the 1974 judgment to ask the Court to examine the situation arising from the risk of radioactive contamination from the continuance of underground testing by France at Mururoa. The New Zealand contention was the island was about to disintegrate under the impact of the repeated tests and that there would be therefore a significant escape of radiation and other material into the atmosphere. The Court dismissed New Zealand's application on the ground that the original 1974 case had related only to atmospheric testing and did not involve underground testing, thus the Court did not become involved in any discussion of the substantive law relating to nuclear testing.

The Court, by implication, rejected the relevance and effect of New Zealand's contention that France was under an obligation to conduct an environmental impact assessment and to act in accordance with the precautionary principles. The only relevant substantive observation of the Court was the statement that the present order is without prejudice to the obligations of States to respect and protect a natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment.

It is to the extensive dissenting opinion of Judge Weeramantry that we must look for any contribution to the substantive law. He devoted some eight pages to an exposition on what he called the relevant legal principles of which I can do no more than briefly summarize the principal elements. First, he applied the intertemporal principle. In his words, if the basic assumption of the protection of a party's rights in 1974 is undermined by knowledge available in 1995, and if the terms of the protecting judgment make it's reconsideration available to a party complaining that its basis has been undermined, this Court, when approached on the question that the basis of the judgment has been undermined, must apply to that question the knowledge that it has today and not the knowledge of 1974. Secondly, he restated the principle of intergenerational rights, the concept of the rights of unborn posterity. A consideration which he said was too serious to be dismissed as lacking in importance merely because there is no precedent on which it rests. Thirdly, he spoke of the
precautionary principle, quoting from, inter alia, the 1980 Bergen principles, as follows: ‘Environment measures must anticipate, prevent and attack the causes of environmental degradation’.

Fourthly, he recalled the need for environment impact assessments. When the matter is brought before the Court, he said, which raises serious environmental issues of global importance and a prima facie case is made out of the possibility of environmental damage, the Court is entitled to take into account the environment impact assessment principle in determining its preliminary approach. Fifthly, Judge Weeramantry emphasized the illegality of introducing radioactive waste into the marine environment. The marine environment, he said, belongs to all and any introduction of radioactive waste into one’s territorial waters must necessarily raise the danger of its spread into the wider ocean spaces that belong to all. And lastly, he recalled the basic principle that appears in principle 2 of the 1992 Rio Declaration on the environment that no nation is entitled by its own activities to cause damage to the environment of any other nation. The Judge concluded his dissenting opinion with an expression of regret that the Court has not availed itself of the opportunities to enquire more fully into this matter and the making a contribution to some of the seminal principles of the evolving corpus of international environmental law. These views were considerably elaborated in Judge Weeramantry’s massive and magisterial dissent in the 1996 advisory opinion to which I shall return briefly in a while.

Judge Koroma also registered dissent from the narrow approach adopted by the Court. In his view the evidence, though not conclusive, is sufficient to show that a risk of radioactive contamination of the marine environment may be brought about as a result of the resumed tests. The Court should have taken cognisance of the legal trend prohibiting nuclear testing with radioactive effect and it should have proceeded to an examination of the situation within the framework of the 1972 Nuclear Tests case. The Court should have decided that New Zealand’s request falls within the provisions of the 1974 judgment and should have taken action on it. In short, the 1974 judgment and the 1995 order each provide us with a clear illustration of two different judicial approaches.

The 1974 majority sought to evade responsibility for a determination of the legality of nuclear testing while three judges took a clear position supporting the legality of nuclear testing. The 1995 majority again took a narrow approach to the issue with only Judges Weeramantry and Koroma coming out clearly against the legality of nuclear testing. The next time the issue arose was in the 1996 request for an advisory opinion on the legality of a threat or use of nuclear weapons. In using the 10th anniversary of the delivery of this opinion as the occasion for the present meeting, we should not think of ourselves as celebrating the event. Others here will no doubt today be examining it in detail. That we should not forget it is reasonable. To praise it would be regrettable. It was not a happy event. Perhaps the blame should lie with those States in the General Assembly who voted in favour of seeking the opinion.

The results reached by the Court were far from impressive. It is true that to four questions the Court gave a unanimous reply: Question A, there is neither in customary nor conventional international law any specific authorization of the threat or use of nuclear weapons. Question C, a threat or use of force by means of nuclear weapons that is contrary to Article 2.4 of the Charter and that fails to meet all the requirement of Article 51 is unlawful. Question D, a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons. Question F, there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament with its aspect under strict and effective international control.

Now these answers are not surprising. They could hardly have been different and so there is nothing to be surprised about in the fact that the Court was able unanimously to give them. But when it came to more controversial issues, the Court was divided. On the answer to question A, the Court divided 11 to three in producing this answer. There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. So we have unanimity on the first part of the issue. Is there any customary or conventional international, any specific authorization of the threat or use of nuclear weapons? And the court said ‘no there is no specific authorization’.

And then when it came to the question of whether there is a prohibition it said ‘there is no customary or conventional international law prohibition of a threat or use of nuclear weapons as such’. Only the
most emphatic of the anti-nuclear judges, Judges Shahabuddeen, Weeramantry and Koroma voted against this answer on the basis that there is already in customary international law a comprehensive and universal prohibition of a threat or use of nuclear weapons.

The most difficult answer for the Court to reach was question E, by seven votes to seven, with the President casting his vote twice. ‘It follows’, said the answer, ‘from the above-mentioned requirements that the 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’. Then it continues:

However, in view of the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake.

So what does this tell us? Yes the use of nuclear weapons would generally be unlawful but would this answer apply to tactical nuclear weapons with limited injurious or destructive effect compared to some non-nuclear weapons with much greater injurious or destructive potential? And what else is covered by the weasel word generally? This and other proforma limitations upon the crucial words in the Court’s answer to question E are compellingly identified by Judge Higgins in her penetrating dissenting opinion. And then there is the qualification. The Court cannot say that the use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence in which the very survival of a State would be at stake. I hope that I’m not being too simplistic in thinking that if the very survival of a State is at stake and the use of a nuclear weapon could be seen as likely to save that State, it would be quite unreasonable to expect any national leader to forgo the use of the weapon.

I’m bound to say that there is something distinctly artificial, not about the quality of the reasoning of the six judges with whom the President exercised his casting vote, but about the very fact that the international community should think that asking such a question to the Court could possibly produce a useful or controlling guide to State conduct in the extreme circumstances identified in the opinion of the Court. The ultimate solution to the problem of the use of nuclear weapons lies in the conclusion of further treaties, both multilateral and bilateral. Those already concluded are too numerous to be cited here but among notable multilateral conventions is the one on the prohibition on the use of nuclear weapons which simply bans the use or the threat to use nuclear weapons under any circumstances and amongst the bilateral treaties, maybe mention the one concluded in 1994 between the United Kingdom and Russia to de-target their strategic nuclear missiles and the agreement between Russia and China not to target strategic nuclear weapons against each other, nor to use force against each other and in particular not to be the first to use nuclear weapons against the other.

At the same time we cannot be other than impressed by the cogency and detail of the considerations set forth in so comprehensive a way by Judges Weeramantry and Koroma in their dissenting opinions in the 1996 proceedings. The opinion of Judge Weeramantry is a veritable encyclopaedia of the argument in favour of finding that customary international law already contains an absolute prohibition on all use of nuclear weapons. But even if we cannot take the final step advocated by Judge Weeramantry, namely the finding that the use of nuclear weapons is already absolutely prohibited by customary international law, we must recognize that whatever degree of limitation customary international law or treaty may impose on recourse to nuclear weapons, there will always remain an escapable difficulty. It is that the State directly concerned will not necessarily comply with the prohibition. The answer lies ultimately in the complete new planning of the use of nuclear weapons in the destruction of those that exist and the prohibition of any further manufacture. Simple debate about whether their existence or use is lawful under customary international law hardly advances matters. At this point I should stop with an apology to those who follow me if I have trespassed on the areas which they intend to cover. The lines between our respective areas of discussion are rather imprecise.

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I must also apologize for the fact that due to indisposition I am unable to remain for the rest of what promises to be a most interesting discussion. Thank you very much.

SIR MICHAEL WOOD: Well Sir Eli, if I can just say a word in thanks to you for what was an excellent introduction to the rest of our meeting; I think you’ve given a brilliant analysis of these difficult cases and some very interesting insights into them. I particularly admire the concision with which you describe Judge Weeramantry’s opinions. I noted that you suggested that perhaps the blame lies with
those members of the General Assembly who sought the opinion. My only contribution to these events was to try and persuade members of the non-aligned in New York not to seek an opinion, and that involved buying gin and tonics in the delegates lounge and I was successful for one year but the next year they did seek the opinion so it was not entirely successful. You didn’t use the word non-liquet but I do wonder whether what we were brought up to believe could not happen in international law did happen in a sense in the 1996 opinion. In any event, I am sorry that you have to leave us at this point but we fully understand and we are particularly grateful to you, Sir, for coming and making the effort to come to this meeting. Thank you very much indeed.

PROFESSOR SIR ELIHU LAUTERPACHT: Thank you for you kind words Michael. I didn’t refer to non-liquet because as a concept it has a much broader scope than a question of the legality of nuclear weapons but I ought to tell you, and I’m sure most of you know anyway, that Judge Higgins makes a very powerful analysis of the approach of the Court and identifies it as a real case of non-liquet and condemns it for that, but forgive me I must leave you now. I hope you have a very interesting session. I am very sad to miss the rest of the discussion because somebody might have said something approving of what I have said.

SIR MICHAEL WOOD: Well after that introduction to our work we’ll hand over to Bob. There is an advantage with having one or two speakers having dropped out because of ill health; I think, unlike Sir Eli who came despite his ill health, it does mean that we will have time for a proper and a good discussion at the end of each session, I hope, so Bob you don’t have to speak for the next hour!

PROFESSOR ROBERT CRYER: Thank you very much for your kind introduction, much appreciated, and the advert was particularly appreciated.

Well, there are a number of ways, I think, of realizing that time and life is sort of passing you by and one of the ways of doing this, certainly all of those of you who’ve ever been involved in undergraduate admissions will know, is to look at the dates of birth of the cohort of incoming undergraduates. I think next year that might hit 1990. And the second, is making any form of cultural reference to the aforementioned cohort of undergraduates. I first made this mistake as a PhD student thinking I was still reasonably in touch with things and I was met with a resounding silence and resolved never to do it again. What’s more concerning about these things also is referring to international legal events to undergraduates, in particular to those who don’t remember the Yugoslav war of dissolution, for whom the Rwandan genocide has to be explained.

For those of us who were at the Roman conference creating the International Criminal Court, the fact that that is 10 years ago next year is also a really a problematic way of sort of looking back and thinking what have I done in the meantime? More importantly put, what haven’t I done? But, on the other hand, 11 years ago we got the nuclear weapons opinion. I think it does allow us, looking back with a little bit of historical perspective, to get a broader view of the case. I don’t think we have to go as far as Telford Taylor did in waiting to decide to get a broader perspective on the Nuremberg Trials, which was wait 45 years but I think it does help us to have a little bit of perspective on this and to see, looking back, what could have been done.

What I am going to talk about really is obviously the humanitarian law aspects of the case, but in particular the critiques that have been made of the Court: that it could have gone further, that it could have gone further than, say, well we’re not quite sure and, say, actually there is a prohibition on the use of nuclear weapons, and I have to say I’m sceptical. I don’t think it could have gone further, personally. But let’s have a look again at, Sir Eli Lauterpacht mentioned it earlier on, the traditional thing to quote is paragraph 2E. This paragraph got through by seven to seven, but of course because President Bedjaoui voted for it, it went through. It states, of course, that the threat or use of nuclear weapons would generally be contrary to the rules of international law, and in particular principles and rules of humanitarian law. However, in view of the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitively whether a threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of the State would be at stake. Now I agree entirely with Professor Sir Lauterpacht that ‘generally’ in that phrase is a weasel word. It can mean whatever it needs to mean. Usually, often, always—well take your pick. And that of course is how we managed to get six other people to sign on to it, because you’re not always quite sure what it did mean.
I think more worrying, in some ways, is the final part of paragraph 2E, in which they can't conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake. And again I think Judge Higgins is extremely good in discussing this, saying if this means that there is an opt-out to a humanitarian law where self-defence is an issue, that is very problematic and we are back really to the old-fashioned just war state and humanitarian law not applying in the same way to the aggressor—something which was tried briefly in a couple of cases after the Second World War and quite rightly, I think, rejected absolutely.

Let's look at how they actually got to this place. Well it began by discussing the effects of nuclear weapons. Now of course Weeramantry engaged in huge, huge discussion of the description of the effects of nuclear weapons. It's harrowing stuff and actually if you start reading the opinion where they begin to discuss the effects of nuclear weapons you might get your hopes up that they are going to say there's got to be a ban. So let's have a look at what they say in paragraph 35: ‘By their very nature, nuclear weapons as they exist today release not only immense quantities of heat and energy but also powerful and prolonged radiation’. So far, so basically true: ‘According to the material before the Court the first two courses of damage are vastly more powerful than the damage caused by other weapons’. Well the phenomenon of radiation is said to be peculiar to nuclear weapons. Again so far, roughly speaking, so factual. These characteristics render the nuclear weapon potentially catastrophic: ‘The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilizations and the entire ecosystem of the planet’. If you were taking bets at this point you might get reasonably bad odds on them saying that there's going to be a prohibition. And if we carry on, the bookmaker's going to get less and less conducive to our bet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionising radiation has a potential to damage the future environment, food and marine ecosystem, add to it all genetic defects and it will suit future generations. In consequence, in order to correctly apply them to the present case the Charter law and the law of armed conflict, in particular humanitarian law, it is imperative for the Court to take into account the characteristics of nuclear weapons and in particular their destructive capacity, their capacity to cause untold human suffering and their ability to cause damage to generations to come.

That's pretty strong stuff. You would be expecting from here something along the lines of 'never'.

However, when they actually come to discuss the implication of humanitarian law to nuclear weapons it's a bit more of a damp squib to be honest. And actually what for a large part they do is follow what happened a decade before, which was Frits Kalshoven's discussion of the legality or otherwise of nuclear weapons in arms, armaments and international law, which was a course he gave at the Hague Academy with one qualifier, to which we'll come back.

So when they are looking at poison weapons they follow Kalshoven practically verbatim, although not quite by saying that the primary effect of nuclear weapons is not actually poison, it's not radiation, it's blast. And this in itself, I think, shows again the truth of what Professor Sir Lauterpacht said, which was asking the question in the abstract leads to a bad answer. Dirty bombs, where the intention and primary effect is meant to be the radiation, might be caught by this. Uses where the blast is the issue would not. So by asking the question in the abstract they made the answer more problematic.

But furthermore, having looked and found the gas protocol doesn't prohibit them; general prohibition of poison weapons doesn't prohibit nuclear weapons, they go back to the general principles of humanitarian law and they say the current legal principles constituting the fabric of humanitarian law provide the following: States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civil and military targets. It's also prohibited to cause unnecessary suffering to combatants. Well fair enough, that's pretty much the basic principles—distinction, unnecessary suffering. You are not going to get too much criticism there and so they said in conformity with the above-mentioned principles, humanitarian law at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants.
Well again pretty much a hornbook explanation of the principles of humanitarian laws as they apply, but again the issue is how are they going to apply to particular weapons? I think again what Professor Sir Lauterpacht said is right; if we are looking at tactical nuclear weapons or strategic nuclear weapons the answers we are going to give to these questions are very, very different, and one of the things about Weeramantry’s opinion, he concentrates on mega tons of nuclear weapons and that’s always going to skew the answer.

However, the nuclear weapons States had argued the possibility of small-scale high-seas-based uses of nuclear depths charges against nuclear submarines. The Court really passes over this. And then, having expressed itself in the abstract about the principles and not really delved into the facts, the Court’s reasoning all of a sudden turns 90 degrees and rather than talking about the law it simply sets out the opinions of the parties. It says, well, how are they going to apply, well the United Kingdom thinks this, the Solomon Islands thinks this, the United States thinks this, Fiji thinks this, Australia thinks this, New Zealand thinks this. France thinks this and doesn’t actually tell us whether it agrees with them or not, until finally what we get in paragraph 95 is the Court cannot make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to an inherent and total incompatibility with the law applicable in armed conflict. In view of the unique characteristics of nuclear weapons to which the Court referred above, the use of such weapons in fact seems scarcely reconcilable with respect to such requirements. Nonetheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

So again we are back to the problem of the abstract question not dealing with specific weapons because they have to look at it in any circumstance. Well the big problem here is, as I said, they don't actually reason this conclusion and Judge Higgins excoriates them for this in the separate opinion. In some ways we perhaps shouldn’t be surprised at this reasoning. I think the reason for this is a simple and practical one. The reason is when the drafting committee are creating the opinion, they have to get judges to sign on to it. So anything controversial in the reasoning is removed and so in the end all you get is essentially an unreasoned conclusion. Well this is going to be a problem because, I don’t want to go back to 38.1.D, but will anyway. Cases for advisory opinions are not in themselves binding. They only achieve the value they have through persuasive force and the level and quality of the reasoning. So if that's not there, the Court is already hobbling the acceptability of its conclusion to States, and in particular sceptical States, and in this example of course its going to be nuclear weapons States who will seize on any weakness in the reasoning to say, well the case is all wrong.

But in the end what do I think of the conclusion of the ICJ? In all honesty I think it went a little too far. I think the problem with it is, however, the simple one that Professor Sir Lauterpacht identified. The question they were asked to answer was abstract and it always meant that the answer was going to be problematic. I think Kalshoven, whose course, as I say, on most of the issues they simply agree with, probably had it right in the end I think. Judge Higgins had it. There may be examples that are possibly lawful. The vast majority no, but there may still be possible examples. And when Kalshoven says this, he adds a little caveat and I think it's worth mentioning. He says:

[T]o the extent that this conclusion might lead to a feeling of frustration at the law of arms conflict, it may be useful to recall that like the rest of international law the law of arms conflict is a reflection of and finds limits in the perceived interests and political will of States and not the idealistic notions of kind souls.

Somewhat similar to the very famous statement of Thomas Batty in, I think, 1910, that in spite of modern theories it is generally agreed that international law still has something to do with States.

But to return to the idea of these kindly souls, this brings me on in particular to the dissenters and the way in which the dissenters try to argue that there was this pre-existing complete prohibition of nuclear weapons. The two mains ones I think on this Judge Weeramantry mentions but also Judge Shahabuddeen. My sense of their reasoning on this is that it tracked pretty closely with each other so I’ll concentrate on Shahabuddeen. Not least because I have great respect for Judge Shahabuddeen because, as anyone who enjoys a bit of judicial blood sport will know, there was some great work in Hadzhasanovic where the majority were really rather rude about Judge Shahabuddeen and his fellow
dissentient, to which the final comment of his dissenting opinion was: ‘I apologize if the constraints of judicial discourse mean that my points have not come across as strongly as they might. I am, however, very impressed by the confidence which the majority have in their own opinions’, which I think was a nice way of saying some of you are new to this judging game. I am not and I know how to comport myself.

But let’s talk a little bit about how they got to this conclusion and part of it is linked to where Weeramantry and Shahabuddeen talk about the effects. They have an absolutely understandable moral revulsion for the effect of nuclear weapons and they want to bring this into their opinions but Shahabuddeen and Weeramantry, these guys are too clever to simply say ‘ahh morals and law are the same’. They are not going to go down the natural law route. Rather, like Judge Powell said back in the Tokyo trial, natural law still has a whiff of the witches cauldron. So they didn’t want to go down to that particular, well they didn’t want to talk about natural law and the law of nature and all that lovely stuff so they needed to positivize their argument somehow. And how are they going to positivize their argument? It’s the Martens clause because the Martens clause was also mentioned by the majority. They said in cases not covered by this protocol or by any international agreements, civilians and combatants remain under the protection of law authorities for principles of international law derived from established custom from the principles of humanity and from the dictates of public conscience.

And so what Shahabuddeen says about this is the Martens clause is authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of a standard implied by these principles of international law to be ascertained with the likes of changing conditions, inclusive of the change to the means and methods of warfare and the outlook at tolerance levels of the international community.

And wherever I hear the words international community, the Colin Warbrick in the back of my head starts shouting. But again Shahabuddeen is a clever man. He knows you can’t just say ‘I am public conscience, I am humanity’; he accepts that it is going to be difficult to determine what the public conscience is. But then he comes to his conclusion that the Court could not say in advance what would be the exact effect of any particular use of nuclear weapons. Examples of possible situations relate to proportionality, the duty to discriminate between combatants and civilians, escalation of conflict, neutrality, genocide and the environment. The Court could, however, find, and find as a fact, that the use of nuclear weapons involves real risks in each of these areas. It could then look to the public conscience for its view as to whether, in the light of those risks, the use of such weapons is acceptable in any circumstances. Examples of possible situations relate to proportionality, the duty to discriminate between combatants and civilians, escalation of conflict, neutrality, genocide and the environment. The Court could, however, find, and find as a fact, that the use of nuclear weapons involves real risks in each of these areas. It could then look to the public conscience for its view as to whether, in the light of those risks, the use of such weapons is acceptable in any circumstances; the view of the public conscience could in turn be found to be that, in the light of those risks, such use is unacceptable in all circumstances. The public conscience thus has a mediating role through which it enjoys a latitude of evaluation not available to the Court.

So now the empiricist in me is expecting something long, something about what the public conscience is, whether it’s the private mind of international society, the way Phillip Allot would say, or the public conscience of sub-societies. However, what do we get? We get:

In the result, on the basis of what the Court finds to be the state of the public conscience, it will be able to say whether the Martens Clause operates to prohibit the use of nuclear weapons in all circumstances. On the available material, it would be open to the Court to hold that the Clause operates to impose such a prohibition.

That is the reasoning on the point. It’s difficult to understand what the public conscience is so we have to be very careful about it, but it’s this. We have to again remember who this advisory opinion is looking to persuade. It is looking to persuade sceptical States. It is looking to persuade States who have nuclear weapons primarily that it’s unlawful. You’ve got to do more than that. And why do we know this? Well that’s why I’ve called it then and now because something has happened since which passes some light on it.

There is a case in which there was an attempt by the majority of the International Court to use the Martens clause in a similar way in relation to reprisals against the civilian population and this was in 2000. It was the ICTY and the Kupreskic case. Now in 2000 the ICTY is buoyed up. It started to become reasonably effective. Its initial seminal opinion written by Antonio Cassese in 1995 on the Tadić jurisdictional appeal, has actually appealed to States quite a lot. The idea is that this customary humanitarian law is applicable in non-international armed conflicts. A lot of States have said ‘yeah that sounds pretty good’. They get together at Rome to negotiate the Rome Statutory International
Criminal Court and Tadić all of a sudden is an important thing. They say Tadić says this about the law in non-international armed conflict so that's what, roughly speaking, gets in the Rome Statute. The difference being the ICTY in Tadić, Cassese’s opinion in Tadić, was well argued. It was built to be persuasive and essentially it managed to persuade States.

The ICTY decides, however, to try its hand again in 2000 in relation to the law on reprisals and so Professor Cassese who was presiding in the case decided to go down the Martens route to argue that all reprisals against, well, essentially bombing cities, bombing civilians, are unlawful under current international law and they are unlawful, owing to the operation, roughly speaking, of the Martens clause: ‘This clause may not be taken to mean that the principles of humanity and the dictates of public conscience have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice’. It starts very cautiously. They are not principles of law. States don’t do that. States don’t buy that they are principles of law.

However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise. What do we mean by rigorous? Does it mean that we don’t like them because they allow reprisals? I think it comes close to that. You see in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion this would entail the prescriptions of Articles 57 and 58 and the corresponding customary rules must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians. This sounds dangerously close to morals. It’s saying we have to at all times make humanitarian law more and more rigorous in respect of whether or not States buy it. And so this is where Cassese moves on. He says:

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\text{[T]his however is an area where opinio iuris sive necessitatis may play a much greater role than usual as a result of the aforementioned Martens Clause. In the light of the way States and Courts have influenced it, this clause clearly shows that principles of humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of opinio necessitatis, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.}\]

So, roughly speaking, the Martens Clause, according to Cassese, has been adopted by courts as meaning you can have a customary rule even where essentially you don’t have any State practice and even where State-based opinio iuris is pretty sceptical on the point. Well the simple answer to that is that’s not how courts have dealt with this. Shahabuddeen and Weeramantry were dissenting. And we’re also thrown back to some of the problems which determined the public conscience.

I think Theodore Meron is right about this. It sounds nice in the abstract but we have to think now what or who is public conscience? Who do we call? What if public conscience is Rush Limbaugh, Ann Coulter or John Bolton? Do we want public conscience in if that’s what public conscience is? If not, what do we do? Well we go to the aristocratic public conscience of right-thinking people such as me. I of course am the law because I am public conscience. Well I’m not sure I’d want to live in a State where that was the case even if I got to make the rules. I’m pretty sure that rules I would make on insolvency would be rubbish for example.

And so I worry about this and we move straight from this principle by Cassese that occasionally you can get a sense of the Martens Clause biting even where the State practice is scant or inconsistent and it continues directly on to explain why a customary rule has arisen. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. (Yes), the most blatant reason for the universal revulsion that usually accompanies reprisals, (note usually), is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation (true). Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers. Well
the same applies, frankly speaking, to collateral damage. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. Well if it is saying that the reprisal violates the law, well that’s what a reprisal is about. It’s a violation which is justified by reference to a prior illegality.

And so, basically, where does this take us? Morally I’m on side with Cassese. Yes, reprisals are an extremely ugly form of enforcing the laws of armed conflict; however, who has it got to persuade as a matter of law? It has to persuade those States who have asserted the rights to use reprisals, the UK being one in particular. And as a legal argument it’s just not being accepted by States. The UK reserved the prohibition on reprisals in Additional Protocol 1 (AP1) in 1995 when it ratified the protocols. It reaffirmed that in 2001 in it’s ratification of the Rome Statute, which includes the interpretive statement saying that the reservations to AP1 are still relevant and more recently in the Ministry of Defence, the manual of the law of armed conflict expresses specifically on page 421 that Kupreskic is wrong. And so in the end I think what we have to accept is that this sort of argumentation doesn’t go down well with the States who it’s seeking to persuade.

Now where does this take us in relation to the nuclear weapons opinion? Could it have gone any further? No it couldn’t have gone any further. The way that the dissentients wanted it to go wouldn’t have made any difference to the state of nuclear weapons. States thought about lawfulness. And that leads me, perhaps, to a couple of final comments, and we can criticize the Court and I enjoy criticizing the Court. It’s what keeps me in food and things like that. But we have to remember the pressure on the Court. Firstly they were asked a bad abstract question. They could either have said, nuclear weapons are lawful and had howls of protest from a large number of States or said they are always unlawful and been considered irrelevant and had howls of protest from a reasonable number of other States. Therefore some people suggest they shouldn’t have answered the question. There is a reasonable argument in favour of that. The question was a bad question, but there again if the Court had refused to answer the question, or they’d refused to give an opinion, then in fact what would have happened is we would have had howls of protest from States and non-State actors saying that we are right back to the 19th-century ideal of certain things not being subject to international law and national order, international law being irrelevant to the most important aspects of the day. So they were caught between these various things. So I think really, I think Professor Sir Lauterpacht has it right: the blame, for in the end what was perhaps an unsatisfactory opinion, is not really with the Court, it’s not really with the way the Court ended up answering the question, it’s by those who actually asked the question and I think I’ll stop there.

**SIR MICHAEL WOOD:** Thank you very much.
Erik Koppe:

Thank you very much Mr Chairman, Daniel. My name is Erik Koppe. As Daniel already said, until recently I was lecturer in public international law at the University of Groningen in The Netherlands; up north, the second oldest, or some people say the oldest, university in The Netherlands. Leiden disagrees but we think differently. And I wrote a doctoral dissertation on the use of nuclear weapons and the protection of the environment during international armed conflict, and, similar to what I did in my doctorate dissertation, I would like to discuss the following subjects: namely, the nuclear weapons opinion and the environment. Subsequently I would like to say a few words on the use of nuclear weapons, the effects of nuclear weapons and the impact on the environment; subsequently a few words on the protection of the environment during international armed conflict, the rules, the legal rules as far as that is concerned; and I will round off with a conclusion as far as the use of nuclear weapons is concerned.

The basis for my research lay in the nuclear weapons opinion given by the ICJ in 1996 upon the request of the General Assembly, and the Court spanned seven paragraphs on the protection of the environment and concluded, and I quote, that

the court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in our conflict.

Unfortunately the Court did not specify which factors had to be taken into account and that was the basis, actually, for my research. Me and my supervisor agreed that we should elaborate on this conclusion and in doing so my research was the next, or probably the last, part of a research programme that was first started by Professor Bert Rolling in Groningen and that was subsequently followed by his successor and my supervisor Professor WD Verwey.

In the past it was—the subject is quite new—assessing the use of nuclear weapons under environmental protection rules because in the past the use of nuclear weapons was usually assessed under rules that protect individuals, humanitarian law primarily. Humanitarian law, the word already says it, focuses on human beings and we thought that the assessing under rules that protect the environment requires independent research, the intrinsic value of the environment warranted that and still warrants that.

A few words on nuclear weapons because we believe, and I believe that, if you assess the use of nuclear weapons under public international law it is absolutely necessary that you know what you are
talking about; what nuclear weapons exactly are, what the effects are and, in my case, what the impact is on the environment. Firstly there are two categories of nuclear weapons: fission weapons first, the oldest kind of nuclear weapons; and fusion weapons. Fission weapons are nuclear weapons that derive their energy from the fissioning of the nuclei of very heavy atoms, including uranium and plutonium. That was the basis for the first bombs that were built during the Manhattan Project during the Second World War and that were used over Hiroshima and Nagasaki. In the 1950s a second category was added to that, namely fusion weapons. Fusion weapons are weapons that derive their energy from the fusion of the nuclei of very light atoms such as hydrogen and therefore they are called hydrogen bombs, the H bomb or also thermonuclear weapons and currently most weapons in the stock piles of nuclear weapons States are of that kind and they are, theoretically at least, much larger and much more powerful than fission weapons.

The effects and energy output of nuclear weapons is as follows. You can see (using slides) I added three effects. Actually there are four effects. There’s a fourth effect in addition to blast, thermal radiation and nuclear radiation, namely the electromagnetic pulse. But the energy that is required for the electromagnetic pulse that is put into that electromagnetic pulse is insignificant. The effects are as follows. You can see in the table that I added in my slide that the primary effect of nuclear weapons is the blast effect. Thermal radiation is second—there are slight differences between fission weapons and fusion weapons; and the third effect is nuclear radiation and this is exactly the effect that distinguishes nuclear weapons from conventional weapons apart from the yield of the weapons, the yield of the explosions.

As far as nuclear radiation is concerned it is important to distinguish also between two kinds of nuclear radiation, namely initial nuclear radiation, which is emitted during the first minute of the explosion; and residual nuclear radiation, which is emitted by the radioactive cloud after the first minute of the explosion, and that come in two forms. Residual nuclear radiation comes primarily in the form of fallout and comes in two forms, namely local fallout, or early fallout, which is emitted during the first day of the explosion; and intermediate and global fallout, or also long-term fallout, which could be emitted years or even decades after a nuclear explosion depending on a number of factors.

As far as environmental damage is concerned you can see that the effects of a nuclear explosion are devastating. Both blast and thermal radiation cause extensive damage over a large area of land killing vertebrates within the scope of a large area that is covered by the explosion. This is an example I gave that I found in literature from Arthur Westing who wrote a report for SIPRI in the early 1980s/late 1970s on the environmental consequences of weapons of mass destruction. This is an example given for a 0.91 mega ton air burst and the consequences for the environment, the impact on the environment, vary with a number of factors, or are dependent on a number of factors, namely the kind of weapon that is used, fission weapon, fusion weapon, the configuration of the weapon, the kind of materials that are used, the type of burst.

There are three kinds of T3 categories of burst, namely surface burst—defined as explosions of which the fireball, the nuclear cloud, touches the ground and in which a lot of debris and a lot of dust is included, which later on could cause extensive fallout; air burst—air bursts are explosions of which a fireball does not touch the ground; and there are sub-surface bursts—sub-surface bursts could be an underground burst or even underwater bursts, three types of bursts.

Another factor that is important is obviously the yield of the explosion and the weather conditions at the time of the explosion and the weather conditions after the explosion. All factors that have to be taken into account when you are assessing environmental damage after a nuclear explosion.

As far as environmental protection during international armed conflict is concerned, what are exactly the rules that directly and indirectly protect the environment during international armed conflict? Well I distinguish between three sets of rules, of rules that fall under three sets of rules, namely lus in Bello, lus ad Bellum and lus Pacis. lus in Bello means the laws of war, law of armed conflict, humanitarian law, humanitarian law of armed conflict; they are all terms used for the same set of rules used interchangeably. lus ad Bellum means the law with respect to the use of force; lus Pacis, the law of peace, in this context I refer to international environmental law.

As far as lus in Bello is concerned—the law of war which primarily regulates the behaviour of States in times of armed conflict and therefore was the focus of my attention—there are rules under treaty law
and under customary law that protect the environment during international armed conflict. There are four conventions, four treaties that do so, namely, first, the 1977 Environmental Modification Convention (ENMOD); secondly, Additional Protocol 1 of 1977, additional to the 1949 Geneva Convention; thirdly the incendiary weapons protocol, Protocol 3 to the Certain Conventional Weapons Convention of 1981; and fourthly the 1998 Rome Statute, which is a little bit different of character because it focuses on individual criminal responsibility under public international law. All four of them contain provisions that refer to environmental protection during international armed conflict. The ENMOD Convention prohibits the use of environmental modification techniques which are defined as deliberate techniques that deliberately manipulate environmental processes. The Additional Protocol 1 contains two provisions prohibiting the use of means or methods of warfare that are intended or expected to cause widespread, long-term and severe damage to the environment. The incendiary weapons protocol contains one provision that prohibits the use of incendiary weapons against plants and forests, except in the circumstances that they are used for camouflage and used as military instruments; and the Rome Statute prohibits or says that individuals could be held criminally responsible if they are involved in attacks that cause widespread, long-term and severe damage to the environment, which is clearly, I believe, excessive to the military advantage to be obtained.

As far as customary law is concerned I do not believe that, except the provision in the Rome Statute, any of those provisions reflect customary international law. I do not believe that ENMOD reflects customary international law. I do not believe that the additional two provisions on environmental protection reflect customary international law, which is contrary to the view of the ICRC [International Committee of the Red Cross] which published an extensive report in 2005 on customary international humanitarian law. ICRC concluded that both provisions reflected meanwhile developed into customary international law; but I do not believe that the evidence that they come up with to support their arguments is convincing. They also use, I believe, a trick saying that the United States, the United Kingdom and France should be regarded as persistent objectors as far as these provisions are concerned and as far as the customary status of these provisions is concerned with respect to nuclear weapons; and that’s the only, as far as I know, the only part in which they use the persistent objector escape basically. I do not believe that the incendiary weapons protocol reflects customary environmental protection provisions in customary law. I do believe that the provision in the Rome Statute does reflect customary international law, and I’ll come back to that in a second, because I believe that, in addition to the treaty rules in the course of the 1990s, three rules of customary international law have come into existence, have emerged, arguably emerged in the course of the 1990s, as I said.

Firstly I believe that there is—I gave evidence, extensive evidence of that in my research, in my doctorate dissertation—a prohibition of wanton destruction of the environment which is related to the prohibition of wanton destruction of property under international humanitarian law, the laws of armed conflict, and which is a reflection of the principle of necessity which is one of the fundamental principles of international humanitarian law. I also believe that another customary prohibition emerged in the 1980s, namely a prohibition to cause excessive collateral damage to the environment during international armed conflict, which is related to the prohibition to cause excessive collateral damage to civilian objects under the laws of armed conflict and which is a reflection or a manifestation, I believe, of the principle of necessity, and more specifically its sub-principle, the sub-principle of necessity, namely the principle of proportionality. And thirdly, I believe that an obligation has arisen under customary international law in the course of the 1990s. An obligation to show due regard for the environment during international armed conflict or an obligation to show a duty of care for the environment during international armed conflict.

Evidence of these three customary rules is found in international practice, in national practice, accepted as law or maybe more specifically reflecting an opinio iuris. And for that the method that I used—I used the same method as the ICRC in their customary international humanitarian law study that was published in 2005—evidence I found in military manuals; I found in statements that were made by government officials within the framework of intergovernmental organizations, for example the Sixth Committee of the General Assembly; evidence I found in statements made by States before the International Court of Justice within the framework of both nuclear weapons opinions of 1996, both the General Assembly opinion and the World Health Organization Assembly opinion; I found in one General Assembly resolution of 1991 or 2, I forget; and I found in statements made by government officials within the framework of conferences; and I found in military manuals that are not binding for States but have a very authoritative character, namely the San Remo manual on the law of armed
conflict at sea. Therefore I believe that these three customary rules are arguable, have arguably emerged in the 1990s.

As far as *ius ad Bellum* is concerned—the law on the use of force—I believe that we have to distinguish between rules that bind the defending State under the law of self-defence and rules and the possible responsibility or liability of an aggressor State. As far as the defendant State is concerned it’s the defendant State that needs to comply with the customary and written or unwritten principles and rules in carrying out their overall conduct of hostilities under the law of self-defence, which means that they can be held responsible; the defendant State can be held responsible under the law of self-defence under *ius ad Bellum* if it acts in contravention of the principles of necessity and proportionality even if their actions, their military actions are completely in conformity with *ius in Bello*. Therefore I believe that if a State uses force and damages the environment, even if those actions are in conformity with *ius in Bello* and the laws of armed conflict, it could still be held responsible under *ius ad Bellum* under public international law.

As far as an aggressor State is concerned, it has been argued in literature and there is one example in international practice that an aggressor State should be held responsible and even liable for all damage that follows from its actions in contravention of the prohibition of the use of force under public international law. All damage resulting from its actions, including environmental damage. An example for that I found in Security Council Resolution 687 of 1991 in which Iraq was held liable for all damage it had caused, including environmental damages, that resulted from its illegal use of force under public international law, including its occupation of Kuwait. It is therefore arguable that a State can be held liable, an aggressor State can be held liable under public international law for all damages including environmental damages, even if those actions were in conformity with the laws of armed conflict. It will certainly be interesting—there is a second example. The Eritrea-Ethiopia Claims Commission made a decision in 2005 in which it would in a later stage establish the scope of Eritrea’s responsibility for its violation of *ius ad Bellum*, for its violation of the prohibition of use of force. In addition to its decisions on the scope of both States’ responsibility under public international law or more specifically international humanitarian law, the laws of armed conflict, it distinguished between both the responsibility of States under *ius in Bello* and *ius ad Bellum*. And it will certainly be very interesting to see what the Claims Commission will say about the scope of Eritrea’s responsibility under public international law for its aggression or at least its violation of the prohibition on the use of force against Ethiopia.

As far as *ius Pacis* is concerned, the law of peace, more specifically international environmental law, I think we should distinguish between the applicability of international environmental law in the relationship between belligerents and non-belligerents and in the relationship between belligerents and belligerents inter se. As far as the first relationship is concerned, the relationship between belligerents and non-belligerents, it is generally agreed that peace-time international law, and in this case international environmental law, remains fully applicable between belligerents and non-belligerents including the customary prohibition to cause transboundary pollution. As far as the relationship between belligerents inter se is concerned, this is more problematic. In the past it was generally agreed that as soon as war broke out, as soon as armed conflict broke out, all peace-time relations between belligerents were terminated. Nowadays States take a more pragmatic view but it is uncertain which categories of rules remain applicable at times of armed conflict between both States. There is agreement on some categories including certain legislative treaties, treaties that establish intergovernmental organizations, treaties concerning diplomatic relations and also fundamental human rights law. Of those categories, States are generally agreed that they remain fully applicable in the relations between belligerents.

As far as the applicability or application of human rights law is concerned, the International Court of Justice has discussed twice over the last 11 years the applicability of human rights law in times of armed conflict: in the 1996 nuclear weapons opinion and in the 2004 wall opinion. In both cases the International Court of Justice said that fundamental human rights remain fully applicable in times of armed conflict but these fundamental applicable human rights should be interpreted in light of the relevant or applicable *lex specialis*, in this case international humanitarian law, which means, I believe, that the interpretation of these fundamental human rights is either superseded by humanitarian law or at least strongly coloured by humanitarian law, which reduces the significance of human rights law in times of armed conflict. And if that is already the case with respect to fundamental human rights law, I do not believe that the significance of peace-time international environmental law...
in times of armed conflict in the relation between belligerents and belligerents inter se, is very high, that the application or the value of peace-time international environmental law is very significant.

Coming to an appraisal and a conclusion, as far as the protection under *Ius in Bello*, the use of nuclear weapons and the protection under *Ius in Bello* is concerned, I do believe that the three customary rules, the existence of which I have argued in my thesis, are applicable to the use of nuclear weapons. Of the treaty rules I also believe that the Rome Statute is applicable to the use of nuclear weapons and also Additional Protocol 1 is applicable to the use of nuclear weapons. ENMOD is not applicable, I believe, because the use of nuclear weapons as such is not an environmental modification technique, is not intended to manipulate natural process. It's also not applicable to, or the incendiary weapons protocol is also not applicable to, the use of nuclear weapons, because nuclear weapons are not incendiary weapons. Because its primary effect is blast and not incendiary it doesn't note the incendiary effect apart from the fact that the incendiary weapons protocol is a protocol to the certain conventional weapons convention, which would make the applicability to use nuclear weapons, I believe, problematic.

I do believe that Additional Protocol 1 is applicable to the use of nuclear weapons although in literature and in certain States they believe that the new provisions or Additional Protocol 1, as such, is not applicable to nuclear weapons. Those arguments are based on an introductory note of the ICRC of 1974 or 1973, at least introducing a draft protocol that would eventually be the basis for discussions during the diplomatic conference between 1974 and 1977. In the introductory note, the ICRC said that it would not broach the issue of nuclear weapons and chemical weapons and biological weapons. I do not see that that means that Additional Protocol 1, that the intention of the parties was that Additional Protocol 1, would not be applicable to nuclear weapons. To broach, means that they didn't want to talk about it and that does not mean that Additional Protocol 1 is not applicable.

Another argument that is used is that certain parties to Additional Protocol 1 have added or attached interpretive declarations or certain declarations to their ratifications of Additional Protocol 1, saying that the new rules of Additional Protocol 1, including the environmental provisions, because they were new rules, are not applicable to nuclear weapons. I believe that those interpretations or those declarations should be read as reservations and I believe that those reservations go against the object and purpose of Additional Protocol 1 and therefore should be regarded as against the object and purpose of Additional Protocol 1 and therefore not valid under public international law under the law of treaties.

Assessing these rules, I do believe that therefore Article 35 paragraph 3 and Article 55 of Additional Protocol 1 could be very relevant to the use of nuclear weapons even though the drafters of those provisions believed that they should cover only exceptional and very unconventional damage to the environment. Just regular battlefield damage was not considered to be falling under those two provisions but those declarations and those interpretations fall under the preparatory works of Additional Protocol 1 and should therefore be seen as subsidiary means of interpretation. And I believe that the damage threshold ‘widespread, long-term and severe’, which was supposed to be made very high by the drafters, could be read more in the context of the current appreciation and values with respect to the environment; so Additional Protocol 1 could be very relevant to the use of nuclear weapons in view of its environmental effects.

Of the three customary rules, I believe that the prohibition of wanton destruction of the environment is not very likely to be violated by any use of nuclear weapons because I do not believe, or it's not likely, that any nuclear weapons State would use its most expensive and most destructive weaponry for the sole purpose of destroying the environment. I do believe, however, that the prohibition to cause excessive collateral damage to the environment could be very relevant to the use of nuclear weapons from an environmental perspective. The question whether or not the use of nuclear weapons is excessive, causes excessive collateral damage, should be interpreted by reference to the military value of the object that is attacked with these nuclear weapons, which means that if an object—the military object that is attacked with these nuclear weapons—has an extremely high military value, a large degree of collateral damage is justified and accepted under international humanitarian law.

As far as the third customary rule protecting the environment during international conflict is concerned, the obligation to show due regard, I also believe that that obligation could be very relevant
to the use of nuclear weapons. It could encompass the obligation of States to conduct an environmental impact assessment. It could encompass an obligation to find alternative means to attack a certain object and it could also involve the foreseeability of the retaliation question if a State knows, and it is very likely if the State uses nuclear weapons, that retaliation is almost a given, almost a fact, then that could very well be reason to conclude that a State, a nuclear weapons State, has violated its duty of care for the environment during international armed conflict.

As far as *Ius ad Bellum* is concerned, I already said that the defendant State should observe the principles of necessity and proportionality under the laws of self-defence, this could be very relevant as far as nuclear weapons are concerned because their effects are very extensive, as I showed earlier. An aggressor State could be held responsible for any damage it causes from a violation of the prohibition to use force under public international law.

As far as the protection under *Ius Pæcis* is concerned, I believe that the applicability between the relation of peace-time international environmental law and the relation between belligerents is not very significant but the significance of peace-time international environmental law in the relationship between belligerents and non-belligerents is very, very important because there are only very few circumstances imaginable in which there will not be any transboundary pollution after a nuclear explosion. Only low-yield, high-altitude explosions are not likely to cause any transboundary pollution in other States or very deep underground bursts will not likely cause any transboundary pollution. Any other use of nuclear weapons will very likely cause transboundary pollution, which will be a violation of a State’s obligation under international environmental law, therefore—this is my slide—I believe that the rules are there and are very significant. The question, however, is whether they are implemented, and that’s a question that Professor Sir Lauterpacht already referred to and Dr Cryer as well, and that is, I think, a political issue whether or not a lot of other factors play a role if a State decides to implement public international law in times of armed conflict and when matters of high policy are involved. Thank you very much.

**DR DAN JOYNER:** Right, thank you to Dr Koppe for an excellent review and explication of international environmental law in the context of nuclear weapons. Let’s move straight on into Dr Michael Byers who will be speaking about nuclear weapons and the right to self-defence.

**DR MICHAEL BYERS:** Thank you Dan. Robert was talking about one of the consequences of approaching middle age being that you have to be aware that your students don’t necessarily have the same reference points in terms of history as you or I might have. There’s another consequence of approaching middle age as an educator and that is that when you meet someone younger than you who you don’t recognize, your first thought is, ‘oh my god it might be one of my former students’. Fortunately some of our former students are more memorable than that and Dan Joyner is one of them and I just want to say I’m very proud of Dan.

I also want to say that I find that speaking about this issue in this country at this particular time is one that is coincidentally preferable and disturbing all at the same time. The United Kingdom is, of course, one of the declared nuclear weapon States. The United Kingdom, among other things, is in arguable violation of its Article 6 obligation under the NPT [Nuclear Non-Proliferation Treaty]. The United Kingdom argued before the ICJ in the advisory opinion proceedings in favour of the legality of nuclear weapons, at least in some contexts. The United Kingdom has not only its own nuclear weapons but has foreign nuclear weapons on its soil. And then the United Kingdom has signed up to US missile defence and now the British Prime Minister is campaigning for missile interceptors on British soil. And then just a day or two ago the Conservative Party, with the support of a fragment of the Labour Party, voted in support of the renewal of Trident. I think I have that right.

Now Canadians have a well-deserved reputation for moralizing about international affairs and I’m not going to try to avoid that but I do want to point out by way of comparison that some countries have taken a different general approach. Canada was a member of the Manhattan Project but chose not to acquire nuclear weapons. Canada accepted American warheads on its soil and then a few years later told the Americans to take their warheads home. In 2005 Canada said no to US missile defence despite being geographically of enormous relevance to the US system. Again, simply a point of comparison but the one that I think may feed into some of the discussion today.
I am going to speak not specifically about the nuclear weapons advisory opinion apart from recommending to the students in the room that if they haven’t yet done so, they should read Martti Koskenniemi’s article—and I believe it was in the Leiden Journal of International Law—about the advisory opinion, in the 1997/98 Leiden Journal of International Law, because Martti, I think, correctly celebrates the advisory opinion as a great step forward in international law because the Court did not say unequivocally that the use of nuclear weapons in self-defence would be legal. It engaged in what, in this country, is called a non liquet [non ‘lɪkwət], what in North America is called a non liquet [non ‘lækwɪt] (pronunciation varying), and by choosing not to rule definitively, Martti argues that it actually signalled that the rights of human beings had risen to the same level as the rights of States even if they had not yet trumped the rights of States in terms of the right of a State to continue to exist; and I think that that is something that we need to remember when we are talking about the detail of the law—to remember that there was this moment of indecision where the Court froze like a deer in the headlights, as we say in Canada, and chose to not rule either way.

But I don’t want to talk about the ICJ advisory opinion. In fact I don’t want to talk about the right to use nuclear weapons in self-defence. I want to talk about the right to use force in self-defence against a country that is allegedly developing nuclear weapons. I want to speak about Iran and I want to speak about George W Bush’s America today because I think that this particular situation can give us some pretty serious insight into the kinds of issues we’ve talked about so far: the role of international law when it comes to issues of nuclear weapons or the development of nuclear weapons and perhaps also, as the title of this conference suggests, something about the interaction between politics and international law.

And I want to begin by walking us through three sub-categories of the right of self-defence from least controversial to more controversial. First of all it’s uncontroversial that if a State is attacked by another State, by another country’s military tanks rolling across borders, missiles flying through the air and exploding on a State’s territory, that the State which has been attacked has a right to engage in the use of force in self-defence, limited only by the restrictions of necessity and proportionality and of course the rules of international humanitarian law; but the rules, the right, the criteria of necessity and proportionality deriving from customary international law out of the Caroline Incident of 1837, the practice and opinions of States, and then the codification or at least the partial codification of this right of self-defence within Article 51 of the Charter. If you are attacked you have a right to respond against your State attacker.

The second sub-category of self-defence, is the right to use force in self-defence against a State-sponsor of terrorism after the terrorists have engaged in violence against you as a State at the level of an armed attack—11 September 2001. I think we can say with some confidence that after the autumn of 2001 that the claim advanced by the United States to be using force in self-defence against the Taliban Government of Afghanistan was accepted by the vast majority of other countries. In fact, I know of only two countries that publicly objected. One of them was Iraq and the other was Cuba. Now you can analyse this as a very recent development, in fact I’ve gone back to look at 1986 and the American bombing of Tripoli in response to a terrorist attack on a nightclub in West Berlin against American servicemen and the American justification at the time being the Schultz doctrine of a right to use force against a State-sponsor of terrorism and the widely negative reaction of other countries, but I think that after the autumn of 2001 this sub-category of self-defence is now established.

I do want to point out that the way I’m articulating it as a right to use force against a State-sponsor of terrorism when the sponsored terrorists have already attacked at a level amounting to an armed attack, is a fairly narrow articulation of this right. I’m not saying that it is accepted that a State can use force in self-defence on the territory of another sovereign State simply because there happen to be terrorists located there who have engaged in a strike. There has to be a degree of complicity of involvement on the part of the territorial State where the self-defence act is actually taking place. And so in the autumn of 2001 it would not have been widely accepted and indeed I think I can say this with complete confidence, would have been widely protested had the United States asserted a right to attack Hamburg, Germany, because the City of Hamburg, although it had supported many of the terrorists involved in the 11 September attacks, had not done so consciously or deliberately. So there is a line that exists there but let’s keep this new development, this second category, in mind.

The third sub-category is that of pre-emptive self-defence; and I think it’s widely accepted that prior to 1945 there was a limited right of pre-emptive self-defence within criteria set out in Daniel Webster’s
letter in the Caroline Incident in cases ‘in which the necessity of that self-defense is instant, overwhelming, leaving no choice of means and no moment of deliberation’, pre-1945 customary international law. And then we have the negotiation and adoption of the United Nations Charter and Article 51 and the famous words ‘if an armed attack occurs’ and then we have the ‘battle of the books’ between most notably Derek Bowett and Ian Brownlie as to whether or not this clause in Article 51 had extinguished the pre-existing limited right of pre-emptive self-defence. And entire forests died as a result of this academic debate.

In terms of State practice after 1945, we have seen almost no enthusiasm for anything more than the most tightly restricted right of pre-emptive self-defence. For instance, in the 1962 Cuban missile crisis the United States deliberately chose not to argue pre-emptive self-defence. There’s a wonderful book by Abe Chayes on this, on the Cuban missile crisis from his perspective as the United States State Department Legal Advisor, and they chose instead to mount the very weak argument of regional peace-keeping under chapter 8 in the absence of Security Council authorization, but they did that precisely because they wanted to avoid creating a precedent for a right of pre-emptive self-defence or at least one that was in any way more extensive than the restrictions of the Caroline Incident. Israel and the Six-Day War in 1967 shied away from pre-emptive self-defence and instead argued that there had been a previous act of aggression in terms of the closing of the Straight of Tiran. The United States in 1988 after the USS Vincennes shot down an Iranian civilian airbus, arguing that the ship was actually under attack and that the shooting down of the airbus, although mistaken, was in the context of self-defence against an armed attack. And the one clear exception in State practice during the Cold War occurred in 1981 with the bombing of the nuclear reactor that was under construction at Osirak near Baghdad, and Israel claimed pre-emptive self-defence and that claim was unanimously rejected in the Security Council including with the affirmative vote of the United States of America and Prime Minister Thatcher said some very strong things against the Israeli attack in the British House of Commons so there was no way that Israel’s most powerful allies were going to stand up for them in that instance.

And then we get to 1 June 2002, and in a speech delivered at Westpoint Military Academy in New York State, George W Bush articulated a new doctrine of not, I think, pre-emptive war but perhaps precautionary or preventive war. He went so far as to say that we must confront the worst threats before they emerge. Now I happen to know that the State Department Legal Advisor, William Taft IV, was somewhat surprised by this speech and he and his very many very capable lawyers in the State Department took upon themselves the task of reformulating the President’s words. I gather that American civil servants have to do this quite often because the President has a tendency to misspeak or at least to paint things in black and white when lawyers prefer to paint in grey, or at least government lawyers.

And the result of their labours was evident in the National Security Strategy of the United States released in September 2002. It’s a remarkable document. One that should give great cheer to international lawyers because 10 per cent of the document that sets out the National Security Strategy of the Bush Administration concerns international law, which is quite remarkable for an administration that is portrayed as not caring at all about international law. And within the 10 per cent that is devoted to international law, Taft and his colleagues take the Bush doctrine, the political policy, and recast it within the pre-existing law of self-defence in a highly intelligent way. First of all they begin by omitting any mention of the UN Charter. It’s interesting, you can read the entire 30 pages of the National Security Strategy and find no mention of the UN, let alone the Charter, let alone Article 51. It’s a strategic move. You start the debate at the pre-existing customary international law, the pre-1945 law. I know this because Mr Taft, like Michael Wood, walks around with the UN Charter, or at least when they are in practice for government, they walk around with the UN Charter in the inside pocket of their jackets, so of course Taft knew about Article 51, he just decided, for strategic reasons, not to mention it. They then assert that the requirement of the concept of imminence, which is one facet of the traditional criterion of necessity, now extends beyond threats which are instant, overwhelming, leaving no choice of means and no moment of deliberation, because of the changed factual circumstances, the combination of the proliferation of weapons of mass destruction and the rise of global terrorism. But in a stroke of true brilliance, they do not argue that we need to change the law, they simply argue that we need to apply the pre-emptive requirement of imminence in a way that extends to encompass the new factual circumstances of the post-9/11 world. So they don’t actually ask other countries for permission to change the law, they merely argue that they will be applying the law in a slightly more flexible manner.
In any event, the United States does not have a monopoly on good international lawyers and a number of other countries had serious problems with the Bush Doctrine even as reformulated, including, of course, the United Kingdom, as we now know because of the leaked opinion of the British Attorney General with respect to the legal arguments available prior to the invasion of Iraq. Other concerns are voiced by many other countries. I remember when the Australian Prime Minister was musing before the press about a right of pre-emptive self-defence it caused an outcry among South Asian governmental leaders. We also saw, as a result of the widespread concern about the Bush Doctrine, and the resulting lack of support for it, the move, and I’m not saying that international law was the only cause of this move, into the United Nations, and the very sustained effort by the then Secretary of State Colin Powell to negotiate a Security Council Resolution 1441 that would give not just the United States but its allies a legal toehold for the invasion of Iraq. I suspect partly because they realized that the claim of pre-emptive self-defence was not going to enable some of the allies they wanted on board to come on board so they needed a second better legal argument.

The consequence of this, of course, is that that sucked most of the air out of pre-emptive self-defence as a precedent arising from the Iraq campaign because the legal weight was put on Resolution 1441 and not on pre-emptive self-defence. And then, of course, we have the United Nations Secretary General’s High Level Panel on Threats, Challenges and Change. A group of 16 former Prime Ministers, four Ministers and Ambassadors presenting their own highly authoritative view on the Bush doctrine as an attempt to reformulate international law, and it is worth quoting the relevant paragraph:

The short answer is that if there are good arguments for preventive military action with good evidence to support them, they should be put to the Security Council which could authorize such action if it chooses to. If it does not so choose, there will be by definition time to pursue other strategies including persuasion, negotiation, deterrents and containment and to visit again the military option. For those impatient with such a response the answer must be that in a world full of perceived potential threats the risk to the global order and the norm of non intervention on which it continues to be based is simply too great for the legality of unilateral preventive action as distinct from collectively endorsed action to be accepted. Allowing one to so act is to allow all.

And so the Bush Doctrine as an attempt to substantially change international law has failed at least to date. I think it has had, however, one small unintended consequence, for today much more than a decade ago it is difficult to find anyone who argues that there is no right at all of pre-emptive self-defence. The debates over the significance of ‘if an armed attack occurs’ have been replaced by a general acceptance that a narrow right of pre-emptive self-defence does exist as it did before 1945, again in cases where the necessity of the self-defence is instant, overwhelming, leaving no choice of means and no moment of deliberation. Although the concept of imminence remains tightly constrained, the influence of the single super power is such that, even when it fails to achieve law-making goals, it still leaves a mark on international rules. OK, Iran.

As we sit here today it seems possible that the Bush Administration will soon launch air strikes against targets in Iran, including facilities that are allegedly part of a nuclear weapons programme. If so, the United States will probably claim self-defence in two of the respects I have just described: self-defence against State sponsors of terrorism and pre-emptive self-defence in the context of a threat involving WMD [weapons of mass destruction]. The Bush Administration has already asserted that Iran is supporting terrorists who are attacking US forces in Iraq, including by providing sophisticated explosive devices. On 5 March 2007 in the New Yorker, Seymour Hersh quoted a former Senior Intelligence Officer as saying: ‘The White House goal is to build a case that the Iranians have been fomenting the insurgency and they’ve been doing it all along—that Iran is, in fact, supporting the killing of Americans’. In short the Bush Administration is working towards the same legal argument that it used against the Taliban Government of Afghanistan in 2001.

However, the fact that the argument was accepted then does not mean that it fits the situation today. Clear and unassailable evidence of direct Iranian involvement in violence directed against US forces is required, and even then the violence must rise to the level of an armed attack before it can justify military action within the territory of a sovereign Iran. And, finally, even if self-defence is justified, any responsive action will have to remain within the traditional bounds of necessity and proportionality, ruling out the right of self-defence against State-sponsors of terrorism being used to justify strikes on
Iranian nuclear facilities. For this reason, at least in part, the Bush Administration is also preparing to claim a right of pre-emptive self-defence. Already Vice President Dick Cheney has warned of the possibility in a few years ‘of a nuclear State astride the world’s supply of oil, able to affect adversely the global economy, prepared to use terrorist organizations and/or their nuclear weapons to threaten their neighbours and others around the world’. The Bush Doctrine as reformulated in the 2002 National Security Strategy is coming back into play, namely that the concept of imminence must be applied in a more flexible manner that addresses the combined threat of terrorism and WMD.

But as I’ve already explained, most countries adhere to the view that self-defence is only justified when a threat is instant, overwhelming, leaving no choice of means and no moment of deliberation, and for the moment, this requirement is far from being met with regards to Iran. Last month Mohamed ElBaradei, the Director General of the International Atomic Energy Agency said that the country was at least five to ten years away from developing a nuclear bomb. Earlier this month, ElBaradei said that his Agency had ‘not seen any diversion of nuclear materials, nor the capacity to produce weapons-useable materials’, and that these were ‘important elements in assessing the situation, assessing the risk, and understanding how to address the Iranian question’. The Bush Administration’s assertions to the contrary can hardly be taken seriously given the misrepresentations it made about weapons of mass destruction before the 2003 Iraq war. The time left for diplomacy and other non-violent forms of persuasion and pressure extends well beyond the date when the current President is required to leave the White House. Now some of George W Bush’s advisors will be aware of these legal constraints which helps to explain why the US Government is trying to provoke Iran into launching a first strike. In his March 2007 New Yorker piece, Seymour Hersh quotes Flynt Leverett, a former Bush Administration National Security Council Official speaking of ‘a campaign of provocative steps to increase the pressure on Iran. The idea is that at some point the Iranians will respond and then the Administration will have an open door to strike at them’. A first strike by Iranian forces perhaps on a US warship in the Gulf of Oman would certainly trigger the right of self-defence.

At this point, any recourse to force by the United States would be limited within the lus ad Bellum only by the traditional criteria of necessity and proportionality, which, while important, might not stop the slide into an all out war. Of course international humanitarian law still applies and it is difficult from our perspective to conceive how a strike on Iranian nuclear facilities, which could conceivably cause radioactive fallout leading to widespread death and injury among civilians, could be proportionate to the military necessity of striking such facilities while Iran remains five to ten years away from acquiring a nuclear bomb. So what I’ve said is I’m sure controversial but it is unarguably topical and I’m very grateful for having had the chance to think aloud about this important matter with you today.

DAN JOYNER: Thank you Michael for a presentation as stimulating and provocative as ever.

DR MICHAEL BYERS: You’ve sat through lots of them.

DAN JOYNER: And I keep inviting you back. There’s a reason for that. Right let’s move along to our question time, we have 35 minutes. We shall attempt to finish at half past so let’s get on with it. Who would like to ask the first question?
DR APHRODITE SMAGADI (Chair): OK, so we are all back for the last session of our symposium and it was inevitable of course that we deal with a treaty law concerning nuclear weapons in international law today, and may I present our speakers. On my left is Dr Daniel Joyner, Associate Professor at Warwick University Law Department. His research interests are in public international law, specifically in trade issues and security issues. He has various publications and he is coming up with a new publication, a monograph entitled Non-proliferation Law: The Regulation of Weapons of Mass Destruction, with Oxford University Press in 2008. And on my right, Dr Ian Anthony from SIPRI. He is going to say a few words about Stockholm International Peace Research Institute. He has been engaged in the activities of the Institute there for 20 years now, and he has many publications in the area of biological, chemical and nuclear weapons, and export control. So we are going to talk a little bit more about the Non-Proliferation Treaty and what is the state of play today, whether there is a need to revisit it and what are the realistic options to do it given the political aspects of the issue. So, Daniel?

DR DAN JOYNER: Thank you. I would like to talk about the 1968 Nuclear Non-Proliferation Treaty, the NPT, in my comments. The NPT was designed to constitute an intermediary facility—now this becomes important, I'll mention it again later—an intermediary facility, in order to stop the situation of horizontal proliferation of nuclear weapons among States at the status quo in 1968. I say intermediary because it was fully intended to complement the negotiations that were ongoing at the time on general and complete nuclear disarmament, and that cannot be forgotten. We cannot think of the NPT as the apex or having been intended as the apex of international agreement on nuclear weapons possession. It was always intended to be an intermediary facility in order to facilitate those other negotiations on general and complete disarmament and the ban on nuclear weapons by stopping things at the status quo and preventing things from getting any worse in terms of proliferation.

However, since 1968 its effectiveness in accomplishing even these intermediary aims of stopping the proliferation, the horizontal proliferation of nuclear weapons, had been proven to be limited, both by fundamental aspects of its structure as well as by the realities of subsequent events in international politics. First, despite the efforts under the NPT the nuclear genie got out of the bottle and States outside the treaty regime have acquired nuclear weapons: India, Pakistan, Israel and, most recently, North Korea. Iran has not yet but may be next. So this non-universality of the regime constitutes a limitation of the treaty, meaning that some States that possess nuclear weapons are not bound by it, so it is non-universal. Also, the secondary proliferation concern that arises because of this non-universality, meaning proliferation by States that have acquired nuclear weapons, nuclear weapons technologies, outside of the treaty framework and are therefore not under legal obligation not to proliferate. This is termed the secondary proliferation problem, and perhaps the most well known of these instances is in Pakistan and the Abdul Qadeer Khan network, which was revealed in February 2004 to have operated for some two decades in the illicit proliferation of nuclear weapons technologies including to Libya, Iran and Iraq. So the non-universality and secondary proliferation as a result of non-universality is one example of the limitation of the Nuclear Non-Proliferation Treaty.

Second, nuclear weapons States under the treaty, State signatories, nuclear weapons States, of which there are five, the same as the permanent members of the Security Council, are effectively totally unregulated as to their obligation to disarm in Article 6. We'll talk about this more. As clarified by the ICJ in its 1996 advisory opinion, I'll leave this for a few more minutes and we'll talk about that more, that nuclear weapons States, as I say, are effectively totally unregulated in their commitment, in their obligation. I say that because this obligation cannot be effectively enforced against nuclear weapons States through the IAEA [International Atomic Energy Agency] because, of course, as nuclear weapons States they are not subject to the safeguard requirement of Article 3, nor can it be enforced effectively by the Security Council because they all have permanent seats on it, and since 1995, when the NPT was made permanent, the non-nuclear weapons States Parties no longer have
the leverage that they had previous to that in order to demand compliance with Article 6 in exchange for their continuing undertaking of Article 2 and Article 3 obligations, thus the nuclear weapons States are effectively completely unregulated in their disarmament obligation in Article 6.

I was speaking before in one of the other panels about having this question of NWS [nuclear weapons States] compliance with Article 6 referred to the International Court of Justice. I think that, and this is a bit of an aside but I will talk about it briefly, I think that this is a real issue that the members of the General Assembly should consider for a number of reasons. One is, as we are talking about the 1996 advisory opinion, I think that that opinion did clarify, substantively clarify, the obligation of Article 6 for nuclear weapons States. I don’t have the text in front of me but if you read it, Article 6 of the NPT reads as though the obligation is one of negotiation, at least you can make that argument by the text, so an obligation to negotiate, well, that gets you nowhere. But the Court in its advisory opinion in 1996 clarified that by saying no it’s not just an obligation to negotiate, it is an obligation to achieve a specific object which is disarmament. So with that clarification you now have a justiciable standard in terms of the object of the obligation and, with the inclusion in Article 6 of the concept of good faith, you have a justiciable principle of compliance. Good faith is a legal principle, it is justiciable, it has legal limits and so I think, and I’m not alone in thinking this, recently there was a very good advisory opinion, a barristers’ advisory opinion written by Christine Chinkin and Rabinder Singh that made this point precisely, that the nuclear weapons States, in their opinion, were in violation of Article 6 and I think that you can make this argument legally and that the Court could find that.

So that’s some more about limitations of the NPT, meaning that the nuclear weapons States in their obligation under Article 6, which is a fundamental obligation in the Treaty, it’s a quid pro quo relationship, which I’ll talk about more later. The NPT is a quid pro quo relationship and if you find, then, that one of the parties is fundamentally in breach en masse, a whole category of States under the Treaty, then that has real meaning for the continuing viability of the Treaty. Third, in terms of limitations of the NPT, non-nuclear weapons States feel increasingly that the terms of the NPT are being applied prejudicially against some of them and that loop holes are being exploited by nuclear weapons States to politically and economically advantage allied States at the expense of others, thereby undermining the incentive structure and fundamental terms of the grand bargain codified in the NPT.

Example of the first charge is to be found in the differential application of IAEA standards between South Korea and Iran. I’m not sure many of you will know of this. We all know about what’s been happening in Iran, that it was revealed by dissident groups that Iran had two clandestine, or rather, undeclared to the IAEA nuclear facilities at Natanz and Arak, and in the course of events Iran admitted that, yes, nuclear fuel-cycle research was going on, activities and experiments were going on there, enrichment activities were going on there; but Iran claimed that all of that, though undeclared and therefore a breach of its safeguards agreement with the IAEA, they admit that, notwithstanding that they maintain that there was no fundamental NPT breach through this activity, meaning that all of that work was justified by reference to Article 4 of the NPT, that they had a right to civilian nuclear technologies. We know that notwithstanding Iran’s argument and notwithstanding the fact that no evidence has been found of a nuclear weapons programme or enrichment past the point of civilian use, Iran has been referred to the Security Council and made the subject of sanctions once now and probably again tomorrow or very soon.

Contrast that case, then, with the treatment of South Korea, which in 2004 revealed that over a period of about 20 years, that on numerous occasions, South Korean scientists had conducted undeclared enrichment experiments, both enrichment of uranium and plutonium separation, that the uranium enrichment experiments had proceeded to 77 per cent of weapons usable material. And that these had been undeclared to the IAEA and likely would never have been declared had it not been for South Korea’s accession to the additional protocol of the IAEA and the assurance that they would be found out through environmental sampling.

So this all emerged. Also it was well known that South Korea had had a weapons programme in the 1970s and so all this information, in light of that, what happened at the IAEA board of governors? Nothing! Conclusory statements reached by the board of governors that they were concerned, very concerned, and the Director General should keep them abreast of any new developments. That’s it. No condemning, no imposition of a more stringent obligation of confidence building, no referral to the
Security Council. That’s one example in which the regime is seen to be politicized, seen to be applied prejudicially.

An example of the second charge, briefly, that of discriminatory treatment through loop holes in the Treaty is to be found in the US–India global partnership, which is an agreement under which the United States is on track to supply civilian nuclear technologies, including nuclear fuel, to India, which is not an NPT signatory, which has nuclear weapons and which under the agreement would not be subject to full-scope safeguards of the IAEA, only facility-specific safeguards. I can’t go through all of that, but full-scope safeguards is a fundamental condition of supply both in the nuclear-suppliers group as well as NPT review conference final documents. It’s a principle that the United States and all the supplier States have long adhered to, but now is being done away with in the case of India, and non-nuclear weapons States Parties to the NPT are concerned about this because, in effect, what it is accomplishing is having a State that is not a party to the NPT, has never undertaken the stringent obligations of the NPT, and will still not be under full-scope safeguards, giving them the same reward of nuclear sharing that the NNWS, the non-nuclear weapon States Parties of the Treaty, have had to undertake these stringent obligations to get.

And so that is again an example of the politicization of the regime and the undermining of the grand bargain which was again a quid pro quo exchange of obligation between nuclear weapons States and non-nuclear weapons States. On a fundamental level, most of the problems in application of the NPT system stem directly from this two-tiered structure in the NPT, and division of State signatories into two separate categories, each with its own unique set of rights and responsibilities. And there was never a good principled reason for the two-tiered structure under which a handful of States laid claim to possession of nuclear weapons simply because they already had them and, requiring all of the NNWS to commit never to have nuclear weapons simply because they could require this in exchange for incentives of civilian nuclear technology-sharing.

The NPT in fact is one of the most unprincipled treaties in history. It is simply the definition of a political deal which makes the NPT classifiable as a contract treaty, codifying a quid pro quo relationship between the parties not unlike a foreign investment treaty, and not as a law-making treaty, which establishes universal rules applicable consistently to all State Parties. While of course not altering the binding nature of the obligations undertaken by NPT parties, this aspect of the character of the NPT has always undercut its standing as a principled instrument and has not given customary international law a clear principle to attach to in order to create parallel custom, unlike in the cases of the Chemical Weapons Convention (CWC) and the biological weapons convention. Such parallel customary law in the cases of these other multilateral non-proliferation treaties is an important vehicle through which to bind even non-signatories or secondary proliferators.

The NPT’s maintenance of a two-category differential obligation structure between its signatories and recognition of the rights of one category of signatories to develop and possess weapons technologies, has always been anomalous compared to the other cornerstone non-proliferation agreements, the CWC and the VWC. They are law-making treaties, meaning that they provide for a blanket prohibition upon development and possession as well as proliferation of their subject weapons technologies, binding upon all State signatories. In these other WMD technology areas this blanket prohibition on possession and proliferation is maintained even though both treaties take care to allow a broad latitude for legitimate civilian scientific use of both biological agents and chemical compounds. These other non-proliferation treaties comfortably include a blanket requirement of disarmament and prohibition of possession of their subject weapons technologies along with the freedom to use those basic technologies in peaceful civilian pursuits.

To explain the anomalous character of the NPT it has to be remembered, as I said before, that the NPT was not conceived of to be the final agreement regarding nuclear weapons possession by States. From the beginning it was understood to be an intermediary step put in place to keep proliferation at a status quo in order to facilitate those larger negotiations concurrently proceeding on the subject of general and complete nuclear disarmament. Even though these concurrent negotiations, GCD negotiations [general and complete disarmament negotiations], never resulted in a multilateral disarmament convention, understanding that they form the background for the conclusion of the NPT not as a final solution to the problem of nuclear weapons possession, but as an intermediary step on the road to achievement of this larger goal, is important to understanding the
problems the NPT system currently faces, as well as to understanding what future direction the nuclear non-proliferation system should take.

Instead of responding to the problems under which the NPT system currently labours by attempting to fix the intermediary vehicle, the fundamental structure of which is itself the cause of these problems, I argue that efforts and resources should now be turned away from attempts to shore up the failing NPT regime and toward the larger and more potentially effective agenda of full nuclear disarmament. It is time for the cornerstone nuclear weapons treaty to be structured in the same way as the cornerstone non-proliferation treaties in the chemical and biological weapons areas, without the inherently problematic two-tiered category structure of signatory States.

Now I’m not alone in making this call. A number of seasoned world leaders, including Mikhail Gorbachev, Henry Kissinger, William Perry, Sam Nunn and George Shultz, have recently written op-eds [opinion-editorials] in the Wall Street Journal urging the United States and other nuclear weapons States to make serious efforts towards complete nuclear disarmament. In the op-ed written by Kissinger, Perry, Nunn and Shultz, they argue

nuclear weapons today present tremendous dangers, but also an historic opportunity. US leadership will be required to take the world to the next stage to a solid consensus for reversing reliance on nuclear weapons globally as a vital contribution to preventing their proliferation into potentially dangerous hands, and ultimately ending them as a threat to the world. Nuclear weapons were essential to maintaining international security during the Cold War because they were a means of deterrence. The end of the Cold War made the doctrine of mutual Soviet-American deterrence obsolete. Deterrence continues to be a relevant consideration for many states with regard to threats from other states. But reliance on nuclear weapons for this purpose is becoming increasingly hazardous and decreasingly effective. North Korea's recent nuclear test and Iran's refusal to stop its program to enrich uranium potentially to weapons grade highlight the fact that the world is now on the precipice of a new and dangerous nuclear era. Most alarmingly, the likelihood that non-state terrorists will get their hands on nuclear weaponry is increasing. In today's war waged on world order by terrorists, nuclear weapons are the ultimate means of mass devastation. And non-state terrorist groups with nuclear weapons are conceptually outside the bounds of a deterrent strategy and present difficult new security challenges.

To these political and strategic arguments regarding the threat and potential usefulness of nuclear weapons can the added principles of international law as have been reviewed here, which argue for the decreasing marginal usefulness of nuclear weapons as clarified by the International Court of Justice in its 1996 advisory opinion.

Existing international humanitarian law and international environmental law already so severely limit the possibility for legitimate use of nuclear weapons that the only question regarding legitimate use of nuclear weapons which remains is their use in the most extreme case of need for reasons of self-defence and States' survival, and that only in response to a proportionate use of force. And of course, even use in these circumstances is controversial as we've seen in Professor Lauterpacht's comments in reviewing a number of the Justices' dissents. It may in fact be the case that the totality of treaty and customary law already forbids the use of nuclear weapons completely, although we've heard lots of talk about that. Add to this accumulation of law on the use of nuclear weapons, the fact that under Article 6 of the NPT, as I've said, nuclear weapons States are already legally obligated to disarm as clarified by the ICJ, and one arrives at the conclusion that since the possession and use of nuclear weapons is so severely restricted already, which thus renders minimal the usefulness of continuing possession of nuclear weapons, the move to a complete ban on possession through the conclusion of a multilateral treaty on disarmament would not in fact do much to the already existing legal situation, and thus would not present high marginal costs to States in the form of requirement of actions they are not already under obligation to perform.

What the conclusion of such a treaty would accomplish is the clarification of that legal status and the commitment of all States to disarmament and non-possession on a real and verifiable basis and within a meaningful timeframe and procedural framework. What would be the practical advantages of the conclusion of such an instrument? A multilateral disarmament treaty establishing a universal ban on
the development, possession and proliferation of nuclear weapons would aid in the enforcement of nuclear non-proliferation law by universalizing and making consistent the obligation to disarm and remain disarmed. Currently when any of the nuclear weapons States complain about NPT breaches, and especially about suspected nuclear weapons programmes of non-nuclear weapons States, the fact that the States making the accusations are engaging in the same conduct for which they condemn other States, regardless of the legal niceties of the case under the NPT against the non-nuclear weapons State, makes the air stink with hypocrisy. This serves only to undermine the credibility of enforcement efforts and causes disunity among States in efforts to curb nuclear weapons proliferation. A universal legal prohibition, and the observance by all States of the norm, would allow for credible collective outrage to be expressed at identified breaches, and would result in a more united voice for the international community in condemning such breaches and calling for their rectification. Particularly as such a universal norm matures into customary law, this added legal reach would additionally help to justify counter-proliferation actions against States and non-State actors breaching the norm. This aspect particularly should be appealing to powerful States interested in taking a more proactive and forceful approach to the subject of stopping weapons proliferation. Again, counter-proliferation actions now undertaken by powerful nuclear weapon States are roundly criticized as hypocritical. These States would find more support if they too were subject to the norm they attempt to enforce upon others.

What about the collective action problem amongst States and the problem with verifiability of a complete ban? Clearly, nuclear weapons States will not give up their nuclear weapons stockpiles except through reciprocal structured verifiable processes in coordination with other nuclear weapons States. This has been done bilaterally by the United States and the Soviet Union under the START Process with some significant success in decreasing nuclear stockpiles, though these efforts have not, as they were originally intended, led to complete nuclear disarmament of the two States. There seems to be no reason why such a process could not be organized among all nuclear weapons States and prosecuted to its conclusion. As Mikhail Gorbachev explains regarding the process of disarmament

the key to success is reciprocity of obligations and actions. The members of the nuclear club should formally reiterate their commitment to reducing and ultimately eliminating nuclear weapons. As a token of their serious intent, they should without delay take two crucial steps. 1. Ratify the comprehensive test ban treaty and make changes in their military doctrines, removing nuclear weapons from the Cold War-era high alert status. At the same time, the states that have nuclear-power programs would pledge to determine all elements of those programs that could have military use.

As the ban would be applicable to all States it is of course true that any system of verification of a ban, once achieved, would be subject to cheating. There is also always the threat of rearmament of other States in the event one State begins to threaten. We cannot of course de-invent nuclear weapons or erase the knowledge of how to create nuclear weapons from the human mind. However, this possibility of rearmament can in fact serve as a residual deterrent to cheating, while bringing the international community back further from the brink of nuclear weapons use, either accidental or intentional.

What about terrorism? The dynamics of terrorism would probably not be affected one way or another by this change to a universal prohibition on nuclear weapons. As the op-eds make clear nuclear weapons held by nuclear weapons States are not a deterrent against terrorism by non-State actors as they can be against States, so getting rid of ‘legitimate nuclear weapons’ won’t have any bearing on the dynamics of terrorism. Would such a multilateral disarmament and a prohibition treaty be universally subscribed to? It would be a difficult road to convince some nuclear weapons States, though the arguments are already being made by influential people, as I’ve cited, and what is lacking is simply the political will.

Some of the nuclear weapons States might sign more readily than others. It depends on how you view the taking of the temperature of Britain in the climate of the recent Trident opinion, but there certainly seems to be a strong opinion among British citizenry to end British nuclear weapons possession, and so Britain might be an example of a State that might with not too much pushing sign on to such an agreement. Ideally this process would be led by the nuclear weapons States. That would make it the
most effective, as the newer nuclear States like Israel, North Korea, Pakistan and India would be more likely to agree to the initiative if it were led in deed as well as in word by the old nuclear weapons States. However, even if not led by the nuclear weapons States, by far most States in the world would support such an initiative and become treaty signatories. This popular acceptance by a super majority of States could be enough in time for the universal norm of a treaty to achieve the parallel status of customary law, binding even non-signatories. It could in time even form the basis for a rule of *ius cogens*, binding even persistent objectors.

If the nuclear weapons States will not lead the way in accomplishing this objective then it will take momentum in the General Assembly particularly to begin the process of producing a UN-sponsored treaty, incorporating universal disarmament and possession-ban obligations. Once produced, civil society movements, including in nuclear weapons States, will pressure States to sign the treaty, and those that don’t will be forced to make difficult arguments to justify their decision not to sign. Political pressure from within nuclear weapons States will be key to actually bringing this about.

In conclusion, though I think the title of Ian’s presentation shows his opinion of this idea in a nutshell, I must say that I do not think of it as unrealistic. It is an idea that has been at the fore of international attention and the subject of serious negotiation in the past but has simply been forgotten and pushed aside by Cold War arguments of the necessity of nuclear weapons arsenals to preserve peace. However, times have changed and these Cold War justifications no longer ring true. As Mikhail Gorbachev concludes in his *Wall Street Journal* piece:

> Over the past 15 years, the goal of the elimination of nuclear weapons has been so much on the back burner that it will take a true political breakthrough and a major intellectual effort to achieve success in this endeavour. It will be a challenge to the current generation of leaders, a test of their maturity and ability to act that they must not fail. It is our duty to help them to meet this challenge.

**DR APHRODITE SMAGADI:** Thank you very much. OK, now let’s move to the ‘realistic options to strengthen the nuclear Non-Proliferation Treaty’ with Dr Ian Anthony.

**DR IAN ANTHONY:** Thank you, and thank you for the opportunity really to participate in this meeting. I just wanted to start by saying a couple of words about SIPRI [Stockholm International Peace Research Institute]. I’m not sure how many people know exactly what it is. SIPRI is an independent international research institute located in Stockholm, which works on issues of international peace and security. We have the status in Swedish law of an independent foundation, meaning that we are very clearly not part of the Swedish Government but we are financially supported to about 60–70 per cent by the Swedish Government; the rest of our financing comes through various types of projects-related financing.

I wanted to take the opportunity really to sit on this panel and, when Dan told me what he was going to talk about, my argument really is going to be quite simple: the NPT has played a valuable role in reducing the threat that nuclear weapons pose to international security in the past and the balance sheet for the NPT, if you look historically, is by no means in the negative column. Countries that chose not to go nuclear, even though they had very well-developed nuclear weapons programmes such as Sweden and Australia, other countries as well which were at a perhaps slightly earlier stages but definitely had nuclear weapons programmes, used the NPT discussion as a very critical element in the domestic debate about which choice to make. Coming more recently, a number of countries also found the NPT played a critical role in affecting their choices about nuclear weapons. South Africa, a country which developed nuclear weapons and then decided to develop and produce nuclear weapons and then decided to give them up, joined the NPT as a non-nuclear weapons State. Argentina and Brazil, which had both nuclear weapons programmes and very strong principled objections to the NPT in the past joined. Ukraine, Belarus and Kazakhstan, which had nuclear weapons on their territory at the time when the Soviet Union dissolved, joined the NPT as non-nuclear weapons States.

So this framework has actually been very helpful in managing the risks of nuclear weapons in the past. I would go further and argue that in my opinion in the present political climate there are risks to changing, to making the effort to change the legal basis for nuclear arms control. You have in the United States in particular a number of people putting forward the idea that what we actually need in
the present environment is an agreement around the rules for legitimate possession of nuclear weapons and they argue in a similar vein today, actually, but for very different reasons, that the NPT is a relic of the Cold War past and we need a new legal framework; and if you open this debate in the present political climate I think it's an open question what the outcome would be.

And finally I'm going to argue that there is an understanding through hard work that has been carried out in the last ten years of ways in which the NPT can be strengthened, and I mean strengthened not amended. I think we have very convincing evidence now that amending the NPT is almost impossible, but the NPT can be strengthened in ways that actually are fully consistent with the objectives of complete nuclear disarmament. I'm not going to make a prediction that this will happen but I think we can see how it can happen.

As Dan said, what the NPT does in fact is it creates a shared set of norms around what are usually called three pillars, around a very large group of States. There are only four countries in the world which are outside the framework of the NPT at the moment: India, Pakistan and Israel, who have never been members of it, and North Korea which was a member but left, defected from the Treaty. The commitments are basically rather straightforward. Those countries that have nuclear weapons promise never to supply them to anybody else and those countries that don't have them agree never to acquire them. But there is also a right to possession of nuclear technology for civilian peaceful uses, which is embedded in the Treaty and there is the commitment to work towards disarmament by those countries that have nuclear weapons but are within the Treaty framework.

But the NPT also does other things apart from create the shared set of norms, which I would argue are of great value. First, the NPT provides a legal basis for the system of nuclear safeguards implemented by the International Atomic Energy Agency, through which countries establish national procedures for accounting for where the fissile material is, without which you can't make nuclear weapons. Fissile material, highly enriched uranium and plutonium doesn't exist in nature, it has to be made. Making it is a very difficult and expensive process and through the IAEA we have some reassurance about where fissile material is located. Without that we would be in very bad shape indeed, although it is true that the safeguard system is largely based on bilateral legal agreements between IAEA Member States and the agency, and the purpose of the safeguard system is to verify one part of the NPT, and if you take away the NPT, the purpose of safeguards would be rather unclear.

Finally I think the NPT does now provide a basis for a legitimate engagement by the UN Security Council in specific cases of non-compliance. It's absolutely correct what Dan said that in fact there are no verification provisions for two of the three pillars of the NPT. The verification system that exists is very much focused on one part, which is the commitment of non-nuclear weapons States to remain non-nuclear. And for a very long time little was done in fact to work seriously to expose or to react to cases of non-compliance but we do now have a basis for, the NPT provides a basis for legitimate engagement by the UN Security Council in cases like Iran and North Korea, without which essentially non-proliferation simply becomes an exercise in power politics and counter-proliferation will most certainly be a preferred route.

The process of discussing the NPT has certainly been clouded by very serious challenges and I wouldn't want to try to deflect from the fact that a lot of what Dan said is actually correct. There have been illegal programmes which went undetected in Iraq, in Libya, in North Korea. There has been certainly an ambiguity about the good faith of countries in regard to disarmament, at the very minimum one could say that, and it's quite clear that even though the numbers of nuclear weapons have been declining quite rapidly since the end of the Cold War, and it's also clear that the numbers of nuclear weapons will continue to decline. Nevertheless it's also clear that nuclear weapons States are modernizing their arsenals to make sure that these smaller numbers of nuclear weapons, at least in their minds, remain adequately tailored to contemporary security threats. We saw that the other day with the Trident decision. Smaller numbers don't necessarily mean a path towards disarmament.

These challenges are very real but I think we can say that if you look at the responses of governments to those challenges a lot of very clear and significant proposals have been made about how to approach meeting these challenges. First of all if you look at the documents that have been presented at the NPT review conferences it is clear that there is still a very large number of countries who believe that the NPT is an essential framework for promoting the consistent application of agreed
norms. And to try and make sure that the analysis of particular cases of proliferation concern doesn’t undermine the general principals established in the NPT. Now we can illustrate that with some specific examples. There’s been a tendency in recent years to look for, essentially, packages of measures which can bring difficult cases back from the brink of proliferation like Iran and North Korea.

So the question arises can the DPRK [Democratic People’s Republic of Korea] nuclear crisis be managed without a de facto accommodation of a new nuclear weapons State or would it be the case that in order to reduce the risks of conflict and create stability on the Korea Peninsula, the de facto nuclear weapons status of North Korea would be acknowledged? And I would argue that it’s really the application of the principles which are contained within the NPT which offers a potential solution to bringing North Korea back into the treaty, reintroducing safeguards and essentially creating a framework for denuclearisation rather than accommodation of North Korean nuclear weapons.

There is also a difficult case with Iran with regard to their clear legal right to possess sensitive enrichment technologies and perhaps also in the future spent fuel reprocessing technologies but the argument has been put forward that the case of Iran demonstrates that in fact this principle cannot be applied and countries must in fact be denied this technology in order to safeguard non-proliferation norms. But again in fact the Treaty and the safeguard system associated with the Treaty as well as other activities of the IAEA give you the opportunity to develop methods which can allow fuel cycle technologies to spread in a proliferation-resistant way and I’ll come back to that in a couple of minutes. So in fact the Treaty offers you the way out of the present crisis if you choose to use it.

It’s also clear from the discussions which have taken place in the IAEA and at the review conferences that people are beginning to think about a future environment in which civil use of nuclear energy will be much more widespread in the world. A lot of countries, particularly in Asia, are now clearly basing their future energy strategy to a much greater extent than was the case in the past, on the use of nuclear energy. We are going to have more power plants which will require more fuel. We are going to have more industrial basis which are producing the equipment that you need to support this nuclear industry. And people are thinking about how to create an environment where that expansion in the use of nuclear power can take place without very significant increases in proliferation risks. The accelerated implementation of the integrated safeguards and work to further strengthen the safeguards is again the potential solution in combination of the promotion of multilateral cooperation or ownership of nuclear power facilities, multilateral ownership and operation of nuclear facilities under the monitoring of the IAEA and expanded cooperation to monitor technology transfers, again probably within the framework of a safeguard system. If we don’t have that we are going to put countries in a position where they basically have to choose between meeting their defined energy security needs and meeting their non-proliferation obligations. I would actually take issue with the example that you used, Dan, of South Korea as an illustrative case of that. I think that’s actually evidence of the way in which the strength and safeguard system can promote transparency and confidence. It was South Korea which volunteered the information to the agencies. It’s a very open question, I think, whether they would have found it without the strength of the safeguard system, and after they’d volunteered the information the South Korean side worked overtime to make sure that the agency was satisfied with the answers to questions, provided them with full access, so in fact by working within the system they were able to provide reassurance about things they’d done in the past which were highly questionable. If you had the same degree of cooperation and good faith from the Iranian side we’d be in a much happier position today.

The current crises in Iran and North Korea have actually demonstrated that even in conditions where the relationship between some of the P5 on other matters are quite strained, they can develop and maintain a significant degree of solidarity when it comes to addressing a nuclear crisis, and the full implementation of the present resolutions on Iran and DPRK again would be a very tangible piece of evidence that the Security Council and especially the P5 were really committing themselves to address cases of non-compliance with an entirely new level of seriousness in comparison with their previous efforts.

Which brings us to the most perhaps difficult area of the pillar related to disarmament and here I think I would again argue that the work that was done between 1995 and 2000 actually produced a framework for disarmament in the action plan on disarmament, which I think at the time most people believed was a much more realistic approach to the problem than the discussion of, for example, timetables for complete nuclear disarmament, because it established criteria and weigh stations along
the road to disarmament which would take into account, if you like, the interests of nuclear weapons States. That disarmament had to be fully verified, that it had to be carried out in a transparent way and that the material which was released by the reduction of warheads had to be basically physically eliminated or put beyond use in nuclear weapons. We had a clear and coherent framework for reducing nuclear weapons stockpiles in ways that the international community could be satisfied would eliminate the programmes and I wonder really whether you would come up with anything very much clearer or more coherent if you simply moved it into a separate negotiating forum. I suspect you would simply go through the same process of discussing the same issues and probably come to very similar conclusions.

What we actually need is a revitalization of the processes that were already defined in that process. Will we get that? I’m not going to try and predict, but you can see the urgency for it now in the bilateral US-Russian discussions. The START 1 treaty will expire in 2009. The Moscow Treaty will expire in 2012 and the Russian side is being very insistent in pressing the United States for a new bilateral negotiating process. Now it is true that last year the Bush Administration pretty much rejected that and said that their preference was for essentially a much looser, informal confidence-building regime rather than anything which was legally binding or which had intrusive verification. But if you look at the discussion in Washington it’s clear that there are a lot of people outside the Bush Administration who were saying we simply have to accommodate that Russian request so of course it’s dependent on how the politics evolve in the United States but I don’t think it is out of the question that there would be a revitalization of bilateral arms control which is a necessary precondition for the establishment of the multilateral discussions. You have on the agenda now, or you have on the table at least, a draft of a fissile material cut-off treaty which can be at least the basis for a discussion of how the nuclear weapons States will approach their developing rules for fissile material. So the elements are there for moving towards the objectives of disarmament within the existing framework. You don’t need to create a new framework; you simply need to create a different political dynamic in order to achieve those objectives. So I think to summarize I would simply want to argue that we have a coherent framework for nuclear arms control, we have a very serious political obstacle to achieving success within that framework but, to my mind at least, it is more likely to be productive to work within the existing framework than to essentially try to replace it with a new one.

DR APHRODITE SMAGADI: Thank you very much.