

The Clinton Administration, Nuclear Weapons, and International Law

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I. Presidential Decision Directive

President Clinton issued a Presidential Decision Directive (PDD) in October, 1997 which reversed a decision made by President Reagan. The Reagan decision made at the height of the Cold War required the United States to "win" a protracted nuclear war. The Clinton decision, by contrast, requires the United States to always have on hand enough nuclear weapons which would completely devastate any foe planning to attack the United States. At first blush, the Clinton PDD seems a major change in US nuclear planning. A closer examination, however, reveals that the United States, under the Clinton Administration, has not changed much of its thinking about nuclear weapons and their usage.

Under the Clinton directive, the United States still targets its weapons against Russian military, civilian and nuclear forces. In fact, the list of targets have increased the number of Chinese targets, for the first time specifically allows nuclear strikes against an enemy who has used biological and chemical weapons and potential nuclear weapons. A US President is also authorized to launch his weapons on warning that there is an incoming attack even though the warning may turn out later to be incorrect. Further, a president can launch the US nuclear arsenal pre-emptively i.e. "First-use", even before an enemy has launched its weapons. This continued hair trigger response posture is reinforced by the PDD's assertion that the US continues to view nuclear weapons as the centerpiece of its national security, and will remain committed to the triad of delivery platforms, i.e. 71 B-52H bombers, 50 Peacekeeper and 500 Minuteman III missiles, and 18 Trident submarines.

Although arguably some progress has been made in having an administration no longer think that it can "win" a nuclear war as it did under the previous Reagan doctrine, the continued reliance on nuclear weapons to deter an opponent from employing its nuclear weapons, as well as for the first time increasing the instances in which nuclear weapons can be employed to include retaliation for a chemical or biological attack, indicates that not much has changed in American nuclear strategy, and in fact, a step backward may have occurred in this vital area.¹

II. The Proposed International Criminal Court

The United States recently participated in a UN conference which met to establish a permanent international criminal court. One of the main issues that could not be agreed on was whether the use or potential usage of nuclear weapons was a war crime. The United States through its representative David C. Scheffer, objected to the inclusion of these weapons on the list of crimes.²

¹ "Clinton Changes Nuclear Strategy", R. Jeffrey Smith, "The Washington Post", December 7, 1997, Page A01

² "Legal Experts Agree on an Outline for a Global Criminal Court", Barbara Crossette, "The New York Times", December 14, 1997, p.23

III. The SSMP and the CTBT

The Comprehensive Test Ban Treaty, signed by President Clinton in September, 1996, is waiting to be ratified by the US Senate. Important features of the treaty include the prohibition of any nuclear testing, irrespective of the yield, purpose or location. Theoretically, the Treaty places a major restraint on the development of new and more advanced nuclear weapons because they cannot be tested. Unfortunately, the Clinton Administration's Stockpile Stewardship and Management Plan (SSMP), tends to negate the restriction imposed on the development of more advanced nuclear weapons by the treaty by using computer simulation. Many see the SSMP as a means of allowing the US to continually revise and refine its nuclear weapons arsenal by allowing the US to use its impressive computer technology to design new weapons, and test old ones.³

According to the "Green Book", another name for the SSMP, the US has embarked on a massive 15 year program to enhance on a continuous basis the infrastructure necessary to produce nuclear weapons, by using "advanced experimental and computational capabilities". A major aspect of this program is to attract and train "...the next generation of nuclear experts"⁴. The "Green Book" also provides for a "surge capability", which would allow the US to reconstruct a larger inventory of nuclear weapons on a quick basis, nuclear testing if any future President deemed it in our "supreme national interest" to break out of the CTBT, as well as new designs of military weapons based on changes in military requirements⁵

³ "End Run The US Government's Plan for Designing Nuclear Weapons and Simulating Nuclear Explosions under the Comprehensive Test Ban Treaty", Chapter VI "Key Elements of the SSMP Are Inconsistent with US Nonproliferation Objectives and Policy Statement", National Resources Defense Council, Inc., 1997.

⁴ The "Green Book" is also known as the US Department of Energy's Stockpile Stewardship and Management Plan (SSMP), Office of Defense Programs, February 29, 1996, Chapter I, page 4, as cited in "End Run The US Government's Plan for Designing Nuclear Weapons and Simulating Nuclear Explosions under the Comprehensive Test Ban Treaty", Chapter VI "Key Elements of the SSMP Are Inconsistent with US Nonproliferation Objectives and Policy Statement", National Resources Defense Council, Inc., 1997.

⁵ Ibid, Pages 1-3 and 4.

IV. The International Court of Justice in the Hague

The International Court of Justice in the Hague issued the following decision on July 8, 1996 after a request to do so by the United Nations General Assembly:

1. The Court unanimously agreed on the following:

There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons;

2. By eleven votes to three the Court decided that:

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

3. The Court also unanimously agreed that:

A. A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

(Article 2, paragraph 4 states: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. Article 51 states: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.)

B. 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;

4. By seven votes to seven, [carried by the President's casting vote], the Court decided:

It follows 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;

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 the extreme circumstance of self-defence, in which the very survival of a State would be at stake;

5. Finally, the Court unanimously decided that,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."