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Focus

Treaty on the Non-Proliferation of Nuclear Weapons, 1968

(entered into force 1970), is designed to:

- prevent the spread of nuclear weapons
- express the determination of the parties that the Treaty should lead to further progress in comprehensive arms control and nuclear disarmament measures.

Comprehensive Nuclear-Test-Ban Treaty,

adopted on September 10th, 1996, by the United Nations General Assembly in New-York, which prohibits all nuclear test explosions in all environments (art.1). The US signed it on September 24th, 1996, but has not ratified it yet.

The Nuclear Posture Review, in 2001 & 2002

urged development of a wider range of nuclear capabilities – what was advocated for some time by many pundits.

The Spratt-Furse Law of 1993

(also known as the PLYWD Law, for Precision Low-Yield Weapon Development), states that the US may not conduct research and development, which could lead to the production of low-yield (five kilotons or less) nuclear weapons.

On May 21st, 2003, the US Senate lifted the ban on the research on small nuclear weapons.

Vienna Convention on the Laws of Treaties, 1969, art.18:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty [...]”

Smaller, but smarter?

The Robust Nuclear Earth Penetrator (RNEP), the Bush administration and the second nuclear age

The terror equilibrium of the nuclear age during the Cold War was based on the assurance of a mutual assured destruction in case war were to break out. As the Cold War ended, the remaining nuclear weapons no longer appeared to be appropriate to the new kinds of war that the US would be fighting. For instance, the use of a thermonuclear bomb would be ill-suited for the so-called “surgical” operations.

Consequently, as set out in the January 2002 *Nuclear Posture Review* of the Department of Defense and the National Nuclear Security Administration of the Department of Energy, the new focus is on the use of earth-penetrating nuclear weapons for attacking Hardened Deeply Buried Targets.

The major problems raised by the RNEP are political and legal.

Politically, the development of such weapons presents contradictions.

While pressing India and Pakistan not to use their nuclear arsenal against each other, the US is precisely searching for a more “usable” kind of nuclear bomb.

As the US is alarmed by the possible acquisition by terrorists of weapons of mass destruction, the development of a smaller, relatively compact, nuclear bomb, may be ill-timed, as it might be harder to control, and easier for terrorists to steal.

Although it is said that the bombs may penetrate deeply enough to avoid widespread collateral damage, contamination and fallout, Dr. Robert Nelson of the Federation of American Scientists has published a study demonstrating the physical impossibility for the bomb to do so. He points out the threshold at which increased velocities no longer result in greater penetration before a warhead is destroyed upon impact. Thus, in his view, any RNEP modification would never create a bomb able to burrow deeply enough to contain radioactive fallout.

Legally, the position of the US is unclear:

First, **in national law**, the initial obstacle has already been avoided by the Bush administration. A 1993 Congress bill (*Spratt-Furse Law*) banning development of small nuclear warheads, was lifted in May 2003, in order to allow “a study” (according to officials) of a new “bunker-buster” bomb, which could be used against terrorists. The Pentagon requested about \$20 million to research a new “low-yield” atomic weapon. (*The Washington Times*, May 22nd, 2003)

As for the US obligations under **international law**, the parties to the *Treaty on the non Proliferation of Nuclear Weapons* (signed and ratified by the US), pledged to prevent the spread of nuclear weapons and to work for their elimination. The development of RNEP appears to be in breach of such a commitment. Generally, it presents a problem for the continued implementation of the *Comprehensive Test Ban Treaty* (CTBT, signed but not ratified by the US) as it might lead to a resumption of nuclear testing. Moreover, it would be contradictory to the spirit of the CTBT, which the US should respect, as it signed it. (*Vienna Convention on the Law of Treaties*, 1969, art.18)

In international humanitarian law (IHL). Despite the fact that nuclear weapons are not prohibited *per se* by IHL, their use is questioned by the principle of distinction, which requires that civilians not be the object of attack but that attacks be limited strictly to military objectives. The use of smaller bombs by the US may satisfy the principle enshrined in article 48 of API, and in customary international law, as the RNEP are precisely-guided munitions. However, as mentioned above, the long-term consequences on the environment and on civilians (e.g. radiation effects) are unknown, and so the use of such weapons might contravene the duty of States to protect civilians (art.51 API) and the environment (art.55 API) “from dangers arising from military operations”. And although API has not been ratified by the US, it may be argued that it – or parts of it – would bind the US as customary international law.

Thus the debate over the RNEP, centres around political inconsistency and probably disrespect of international law. But on the whole, the launch of this new programme does witness the implementation of the broader policy shift from an old threat-based model to a newer capabilities-based model, or put differently, from deterrence to possible pre-emptive attacks.

Responsibility

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