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(Updated 7 April 2005)

**Essential Points and Issues
In
Providing Legal Support to the Global Operations Center**

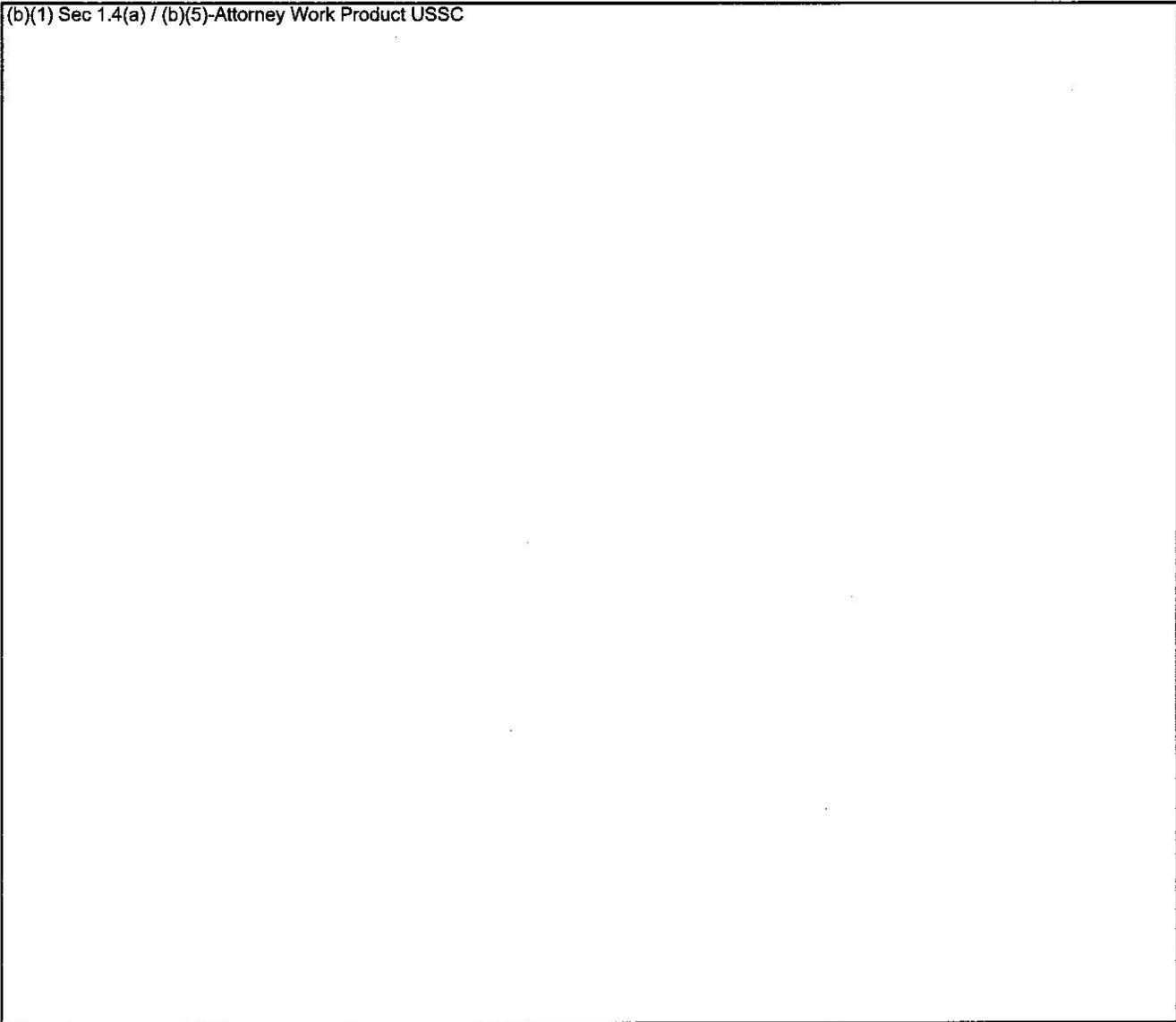
(U) Nuclear Warfare Issues:

- **(U) Legality:** There is no international law that makes the use of nuclear weapons *per se* illegal.
 - (U) We apply the traditional LOAC analysis of *military necessity, proportionality, and minimizing collateral damage.*
 - (U) There are treaties and political agreements that may impact how, when, and where can execute a nuclear attack (see discussion below on the Nuclear Non-proliferation Treaty and Launch Notification Agreements).
 - (U) However, because of the controversy associated with nuclear weapons, the U.S. policy has always been to avoid making a direct threat to use nuclear weapons. The U.S. traditional response to the possibility of Weapons of Mass Destruction (WMD) has been to state that we will “consider all options available to us in response to an attack using WMD.”

(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

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(b)(1) Sec 1.4(a) / (b)(5)-Attorney Work Product USSC

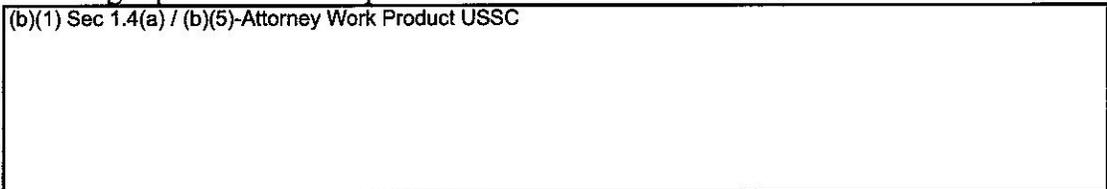


- **(U) Overflight Issues:** You often will hear discussion expressing concern (or limitations) of overflight of certain countries. The legal aspects of overflight are as follows:

-- (U) *Intercontinental Ballistic Missiles (ICBMs) and Submarine Launched Ballistic Missiles (SLBMs):*

--- (U) Since ICBMs and SLBMs travel through space to reach their targets, NO overflight permission is required under international law.

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-- (U) *Bombers and Cruise Missiles:*

--- (U) Under international law, overflight by these type of aircraft of a country without that country's permission would be a violation of that nation's sovereignty and considered an aggressive act. (Convention on Int'l Civil Aviation (Chicago Conv))

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- (U) **Impact of Risk Reduction Agreements:**

-- (U) There are a series of agreements by which the U.S. and Russia have agreed to notify each other in advance of the peacetime launch (and the intended target) of ICBMs and sea launched ballistic missiles SLBMs (NOTE: these agreements do NOT apply to bombers and cruise missiles). (Agreements/Treaties found at <http://www.state.gov/t/vc/trty/> "Agreement on Nuclear Risk Reduction Centers" is good starting point for notification obligations. DoS owns the NRRC.)

--- (U) These agreements are NOT treaties (i.e. they have not been ratified by Congress and are not binding under U.S. law) but are political agreements and are designed to prevent the inadvertent escalation of nuclear warfare

--- (U) Although these agreements designate a specific time-frame in which these advance notifications will be given (usually at least 24-hours to four days before a launch),

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- (U) **Impact of the Nuclear Non-proliferation Treaties and Agreements:**

-- (U) The Nuclear Non-proliferation Treaty (NPT) was signed and ratified by the five nuclear weapons states (NWS) at that time (U.S., Great Britain, France, the Soviet Union and China) and non-nuclear weapon states (NNWS). All of the NWS ratified the treaty and many NNWS (including Cuba, **North Korea**, Syria, Lybia and Iran, but NOT including Israel, Pakistan and India) also signed the treaty.

--- (U) As part of the NPT, the NWS agreed not to transfer nuclear weapons or nuclear weapon technology to the NNWS.

--- (U) The NNWS agreed in the treaty not to attempt to obtain either nuclear weapons or nuclear weapons technology.

-- (U) In order to induce the NNWS to sign the treaty, the NWS each made separate **non-treaty** statements called "negative security assurances" as to their policy on the use of nuclear weapons.

--- (U) In 1995, The U.S. stated, as part of its negative security assurance (NSA) to get NNWS to extend the treaty, that it would not use nuclear weapons against a NNWS except in the case of an invasion or an attack on the U.S., its territories, its armed

SECRET

forces, its allies or a State with which the U.S. has a security commitment, carried out or sustained by a NNWS in association or alliance with a NWS.

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---- (U) However, subsequent to 1995, the U.S. has attempted to restate its NSA to warn NNWS that the U.S. "will not limit the options available to the U.S. in response to an attack by a party using WMD."

-- (U) The following are therefore issues associated with the NPT:

---- (U) Can the U.S. modify its NSA and attack treaty NNWS signatories to prevent a biological or chemical attack on the U.S. and its interests?

---- (U) The U.S. position is "yes" (i.e. we never intended to give up our inherent right of self-defense, and the NNWS states can always withdraw if they don't like the new U.S. NSA), but some international bodies have said "no" because the NSA was a promise that induced the other countries to give up their right to seek nuclear weapons.

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---- (U) Again, the U.S. position is that it has always reserved its inherent right of self-defense and does not have to wait until an actual attack, but can preempt an imminent WMD attack. A nuclear attack must be evaluated using LOW/LOAC principles.

- (U) Nuclear Weapons Free Zones:

-- (U) Notwithstanding the NPT, there are three other treaties that could impact the political considerations of a nuclear attack:

---- (U) The Treaty of Tlatelolco established Latin America (all North American countries from Mexico southward and the Caribbean) as a nuclear weapons free zone.

---- (U) The U.S. ratified this treaty and is **legally prohibited under U.S. law** from using or threatening to use a nuclear weapon against a treaty signatory.

---- (U) Again, the U.S. has said it is not bound if a treaty party attacks the U.S. or its territories in association with a NWS.

---- (U) The Treaty of Rarotonga established the South West Pacific nations (including Australia, New Zealand and Fiji) as nuclear free zones. The U.S. signed, but has not ratified this treaty. It is considered *politically* binding, but not binding under U.S. law.

---- (U) The impact of this treaty is that the signatories could refuse to allow the U.S. the ability to transit their territory with nuclear weapons or conduct an attack from territories within the treaty boundaries.

---- (U) The Treaty of Pelindaba established the entire continent of Africa as a nuclear free zone. The U.S. also has signed, but not ratified this treaty.

---- (U) The treaty might impact the political considerations of a U.S. nuclear attack on an African nation and the ability of the U.S. to launch nuclear attacks from countries in Africa or overfly African countries to execute a nuclear attack.

SECRET

---- (U) In signing this treaty, the U.S. specifically said that it reserves its right to use all options against a nation that attacks the U.S. or its interests with WMD.

- **(U) Mutual Defense Treaties**

- (U) Sometimes, the question comes up in the context of mutual defense treaties whether we are obligated to respond with nuclear weapons if a signatory is attacked with WMD.
 - (U) There is no provision under international law that allows one country to dictate the manner and method of mutual defense to another. While two major mutual defense treaties (i.e. NATO and Japan) require "appropriate response," the U.S. will determine what response is appropriate under the circumstances.
- (U) Another issue is whether the U.S. can unilaterally invoke a mutual defense treaty without the request or consent of the attacked ally (i.e. NATO treaty).
 - (U) While there may be some discussion on this issue, we would note three observations:
 - (U) Any operation that would propose to overfly or put "boots on the ground" on the national territory of the ally would still require permission of the ally.
 - (U) The U.S. still retains its right to declare when its national interests are in jeopardy and, pursuant to Article 51 of the UN Charter, would reserve the right to respond unilaterally against an aggressor nation if it believes such action is necessary for its own self-defense.
 - (U) While we can justify unilateral response based on our inherent right of national self-defense under Article 51 if U.S. interests (ie. citizens and forces) are threatened, traditional thought is that absent a direct U.S. interest, we would need the request of the attacked country in order to justify application of armed force.

(b)(1) Sec 1.4(a) USSC

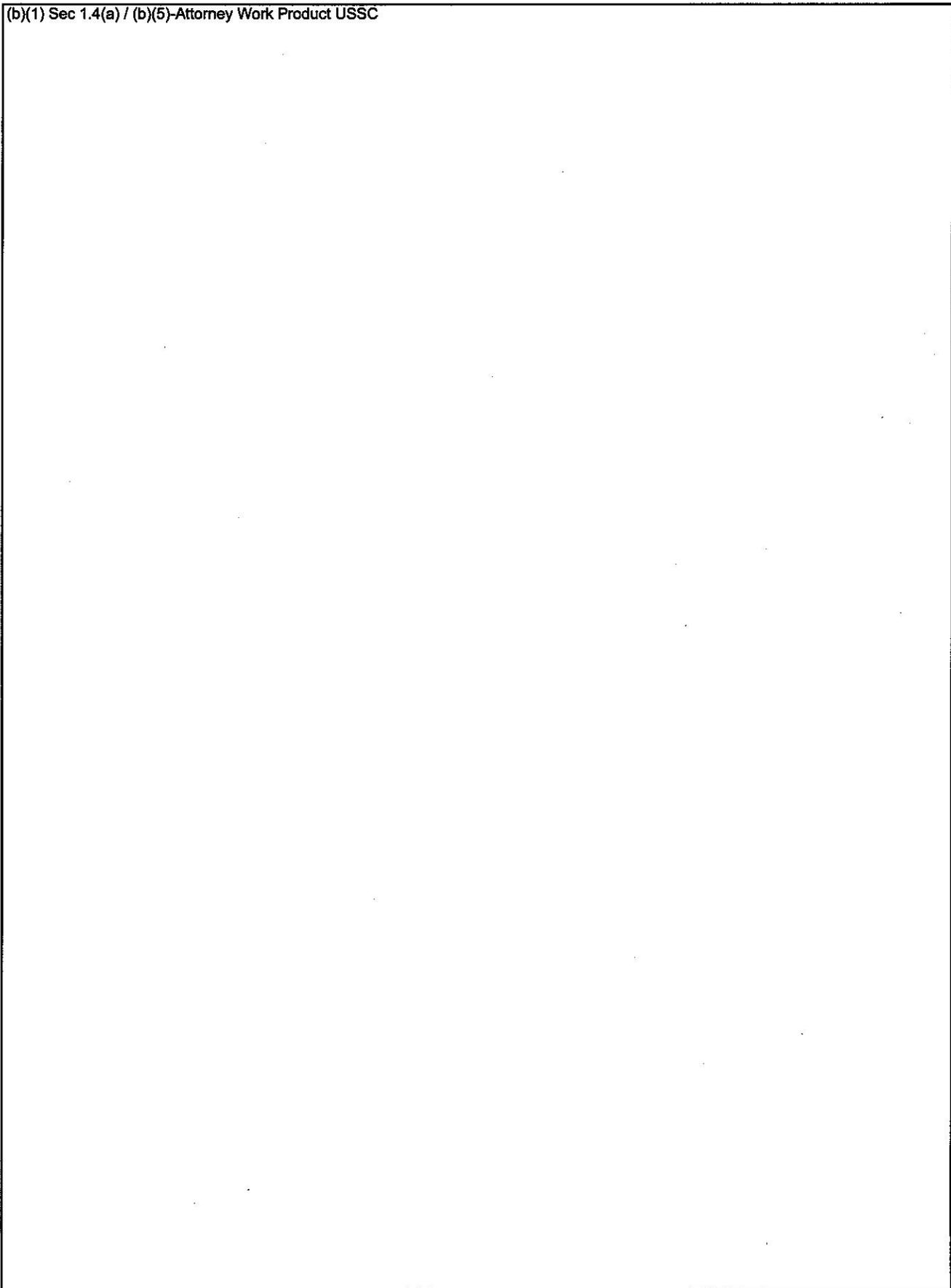
(U) Information Operations:

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