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## Arms Control and Disarmament

JOHN H. HARRINGTON\*

### I. Nuclear Disarmament and Non-Proliferation

The new millennium awaits full implementation of the consensus reached a generation ago, to prevent nuclear catastrophe while pursuing the goal of disarmament. Since 1970, when the Treaty on the Non-Proliferation of Nuclear Weapons<sup>1</sup> (NPT) entered into force, the producers of 98 percent of the world's nuclear forces,<sup>2</sup> plus China, France, England, and the non-nuclear states have undertaken to establish the multilateral Conference on Disarmament (CD),<sup>3</sup> in which the parties agreed to bilaterally reverse the arms race by actively reducing the number of delivery systems and warheads,<sup>4</sup> institute international

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1. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force March 5, 1970) [hereinafter NPT]. Article VI states:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty in general and on complete disarmament under strict and effective international control.

2. The producers are the Soviet Union/Russia and the United States. See NRDC *Nuclear Notebook: Global Nuclear Stockpiles, 1945-2000*, BULLETIN OF THE ATOMIC SCIENTISTS, March/April 2000, at 79, available at <http://www.thebulletin.org>. Quoted from DOUGLAS ROCHE, AN UNEQUIVOCAL LANDMARK, THE 2000 REVIEW OF THE NON-PROLIFERATION TREATY, Appendix C (2000), available at <http://www.ploughshares.ca/index.html> [hereinafter UNEQUIVOCAL LANDMARK]. See also DOUGLAS ROCHE, THE ULTIMATE EVIL: THE FIGHT TO BAN NUCLEAR WEAPONS, 28 (James Lorimer & Co. 1997). NRDC is the acronym for Natural Resources Defense Counsel, Washington, D.C.

3. See U.N. Conference on Disarmament (CD), Palais de Nations, Geneva, Switzerland (1979), available at <http://www.unog.ch/disarm/disconf/htm> [hereinafter CD]. The CD convenes in Geneva and is chaired in four-week intervals by member nations' ambassadors to disarmament who alternate according to the states' alphabetical order among the current list of members.

4. See Treaty on the Reduction and Limitation of Strategic Offensive Arms, July 31, 1991, U.S.-Russ., S. TREATY DOC. NO. 102-20 (1992), available at <http://www.state.gov/www/global/arms/starthtm/start.html> [hereinafter START I].

verification procedures,<sup>5</sup> work toward the reduction or banning of fissile material,<sup>6</sup> eliminate or safeguard stockpiles of proliferative material,<sup>7</sup> prevent the use of nuclear weapons either by example, or by preserving the credibility of the nuclear threat through the Anti-Ballistic Missile (ABM) Treaty,<sup>8</sup> and prevent proliferation of nuclear weapons through signing the Comprehensive Test-Ban Treaty (CTBT).<sup>9</sup>

However, the inability of the CTBT to enter into force, tests heralding the recent entry of India and Pakistan into the nuclear arms community,<sup>10</sup> stalled negotiations in the CD, and Russian opposition to a U.S. plan to develop and deploy a national missile defense have created an environment in which NPT States parties are questioning the future evolution of the existing weapons reduction regime.<sup>11</sup> Despite the perceptible cessation of new initiatives, an inspiring 2000 NPT Review Conference showed there exists a commitment by all parties to the treaty's goal of complete disarmament.

#### A. 2000 REVIEW CONFERENCE OF THE PARTIES TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT REVIEW CONFERENCE)

The NPT Review Conference took place at the United Nations in New York City from April 24 to May 20, 2000, in accordance with the treaty provision to hold a conference every five years to ensure "the purposes of the Preamble and the provisions of the Treaty are being realised."<sup>12</sup> The Preamble of the NPT refers to the devastation inherent in the use of nuclear weapons. The purposes of the treaty provisions are the prevention of such use via cessation of the nuclear arms race, and undertaking measures to achieve nuclear disarmament. The NPT also establishes the role of the International Atomic Energy Agency (IAEA), which functions as the watchdog of fissile material and promotes the peace-

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5. Various inspection regimes exist, including under the auspices of the International Atomic Energy Agency, such as The Trilateral Initiative, which is developing means for the IAEA to verify that nuclear material that is declared to be in excess of the defense needs of the United States and Russia is never used again in nuclear weapons. The Plutonium Production Reactor Agreement, Sept. 23, 1997, State Dept. No. 97-159, confirms that a 1994 U.S.-Russian agreement to end military plutonium production is confirmed to ensure the production plants are closed permanently.

6. See *The United States of America Meeting Its Commitment to Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 2000 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, at 13 (U.S. Department of State April 2000), available at <http://usinfo.state.gov/topical/pol/arms/stories/0425art6.htm> [hereinafter 2000 Review Conference of NPT].

7. See *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, Final Document of The Conference, Part I, Paragraph 13, U.N. Doc. NPT/CONF.2000/28 [hereinafter Final Document of NPT Conference]. The Conference noted the conclusion of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.

8. See Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, 944 U.N.T.S. 13 [hereinafter ABM Treaty]. Done in Moscow, and signed by U.S. President Richard M. Nixon and Leonid I. Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union.

9. Comprehensive Nuclear Test-Ban Treaty, opened for signature Sept. 24, 1996, S. TREATY DOC. No. 105-28 (1996) [hereinafter CTBT].

10. India conducted nuclear tests on May 11 and 13, 1998. Pakistan followed with tests on May 28 and 30, 1998. These states have not been granted the formal status of Nuclear Weapons States in accordance with the NPT and S.C. Res. 1172, U.N. SCOR, 3890th mtg., U.N. Doc. S/RES/1172 (1998), available at <http://www.un.org/Docs/scres/1998/sres1172.htm>.

11. See NPT, *supra* note 1.

12. See *id.* art. VIII, at ¶ 3.

ful use of nuclear energy. The Review Conference is an opportunity for the States parties to present their varied positions on the goals of the Treaty and on steps necessary to fulfill its intent. The States parties operate on consensus, meaning unanimous approval is necessary to generate declarations and directives, and to realize nuclear disarmament.

The 2000 Conference was successful, but only after weeks of contentious debate. The Conference resulted in the promulgation of a Final Document, which specified steps required to fulfill the goals of the Treaty. One hundred fifty-eight States that were party to the Treaty participated in the conference (out of the 187 State total), with nonparties Cuba and Palestine present as observers.<sup>13</sup> (Only Cuba, India, Israel, and Pakistan remain outside the treaty.) As is customary, the Conference was split into three main committees. Main Committee I dealt with the Article VI<sup>14</sup> disarmament issues. Main Committee II focused on safeguards issues. Main Committee III deliberated the peaceful use of nuclear energy.<sup>15</sup> These committees were further divided into subsidiary committees. Reaching consensus was problematic in each committee.

The Conference proceeded under a cloud of uncertainty surrounding pending U.S. Senate action to approve 1997 agreements concerning what Ballistic Missile Defense tests may be conducted under the ABM Treaty.<sup>16</sup> This environment was apparent from the outset, as nuclear weapons states (NWS) and non-nuclear weapons states (NNWS) opposed the United States' plan to amend the ABM Treaty both during the conference and throughout the entire year at every available convenience. During the conference, Russia, China, and the New Agenda Coalition<sup>17</sup> ruled out any amendment of the ABM Treaty. Further substantive negotiations stalled as a result because of the ABM Treaty's influence on the viability of the START accords.

The Conference was widely hailed as a success due to the agreement reached on specific steps for the "systematic and progressive efforts to implement Article VI" of the NPT.<sup>18</sup> The so-called Thirteen Steps are as follows:

1. The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty.
2. A moratorium on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of that Treaty.
3. The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices in accordance with the statement of the Special Coordinator in 1995 and the mandate contained therein, taking into consideration both nuclear disarmament and nuclear non-proliferation objectives. The Conference on Disarmament is urged to agree on a programme of work which includes the

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13. See Final Document of NPT Conference, *supra* note 7, Part II at ¶¶ 18–19. Forty-three States took part in the general debate in plenary, held from April 24 to May 12, 2000.

14. See NPT, *supra* note 1.

15. See UNEQUIVOCAL LANDMARK, *supra* note 2, at 16.

16. See John Burroughs & Jim Wurst, *NPT Conference Shadowed by Defiance of Article VI, BOMBS AWAY!*, Spring 2000, at 1.

17. The New Agenda Coalition members are Brazil, Egypt, Ireland, Mexico, New Zealand, Slovenia, South Africa, and Sweden.

18. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (2000), U.N. Doc. NPT/CONF.2000/28 (Parts I and II); see also Ambassador Norman A. Wulf, *infra* note 20.

immediate commencement of negotiations on such a treaty with a view to their conclusion within five years.

4. The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament. The Conference on Disarmament is urged to agree on a programme of work which includes the immediate establishment of such a body.
5. The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures.
6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.
7. The early entry into force and full implementation of START II and the conclusion of START III as soon as possible while preserving and strengthening the Treaty on the Limitation of Anti-Ballistic Missile Systems as a cornerstone of strategic stability and as a basis for further reductions of strategic offensive weapons, in accordance with its provisions.
8. The completion and implementation of the Trilateral Initiative between the United States of America, the Russian Federation and the International Atomic Energy Agency.
9. Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all:
  - Further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally;
  - Increased transparency by the nuclear-weapon States with regard to the nuclear weapons capabilities and the implementation of agreements pursuant to article VI and as a voluntary confidence-building measure to support further progress on nuclear disarmament;
  - The further reduction of non-strategic nuclear weapons, based on unilateral initiatives and as an integral part of the nuclear arms reduction and disarmament process;
  - Concrete agreed measures to further reduce the operational status of nuclear weapons systems;
  - A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination;
  - The engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons.
10. Arrangements by all nuclear-weapon States to place, as soon as practicable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification and arrangements for the disposition of such material for peaceful purposes, to ensure that such material remains permanently outside military programmes.
11. Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.
12. Regular reports, within the framework of the strengthened review process for the Non-Proliferation Treaty, by all States parties on the implementation of article VI and paragraph 4(c) of the 1995 Decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament”, and recalling the advisory opinion of the International Court of Justice of 8 July 1996.
13. The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.<sup>19</sup>

Elaboration on each of the foregoing Thirteen Steps is beyond the scope of this year’s summary. However, several of these steps deserve comment. Step 3, which calls for a Fissile

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19. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (2000), U.N. Doc. NPT/CONF.2000/28.

Material Cutoff Treaty (FMCT), is supported by the United States. However, demands for parallel negotiations in the CD on nuclear disarmament and the Prevention of an Arms Race in Outer Space (PAROS) have stalled progress on further FMCT talks. Step 4, on multilateral nuclear disarmament, was agreed to only after negotiations provided sufficient ambiguity. Note that Step 4 calls upon the CD to establish an *appropriate* subsidiary body to *deal with* nuclear disarmament. The absence of any specific directive to negotiate multilateral disarmament made that step palatable to States parties concerned with such a requirement. Step 6 is widely hailed as the most spectacular of the steps and is arguably the finest diplomatic accomplishment of Main Committee I diplomats. According to Ambassador Norman A. Wulf, U.S. Representative for Arms Control, Step 6 "avoids the implication that practical steps toward nuclear disarmament are all that is contemplated by Article VI, not its ultimate achievement."<sup>20</sup> Mexico's Ambassador De Icaza noted, "what has been implicit has now been made explicit."<sup>21</sup> Finally, Step 12 makes reference to the International Court of Justice advisory opinion on the threat of use and the use of nuclear weapons.<sup>22</sup>

The Conference noted that, since 1995, twenty-eight Non-Nuclear-Weapon States (NNWS) have concluded safeguard agreements with the IAEA in compliance with article III, paragraph 4, of the Treaty.<sup>23</sup> Twenty-five states have brought the agreements into force. It should be noted that the NPT required the NNWS to begin negotiations of such agreements within 180 days of the original entry into force of this Treaty, or entry into force of such agreements within eighteen months after depositing their instruments of ratification.<sup>24</sup> Therefore, the NNWS are seriously delinquent in honoring their Article III obligations.

Observers hope that the mere promulgation of the NPT Review Conference Final Document, with its Thirteen Steps, will provide renewed authority with which to negotiate and enforce the Treaty's goals.

## B. CONFERENCE ON DISARMAMENT

The CD, established in 1979 as the single multilateral disarmament negotiating forum of the international community, was a result of the first Special Session on Disarmament of the United Nations General Assembly held in 1978. It succeeded other Geneva-based

20. Ambassador Norman A. Wulf, *Implementation and Follow Up Actions, Commitments of the United States*, U.N. Asia Pacific Regional Disarmament Conference, Wellington, N.Z. (Mar. 27, 2001).

21. *See id.* ¶ 6.

22. *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice Advisory Opinion, July 8, 1996. The court stated:

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

23. *See* Final Document of NPT Conference, *supra* note 7. Article III of NPT, paragraph 4 states that the non-nuclear weapons states (NNWS) shall conclude agreements with the IAEA for the purpose of verifying the fulfillment of Article III obligations to prevent diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Article III also prohibits State parties from providing equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any NNWS for peaceful purposes, unless the material shall be subject to IAEA inspection.

24. *See* NPT, *supra* note 1, art. III, ¶ 4.

negotiating fora, which include the Ten-Nation Committee on Disarmament (1960), the Eighteen-Nation Committee on Disarmament (1962-68), and the Conference of the Committee on Disarmament (1969-78).<sup>25</sup>

The Conference on Disarmament<sup>26</sup> adopted the following agenda for its 2000 session:<sup>27</sup>

1. Cessation of the nuclear arms race and nuclear disarmament.
2. Prevention of nuclear war, including all related matters.
3. Prevention of an arms race in outer space.
4. Effective international agreements to assure non-nuclear-weapons States against the use or threat of use of nuclear weapons.
5. New types of weapons of mass destruction and new systems of such weapons; radiological weapons.
6. Comprehensive program of disarmament.
7. Transparency in armaments.
8. Consideration and adoption of the annual report and any other report, as appropriate, to the General Assembly of the United Nations.

Negotiations on most, if not all, of the agenda items above proved fruitless. Since Prevention of an Arms Race in Outer Space (PAROS) was put on the agenda in 1985, the PAROS movement has witnessed several efforts to militarize space. However, other agenda items appear elsewhere in the arms control and disarmament community as full-blown initiatives. This is especially apparent in the area of transparency where the IAEA is engaged in several verification regimes to ensure drawdowns in nuclear stockpiles and weapons material production facilities.

The Geneva-based Conference on Disarmament works in concert with the NPT Article VI requirement that "Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament."<sup>28</sup> As in previous years, negotiations stalled, or simply did not occur among the convened representatives during the year 2000.

Echoing the frustrations of many members, the Canadian Ambassador lamented:

For four years, we have negotiated nothing. For the second year in a row, we have failed to agree to a work programme. Since late last century, we've been confined to sterile debate about the implementation of two specific points of a draft programme of work. Like it or not, this record calls our very purpose into question in public opinion and in considered assessments of our work, our credibility, our potential and our prospects.<sup>29</sup>

During the May session, the five declared nuclear powers, including the United States, issued a twenty-three-point statement calling for strengthening the ABM Treaty. One point called attention to Israel's refusal to sign the NPT. The statement was issued in response to the glacial pace of strategic and tactical nuclear arms reductions.

25. See CD, *supra* note 3.

26. The Conference on Disarmament is a disarmament negotiating forum open to the nuclear weapon States and sixty-one other States. See *id.* New states may seek admission under Article I of the *Rules of Procedure of the Conference on Disarmament*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/8/Rev.8\* (Aug. 17, 1999), available at <http://www.unog.ch/disarm/cdproced.htm>.

27. See *id.* The Conference decided that its 2000 session would be divided into three parts: from January 17 to March 24, 2000, from May 22 to July 7, 2000, and from August 7 to September 22, 2000.

28. See NPT, *supra* note 1.

29. *Final Record of the Eight Hundred and Forty-Ninth Plenary Meeting*, U.N. Conference on Disarmament (CD), U.N. Doc. CD/PV.849 (May 30, 2000), available at <http://www.unog.ch/disarm/pvs/849.htm>.

Following this dismal beginning, in August 2000, the Conference established an Ad Hoc Committee, under agenda item 1 entitled "Cessation of the nuclear arms race and nuclear disarmament." The Ad Hoc Committee was engaged to exchange information and views on practical steps for progressive and systematic efforts to attain this objective. The Committee was tasked to focus on three issues: (1) negotiating a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices; (2) identifying specific topics or proposals, which could include confidence-building or transparency measures, general principles, treaty commitments, and the elaboration of a regime capable of preventing an arms race in outer space; and (3) reaching an agreement on effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons. Its efforts were to include seeking the views of its Members on the most appropriate means of dealing with the questions related to anti-personnel land mines taking into account, inter alia, developments outside the Conference. Finally, the Committee was expected to appoint Special Coordinators on the Review of Its Agenda, the Expansion of Its Membership and Its Improved and Effective Functioning.<sup>30</sup>

By year's end, the CD was still unable to reach a consensus on a program of work. Although there was agreement on most elements of such a program, the issues of nuclear disarmament and prevention of an arms race in outer space precluded substantive progress. The impasse resulted from difficulties raised concerning the emergence of the United States' plan to deploy a Ballistic Missile Defense (BMD). The plan was opposed by China and Russia. Although negotiation on BMD was not on the agenda, the specter of a U.S. deployment had a chilling effect on expectations for the existing items.<sup>31</sup>

### C. START I, II, AND III

The START<sup>32</sup> bilateral agreements are fundamental to the prospect of disarmament due to the Parties' combined arms constituting an overwhelming majority of nuclear weapons worldwide, including those still targeted and those on hair-trigger alert status.

START I entered into force on December 5, 1994,<sup>33</sup> and ushered in a cooperation toward arms reductions on an unprecedented scale, which coincided with the warming relations between the United States and Russia. As a result of START I, we have witnessed reductions in standing forces. The United States is already below the 2001 final START I limit of 1,600 heavy bombers with their launchers. Nuclear warheads totaling 3,900 have been removed from Minuteman and Poseidon Missiles. Nine hundred forty heavy bombers and ballistic missiles have been eliminated. All heavy bombers have been de-alerted and all long-range ballistic missiles have been de-targeted. All U.S. heavy bombers to be eliminated under the accord have been moved to a facility where they are being destroyed.<sup>34</sup> Overall, the United States has reduced its nuclear weapons arsenal by 60 percent. Corresponding

30. *Proposal by the President on the Programme of Work for the 2000 Session of the Conference on Disarmament*, U.N. Conference on Disarmament (CD), U.N. Doc. CD/1624 (Aug. 24, 2000), available at <http://www.unog.ch/disarm/curdoc/1624.htm>.

31. See *CD Deadlock Continues, BOMBS AWAY!*, Fall 2000, at 13.

32. The acronym START is formally referred to as the Treaty on the Reduction and Limitation of Strategic Offensive Arms. See START I, *supra* note 4.

33. See *id.* Done in Moscow on July 31, 1991, and signed by George Bush and Mikhail Gorbachev.

34. See 2000 Review Conference of NPT, *supra* note 6, at 2.

reductions in Russia's forces pursuant to START I may be characterized in the words of their representative to the Conference on Disarmament:

By now, more than 930 launchers for ICBMs and SLBMs have been eliminated in Russia under the START I Treaty, as well as about 2,000 missiles for such launchers, 24 nuclear submarines and more than 80 heavy bombers. Overall, the strategic nuclear forces of Russia will be reduced by approximately 40 per cent under that Treaty.<sup>35</sup>

START II<sup>36</sup> was signed by the parties on January 3, 1993, and ratified in 2000 by Russia.<sup>37</sup> In 1996, the United States ratified START II.<sup>38</sup> START II commits the parties to reduce their nuclear arsenals from over 6,000 deployed weapons to 3,000–3,500 weapons by the year 2007. Multiple Reentry Vehicle ICBMs would be eliminated.<sup>39</sup> Russia has indicated its willingness to further reduce nuclear arsenals. "There is no objective political reason not to go to a common ceiling of a maximum 1,500 warheads for each side," stated the Russian Foreign Ministry, following talks between Russian Deputy Foreign Minister Georgy Mamedov and John Holum, the State Department's Under Secretary for Arms Control and International Security.<sup>40</sup> Russia reiterated its position of making the proposed arms cuts only if the 1972 ABM Treaty remained unchanged.<sup>41</sup>

In March 1997, the presidents of the United States and Russia agreed to further reductions in nuclear warheads in the context of START III. Russia exhibited an eagerness to finalize START II, to commence START III talks, and to unilaterally reduce numbers even further than initially anticipated:

The ratification of the START II Treaty opens the path to the launching of official talks on further reductions of Russian and United States strategic arsenals within the framework of a START III Treaty. We are prepared to reduce our strategic offensive arms—naturally, on the basis of reciprocity with the United States—to a level lower than that provided for in the 1997 Russian-American agreement in Helsinki, i.e., to 1,500 warheads, instead of 2,000–2,500.<sup>42</sup>

START III would also include provisions that ensure transparency of strategic warhead inventories and destruction of strategic nuclear warheads.<sup>43</sup>

35. *Final Record of the Eight Hundred and Forty-Seventh Plenary Meeting*, U.N. Conference on Disarmament (CD), U.N. Doc. CD/PV.847 (Mar. 23, 2000), available at <http://www.unog.ch/disarm/pvs/847.htm>.

36. Treaty on Further Reductions and Limitations of Strategic Offensive Arms, Jan. 3, 1993, U.S.-Rus. Fed., S. Treaty Doc. 1, 103rd Cong., 1st Sess. (1993) [hereinafter START II]. See also Peter W. Mason, *Public International Law, Arms Control and Disarmament*, 34 INT'L LAW. 609 (2000) [hereinafter Arms Control and Disarmament].

37. See Ratification of the Treaty between the Russian Federation and the United States of America on Further Reductions and Limitations of Strategic Offensive Weapons, signed by the President of the Russian Federation, Vladimir Putin, May 4, 2000 (author trans.) [hereinafter Treaty Ratification], available at <http://www.duma.ru>.

38. See The White House, Fact Sheet, *Background Information: START II Ratification* (Jan. 26, 1996), available at <http://www.state.gov/www/global/arms/factsheets/wmd/nuclear/start2/strtrat.html>.

39. In addition, START II limits the number of warheads that can be deployed on submarine-launched ballistic missiles (SLBM) to between 1,700 and 1,750, although multiple-warhead SLBMs are not prohibited. See START II, *supra* note 36.

40. *Russia Sticks to Arms Plan*, MOSCOW TIMES, Oct. 19, 2000.

41. See *id.*

42. *Statement in Connection with the Adoption by the State Duma of the Federal Assembly of the Russian Federation of Laws on the Ratification of the Start II Treaty and of the Package of 1997 Agreements on Anti-missile Defence*, U.N. Conference on Disarmament (CD), U.N. Doc. CD/1611 (Apr. 25, 2000), available at <http://www.unog.ch/disarm/curdoc/1611.htm>.

43. Ambassador Robert T. Grey, Jr., Statement to Main Committee I of the 2000 Review Conference of

Despite Russia's efforts to negotiate further reductions, they nevertheless plan to upgrade their existing forces. Russia planned its deployment of Topol-M intercontinental missile to begin in December 2000, eventually to rely on that missile as the backbone of their nuclear forces in the foreseeable future. Available funding, equal to just one-third of that anticipated, curtailed the planned deployment of ten missiles to six.<sup>44</sup> The Topol-M deployment, according to the Moscow Carnegie Center, is aimed at compensating for the planned elimination of ten Strategic Missile Force divisions by the year 2006.<sup>45</sup>

The United States and Russia premised START initiatives upon perpetuation of the ABM Treaty.<sup>46</sup> During the year 2000, as the United States came closer to announcing deployment of a BMD system, and has since exhibited the political will to deploy it, Russia has announced it would retaliate by abandoning START II and III.<sup>47</sup> Russia's threatened withdrawal from START compliance, if realized, will result in a rule of law vacuum, which would leave no established guidance to total disarmament as previously negotiated, pursuant to the requirements laid out in NPT Article VI.<sup>48</sup> Adherence to NPT Article VI would thereafter require a new paradigm of arms control negotiations and treaties under the specter of a deployed BMD system. On the other hand, if BMD deployment and further arms reductions are, in fact, antithetical, then current and future progress in arms control and disarmament may be reversed dramatically and indefinitely.

#### D. ANTI-BALLISTIC MISSILE TREATY

The first round of Strategic Arms Limitation Talks (SALT) began in November 1969.<sup>49</sup> Two and a half years later, in 1972, these talks produced the ABM Treaty,<sup>50</sup> which limited the United States and Soviet Union to two missile defense sites, each having no more than one hundred interceptors. In 1974, a protocol to the treaty reduced the number of sites each side could deploy to one. A year and a half after the protocol was signed, the United States finished its one Safeguard<sup>51</sup> site, which was located near Grand Forks, North Dakota. In February 1976, a few months after the Safeguard site became operational, Congress directed the Defense Department to close the Grand Forks facility.<sup>52</sup> Russia deployed one missile defense system around Moscow. Since then, the ABM Treaty has preserved the strategic concept of nuclear deterrence as the primary means of avoiding nuclear conflict.

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the Treaty on Non-Proliferation of Nuclear Weapons, at 3 (Apr. 27, 2000), available at <http://www.fas.org/nuke/control/npt/news/000427-npt-usia1.htm>.

44. See *Fewer Topol-M Missiles*, MOSCOW TIMES, Oct. 25, 2000.

45. Simon Saradzhan, *See Military to Cut Its Ranks by a Third*, MOSCOW TIMES, Sept. 9, 2000.

46. See START II, *supra* note 36, at preamble.

47. See ABM Treaty, *supra* note 8.

48. See NPT, *supra* note 1.

49. SALT I extended from November 1969 to May 1972. Information about SALT I is available at <http://www.fas.org/nuke/control/salt1>. SALT II began in November 1972 and continued in various forms until 1979, when ratification was delayed by U.S. President Jimmy Carter due to the Soviet invasion of Afghanistan. President Reagan pulled out of SALT II on May 26, 1986, citing Soviet non-compliance with SALT I and II. Information about SALT II is available at <http://www.fas.org/nuke/control/salt2/>.

50. See ABM Treaty, *supra* note 8.

51. Safeguard sites were designated by Richard Nixon to protect deterrent forces. See Donald Baucom, *National Missile Defense: An Overview (1993-2000)*, Ballistic Missile Defense Organization, available at <http://www.acq.osd.mil/bmdo/bmdolink/html/nmdhist.html>.

52. See *id.*

The ABM Treaty is based upon the premise that it “would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,” that the Parties are “mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” and having declared their intention “to achieve at the earliest possible date the cessation of the nuclear arms race,” the Parties desire “to contribute to the relaxation of international tension and the strengthening of trust between states.”<sup>53</sup> The Treaty holds that the Parties may not engage in development, testing, deployment,<sup>54</sup> or support<sup>55</sup> of Anti-Ballistic Missile interceptor missile systems, which would constitute a national missile defense shield, and it also provides for verification of the same.<sup>56</sup> The understanding underlying the ABM Treaty has been to foreswear the strategic advantage gained by a missile shield, thereby assuring the other party that its nuclear deterrent remains effective, negating the necessity for further buildup in numbers of intercontinental ballistic missiles on both sides. Thereafter, the ABM Treaty has served as the foundation for existing and proposed cuts in nuclear arms.

The year 2000 saw substantial attention brought to the ABM Treaty. Both the Clinton and Bush administrations sought changes to, or outright removal of, the Treaty through the testing of a BMD system as well as the advocating of its deployment. The Clinton proposal envisaged deployment of the system in a number of stages: (1) a “Threshold Capability 1” system with 20 interceptors based at a single site in Alaska in 2005; (2) an “Expanded Capability 1” system with 100 interceptors in 2007; (3) a “Capability 2” system, featuring an improved ability to deal with countermeasures in 2010; and (4) ultimately a “Capability 3” system with 250 interceptors based at two sites in 2011.<sup>57</sup>

On September 1, 2000, President Clinton announced that he would not authorize deployment of the system. This decision was based on four criteria: (1) the extent of the missile threat; (2) the status of BMD technology (two of three live fire tests failed); (3) the cost of the system; and (4) the impact of deployment on U.S. security, including arms control and disarmament regimes, relations with Russia and China, and the effect of the decision on U.S. Allies.<sup>58</sup> At that time, then presidential candidates, Al Gore and George W. Bush, indicated their intentions to continue development of BMD. Following the disputed 2000 presidential election, the Bush administration firmly stated its policy to deploy BMD at its outset, placing the matter high on its agenda.

The Ballistic Missile Defense Organization (BMDO) is responsible for managing, directing, and executing the BMD Program. The program focuses on: Theater Missile Defense (TMD), National Missile Defense (NMD), and advanced ballistic missile defense technologies.<sup>59</sup>

53. See ABM Treaty, *supra* note 8, at preamble. See also CD, *supra* note 3; see also Ambassador Norman Wolf, *supra* note 20.

54. See ABM Treaty, *supra* note 8, art. V. Article VI also prohibits the testing of new systems, or conversion of existing systems, for ABM capability.

55. See *id.* art. VI. This provision prohibits deployment of radar systems for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

56. See *id.* art. XII.

57. See *Canada and Ballistic Missile Defense*, Project Ploughshares, available at <http://www.ploughshares.ca/> (last updated Feb. 8, 2001).

58. The four reasons stated above correspond with four predetermined factors to be considered by President Clinton in resolving whether to deploy a limited national missile defense. These factors were listed in President Clinton's signing statement on July 22, 1999. See Arms Control and Disarmament, *supra* note 36, at 609-10.

59. See *National Missile Defense Program*, Ballistic Missile Defense Org., available at <http://www.acq.osd.mil/bmdo/bmdolink/html/nmd.html>.

The reasons stated for President Clinton's deferring deployment remain. First, there is no evidence that rogue states have furthered substantially their capability to launch long-range missiles capable of reaching the United States, or that such states would elect to deliver weapons using such a traceable means of conveyance. The only possible exception would be North Korea, which is gradually warming its ties with South Korea and softening its anti-U.S. stance. The more realistic threat from rogue states is terrorism in the form of suitcase bombs and chemical and biological attacks.<sup>60</sup> Second, the technology may be unworkable and doomed to failure. On this point, live fire testing has produced mixed results, and the discrimination component necessary for an interceptor to choose between a live warhead and a decoy is thought by many to be technically infeasible.<sup>61</sup> Third is the cost of the program. Republican proponents of the measure anticipate expending \$61 billion on the program. An additional potential cost is the loss of many successful years of ballistic missile reductions, should Russia and China follow through with their threats of response to the BMD plan. Fourth, the program would require unilateral abandonment of the ABM Treaty. Past and present presidential administrations concede that, without Russia's consent to amend it, the ABM Treaty would cease to exist following deployment. Abrogation of the ABM Treaty thereafter threatens existing arms control treaties.

Though NATO members accept the U.S. position to deploy BMD, European allies fear a U.S.-based NMD system would result in an unbalanced trans-Atlantic defensive regime, leaving their countries vulnerable to attack. Responding to their concerns, U.S. Defense Secretary Donald Rumsfeld stated at the Munich Conference on Security Policy<sup>62</sup> that the United States would consult with its European allies, and that it was prepared to help them "deploy such defenses."<sup>63</sup> For their part, the Russians have begun courting the Europeans, including NATO, to deploy a shield that would not violate the ABM Treaty.<sup>64</sup> But other deployments are problematic. U.S. placement of a BMD system in Taiwan could be considered by China to be an act of aggression that would "bring severe consequences."<sup>65</sup>

Despite their own proposal, Russia has resolved to oppose U.S. plans to deploy the BMD system. China and the NATO allies joined Russian opposition to what they agree is a threat to strategic stability and the possible advent of a new arms race. The year was so wrought with official declarations and statements to the press on both sides of this argument, that the subject of BMD-dominated arms control and disarmament in 2000. The United States' failure to secure Russia's acquiescence on BMD deployment meant that there was no real

60. See Harry Austin, *A Dubious Anti-Missile System*, CHATTANOOGA TIMES, Jan. 22, 2000, at B6; Rob Morse, *About as Effective as a Big Sheet of Paper*, Julian Borger, *Clinton Wants Dollars 60bn Missile Defence System to Fail Test*, THE GUARDIAN (London), July 7, 2000, at 2.

61. A former senior engineer at TRW, one of the military contractors involved in designing NMD, alleged that the company withheld information on shortcomings of the "extractor program," which would enable the "kill vehicle" to discriminate between an incoming warhead and decoys, and that the program amounts to a "conspiracy to milk the government." She has filed a wrongful termination suit against TRW. *Bulletin of Atomic Scientists*, Mar. 7, 2000, available at <http://www.bullatomsci.org>.

62. U.S. Defense Secretary Donald H. Rumsfeld, Speech at the Munich Conference on European Security Policy (Feb. 3, 2001), available at <http://www.defenselink.mil/speeches/2001/s20010203-secdef.html>.

63. Space Daily, Feb. 7, 2001, available at <http://www.spacer.com/news/bmdo-01e.html>.

64. Upon the reopening of the NATO information center in Moscow in February 2001, the Russian Secretary General presented the Russian plan, which the Bush administration interpreted as Moscow's acquiescence that a need exists for a defense from a missile threat by rogue states.

65. Senator John Kyl, *Great Wall of Missile Defense*; see Senator John Kyl's website at <http://www.senate.gov/~kyl/>.

progress toward new arms reduction efforts. To the contrary, Russia has threatened to tear up START II if the United States follows through with BMD planning and deployment. Furthermore, China indicated that it would be forced to build above its current nuclear deterrent of about twenty missiles to counter the American BMD system. China and the United States do not have arms limitations treaties. India, which has fought two wars with China, would be forced to bolster its nuclear forces in response to a Chinese buildup. Thereafter, Pakistan, which has fought three wars with India, would be forced to commence an arms buildup in response to India.

Russia and China have found common ground on this issue, speaking out together on the subject. The nations' leaders submitted the following statement to the CD:

China and Russia hold that this plan is, in essence, aimed at seeking unilateral superiority in the military and security arena. Implementation of the plan would have the gravest adverse consequences for the security not only of China, Russia and other States, but also for that of the United States itself and for global strategic stability in the world as a whole. For that reason, China and Russia resolutely oppose this plan. The collapse of the ABM Treaty would trigger another round of the arms race and reverse the positive trends that have emerged in international politics following the end of the cold war . . . Proposals for the so-called "amendment" of this Treaty are in effect a disguised attempt to contravene its provisions. Changing the text of the ABM Treaty is tantamount to scrapping the whole Treaty with all the negative consequences that this would entail. In the current strategic situation, it is vital that the integrity and force of the ABM Treaty should be preserved intact.<sup>66</sup>

During an Ottawa summit in December 2000, Russian President Vladimir Putin encouraged Canadian intervention on the issue of BMD. Canada responded by deferring involvement until the incoming Bush administration decides whether to construct the system, feeling that the matter was still a hypothetical situation. However, Canadian President Chretien, referring to the ABM Treaty, stated that Canada would not want to see the current arms control regime eroded.<sup>67</sup>

Members of Congress and the administration continue to push deployment of a BMD system. President Bush's Secretary of Defense, Donald Rumsfeld, a former U.S. ambassador to NATO, has already called the ABM Treaty "ancient history." According to Secretary Rumsfeld, attempting a system that fits within the ABM treaty, as suggested by Russia, would result in a less desirable product in terms of lead-time, cost, and operational effectiveness. During a European security conference in Munich in February 2001, he stated, "You would very likely come up with something other than [an effective missile defense] if you sat down and tried to design something that would fit within a treaty that was written twenty-five years ago when technology was notably different, when we were in a Cold War, when the threats in the world were vastly different. That is Cold War thinking," he said.<sup>68</sup> "That period is over in our life. Why don't we get over it?"<sup>69</sup> Citing the president's constitutional responsibility to protect the country, he added, "Indeed, it is in many respects—a moral issue" and urged that the system constitutes a threat only to those who would

66. *Joint Statement by Jiang Zemin, President of the People's Republic of China, and Vladimir V. Putin, President of the Russian Federation, on Anti-Missile Defence*, U.N. Conference on Disarmament (CD), U.N. Doc. CD/1622 (Aug. 4, 2000), available at <http://www.unog.ch/disarm/curdoc/1622.htm>.

67. DeNeen L. Brown, *Putin Asks Canada to Mediate with U.S.*, WASH. POST, Dec. 19, 2000, at A36.

68. U.S. Defense Secretary Donald H. Rumsfeld, *supra* note 62.

69. *Id.*

threaten an attack.<sup>70</sup> Secretary of State Madeleine Albright stated at the NPT Review Conference, “that Treaty has been amended before and there is no good reason it cannot be amended again to reflect new threats from third countries outside the strategic deterrence regime.”<sup>71</sup>

These events have made it seem that it is not a question of if, but when, the 1972 ABM Treaty will be a dead letter in the absence of further amendment. If the United States continues to test the systems proposed, that could be considered conduct constituting a breach under Article V, which states, “Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.”<sup>72</sup> TMD is predicated upon a sea-based and mobile land-based system. Further, Article XV provides that a Party may withdraw from the Treaty “if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.”<sup>73</sup> Withdrawal pursuant to Article XV requires six months’ notice to the other party, which notice shall include an enumeration of the extraordinary events triggering the event of withdrawal. Therefore, if a U.S. abrogation of the ABM Treaty becomes imminent, it is incumbent on the U.S. administration to provide notice and articulate its reasons for its abrogation.

#### E. RUSSIAN-AMERICAN MEMORANDUM OF UNDERSTANDING (MOU) ON THE NOTIFICATION OF MISSILE LAUNCHES<sup>74</sup>

In January of 1995, a Black Brant XII scientific rocket lifted off from Norway on a twenty-four-minute flight to conduct research toward a joint Norwegian-American study on the Northern Lights. Military observers in Russia mistook the rocket for a nuclear missile. Russian President Boris Yeltsin agonized over an appropriate response, and the incident almost sparked a nuclear catastrophe as he vacillated between retaliation and observation. This event sparked talks, which culminated in the agreement<sup>75</sup> between the United States and Russia on the matter of vehicle launches. The agreement sets up a multilateral notification regime, into which interested states may join.

The MoU furthers notification systems already in place following the entry into force of the START I Treaty,<sup>76</sup> and the parties hope that the MoU will further prevent accidental launches of nuclear missiles. Many of these missiles remain targeted and on a status of high alert.

#### F. COMPREHENSIVE TEST-BAN TREATY (CTBT)<sup>77</sup>

The CTBT prohibits all parties from carrying out “any nuclear weapon test explosion or any other nuclear explosion,” and to “refrain from causing, encouraging, or in any way participating in” nuclear testing.<sup>78</sup>

70. CONN. POST, Feb. 4, 2001, at A16.

71. Secretary of State Madeleine K. Albright, Delivery of U.S. Statement to NPT Review Conference (Apr. 24, 2000).

72. ABM Treaty, *supra* note 8, art. V.

73. *Id.* art. XV.

74. See Memorandum of Understanding on Notifications of Missile Launches, Dec. 16, 2000, U.S.-Russ., State Dept. No. 01-15 (1997).

75. *Id.*

76. See START I, *supra* note 4.

77. CTBT, *supra* note 9.

78. See *id.* art. I.

The CTBT bears the signatures of 150 states, but still awaits entry into force. Although President Clinton was the first world leader to sign the treaty on September 24, 1996, the failure of the U.S. Senate to ratify has helped prevent CTBT from becoming international law. Entry into force will occur upon ratification by forty-four states specified under the treaty.<sup>79</sup> Thus far, forty-one of the forty-four have signed. The CTBT awaits the signatures of India, North Korea, and Pakistan. Only thirty of the forty-four states have ratified.

The CTBT furthers the goals set out in NPT Article VI by acting to prevent nuclear proliferation. Counterpart to the negative security assurances achieved by the ABM treaty, the CTBT encourages the non-nuclear parties to multilaterally eschew a nuclear strategy by forswearing the ability to test nuclear weapons. Meanwhile the nuclear states agree not to engage in proliferative conduct. The U.S. Senate voted down the CTBT ratification by a vote of 51-48 on October 13, 1999. Then, the Clinton impeachment issue and NATO bombings in Yugoslavia hampered serious Senate debate. Opponents to ratification cited their misgivings with: (1) the program intended to maintain nuclear weapons readiness in the absence of testing; (2) the treaty's verification regime; and (3) the treaty's value to the goals of non-proliferation.<sup>80</sup> The Senate only allowed three days of hearings, followed the next day by two and a half days of debate, and a final vote five days after consideration commenced. The time allotted was substantially less than that afforded consideration of other complex arms-related treaties previously before the Senate.<sup>81</sup>

In 2000, the president of the United States had not withdrawn from consideration the CTBT. Therefore, the matter may be deemed pending, albeit not currently before the Senate. In order to turn the tide in the Senate, President Clinton appointed General John Shalikashvili, former Chief of the Joint Chiefs of Staff, to help lobby for the Senate's advice and consent on ratification. The United States is now operating under a voluntary moratorium from testing nuclear weapons and has not conducted a test explosion since September 1992.

On April 21, 2000, the State Duma of the Federal Assembly of the Russian Federation adopted, by an overwhelming majority, a Federal Act on ratification of the CTBT.<sup>82</sup> This action, along with Russia's ratification of START II,<sup>83</sup> has been viewed as an attempt to focus U.S. attention on disarmament, and away from plans for a BMD. Such a system, according to Russia, threatens current progress in disarmament, and possibly a new arms race.

Since their 1998 tests, neither India nor Pakistan has signed the treaty, but they have instituted voluntary moratoriums on further testing until it comes into force. Indian Prime Minister Atal Bihari Vajpayee visited the White House on September 15, 2000, and received praise from President Clinton for India's commitment to impose a voluntary moratorium on further nuclear testing.<sup>84</sup> However, India also has expressed its pleasure with the Bush administration stance on the Senate's rejection of CTBT.

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79. *See id.* at Annex.

80. *See* George Bunn et al., *White Paper on the Comprehensive Nuclear Test Ban Treaty*, LAWYERS ALLIANCE FOR WORLD SECURITY (Fall 2000), available at <http://www.lawscns.org>.

81. *See id.*

82. *See* Ratification of the Comprehensive Nuclear Test-Ban Treaty, signed by the President of the Russian Federation, Vladimir Putin, May, 27, 2000 (author trans.), available at <http://www.duma.ru>.

83. *See* Treaty Ratification, *supra* note 37.

84. *See* Associated Press Release, Sept. 15, 2000, 1408EDT.

## G. CONCLUSION

The United Nations held the Millennium Summit in New York on September 6-8, 2000. The event culminated in the adoption of the Millennium Declaration by the General Assembly, which "reflects the concerns of 147 heads of State and Government, and 191 nations in total, who participated in this largest-ever gathering of world leaders."<sup>85</sup> Therein, the world leaders resolved "to eliminate the dangers posed by weapons of mass destruction" and "to strive for the elimination of weapons of mass destruction, particularly nuclear weapons, and to keep all options open for achieving this aim, including the possibility of convening an international conference to identify ways of eliminating nuclear dangers."<sup>86</sup> While the language of that resolution is conspicuously vague, it nevertheless reflects humanity's interest in a world made more secure through the elimination of weapons of mass destruction. However, as we enter the much-anticipated millennium, the impending failure of the CTBT and the ABM Treaty has created severe rifts in the relationships among nuclear powers in the area of arms control. Despite heroic diplomatic efforts in the NPT Review Conference, arms control experts worldwide were tormented by the rapid departure of the United States from its ABM obligations. These obligations have long been regarded as the bedrock of current reductions in nuclear weapons. The potential of future weapons cuts, which once seemed imminent, are now threatened. The question, therefore, is whether the United States is able to convince the nuclear-weapon States that a BMD is in everyone's interest, and that such a system will not lead to the same destabilization that nuclear weapons presented upon their introduction to the geopolitical landscape. The answer to the question will emerge in the years to come.

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85. U.N. GAOR, 1st Comm., 55th Sess., U.N. Doc. A/RES/55/2 (2000), available at <http://www.un.org/documents/ga/res/55a55r002.pdf>.

86. See *id.*

