



*International Association of Lawyers Against Nuclear Arms*

## **Implementing the legal norm for abolition**

### **Presentation to the United Nations Open-ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations**

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Your excellencies,

I have the honour to make an intervention on behalf of the International Association of Lawyers Against Nuclear Arms, an organisation of lawyers and law organisations that has been active on nuclear disarmament since 1988.

IALANA welcomes the establishment of the 2016 Open-ended Working Group and supports your vital work on the legal measures and norms to achieve and maintain a nuclear weapon free world.

In IALANA's assessment, because of their very nature, the use of nuclear weapons is and always has been illegal under customary international law. They cannot be used in compliance with fundamental principles protecting civilians and neutral states from the effects of warfare, protecting combatants from unnecessary suffering, protecting the environment from severe and irreversible damage, and safeguarding the interests of future generations. Use of nuclear weapons would constitute war crimes under the Rome Statute of the International Criminal Court, and in many circumstances, crimes against humanity as

well. For more analysis, please see the 2011 Vancouver Declaration appended to this statement.<sup>1</sup>

The 1996 Advisory Opinion of the International Court of Justice supports this assessment. The Court stated that “the use of [nuclear] weapons in fact seems scarcely reconcilable with respect for [the strict] requirements” of “the principles and rules of law applicable in armed conflict -- at the heart of which is the overriding consideration of humanity.”<sup>2</sup>

Though nuclear weapons have not been used in war since World War II, the nuclear-armed states and states in nuclear alliances have yet to squarely accept the illegality of use of nuclear weapons. Indeed, the use of nuclear weapons has been threatened, directly or implicitly, on numerous occasions, to say nothing of doctrines of ‘deterrence’. It is therefore desirable to codify the prohibition of use and threat of use in a legal instrument. The best way to do so would be through negotiation of a nuclear weapons convention that would codify the prohibition of use and threat of use from entry into force and provide for verified elimination to occur over a phased period. In so doing states would fulfil their obligation under NPT Article VI and customary international law, as stated by the International Court of Justice, “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.”

In 1997, IALANA led a group of experts to prepare a Model Nuclear Weapons Convention to outline the legal and technical elements required for complete nuclear disarmament.<sup>3</sup> This Model, updated in 2007, has been circulated as a UN document, and was described by UN Secretary-General Ban Ki-moon as a “good point of departure” for negotiations.<sup>4</sup> We encourage you to make use of the Model Convention in your deliberations.

Thank you for your attention.

[See attached appendix: *Vancouver Declaration, February 11, 2011: Law’s Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World*]

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<sup>1</sup> Released by IALANA and The Simons Foundation, the declaration was signed by many international lawyers and others around the world. For a list of signatories, see [http://www.lcnp.org/wcourt/VanDecl\\_Signatories\\_Feb15\\_2013.docx](http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx).

<sup>2</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 95.*

<sup>3</sup> [http://inesap.org/sites/default/files/inesap\\_old/mNWC\\_2007\\_Unversion\\_English\\_N0821377.pdf](http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf). For translations and background, see <http://lcnp.org/mnwc/index.htm>.

<sup>4</sup> [http://www.un.org/apps/news/infocus/sgspeeches/search\\_full.asp?statID=351](http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351).

## Law's Imperative for the Urgent Achievement of a Nuclear-Weapon-Free World

Nuclear weapons are incompatible with elementary considerations of humanity.

Human security today is jeopardized not only by the prospect of states' deliberate use of nuclear weapons, but also by the risks and harms arising from their production, storage, transport, and deployment. They include environmental degradation and damage to health; diversion of resources; risks of accidental or unauthorized detonation caused by the deployment of nuclear forces ready for quick launch and inadequate command/control and warning systems; and risks of acquisition and use by non-state actors caused by inadequate securing of fissile materials and warheads.

Despite New START there are more than enough nuclear weapons to destroy the world. They must be abolished and the law has a pivotal role to play in their elimination. In 1996 the International Court of Justice (ICJ) spoke of "the nascent *opinio juris*" of "a customary rule specifically prohibiting the use of nuclear weapons." Fifteen years later, following the establishment of the International Criminal Court, the entry into force of the Chemical Weapons Convention and the achievement of treaty bans on landmines and cluster munitions, the legal imperative for non-use and elimination of nuclear weapons is more evident than ever.

Reasons advanced for the continuing existence of nuclear weapons, including military necessity and case-by-case analysis, were once used to justify other inhumane weapons. But elementary considerations of humanity persuaded the world community that such arguments were outweighed by the need to eliminate them. This principle must now be applied to nuclear weapons, which pose an infinitely greater risk to humanity.

We cannot forget that hundreds of population centers in several countries continue to be included in the targeting plans for nuclear weapons possessing many times the yield of the bombs dropped on Hiroshima and Nagasaki. The hibakusha – survivors of those bombings – have told us plainly, "No one else should ever suffer as we did." The conventions banning chemical and biological weapons refer to them as "weapons of mass destruction." WMD are, by definition, contrary to the fundamental rules of international humanitarian law forbidding the infliction of indiscriminate harm and unnecessary suffering. As set out in the Annex to this Declaration, that label is best deserved by nuclear weapons with their uncontrollable blast, heat and radiation effects.

The ICJ's declaration that nuclear weapons are subject to international humanitarian law was affirmed by the 2010 Nuclear Non-Proliferation Treaty (NPT) Review Conference. In its Final Document approved by all participating states, including the nuclear-weapon states, the Conference "expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law."

It is unconscionable that nuclear-weapon states acknowledge their obligation to achieve the elimination of nuclear weapons but at the same time refuse to commence and then "bring to a conclusion," as the ICJ unanimously mandated, "negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

In statements made during the 2010 NPT Review Conference, one hundred and thirty countries called for a convention prohibiting and eliminating nuclear weapons globally. And the Conference collectively affirmed in its Final Document "that all states need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons," and noted the "five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, *inter alia*, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification."

An "absolute evil," as the President of the ICJ called nuclear weapons, requires an absolute prohibition.

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<sup>1</sup> Developed with the input of a conference convened February 10-11, 2011, in Vancouver, Canada, by The Simons Foundation and the International Association of Lawyers Against Nuclear Arms, entitled "Humanitarian Law, Human Security: The Emerging Framework for the Non-Use and Elimination of Nuclear Weapons," in acknowledgement of the Simons Chairs in International Law and Human Security at Simon Fraser University.

## Annex: The Law of Nuclear Weapons

Well-established and universally accepted rules of humanitarian law are rooted in both treaty and custom; are founded, as the ICJ said, on “elementary considerations of humanity”; and bind all states. They are set forth in armed service manuals on the law of armed conflict, and guide conventional military operations. They include:

- The prohibition of use of methods or means of attack of a nature to strike military objectives and civilians or civilian objects without distinction. As put by the ICJ, “states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”
- The prohibition of use of methods or means of warfare of a nature to cause superfluous injury or unnecessary suffering.
- The Martens clause, which provides that in cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the *dictates of public conscience*.

Nuclear weapons cannot be employed in compliance with those rules because their blast, heat, and radiation effects, especially the latter, are uncontrollable in space and time. The ICJ found that “radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area” and that it “has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.” Moreover, as the International Committee of the Red Cross has observed, the suffering caused by the use of nuclear weapons in an urban area “is increased exponentially by devastation of the emergency and medical assistance infrastructure.” Use of nuclear weapons in response to a prior nuclear attack cannot be justified as a reprisal. The immunity of non-combatants to attack in all circumstances is codified in widely ratified Geneva treaty law and in the Rome Statute of the International Criminal Court, which provides *inter alia* that an attack directed against a civilian population is a crime against humanity.

The uncontrollability of effects additionally means that states cannot ensure that the force applied in an attack is no more than is necessary to achieve a military objective and that its effects on civilians, civilian objects, and the environment are not excessive in relation to the concrete and direct military advantage anticipated. Other established rules of the law of armed conflict excluding use of nuclear weapons are the protection of neutral states from damage caused by warfare and the prohibition of use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Recent studies have demonstrated that the detonation of a small fraction of the global nuclear stockpile (*e.g.*, 100 warheads) in cities and the ensuing fire storms would generate smoke causing a plunge in average global temperatures lasting years. Agricultural production would plummet, resulting in extensive famine.

That nuclear weapons have not been detonated in war since World War II contributes to the formation of a customary prohibition on use. Further to this end, in 2010 the United States declared that “it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever,” and President Obama and Prime Minister Singh jointly stated their support for “strengthening the six decade-old international norm of non-use of nuclear weapons.”

Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies (“deterrence”) declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack.

The unlawfulness of threat and use of nuclear weapons reinforces the norm of non-possession. The NPT prohibits acquisition of nuclear weapons by the vast majority of states, and there is a universal obligation, declared by the ICJ and based in the NPT and other law, of achieving their elimination through good-faith negotiation. It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.

Ongoing possession by a few countries of weapons whose threat or use is contrary to humanitarian law undermines that law, which is essential to limiting the effects of armed conflicts, large and small, around the world. Together with the two-tier systems of the NPT and the UN Security Council, such a discriminatory approach erodes international law more generally; its rules should apply equally to all states. And reliance on “deterrence” as an international security mechanism is far removed from the world envisaged by the UN Charter in which threat or use of force is the exception, not the rule.