

LAWS AND NORMS: TOWARDS NON-USE AND PROHIBITION

“The Council of Delegates (...) finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.”

Council of Delegates of the International Red Cross and Red Crescent Movement,
26 November 2011

In its 1996 landmark Advisory Opinion on the Legality of the threat or use of nuclear weapons, the International Court of Justice examined current treaty law, customary rules and State practice with regard to nuclear weapons and, based on its analysis, concluded unanimously that the principles and rules of international humanitarian law apply to the use of nuclear weapons.¹⁵⁷ It held that the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.

International humanitarian law governs the use of weaponry and force in war. It prohibits the use of weapons or methods of warfare that cause indiscriminate harm to civilians (who are protected), cause unnecessary suffering to combatants, have effects that are disproportionate when

Legality of nuclear retaliation

Just as torture is illegal even against citizens or officials of a country that has used torture against its own citizens, so, too, would the use of nuclear weapons remain illegal even if used against a country that has used nuclear weapons.

The indiscriminate nature of nuclear weapons means that their use cannot be limited to legitimate targets – and use that would indiscriminately affect civilians is prohibited.

compared to the anticipated military advantage, or cause widespread, long-term and severe damage to the environment. The International Court of Justice could find no circumstance in which the threat or use of nuclear weapons would conform to such law. However, its inconclusiveness on legality in the “extreme circumstance of self-defence when the very survival of a State is at stake”¹⁵⁸ limited the impact of the Court’s opinion on the policies of the nuclear-weapon States at the time.

More recently, there has been renewed acknowledgement of the humanitarian consequences of nuclear-weapon use, and interest has grown in the application of international law, particularly humanitarian law, to nuclear weapons. The 2010 NPT Review Conference expressed “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirm[ed] the need for all States at all times to comply with applicable international law, including international humanitarian law”.¹⁵⁹

The 2011 Vancouver Declaration, “Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World”, underlines the incompatibility of nuclear weapons with law and human security.¹⁶⁰ In November 2011, the Council of Delegates of the International Red Cross and Red Crescent Movement adopted a resolution entitled: “Working towards the elimination of nuclear weapons”, which affirms the irreconcilability of nuclear weapons with international humanitarian law. It “emphasizes the incalculable human suffering that can be expected to result from any use of nuclear weapons [and] the lack of any adequate humanitarian response capacity” and calls for States to undertake negotiations to prohibit and eliminate nuclear weapons through a legally binding international agreement.¹⁶¹ In April 2012, the Norwegian Foreign Minister announced to parliament that Norway would host an inter-governmental conference in the spring of 2013 on the humanitarian consequences of nuclear weapons.¹⁶²

The recognition of the catastrophic humanitarian consequences of any use of nuclear weapons and the application of international humanitarian law to the nuclear weapons debate is a welcome development, and has the potential to help break the impasse in multilateral nuclear disarmament negotiations and open the way for genuine progress. Importantly, international humanitarian law places humanitarian considerations at the centre of the nuclear weapons debate and as such demands highly

effective outcomes focused on prohibiting these weapons – as opposed to the lowest-common-denominator results associated with gradual arms control measures. A humanitarian law approach might provide a basis for like-minded States to prohibit a weapon system without having to wait for consensus by all States possessing such weapons. The application of such an approach enabled the achievement of treaties banning anti-personnel landmines and cluster munitions, and has the same potential to stimulate negotiations on an international treaty to ban nuclear weapons.

Some nuclear-weapon-possessing States – including China, the Democratic People’s Republic of Korea, India and Pakistan – support such a prohibition. Others are not yet ready to prohibit the weapons, but may be ready to join a global prohibition on use similar to the 1925 prohibition on the use of chemical weapons (i.e. with right of retaliation), or at least to affirm a norm against nuclear-weapon use.

Some nuclear-weapon-possessing States have adopted “no-first-use” policies – a commitment that nuclear weapons will only be used in response to a nuclear attack by others. (See also **Chapter 5. Nuclear deterrence and security**).

Commitments to no first use are important confidence-building measures along the road to nuclear disarmament, significantly reduce the need for a nuclear deterrent, could lead to changes in State practice in deploying nuclear arsenals (including de-alerting, separating warheads from delivery vehicles, eliminating tactical nuclear weapons), and would implicitly provide negative security assurances to non-nuclear-weapon States.

However, no-first-use policies still entail the threat to use nuclear weapons in retaliation. Such policies might be consistent with the requirement under international humanitarian law for proportionality, but would still violate the other elements of the law. Just as torture is illegal even against citizens or officials of a country that has used torture against its own citizens, so would the use of nuclear weapons be illegal even against a country that has used nuclear weapons. The indiscriminate nature of nuclear weapons means that their use cannot be limited to legitimate targets – and use that would indiscriminately affect civilians is prohibited. Thus, international humanitarian law generates an imperative to prohibit any use of nuclear weapons and to ensure such prohibition is

implemented by eliminating existing weapons under strict and effective international control.

The 2010 United States Nuclear Posture Review took a step in this direction by affirming that “it is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.”¹⁶³ It included no proposals, however, on steps that could be taken to codify such a norm against use in any binding international instrument. The United States continues to oppose resolutions at the United Nations to negotiate either a convention prohibiting use of nuclear weapons (proposed by India) or a more comprehensive convention to prohibit the threat, use and possession of nuclear weapons and provide for their elimination.

Good Practice

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Examples

A. No-First-Use Pact

Bilateral confidence-building measure

B. 2010 United States Nuclear Posture Review

Towards a norm of non-use

A

No-First-Use Pact

Bilateral confidence-building measure

Of the five nuclear-weapon States, China is the only one that has adopted an unconditional no-first-use nuclear policy; it did so in 1964, immediately after its first successful nuclear test. Of the nuclear-weapon-possessing States outside the NPT, only India has proclaimed a no-first-use policy (after its nuclear tests in 1998).

In 1994, at the UN General Assembly, China proposed to the other NPT nuclear-weapon States a draft treaty on no first use. However, only the Russian Federation took up the proposal, and eventually (4 September 1994) made a bilateral commitment with China declaring

that neither country would be the first to use nuclear weapons against each other or target their nuclear weapons at each other.¹⁶⁴

B

2010 United States Nuclear Posture Review

Towards a norm of non-use

Although it fell short of declaring no first use, the 2010 Nuclear Posture Review reduces the role of US nuclear weapons, stating that, “The fundamental role of U.S. nuclear weapons, which will continue as long as nuclear weapons exist, is to deter nuclear attack on the United States, our allies, and partners.”¹⁶⁵ It adds that the United States will refrain from using nuclear weapons in response to a chemical or biological attack.

The US doctrine also includes the following assurance to other States: “The United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations.”¹⁶⁶

Importantly, the Nuclear Posture Review notes that, “It is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,” and that although the United States is “not prepared at the present time to adopt a universal policy that the ‘sole purpose’ of US nuclear weapons is to deter nuclear attack on the United States and our allies and partners, [it] will work to establish conditions under which such a policy could be safely adopted.”¹⁶⁷ While this reaffirmation of the norm of non-use is a welcome development, it would be of little comfort if possession were also to be extended forever.

Recommendations for Parliamentarians

- Call on your government to commit to and strengthen the norm of non-use of nuclear weapons.
- Explore possibilities for adopting a policy of “sole purpose” as a starting point for negotiations for the global prohibition of nuclear weapons.
- Raise in parliament, through hearings, debates or studies, the issue of the humanitarian consequences of any use of nuclear weapons and the incompatibility of any use of nuclear weapons with international humanitarian law, and thus the imperative to seek alternatives to nuclear weapons in security doctrines.

Good Practice**NON-NWS****Examples****A. New Zealand Nuclear Free Zone, Arms Control and Disarmament Act**

From nuclear ally to anti-nuclear advocate

B. Nuclear Free Amendment to the Philippine Constitution

Entrenching the anti-nuclear norm

C. Constitutional Law in Favour of a Nuclear-Free Austria

Commitment to promote anti-nuclear policy

D. Law of Mongolia on its nuclear-weapon-free status

Building recognition through a single-State nuclear-weapon-free zone

A**New Zealand Nuclear Free Zone,
Arms Control and Disarmament Act****From nuclear ally to anti-nuclear advocate**

The horrific health and environmental consequences of nuclear testing in the South Pacific, growing concern about the risks of nuclear war and government plans to develop nuclear energy led to a surge in anti-nuclear sentiment in Aotearoa-New Zealand in the 1970s. Among the campaigns employed by the anti-nuclear movement was the declaration of nuclear-weapon-free zones in classrooms, work places, towns and cities. By the 1984 general election, over 66 per cent of New Zealanders lived in such zones, and the victorious Labour Party, under the leadership of David Lange, had adopted an unequivocal policy to ban nuclear weapons from the country's territory and waters. In 1987, the nuclear-free policy was firmly cemented in the New Zealand Nuclear Free Zone, Arms Control and Disarmament Act.

The Act contains a number of provisions. It prohibits manufacture, acquisition, possession or control over nuclear weapons as well as

aiding and abetting any person in doing so, by New Zealand citizens or residents. It also contains an extraterritoriality clause prohibiting such acts by agents of New Zealand anywhere in the world. The Act also established the Public Advisory Committee on Disarmament and Arms Control to advise the Minister of Foreign Affairs and Trade on any disarmament issues it deems important; its Chairman is the Minister for Disarmament and Arms Control – a unique position not found in any other country.

Although New Zealand's nuclear-free legislation came under severe pressure from its western allies – particularly Australia, the United States and the United Kingdom – and led to significant diplomatic ostracism, successive governments have been steadfast in maintaining the policy and keeping it a cornerstone of the country's identity.

The policy has provided a platform for New Zealand to advance nuclear disarmament initiatives globally, including as a supporter of the case heard against nuclear weapons by the International Court of Justice and the follow-up UN resolution calling for a nuclear weapons convention, as a member of the New Agenda Coalition, and as one of the like-minded countries supporting the criminalization of nuclear-weapon use in the Statute of the International Criminal Court.

There has been a shift in the US attitude towards the anti-nuclear legislation under the Obama Administration. In November 2010, at the signing of an agreement to forge stronger strategic ties between the two countries, US Secretary of State Hilary Clinton commended New Zealand's leading role on nuclear non-proliferation, effectively ending the 25-year nuclear row.¹⁶⁸

On 31 May 2012, New Zealand's Parliament unanimously adopted a motion submitted by member Maryan Street commemorating the 25th anniversary of legislation prohibiting nuclear weapons, highlighting the catastrophic humanitarian consequences of any use of nuclear weapons, affirming that all States have a role to play in creating the framework for a nuclear-weapon-free world, commending Norway for its announcement that it would hold a high-level conference on the humanitarian consequences of nuclear weapons, and calling on the New Zealand Government to give its full support to the conference.¹⁶⁹

B**Nuclear-Free Amendment to Philippine Constitution****Entrenching the anti-nuclear norm**

In 1987 the Philippines amended its Constitution to affirm that the country adopts and pursues a policy of freedom from nuclear weapons in its territory (Article II, Section 8 of the 1987 Philippine Constitution).¹⁷⁰ This constitutional policy means that the government may not store or allow anyone to store nuclear weapons on the national territory, and nuclear-armed aircraft and vessels may not be allowed to enter.

Invoking this constitutional provision, in 1988 the Philippine Senate passed by a wide margin an anti-nuclear bill that not only prohibits nuclear weapons from being stored in the Philippines but also prohibits nuclear-armed ships and aircraft from entering or transiting into or through Philippine territory.

As with previously discussed nuclear-free legislation, the Philippines policy proved an effective tool in the country's work to build and affirm an independent identity, and preceded the Senate's rejection of the new Military Bases Agreement with the United States in 1991.¹⁷¹

C**Constitutional Law in favour of a Nuclear-free Austria****Commitment to promote anti-nuclear policy**

In July 1999, the Austrian Parliament passed the Constitutional Law in favour of a Nuclear-Free Austria, which prohibits the testing, production, storage or transport of nuclear weapons within Austrian territory. In addition, the Constitutional Amendment reaffirms the ban on constructing or operating nuclear power plants in Austria and includes a provision guaranteeing that damages caused by a nuclear accident in Austria should be compensated appropriately. Moreover, the law calls on the federal government to implement the anti-nuclear policy internationally.

D**Law of Mongolia on its nuclear-weapon-free status****Building recognition through a single-State nuclear-weapon-free zone**

In September 1992, the same year the last Russian troops left Mongolia, Mongolian President Punsalmaagin Ochirbat announced at the 47th session of the UN General Assembly that Mongolia's territory would be a nuclear-weapon-free zone and that the country would work to have its status internationally recognized.¹⁷²

Mongolia's anti-nuclear stance stemmed largely from the fear that it would be caught in the middle of a conflict between its nuclear neighbours, China and the former Soviet Union, which had an increasingly tense and confrontational relationship in the 1960s and 1970s. Nuclear testing by the two countries near Mongolia's territory further heightened anxieties about the dangers of nuclear weapons.

Following constructive multilateral diplomacy, notably with its neighbours, and practical work through the United Nations,¹⁷³ Mongolia cemented its policy into law in 2000 when the State Great Hural (national parliament) adopted the Law of Mongolia on its nuclear-weapon-free status, which entered into force the same day.¹⁷⁴

Peaceful purposes nuclear clause in the Brazilian Constitution

Though not as far-reaching as the other examples highlighted in this section, Brazil's 1988 Constitution includes a peaceful purposes clause (Article 21), which states that "all nuclear activity within the national territory shall only be admitted for peaceful purposes and subject to approval by the National Congress".

In addition, Brazil signed the Treaty of Tlatelolco (nuclear-weapon-free-zone treaty for Latin America and the Caribbean) in 1967, making it a nuclear-weapon-free zone. Signatories agree to prohibit and prevent the "testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons" and the "receipt, storage, installation, deployment and any form of possession of any nuclear weapons".

The Law prohibits individuals, legal persons, or any foreign State on Mongolian territory from developing, manufacturing or otherwise acquiring, possessing or having control over nuclear weapons, stationing or transporting nuclear arms by any means, testing or using nuclear weapons, or dumping or disposing of nuclear-weapon-grade radioactive material or nuclear waste. It further bans transportation of nuclear weapons, parts or components thereof, as well as nuclear waste or any other nuclear material designed or produced for weapon purposes through the territory of Mongolia.

Among other verification measures, the legislation gives the Mongolian Government the right to gather information, stop, detain and search any suspected aircraft, train, vehicle, individual or group of persons. In addition, NGOs or individuals may exercise public oversight of the implementation of the legislation and submit proposals thereon to the relevant State authority.

The Mongolian initiative remains unique and innovative with respect to the theory of nuclear-weapon-free zones established under UN auspices, in that it does not comprise a group of countries covering a specific geographic area but rather one State declaring its sovereign territory free of nuclear arms. A 1974 comprehensive study on nuclear-weapon-free zones, commissioned under UN General Assembly resolution 3261 F, created the possibility for such unilateral action, as it proclaims that “obligations relating to the establishment of nuclear-weapon-free zones may be assumed not only by groups of States, including entire continents or large geographical regions, but also by small groups of States and even individual countries.”¹⁷⁵

As such, Mongolia’s legislation obliges its National Security Council to coordinate the international institutionalization of its nuclear-weapon-free status. To this end, Mongolia has worked multilaterally and bilaterally to secure negative security assurances¹⁷⁶ from nuclear-weapon States. Mongolia’s novel solution could inspire States in similar geopolitical circumstances facing comparable security issues.



Recommendations for Parliamentarians

- Explore, initiate, and/or support legislation that would prohibit nuclear weapons, including - but not limited to - the prohibition of the manufacture, acquisition, possession or control over nuclear weapons, as well as their stationing, storage or transport within territorial boundaries.
- Examine the possibilities of including in such legislation *extra-territoriality* (prohibitions applicable to actions by nationals of the country committed anywhere in the world) and *universality* (prohibitions applicable to anyone regardless of their nationality or where the acts were committed).
- Adopt resolutions in your parliament recognizing the catastrophic humanitarian consequences of any use of nuclear weapons and affirming the incompatibility of international humanitarian law with nuclear weapons, and the illegality of their use (and possibly threat of use and possession).

