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Taking the Path of Delegitimization to Nuclear Disarmament

By Amandeep Gill



Center for a
New American
Security



Acknowledgements

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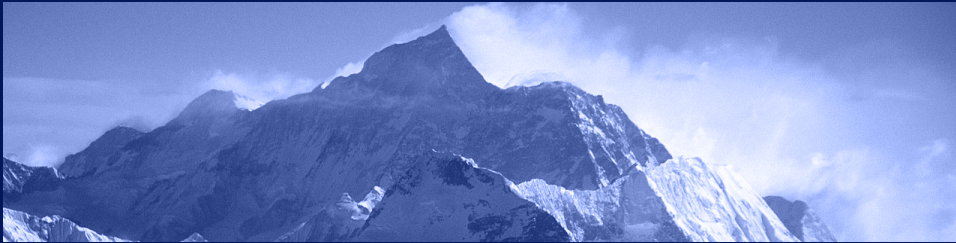
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Taking the Path of Delegitimization to Nuclear Disarmament

By Amandeep Gill

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About the Project Base Camp Series

"In some respects, the goal of a world free of nuclear weapons is like the top of a very tall mountain. From the vantage point of our troubled world today, we can't even see the top of the mountain, and it is tempting and easy to say we can't get there from here. But the risks from continuing to go down the mountain or standing pat are too real to ignore. We must chart a course to higher ground where the mountaintop becomes more visible."

—George P. Shultz, William J. Perry, Henry A. Kissinger, and Sam Nunn
"Toward a Nuclear-Free World," *The Wall Street Journal*, January 15, 2008

Project Base Camp, conducted by the Center for a New American Security in partnership with the Nuclear Threat Initiative with support from the John D. and Catherine T. MacArthur Foundation, explored alternative options for "base camps" – nuclear worlds that are significantly different from today, more desirable than today, and that might serve as "staging areas" on the path to the nuclear-free mountaintop. The project applied a competitive strategies approach in which authors of different nationalities described alternative base camps, as well as transition paths to them from today's world, and potentially from them to a world free of nuclear weapons.

At this time, in 2009, a nuclear-free world remains a distant vision. Project Base Camp is intended to inform international deliberations about the future of nuclear weapons and arms control, whether or not the mountaintop is reached.

INTRODUCTION

This paper describes a “base camp” on the path to the “summit” of nuclear elimination in which the current tradition of nuclear non-use has been strengthened significantly, so that nuclear use and nuclear threats are delegitimized as instruments of national power. Before describing this future world and the steps that could lead up to or beyond it, the paper presents some essential background information on nuclear delegitimization.

The Setting

The dictionary meaning of delegitimization is to diminish or destroy the legitimacy, prestige or authority of an entrenched idea or object. If nuclear weapons are today an established currency of politics and security, delegitimizing them would imply any number of actions or processes that devalue nuclear weapons and render them increasingly worthless. The advocates of the delegitimization path to nuclear disarmament believe that it becomes easier then to withdraw such a worthless currency from circulation.

Means of warfare have been subject to a variety of legal or cultural norms through the course of history. In modern times, the legitimacy of the development, stockpiling and use of weapon systems with highly destructive, indiscriminate and inhumane effects has been repeatedly challenged, often successfully.¹ Nuclear weapons are no exception. However, their immense destruction potential as well as their perceived utility in averting catastrophic major wars has given a unique character to debates about the legitimacy of nuclear weapons.²

This uniqueness is also reflected in the current status of international legal and cultural norms on nuclear weapons. Possession, and by extension development, of nuclear weapons is restricted to the five nuclear weapon States (China, France, Russia, United Kingdom and the United States) mentioned in the Nuclear Non-Proliferation Treaty (NPT); the three States which never signed the NPT (India, Israel and Pakistan)³ could thus develop nuclear weapons without violating international law.⁴ Stockpiling of nuclear weapons among these eight possessors is limited in a strict legal sense only for two of them by the bilateral U.S.-Russian arms control agreements, which also set an informal ceiling of sorts for the other possessors. The United Kingdom and France have reduced the number of nuclear weapons deployed by them through national declarations in the post-Cold

War years thus creating an informal but not treaty-bound ceiling for themselves.⁵

Testing and qualitative improvement of nuclear weapons with or without explosive testing are similarly restricted to varying degrees, demonstrating the evolving and patchwork-like nature of legal restrictions on nuclear weapons.⁶ Russia, the United Kingdom and France have ratified the Comprehensive Nuclear Test Ban Treaty (CTBT), accepting its core obligation not to test nuclear weapons; the United States, Israel and China have only signed the CTBT, thus accepting the norm but not the strict legal obligation. India and Pakistan have not signed the treaty but have declared national moratoriums on further testing. In the post-CTBT, post-Cold War era, even the development of new nuclear warheads without testing is subject to an informal restraint on qualitative development of nuclear weapons. The debate on the Reliable Replacement Warhead (RRW) in the United States demonstrates the potency of this informal restraint. While it is legally permissible for the eight possessors to develop new nuclear warheads, it is politically difficult to do so and even the “new” possessors are likely to go about such work in a quiet, almost embarrassed manner.

Of all the norms related to nuclear weapons, the one pertaining to use is most germane to the delegitimization path. Nuclear weapons have not been used since their first and last use in 1945 even though many subsequent conflict situations were asymmetric (i.e., one party to the conflict could use them without fear of nuclear retaliation by the other). Independent of the “material” reasons (political costs, lack of suitable targets, etc.) for this non-use it has been argued that this is because a clear taboo against first use of nuclear weapons has taken root.⁷

Evidence for the existence of this taboo is seen not only in the absence of use in specific situations involving the United States since 1945 (Korean

War, Vietnam War and the first Gulf War) but also in the broader usage of terms such as weapons of mass destruction, which “civilized states” do not employ, at least not casually, as well as the extent to which two nuclear weapon states – China and India – extol their “responsible” no-first use posture.⁸ One may debate the applicability of this taboo or tradition of non-use⁹ to all nuclear weapon states or to future conflict situations with radically different material reasons¹⁰ but there is no denying some of its instrumental, constitutive and permissive effects (legitimizing highly destructive conventional weapons, for example). The problem lies in publicly acknowledging or formalising this taboo or tradition of non-use. Officials and politicians in countries that rely on nuclear deterrence may believe that nuclear weapons are unusable but they will not publicly admit this private belief because making deterrence credible requires generating a contrary belief that one could actually use nuclear weapons.

The problem of linking this tradition or taboo that operates informally to formal, legal norms was dramatically highlighted when in 1993, the World Health Assembly requested the International Court of Justice (ICJ) to give its advisory opinion on whether the use of nuclear weapons by a state in war or other armed conflict would be a breach of its obligations under international law, including the statute of the World Health Organization (WHO). A voted resolution of the UN General Assembly followed in 1994 requesting the ICJ to give its advisory opinion on whether the threat or use of nuclear weapons is *permitted* under international law in any circumstance. States that rely on nuclear deterrence and those that do not gave dramatically different submissions to the Court. The Court’s opinion reflected these diverse views.¹¹ The Court noted the contention of one set of states that the taboo operating since 1945 reflected the expression of an *opinio juris* of sorts by the possessors. On the other hand, those states that assert

the legality of the threat and use of nuclear weapons in certain circumstances invoked the doctrine and practice of nuclear deterrence to contend that no such customary law provision exists.

The ICJ's own view was that the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other. However, the Court concluded unanimously that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter¹² and that fails to meet all the requirements of Article 51 on self-defense, would be unlawful and that a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons. The Court was divided down the middle on whether 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. Similarly the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.

Nothing has happened to change the legal stalemate since then. However, the delegitimization idea – in particular the experience of the 1925 Geneva Protocol leading to the Chemical Weapons Convention¹³ – continues to inspire initiatives for nuclear disarmament. Some have been ambitious, positing for example a draft convention on the prohibition of the use of nuclear weapons pending nuclear disarmament; others choose to emphasise limited, technical aspects of delegitimization such as de-alerting of deployed nuclear weapons.

Inspired by one of the recommendations of the WMD Commission of 2006,¹⁴ Chile, New Zealand, Nigeria, Sweden and Switzerland, later joined by Malaysia, have been tabling since 2007 a resolution at the UN General Assembly titled *Decreasing the Operational Readiness of Nuclear Weapons Systems*. India has been tabling a similar resolution titled *Reducing Nuclear Danger* since 1998. De-alerting is also one of the thirteen steps agreed at the 2000 NPT Review Conference. De-alerting has been criticized for being unverifiable and for its potential negative impact on crisis stability, say through a race to re-alert.¹⁵ Viewed in a purely technical context in light of the Cold War deterrence experience, this criticism has some validity. However, the real value of de-alerting is political (i.e., deemphasising the military utility of nuclear weapons by introducing delays before nuclear use can be executed, by reducing the role of “experts” and by enhancing political control over use). In that sense de-alerting is an important intermediate step on the delegitimization path. As argued later in this paper, in an n-player complex nuclear world where some possessors may be reluctant to embrace no first use right away, it provides essential interim scaffolding for the move away from first use policies.

Nuclear weapon states committed to no first use such as China have proposed a binding agreement on such a posture but without linking it to specific disarmament proposals.¹⁶ A recent, more comprehensive elaboration of the delegitimization idea is contained in a Working Paper presented by India to the 2006 session of the UN General Assembly with the modest aim of stimulating a debate.¹⁷ A number of NGOs, individuals¹⁸ and independent commissions, including the 2006 WMD Commission led by Hans Blix, have also proposed delegitimizing nuclear weapons in the same manner as chemical and biological weapons.

In fact, even in the United States the delegitimization idea is witnessing a renaissance after a gap

of fifteen years. In a January 2007 op-ed in the *Wall Street Journal*, four eminent U.S. statesmen – George P. Shultz, William J. Perry, Henry A. Kissinger and Sam Nunn¹⁹ – advocated “a series of agreed and urgent steps that would lay the groundwork for a world free of the nuclear threat.” The first of these steps is changing the Cold War posture of deployed weapons to increase warning time and reduce the danger of accidental or unauthorized use of nuclear weapons. President Obama in his campaign speeches repeatedly stressed the need for the United States to take the lead in de-emphasising nuclear weapons.²⁰

The continued attraction of the delegitimization track is due chiefly to the following:

- Delegitimization sends an important political signal to leaders that nuclear weapons are not to be brandished casually and that they are a weapon of last resort. Even operationally it reduces the likelihood of nuclear war among two or more of the possessors by relaxing deployment postures.
- It reduces the incentive for, and raises the costs of proliferation by devaluing nuclear weapons as a currency of power and security.
- It lowers the probability of the use of nuclear weapons or devices by non-state actors by strengthening the societal taboo against nuclear weapons.²¹
- It reduces the differential between nuclear and non-nuclear weapon states by constraining visibly and early the nuclear weapon states, thus creating a broader, less divisive platform on nuclear disarmament.
- It offers an attractive platform to involve the public on the moral aspects of nuclear weapons further broadening the platform or the “expedition” to the mountain top of disarmament.
- At the same time the delegitimization path faces the following challenges:
 - It is seen as a slow and possibly redundant path to disarmament given the experience of the long gap between the 1925 Geneva Protocol and the adoption of the 1993 Chemical Weapons Convention.
 - It threatens to embroil disarmament negotiations in complex international legal issues related to the legitimacy of the use of force.
 - While delegitimization would constrain the nuclear deterrent postures of “responsible” powers, perhaps irreversibly, “less responsible” states or potential proliferators would be emboldened to change the status quo to their advantage,²² say by manipulating the differential aspects of delegitimization²³ or the line between state and non-state action.²⁴
 - It could prematurely compromise the political role of nuclear weapons for those nuclear powers (China, India) that still aspire to a better position in the international balance of power, those for which nuclear weapons are a guarantee of such a position (UK, France) or those for which nuclear weapons constitute the ultimate guarantee of survival in a hostile region (Israel).
 - Most important, key states (U.S., France, Russia, Pakistan and UK) view nuclear weapons as possessing warfighting potential. Their strategic communities see nuclear weapons as offering irreplaceable deterrent benefits against a variety of threats, not just nuclear. Thus as a matter of practical security policy they are averse to committing to the delegitimization path.²⁵

Treating delegitimization as a flexible continuum - from the current state of partial restrictions through intermediate measures such as de-alerting and no first use to a future state of comprehensive restrictions in which delegitimization becomes virtually inseparable from nuclear disarmament – could help address some of the above challenges. Another critical element in addressing these

concerns is the framework in which the delegitimization continuum is placed. The right balance has to be struck between the need to sustain momentum toward the eventual goal of nuclear disarmament and the need to address the anxieties inherent in the gradual disappearance of the broader deterrent role for nuclear weapons. As the response or non-response to some of the existing delegitimization proposals shows, such a balance has not been struck so far.

A Base Camp for the Delegitimization Path: March 20, 2024

The horseshoe table seemed more crowded than it had ever been since the expansion of the Security Council in 2017.²⁶ There was hardly an alternate in the ambassadors' chairs. Note-takers leaned forward from the rows behind with their pencils poised for the president's gavel. The ambassador from South Africa was no stranger to political drama. He nodded with satisfaction as the secretary general rushed to the chair by his side and pounded the gavel to begin proceedings.

The 24-member Security Council was in session. The text before it was a two-page draft resolution tabled jointly by China, India, South Africa and the United States. It had been put into blue after much wrangling among the P10 and between key permanent members and the elected non-permanent members: Pakistan, the United Republic of Korea²⁷ and Kazakhstan; Nigeria, Morocco, Southern Sudan, Botswana and Burundi, Sweden and New Zealand; Lithuania and Armenia; and Mexico and the newly-established Republic of Cuba. As the U.S. ambassador introduced the text, her voice betrayed a tinge of nervousness. The fact that an aide to the French ambassador rushed in just at that moment with what seemed to be the long awaited instructions from the Élysée in Paris did nothing to lessen the anxiety of the cosponsors. Would France or Russia still veto the modified text, now to be adopted under Chapter VI and not Chapter VII as originally proposed by Sweden on

behalf of the Nordic countries?

Not since the first resolution of the UN set up the Atomic Energy Commission at London on January 24, 1946 and asked it to report to the Security Council had the Council attempted to assume such responsibility for nuclear disarmament. The first operational paragraph of the draft called on all member states to commit irrevocably to the progressive and irreversible delegitimization of nuclear weapons and hence their eventual elimination. The second called on the Geneva-based Conference on Disarmament²⁸ (CD) to propose a draft treaty framework for delegitimizing and eliminating nuclear weapons. The third and key operative paragraph called on the CD to prepare by 2026, as part of the draft treaty framework, a draft protocol on no first use of nuclear weapons. The remaining operative paragraphs detailed the procedural and reporting links between the Conference on Disarmament, the UN General Assembly and the Council.

The sponsors had been cagey about the details of the proposed instruments. However, an article in that morning's New York Times gave a peek into their evolving thinking. Following the failure of the 2020 NPT Review Conference, the inability of the Russian Duma to ratify the Washington Treaty²⁹ and China's reluctance to join the U.S.-Russia bilateral reduction process, the U.S. president embraced a different approach to reducing nuclear danger. This approach centred on preventing the use of a single nuclear weapon anywhere through delegitimization of the use or threat of use of nuclear weapons instead of numerical reductions to a common number x . The still strong opposition within the U.S. strategic community to the idea of a complete abandonment of nuclear weapons also convinced her that it was wiser to take an intermediate step, a Nuclear Weapons Treaty so to speak, instead of a leap from the NPT to a Nuclear Weapons Convention. In other words, there was a need to preserve the core deterrence

mission of nuclear weapons through a Nuclear Weapons Treaty that would allow retention of nuclear weapons under national control during an initial period to be followed by a period where low numbers of weapons completely de-mated from their delivery systems could be placed under a dual national-international control system.

This approach began to be fleshed out on the margins of the G16 (erstwhile G8) in bilateral meetings with the leaders of the United Kingdom, Germany, Japan, China and India. As the talks expanded to include Russia and France, it became apparent that there was no alternative to a building block approach. As part of this step-by-step approach, all nuclear weapon states could first commit to a no-frills nuclear disarmament and delegitimization framework. They could then commit to specific components of the framework such as the no first use protocol in a manner and at a pace comfortable to them.

Resolution S/RES/3031(2024) finally carried by 20 votes in favour and four abstentions (France, Mexico, Pakistan and Russia). In almost identical statements the Russian and French representatives stated after the vote that while their countries were committed to the elimination of nuclear weapons, they could not agree to a framework that specified a deadline for nuclear disarmament or circumscribed the manner in which member states pursue their sovereign right to self-defense under Article 51 of the UN Charter. The Russian Ambassador described at length the considerable progress made in bilateral arms control with the United States, including de-alerting of land-based ICBMs. Although Russia agreed with the need to further deemphasise nuclear weapons, such a process could not take place in a vacuum. In particular, the still-fragile cooperative approach to missile defense needed consolidation and disparities in “surprise conventional strike capabilities” needed to be addressed. The French Ambassador stated his country’s readiness to negotiate the draft

protocol on no first use with an open mind in light of the assurances given by the co-sponsors that the right of any nation to defend its existence by any or all means at its disposal would not be compromised. France viewed the proposed protocol as an inherently flexible measure that reflected the differentiated objective reality of nuclear deterrence.

Pakistan’s representative stated that following the conclusion of the Srinagar Treaty for Peace and Cooperation his country was committed to no first use of nuclear weapons.³⁰ However, the sponsors had been unable to address some of his concerns regarding the relationship between the proposed protocol on no first use and the so-called Nuclear Weapons Treaty framework. Pakistan would view the discussions in the CD on such a treaty framework as purely exploratory, implying no commitment to negotiate, unless the relationship between the proposed protocol(s) and the treaty framework became clear.

Mexico welcomed the resolution as a first step, in particular the commitment to nuclear disarmament, but stressed the need to take the text to its logical conclusion. It regretted the fact that the sponsors had not chosen to specify a timeframe for the elimination of nuclear weapons. While the proposed protocol could be useful in limiting the possible use of nuclear weapons in the short interregnum until their complete elimination to retaliation alone, it could end up prolonging the nuclear weapon states’ reliance on the outmoded concept of nuclear deterrence.

Table 1: Excerpts from Security Council Resolution 3031 (2024)

Recalling that the very first Resolution adopted by the United Nations on 24 January 1946 sought to address the problem raised by the discovery of atomic energy;

Recalling also the 1996 opinion of the International Court of Justice 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;

Aware that any use or threat of use of nuclear weapons would have serious repercussions for international peace and security;

Recalling its resolution 1540(2004) which decided that all States shall refrain from supporting by any means nonstate actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems;

Encouraged by the resolve the international community has shown in first delegitimizing and then eliminating biological and chemical weapons of mass destruction;

Convinced that a similar approach is necessary to address nuclear danger, reduce the possibility of nuclear use by a state or nonstate actor and achieve the total elimination of all nuclear weapons;

1. Decides that all member states must commit irrevocably to the progressive and irreversible delegitimization of nuclear weapons and hence their eventual elimination;
2. Calls on the Conference on Disarmament in Geneva to commence negotiations on a draft framework treaty that enshrines this commitment;
3. Decides that as a first step and as part of the treaty framework the CD shall prepare and submit to the General Assembly by 2026 a draft protocol on no first use of nuclear weapons;
4. Calls on all states possessing nuclear weapons to commit through the draft protocol not to be the first to use or threaten to use nuclear weapons.

The Path to the Base Camp

Later that evening after signing the cable on the day's developments, the Indian Permanent Representative to the UN reflected in his 43rd Street office on the extraordinary chain of events that had led to Resolution 3031. The first link in the chain had to be the 2010 U.S. Nuclear Posture Review (NPR), which began the process of deemphasising nuclear weapons in U.S. security policy. The 2010 NPR concluded that while the United States could not yet completely rule out the option of a nuclear response to WMD use, "robust" conventional strike capabilities combined with "modest but proven" missile defense capabilities should be sufficient in the future to deter the use or threat of use of chemical and biological weapons against the United States. The review retained the previous focus on counter-proliferation but jettisoned plans for new warheads. Significantly, it revived U.S. support for a verifiable fissile material cutoff treaty (FMCT), a verification protocol to the Biological Weapons Convention³¹ and a "legally binding moratorium" or equivalent treaty commitment on testing for all states. Subsequently, the Lisbon NATO Summit began the slow process of redefining extended deterrence away from physical presence of nuclear weapons on the territories of non-nuclear weapon states covered by such deterrence. Simultaneously the United States engaged Japan bilaterally to address its concerns on the evolution of U.S. extended deterrence policy. NATO also started to rethink its approach to expansion in Russia's neighborhood.³²

The Nuclear Posture Review by the U.S. administration in 2018 was bolder. It committed the United States to no first use of nuclear weapons "except in the case of circumstances that in the judgement of the President pose an extraordinary and immediate threat to the existence of the United States and/or its allies." If the bilateral Washington Treaty with Russia, the testing ban and the FMCT were the crowning arms control achievements of the

Obama administration, the next President bested them with the no first use posture³³ and the roll-back of the DPRK and Iranian nuclear programs.

Obama's policy of polite bilateral engagement and firm multilateral pressure on Iran was continued by his successor. The two-decade long retooling of major economies away from hydrocarbons that began during the recession years of the first Obama term accelerated those shifts. Weeks of unrest led by students and civil servants heralded radical changes in the Iranian domestic political structure, including a complete redefinition of the role of the Supreme Leader. The new Iranian president startled the world in 2019 by inviting the IAEA to verify the dismantlement of six nuclear devices clandestinely built by the earlier regime. The United States responded by restoring full ties with Iran and leading nuclear weapon states to agree to IAEA inspections on all of their civilian nuclear facilities (instead of the earlier voluntary offers of select facilities) even before the entry into force of the FMCT. This undermined the remaining resistance to multilateral control of the fuel cycle and Iran became one of the first countries to cede control of its Natanz enrichment facilities to an international consortium.

At a superficial level the positive changes in the United States contrasted unfavorably with the increasing reliance on nuclear deterrence in Asia. India joined the NPT five in fielding SLBMs in 2012 and began to deploy mobile 5,000-kilometer missiles with multiple thermonuclear warheads. It also began deploying a limited layered ballistic missile defense system in 2015. China continued modernizing both nuclear and conventional strike systems while adding asymmetrical capabilities such as ASAT weapons and information warfare tools. For its part, Pakistan added a cruise missile capability to its considerable solid-fuel ballistic missile capabilities. At the level of doctrines, however, there was increased congruence among the Asian nuclear weapon states away from

warfighting and toward pure deterrence. As the Western nuclear powers began to respond positively to the idea of no first use, China and India became more willing to join the nuclear weapons reduction process. Ironically, modernized, more survivable strategic capabilities helped the Asian nuclear states engage more confidently in the delegitimization and disarmament process.

However, the critical factor in increasing the confidence of Asian engagement was their increasing involvement as equal partners in issues of global governance. The G8 became the G16 when it invited Brazil, China, India, South Africa and Mexico (Outreach Five) along with Indonesia, Turkey and Nigeria to join the Grouping at its 39th Summit in 2013,³⁴ even as it fought hard to redress its sagging credibility on global economic issues. The same year, for the first time since the founding of the IMF, a Japanese national became its Managing Director. The geopolitics of the UN Security Council, frozen since 1945, was finally transformed in 2017 when five new Permanent Members joined the Council. The UN's disarmament and arms control negotiating processes too were slowly transformed, in particular by the experience of the FMCT negotiations. A series of informal dialogues on nuclear danger that sprung up in Geneva, Vienna and Singapore on the margins of existing formal forums (Conference on Disarmament, IAEA's Board of Governors and the ASEAN Regional Forum) helped consolidate the ideas eventually encapsulated in Resolution 3031 and focus public attention on the issue of delegitimization of nuclear weapons.

Table 2: Nine Critical Steps on the Way to the Base Camp

1. A halt to the qualitative development of nuclear weapons or the development of new warheads.
2. Formalising a quantitative cap and strengthening international control on fissile material through a verifiable FMCT. An FMCT would also increase the confidence of the engagement of the non-NPT possessors in the broader nuclear regime and would get some of the NPT states used to the idea of working with the “outliers.”³⁵
3. Boiling down the mission of nuclear weapons to core deterrence through changes in the U.S. nuclear doctrine.³⁶ A critical mass of no first users – United States, India and China – could then overcome the resistance to no first use in Russia, Pakistan and France.
4. A reduction in deployed U.S. and Russian warheads to the high hundreds, thereby setting a normative ceiling for other possessors. The two could also eschew silo-based MIRVed ICBMs and reduce alert levels further for all deployed systems.
5. Universalising the CWC regime and completing pending CW destruction programs as well as strengthening the BWC including through verification measures. Delegitimization of the three types of weapons of mass destruction should be mutually reinforcing. Completing the CW and BW delegitimization processes would also reduce the incentive to pursue these weapons as nuclear weapons are delegitimized.
6. Reform of multilateral political and economic institutions, including the UN Security Council, to increase the stakes of China, India and Japan in global governance and to strengthen the confidence of their engagement in the process to reduce nuclear danger.
7. Voluntary acceptance of IAEA oversight over their civil nuclear fuel cycles by nuclear weapon states to buttress the idea of international control over emerging nuclear fuel cycle capabilities in non-nuclear weapon states.
8. Preserving offense dominance through a cooperative and modest approach to missile defense. If combined with lower overall deployed weapons, de-alerting measures and reduction of first strike-oriented weapon systems (e.g., MIRVed silo-based heavy missiles) this should convince states such as China that their minimal deterrent would not be undermined by the development of ballistic missile defense systems.
9. Lastly, a series of nuclear dialogues to address the anxieties created by the movement away from an NPT-centric regime to a more plural and complex regime necessitated by current nuclear dangers. These dialogues would be of variable geometry ranging from bilateral U.S.-China and China-India nuclear dialogues (currently missing) to dialogues involving the fuel cycle capable states³⁷ on international control of fuel cycle activities, the role of IAEA, etc. Any of these “training camps” could potentially evolve into a Base Camp as shown by the hypothetical example of the Eighteen-Nation Dialogue Forum.

From the Base Camp to the Summit³⁸

What happens once a political decision is taken by all the nuclear powers to delegitimize nuclear weapons and give them up through a step by step process embedded in a treaty framework? The summiteers could get off to an “Alpine start” with a Protocol on the lines of the 1925 Geneva Protocol that embodies the nuclear no first use norm. The problem posed by the lack of complete harmonisation among the declaratory policies of the nuclear weapon states at that point could be addressed by allowing some states – say Russia, Pakistan and France – to retain for a period the option of first use in case of a threat to their very existence. This time- and scope-limited reservation could be defined in the Protocol itself (more difficult given the perceived nature of nuclear deterrence) or left to individual states to define through formal reservations as was done in the case of the 1925 Geneva Protocol (more likely). This would keep alive for a while a sense of existential deterrence against non-nuclear threats. However, it is essential for the success of the overall process that this aspect of deterrence disappears after an interim period.

The second and related challenge would be how a nuclear weapon state’s no first use pledge is perceived by others looking at its actual deployment of nuclear weapons. This challenge could be addressed through a Protocol on Deployment that places restrictions on certain deployment modes say fixed land-based MIRVed ballistic missiles, long-range stealth planes or accurate long-range cruise missiles – all capable of being exploited for first-strike. These restrictions could take the form of outright bans and/or verifiable de-mating measures. Importantly, this protocol could also lay down limits on numbers of warheads deployed in the form of a ladder with rungs at five, 20, 50, 100 and 200 (upper ceiling). The parties to the framework treaty would meet regularly to consider among others a permanent agenda item on moving to the next lower rung. Such an approach would

keep up the pressure to disarm while allowing possessors to “rest on a rung” or moderate the pace if political and security conditions are not conducive to further reductions.

When does the delegitimization path get to the headwall of disarmament? For some, a global reduction down to 200 would virtually constitute elimination.³⁹ Others would not rest until every weapon has been dismantled and destroyed. Managing this tension between the advocates of *full* nuclear disarmament and *near* nuclear disarmament would be a key challenge in the endgame.⁴⁰ The author believes that once no first use and its technical surrogate de-alerting become international norms, any of a number of rungs of de-mated weapons – five, 20 or 50 – could constitute “zero.” The precise rung where disarmament kicks in through partial international control⁴¹ would depend among other things on the latency inherent in the nuclear fuel cycles of the advanced states at that point, the perceived efficacy and numbers of missile defenses deployed and the system of international guarantees and responses designed to address breakout. Increased global interdependence, strengthened reliance on cooperative security mechanisms, a significant reduction of terrorist threats and extensive international oversight over civilian nuclear activities could further ensure that this “zero” settles down at the lowest rung on the ladder. Nuclear deterrence would not completely disappear at “zero” but would resemble what Schell calls “weaponless deterrence.”⁴² It would provide an existential insurance against threats to the existence of the state. For the advocates of full nuclear disarmament, this residual deterrence could be an obstacle to abolition but in the real world this could be an important sanctuary on the way to the mountaintop.

An agreement on testing and deployment of weapons in outer space/weapons targeting assets in outer space could play a supportive role in this transition. So could confidence building

and transparency measures in the area of missile testing and space launches. However, attempts to ban ballistic missiles alone could detract from the attention that their WMD payloads require and could prove divisive given the current asymmetry in long-range cruise missile and stealth capabilities among the major powers.

Total defense dominance at lower rungs of nuclear weapons deployed for strict and delayed retaliation might undermine the delegitimization and disarmament process. However, once the process moves to its final stage, missile defenses could provide the major powers a cushion against a threat from small numbers of new or reconstituted nuclear weapons while international action against a deviant is mobilized. Thus missile defenses could go through an inflection point as we approach “zero.” An appropriate instrument on testing and deployment of missile defenses may need to be crafted in the stage before this point if missile defense technology wins over offense. This could stand on its own or be made part of the nuclear framework depending on the strength of concerns related to the impact of missile defenses on strategic stability.

General and complete disarmament or ambitious conventional arms control in any form could hobble the ascent to the summit. However, depending on the circumstances, long-range conventional “reconnaissance strike complexes” would need to be addressed unless all major powers come to possess them to varying but largely similar degrees, in which case they would resist restraints on these capabilities. The impact this asymmetry has on the commitment of other states both nuclear and non-nuclear to nuclear disarmament and non-proliferation bears watching.

What if an avalanche hits the summiters in the form of a threat of use or actual use of nuclear weapons? If the tradition of non-use has been transformed into a taboo by this time, such deviant behavior if sanctioned promptly could actually end

up strengthening the taboo. However, if progress on delegitimization has not been consolidated and the international response is tepid, there could be a scramble back to reestablish the primacy of nuclear deterrence.

Table 3:
Possible Steps on the Way to the Mountain Top

A binding commitment to delegitimize and eliminate nuclear weapons contained in a **framework treaty**⁴³ to which all states possessing or capable of possessing nuclear weapons are party.

A **Protocol on No First Use of Nuclear Weapons** (and by implication their non-use against non-nuclear weapon states⁴⁴).

A **Protocol on Deployment** among the nuclear weapon states. This Protocol would be the technical buttress for the preceding political instrument and could contain, apart from ceilings on numbers of weapons deployed, specific de-alerting measures and restrictions on forms of deployment considered incompatible with a no first use posture. It would be backed by transparency measures.

Supporting agreements on missile defense and non-weaponization of outer space.

A **Protocol on Irreversibility** that addresses issues arising from dismantling of warheads and that includes transparency measures such as exchanges between the nuclear weapons complexes of the weapon states and collaborative laboratory projects on verification technologies. These would ameliorate concerns related to reconstitution and breakout and help build blocks of a verification system for the next stage.

In the final stage, a **Protocol on Nuclear Security** to lay out international responses to breakout,⁴⁵ reconstitution or rapid build up, as well as to restrict and reduce over time national control over small numbers of nuclear weapons and sensitive weapons-related facilities (through provisions of regular international access and even control in ambiguous situations). This would in a sense imply a return to a modified form of the Acheson-Lilienthal Plan.⁴⁶

Conclusion

This paper posits a framework disarmament process that builds on the current differential aspects of nuclear delegitimization – partial restrictions on possession (NPT), development (NPT, CTBT) and use (national declaratory policies and an incipient/informal taboo as noted by the International Court of Justice and others). It treats delegitimization as a continuum that ends in more comprehensive prohibitions on use, development and possession. Elimination is conceived as one of a possible set of low-deployment rungs of fully de-alerted or de-mated nuclear weapons. These rungs also constitute a set of sanctuaries for those who might get high altitude sickness as the disarmament expedition approaches the mountaintop. The differential nature of delegitimization becomes an asset rather than a liability in such an approach as it allows opportunities to be grabbed politically as they present themselves and momentum to be built up in one area as it slows down in another. The approach could also be seen as more feasible by those wedded to nuclear deterrence than a “rigid” treaty-based approach that eliminates nuclear weapons in one fell swoop. This is also not a mutually exclusive approach as elements of other approaches – the United States and Russia leading the climb with deep cuts to be joined at some stage by other nuclear weapon states, multi-lateral negotiations involving all nuclear weapon states, reducing the security and political concerns that sustain possession of nuclear weapons and a top-down disarmament process driven by public shock at catastrophic use or near use of nuclear weapons⁴⁷ – can be added to the framework either directly or as supporting buttresses. Finally, this approach is directly useful in addressing the three biggest nuclear dangers – nuclear war among existing nuclear states, proliferation of new nuclear states and nuclear terrorism – that the world faces today through a broad platform that transcends the divides of yesterday.

ENDNOTES

1. The Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare (text and summary at <http://www.state.gov/t/ac/trt/4784.htm>) reflected the international revulsion at the use of poison gases in World War I. The Protocol did not cover development, production and stockpiling of these weapons and had no verification mechanism. It was not ratified by all states and some of those that became party did so with reservations. The UK for example reserved the right to use such weapons in retaliation. Thus, the Protocol operated more like a no-first-use restriction for these states till the entry into force of more comprehensive conventions on biological and chemical weapons of mass destruction. It served as a base for negotiating first the Biological Weapons Convention in 1972 and later the Chemical Weapons Convention in 1993. Many of the reservations related to retaliation were withdrawn subsequently.
2. An excellent introduction to this debate is Sohail H. Hashmi and Steven P. Lee, eds., *Ethics and Weapons of Mass Destruction Religious and Secular Perspectives*, (Cambridge: Cambridge University Press, 2004). Joseph S. Nye, Jr., *Nuclear Ethics* (New York, Free Press, 1986): 91-132, succinctly and prudently debates the interface of Western morality and nuclear issues. Nye suggests five maxims of nuclear ethics: 1) self-defense is a just but limited cause (motives); 2) never treat nuclear weapons as normal weapons; 3) minimize harm to innocent people (means); 4) reduce risks of nuclear war in the near term; 5) reduce reliance on nuclear weapons over time (consequences). Although Nye himself did not use the term “delegitimization,” his maxims lend themselves well to the concept.
3. DPRK signed the NPT voluntarily as a non-nuclear weapon State and developed a nuclear program. It withdrew from the Treaty and conducted a nuclear test in 2006. However, it has committed voluntarily to a process of denuclearization. The extent to which it is still bound by its NPT obligations is debated.
4. Theoretically a non-nuclear weapon state can withdraw from the NPT after a three-month notice and then develop nuclear weapons without violating international law.
5. As democracies it would be hard for them to explain for example to domestic audiences why they would need to build back up in the absence of grave threats to their security and independence.
6. There is a more structured and orderly parallel on the conventional side. The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, also known as the Inhumane Weapons Convention, and its five Protocols prohibit or restrict to varying degrees the development, deployment, transfer and use of fragmentation weapons, landmines, incendiary weapons, blinding laser weapons and Explosive Remnants of War (ERW). Its structure, a chapeau Convention with annexed Protocols, allows for flexibility and movement at a pace comfortable to the possessors of specific weapon systems. This also leads to frustration among certain states that wish to move more aggressively to ban such weapon systems and that have done so in forums outside the CCW process.
7. See for example Nina Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use,” *International Organization* Vol. 53, No.3 (Summer 1999).
8. Even though China’s move to limited deterrence allowing for first use of nuclear weapons has long been debated and India’s January 2003 doctrine can be seen to allow the possibility of nuclear retaliation against non-nuclear WMD use.
9. Scott Sagan argues in his Chapter “Realist Perspective on Ethical Norms and Weapons of Mass Destruction,” in *Ethics and Weapons of Mass Destruction* (ibid) that the non-use of nuclear weapons by the US after 1945, especially in the first Gulf War, is due mainly to a desire to strengthen a tradition of non-use and not so much due to a nuclear ‘taboo’. Maintaining such a tradition has practical significance – it strengthens nuclear deterrence as well as U.S. credibility on counter-proliferation.
10. Nuclear weapon states have argued, say before the International Court of Justice, that there has been no nuclear use since 1945 not because an *opinio juris* (customary law) has come into being but because the right conditions for use have not arisen.
11. Text of the Advisory Opinion available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.
12. Text available at <http://www.un.org/aboutun/charter/>.
13. See K. Subrahmanyam, “Elimination or Irrelevance,” *Arms Control Today* (June 2008) for an illustration of the application of this model to nuclear weapons. Subrahmanyam calls for a commission of former strategic commanders to debate whether nuclear weapons are militarily useful with a view to delegitimizing the use or threat of use of nuclear weapons.

14. Full report available at www.wmdcommission.org.
15. See, for example, Christopher A. Ford, "Dilemmas of Nuclear Force 'De-Alerting,'" International Peace Institute Policy Forum (New York, 7 October 2008). Viewed in a purely technical context in the light of the Cold War deterrence experience, this criticism has some validity. However, the real value of de-alerting is political, i.e. deemphasising the military utility of nuclear weapons by introducing delays before nuclear use can be executed, by reducing the role of "experts" and by enhancing political control over use. In that sense de-alerting is an important intermediate step on the delegitimization path. In an n-player complex nuclear world, where some possessors may be reluctant to embrace no first use right away, it provides essential interim scaffolding for the move away from first use policies.
16. See Li Bin, "China's Nuclear Disarmament Policy," in Harold A. Fieveson, ed., *The Nuclear Turning Point* (Washington, D.C.: Brookings Institution Press, 1999) for an exploration of how no first use fits in with China's approach to nuclear disarmament. Li Bin argues that it is difficult in the current strategic context for China to commit to reductions to specified numbers of warheads in the absence of no first use policies in the United States and Russia.
17. The paper (UNGA Document A/C.1/61/5) proposes seven specific steps starting with a reaffirmation of the unequivocal commitment of all nuclear weapon States to the complete elimination of nuclear weapons; reduction of the salience of nuclear weapons in security doctrines; de-alerting of nuclear-weapons to prevent unintentional and accidental use of nuclear weapons; negotiation of a global agreement among nuclear weapon States on no first-use of nuclear-weapons; negotiation of a universal and legally-binding agreement on of nuclear weapons against non-nuclear weapon States; negotiation of a Convention on the complete prohibition of the use or threat of use of nuclear weapons; followed by negotiation of a Nuclear Weapons Convention prohibiting the development, production, stockpiling and use of nuclear weapons and on their time-bound destruction, leading to the global, non-discriminatory and verifiable elimination of nuclear weapons.
18. See for example Jack Mendelsohn, "Delegitimizing Nuclear Weapons," *Issues in Science and Technology* (Spring 2006); and Selig S. Harrison "The Forgotten Bargain Nonproliferation and Nuclear Disarmament," *MIT Press Journal* (Fall 2006).
19. An early and influential convert to the idea of de-alerting nuclear forces.
20. In response to questions from the Council for a Liveable World, he said on 16 August 2007, "I believe the United States should lead the international effort to deemphasize the role of nuclear weapons around the world." In a speech to the Chicago Council on Global Affairs on 23 April 2007, he said, "Finally, if we want the world to deemphasize the role of nuclear weapons, the United States and Russia must lead by example. President Bush once said, The United States should remove as many weapons as possible from high-alert, hair-trigger status - another unnecessary vestige of Cold War confrontation. Six years later, President Bush has not acted on this promise. I will. We cannot and should not accept the threat of accidental or unauthorized nuclear launch." Again on 24 September 2008, in response to an *Arms Control Today* survey, he said, "The most important objective with respect to nuclear weapons is doing everything we can to prevent the use of any such weapons, anywhere in the world." (Quotes compiled by the Nuclear Age Peace Foundation).
21. In his 11 February 2008 speech at Stanford's CISAC U.S. National Security Advisor Stephen Hadley said that because many terrorists value the perception of popular or theological legitimacy for their actions "By encouraging debate about the moral legitimacy of using weapons of mass destruction, we can try to affect the strategic calculus of the terrorists."
22. Then Commander of the U.S. Strategic Command Admiral Henry Chiles told the Senate Committee on Armed Services on April 20, 1994 that adopting a policy of no first use would mean that "rogue leaders" would no longer be deterred.
23. Iran's Supreme Leader Ayatollah Khamenei has declared that nuclear weapons are haram (illegitimate). In his words "we consider the deployment of nuclear weapons to be contrary to Islamic tenets and principles." (Remarks on the death anniversary of Ayatollah Khomeini 4 June 2006 as reported on Khamenei's official website). This could be seen as a delicious example of the subtlety of Shia jurisprudence which leaves open a skylight between the development and use of nuclear weapons.
24. It is not impossible to imagine the use or threat of use of a 'missing' or improvised nuclear device by a non-state actor linked to state entities say in the South Asia leaving the threatened state, bound by its delegitimization commitments, frozen in inaction.
25. Janne E. Nolan, "The Next Nuclear Posture Review?" in Fieveson, ed., *The Nuclear Turning Point*, gives a detailed account of the failed attempt during the first Clinton administration to deemphasise nuclear weapons and the formidable bureaucratic and political resistance it encountered. Another excellent summary

- of objections from a nuclear deterrence perspective to the “stigmatization” approach is contained in Robert G. Spulak, Jr., “The Case in Favor of U.S. Nuclear Weapons,” *Parameters* (Spring1997): 106-18. Text available at <http://www.carlisle.army.mil/usawc/parameters/97spring/spulak.htm>.
26. *The long-drawn process of expansion received a critical boost in 2015 when President Obama wangled India’s ratification of the CTBT in exchange for U.S. support to the expansion of the UN Security Council. After completion of the ratification formalities in the U.S. Senate in 2017, Brazil, India, Japan, South Africa and Germany joined the erstwhile P5. No decision could be taken regarding a sixth seat for Africa, as Egypt successfully managed to undercut Nigeria, and in doing so, itself as well. International enthusiasm—such as it was—for an Egyptian candidature melted away in 2013, when efforts to replace the late President by his son came unstuck following the landslide electoral victory of the Muslim Brotherhood. The Council also expanded its non-permanent category, adding a seat each for the East Europe Group, Asia, Latin America and two for Africa.*
 27. *The two Koreas were reunified in 2019 after the DPRK government crumbled and economic refugees began pouring into China and South Korea. The non-nuclear and non-aligned status of the United Republic of Korea was written into the Seoul Treaty formalising the unification.*
 28. *The Conference had long been bedeviled by political deadlock. It was shaken out of its stupor when an informal grouping of eight (U.S., UK, Russia, Pakistan, France, Israel, India and China) began to meet on its margins to discuss control over weapons-usable fissile material in 2013. That informal grouping expanded to eighteen when the United Republic of Korea, Japan, Australia, Canada, Iran, Egypt, Germany, Sweden, Brazil and South Africa joined the deliberations in 2015 during the Fissile Material Cut-off Treaty (FMCT) endgame. The so-called Eighteen Nation Dialogue Forum (ENDF) played a key role in helping the CD conclude the FMCT in 2016 cementing its role as a deliberative body in which ideas and proposals were thrashed out and then formally presented by one or more of its members at the CD.*
 29. *The successor to the 2002-2012 Moscow Treaty on Strategic Offensive Reductions.*
 30. *The evolution in Pakistan’s thinking on use of nuclear weapons started when President Zardari said in his remarks to the Hindustan Times Summit on 22 November 2008 that Pakistan will not be the first country ever to use nuclear weapons. “I hope that things never come to a stage where we have to even think about using nuclear weapons (against India).” The remarks were quickly downplayed by the Army. However, in the aftermath of the Bangalore terrorist attacks of 2010 the civil-military balance in Pakistan began to alter irreversibly in favour of the civilian government. India’s conventional response degraded the army’s capabilities and undermined its standing in Pakistan. Binding guarantees by India in the Srinagar Peace Treaty that it would not seek to undermine Pakistan’s territorial integrity or political independence through use of force allowed Pakistan’s strengthened civilian government to revise its first use policy. The military denouement had significance going beyond South Asia. The inability of Pakistan to deploy its nuclear capability in response to the Indian conventional attacks began a rethink on the possible role of nuclear weapons in deterring conventional threats. This strengthened the global move toward the core deterrence mission of nuclear weapons.*
 31. *The 2001 draft Protocol was then dusted off the shelf by the 7th Biological Weapons Convention Review Conference in 2011.*
 32. *Ukraine joined the EU in 2016 but eschewed NATO membership following separate security guarantees by United States.*
 33. *The new verification provisions for the BWC, universalization of the CWC with the United ROK filing declarations for the DPRK’s chemical weapons program in 2019 as well as the earlier than expected completion of the delayed CW destruction programs in Russia and the United States significantly reduced the non-nuclear WMD threat. This and the positive developments in Iran helped the administration counter criticism in the Congress of its no first use policy.*
 34. A key recommendation of scholars such as Bruce Jones, Carlos Pascual and Stephen John Stedman in “Power & Responsibility Building International Order In An Era of Transnational Threats” (Washington, D.C.: Brookings Institution Press, 2009): 45-71.
 35. Israel’s eventual involvement in a disarmament/ delegitimization process is crucial but is a psychological challenge for countries such as Egypt.
 36. A 1997 report of the National Academy of Sciences Committee for International Security and Arms Control, “The Future of U.S. Nuclear Weapons Policy,” (Washington, D.C.: National Academy Press, 1997) concluded that in the post-Cold War security environment nuclear deterrence should be confined to “the core function of deterring nuclear attack, or coercion by threat of nuclear attack, against the United States or its allies.” “Given adequate conventional forces, the active and conspicuous role given to nuclear weapons during the Cold War can be greatly reduced

- without significant adverse effect on the probability of major war or on this country's ability to deal effectively with regional conflicts where its vital interests and those of its allies are at stake. The committee believes that Russia and the other nuclear weapons states can be persuaded to reach a comparable conclusion."
37. One definition could encompass all twelve states with uranium enrichment plants, namely, Brazil, China, France, Germany, India, Iran, Japan, Netherlands, Pakistan, Russia, the United Kingdom and the United States.
 38. This section examines all too briefly the complexities of going down to "zero" once delegitimization has been accepted as the preferred path. These could include residual disparities in postures and deployments, missile defenses, disparities in conventional capabilities, verification and international control, nuclear latency inherent in advanced fuel cycles, reconstitution and breakout, etc.
 39. See Morton H Halperin, "Defining 'Eliminating' Nuclear Weapons," in Victoria L. Farmer, ed., *Proceedings*, The Future of Nuclear Weapons: A US-India Dialogue (University of Pennsylvania, May 5-9, 1997). Also available in *Disarmament Diplomacy* Issue No. 19, October 1997.
 40. See Michael May, "The Trouble with Nuclear Disarmament," *The Bulletin of Atomic Scientists* Vol. 64, No. 5, (November/December 2008): 20-21.
 41. The Panama Canal demonstrates that the surrender of national control over a strategic asset via the intermediary of a dual-control regime is possible. The United States exercised exclusive control over the Canal Zone from 1914-1977. The Torrijos-Carter Treaty of 1977 led to a period of dual-control from 1979-1999. This allowed confidence to be built up. On 31 December 1999 Panama acquired complete control over the canal.
 42. Jonathan Schell, *The Abolition* (New York: Knopf, 1984).
 43. Such a framework is not a novelty as the experience of the Antarctica Treaty System and the Inhumane Weapons Convention shows.
 44. Such an instrument may have more non-proliferation value than two separate arrangements which would compartmentalise the commitments on no first use and non-use thus relieving the non-nuclear states of their shared responsibility in upholding the tradition of non-use.
 45. Delegitimization itself would ease concerns related to break out by increasing the political and moral pressure that could be brought to bear on possible deviants.
 46. A Report on the International Control of Atomic Energy, Prepared for the Secretary of State's Committee on Atomic Energy, U.S. Government Printing Office (Washington, D.C.: Department of State Publication 2498 [Reprint], March 16, 1946).
 47. See papers by Pavel Podvig, Eli Levite, and Bruno Tertrais for Project Base Camp.

A P R I L 2 0 0 9

Taking the Path of Delegitimization to Nuclear Disarmament



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