

Threat or Use of Weapons of Mass Destruction and the Right to Life

Comments and Proposal of

International Association of Lawyers Against Nuclear Arms (IALANA)

and

Swiss Lawyers for Nuclear Disarmament (SLND)

on

Human Rights Committee, Draft general comment No. 36, Article 6,
Right to Life (CCPR/C/GC/R.36/Rev.3), para. 15

CURRENT TEXT

15. The threat or use of weapons of mass destruction, including nuclear weapons, is prima facie incompatible with respect for the right to life. States parties must take all feasible measures to stop the proliferation of weapons of mass destruction and to prevent their development and use.

PROPOSED REVISED TEXT

15. The threat or use of weapons of mass destruction, including nuclear weapons, amounts to actual or potential “arbitrary deprivation” of life within the meaning of Article 6 ICCPR and, as a result, is incompatible with respect for the right to life. States parties must take all feasible and lawful measures to ensure compliance, without any exception whatsoever, with existing obligations not to possess and use weapons of mass destruction; to prevent their proliferation, development, and use; and to bring about their global elimination, including through early fulfilment within a given timeline of the universal legal obligation to pursue in good faith and conclude negotiations on nuclear disarmament in all its aspects.

COMMENTS

1. Introductory observations

We have the honor to make this submission on behalf of the *International Association of Lawyers Against Nuclear Arms (IALANA)*, an organisation of lawyers and law organisations that

has been active on nuclear disarmament since 1988, and its Swiss affiliate, *Swiss Lawyers for Nuclear Disarmament (SLND)*.

We are submitting these observations since we are of the opinion that the current text does not fully reflect the nuclear disarmament obligations of States under international law and the potential impact of weapons of mass destruction (WMD) on the right to life and, therefore, needs to be expanded for several reasons that will be addressed in the following observations:

- The draft does not refer at all to the obligation to pursue in good faith and conclude negotiations on the elimination of nuclear weapons in accordance with Article VI of the Nuclear Non-Proliferation Treaty (NPT) and customary international law,

- Neither does it reflect the fact that there are obligations of non-possession and non-use of certain weapons often referred to as WMD under widely ratified treaties, in particular the 1993 Chemical Weapons Convention (CWC) and the 1972 Biological Weapons Convention (BWC), as well as an obligation of non-possession under the 1968 Non-Proliferation Treaty (NPT) applicable to non-nuclear weapon States parties, *i.e.* the vast majority of States in the world, and

- The current text states that threat or use of WMD is “prima facie” incompatible with the right to life. From our point of view, any use of nuclear weapons as well as other weapons of mass destruction would constitute “arbitrary deprivation” of life prohibited under Article 6 ICCPR.

Our proposed revised text builds upon the current text and remains brief. Should the committee determine that a lengthier treatment is warranted, which we would support, we suggest that some of the points made in our comments could be drawn upon. We are at your disposal for suggestions and clarifications.

2. Possession of nuclear weapons and the duty to negotiate in good faith towards a world free of nuclear weapons

Article VI NPT constitutes the disarmament pillar of the treaty. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ unanimously held that “[t]here 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.”¹ This duty is imposed on all States, whether possessing nuclear weapons or not, and whether having ratified the NPT or not.² Moreover, the fundamental legal principle of good faith requires implementation of the obligation without unreasonable delay within a timeline set by participating States. Delay has already been unreasonable in view of the facts that the first UN

¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226 (hereafter, “Nuclear Weapons Advisory Opinion”), at § 105(2)F.

² Daniel Rietiker, *Some thoughts on Article VI NPT and its Customary Nature*, Arms Control Law, 10 June 2014, <https://armscontrollaw.com/2014/06/10/some-thoughts-on-article-vi-npt-and-its-customary-nature/>.

General Assembly resolution sought to set in motion a process for the elimination of WMD and that the NPT already entered into force in 1970.

In 2016, the UN held an open-ended working group (OEWG) on nuclear disarmament in Geneva, pursuant to UNGA Resolution 70/33 (“Taking forward multilateral nuclear disarmament negotiations”) and mandated, *inter alia*, to “substantively address concrete effective legal measures, legal provisions and norms that would need to be concluded to attain and maintain a world without nuclear weapons”.³ On 19 August 2016, this body recommended the commencement of negotiations, in 2017, on a legally binding instrument prohibiting nuclear weapons, leading to their total elimination.⁴ The OEWG was clearly set up against the background of the States’ failure to fulfill their disarmament commitments in good faith and in a timely fashion under Article VI NPT and the humanitarian impact of use of nuclear weapons.

From our point of view, this legal obligation should be reflected in the General Comment that is currently being drafted. We note that such a change was at least discussed at the 12 July 2016 meeting of the Human Rights Committee.⁵

3. *Threat of use of nuclear weapons*

Fundamentally, the catastrophic consequences of use of nuclear weapons vastly exceed the ordinary boundaries of armed conflict and adversely impact populations in neutral States, the natural environment necessary to sustain human life and future generations.⁶

The threat or use of nuclear weapons massively violates the right to life in ways not reducible to law intended to govern the conduct of warfare. This is true even if, implausibly, nuclear weapons are possessed and deployed indefinitely but not used. Deployment coupled with declared policies that the weapons may be used when vital interests are at stake casts a shadow over exercise of the right of life⁷ and further runs counter to the UN Charter’s clear injunction that the lawful

³ Operative § 2 of UNGA Resolution 70/33, adopted on 7 December 2015.

⁴ For the final report of the OEWG, see: <http://www.unfoldzero.org/wp-content/uploads/Advance-copy-of-OEWG-report-as-orally-ammended-and-adopted-on-August-19.pdf>.

⁵ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20281&LangID=E>.

⁶ See, *inter alia*, § 35 of the Nuclear Weapons Advisory Opinion.

⁷ In his argument to the International Court of Justice in the Advisory Opinion proceedings, Australian Foreign Minister Gareth Evans observed: “The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-war generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains in all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear weapons remains.” Verbatim Record, Public Sitting, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons*, 30 October 1995, p. 42. Cf. CCPR General Comment No. 14: Article 6 (Right to Life), Nuclear Weapons and the Right to Life, 9 November 1984. Referring to the threat to the right to life posed by nuclear weapons, GC 14 observes that “the very existence and gravity of this

threat of force is the exception, not the rule.⁸ According to the ICJ, if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2 § 4 of the UN Charter.⁹

Moreover, a direct threat to use an already deployed nuclear weapon might also run counter to international humanitarian law. The ICJ stated that “[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”¹⁰ Further, under Article 51 § 2 of Additional Protocol I to the 1949 Geneva Conventions, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹¹ Such acts or threats are today also prohibited in international and non-international armed conflicts by customary humanitarian law.¹²

4. “Arbitrary deprivation” of life caused by any use of nuclear weapons

An assessment of the use of nuclear weapons under Article 6 ICCPR would have to be made in light of the notion of “arbitrary deprivation” of life. As developed below, any use of nuclear weapons would cause arbitrary deprivation of life and violate the right to life, without any exception whatsoever in view of the fundamental character of that right and considering the indiscriminate nature of nuclear weapons and the incontrollable effects of their use.

In its Advisory Opinion, the ICJ confirmed the continued applicability of the ICCPR, in particular the right to life, in a situation of use of nuclear weapons.¹³ The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have both been confronted with cases involving allegations of violations of the right to life caused in situations of armed conflict. Article 4 of the American Convention on Human Rights (ACHR), adopted in 1969, was inspired by the ICCPR that had been concluded only three years before. Therefore, it also refers to the criterion of “arbitrary deprivation” of life. In the case of *Zambrano Vélez et al. v. Ecuador*, the IACtHR held that lethal force must be

threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms...”

⁸ Article 2 § 4 of the UN Charter: “All Members shall refrain in their international relations from the *threat* or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” (Emphasis added.)

⁹ Nuclear Weapons Advisory Opinion, § 47.

¹⁰ *Ibid.*, § 78.

¹¹ Emphasis added.

¹² See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, 2005, Rule 2, pp. 8-11.

¹³ Nuclear Weapons Advisory Opinion, § 25.

“absolutely necessary in relation to the force or threat to be repealed[sic]. When excessive force is used, any resulting deprivation of life is arbitrary.”¹⁴

Another leading case, *Santa Domingo Massacre v. Colombia*, involved the dropping of cluster munitions against guerrillas. The Court held that that there had been a violation of the right to life due to lack of precautions to avoid or minimize deaths among the civilian population.¹⁵

As far as the practice of the ECtHR is concerned, the most relevant cases arose out of the non-international conflicts in Chechnya (Russia) and Turkey. In order to ensure that the use of force was no more than “absolutely necessary” within the meaning of Article 2 (right to life) of the European Convention on Human Rights (ECHR), the Court examined whether the planning of the operation was such as to “avoid” or at least “minimise deaths”. In the case of *Khamzayev and Others v. Russia*, the ECtHR found a violation of the right to life, in particular because the Russian armed forces had exceeded what was strictly necessary in the concrete situation:

“Against this background and in the light of the principles stated...[the Court] is, however, not convinced, having regard to the materials at its disposal, that the necessary degree of care was exercised in preparing the operation of 19 October 1999 in such a way as to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for the persons at whom the measures were directed and for civilians (...).”¹⁶

In fact, the Russian operation resulted in six deaths, sixteen injuries and thirteen houses destroyed, caused by the use of high-explosive fragmentation bombs of caliber 250-270kg. These weapons were considered “indiscriminate weapons” by the Court,¹⁷ concluding that the use of such bombs in inhabited areas was “manifestly disproportionate” to the aim of dislodging the extremists.¹⁸

If the use of these conventional weapons has been considered “disproportionate” by these two regional human rights Courts, it is *a fortiori* hardly imaginable that a use of nuclear weapons or other WMD would not constitute an “arbitrary deprivation” of the right to life within the meaning of Article 6 ICCPR. In fact, the ICJ stated that the destructive power of nuclear weapons “cannot be contained in either space or time.”¹⁹ Professor Louise Doswald-Beck argues that, in the context of nuclear weapons, the huge number of deaths is unlikely to fall into what is

¹⁴ IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment (Series C No. 166), 4 July 2007, § 84, with other references.

¹⁵ IACtHR, *Santa Domingo Massacre v. Colombia*, Judgment (Series C No. 259), 30 November 2012, §§ 216-230.

¹⁶ ECtHR, *Khamzayev and Others v. Russia*, no. 1503/02, § 180, 3 May 2011.

¹⁷ *Ibid.*, § 185.

¹⁸ *Ibid.*, § 189. See also *Ergi v. Turkey*, 28 July 1998, § 79, Reports of Judgments and Decisions 1998 IV, *Isayeva v. Russia*, no. 57950/00, 24 February 2005, and *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, 24 February 2005, § 199.

¹⁹ Nuclear Weapons Advisory Opinion, § 35.

‘absolutely necessary’ in the sense of the jurisprudence of both regional human rights Courts, considering that the element of radioactive fallout would kill both soldiers and civilians long after the attack is over, due to the effects of radiation poisoning.²⁰ She adds that the presence of radiation would also severely limit the ability to search for, rescue and care for the wounded after a nuclear attack, which would amount to a further violation of the right to life.²¹

In addition, the ECtHR developed a very far-reaching, particularly dynamic jurisprudence in the field of environmental protection, making the right to live in a certain environment an individual right. Especially under Article 2 (right to life) and 8 of the ECHR (right to respect for private life and home), States are today obliged to prevent environmental disasters, to inform the affected populations about possible risks and, in the event of a realization of such a risk, to investigate the accident, to pay compensation to the victims and, under certain circumstances, to punish the responsible officials in an adequate manner.²² It is obvious that use of nuclear weapons, causing widespread, trans-boundary and long-lasting harm to environment and to present and future generations as a result of radioactive contamination and nuclear fallout, would diametrically run counter to these duties.

Concern about nuclear weapons has grown more recently among States and humanitarian organizations. An influential actor in the broader initiative on the humanitarian impacts of nuclear weapons, the International Red Cross and Red Crescent Movement, adopted a resolution in 2011 that “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.”²³ To similar but stronger effect is the Vancouver Declaration appended hereto. It was released in 2011 by IALANA and The Simons Foundation and signed by many international lawyers and others around the world.²⁴

Understanding of the catastrophic consequences has moreover been advanced in three governmental conferences on the humanitarian impact of nuclear weapons held in 2013 and 2014 in Oslo, Nayarit (Mexico) and Vienna. As observed in the Summary of Findings of the 2014 Vienna Conference on the Humanitarian Impacts of Nuclear Weapons:

²⁰ L. Doswald-Beck, “Human rights law and nuclear weapons,” in: G. Nystuen, S. Casey-Maslen and A. Golden Bersagel (eds.), *Nuclear Weapons Under International Law*, Cambridge University Press 2014, pp. 435-460, 450 and seq.

²¹ *Ibid.*, p. 451.

²² For an overview, see Dinah Shelton, “Human Rights and the Environment: What Specific Environmental Rights Have been Recognized?,” *Denv. J. Int’l L. & Pol’y*, Vol. 35, 2006, pp. 129-171. See, among many others, the leading case of *Öneryildiz v. Turkey* [GC], no. 48939/99, 30 November 2004.

²³ Council of Delegates of the International Red Cross and Red Crescent Movement, “Resolution 1, Working Towards the Elimination of Nuclear Weapons,” November 26, 2011, <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>.

²⁴ Declaration: <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>; signatories: http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx.

“The impact of a nuclear weapon detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences, causing destruction, death and displacement as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development, social order and could even threaten the survival of humankind.”²⁵

In a resolution adopted in 2015, “Humanitarian consequences of nuclear weapons,” growing out of the conferences, the UN General Assembly emphasized that

“the catastrophic consequences of nuclear weapons affect not only Governments but each and every citizen of our interconnected world and have deep implications for human survival, for the environment, for socioeconomic development, for our economies and for the health of future generations.”²⁶

Also noteworthy is that since General Comment No. 14 was adopted in 1984, several treaties have entered into force prohibiting entire categories of weapons considered to have indiscriminate effect, including chemical weapons,²⁷ anti-personnel landmines,²⁸ and cluster munitions.²⁹ These instruments also prohibit the use of these weapons in all circumstances and aim at their total elimination through universal ratification by States.

5. Conclusions

To sum up, we argue that the threat or use of nuclear weapons is in all circumstances incompatible with international humanitarian law and fundamental human rights and dignity. Moreover, the catastrophic consequences of use of nuclear weapons vastly exceed the ordinary boundaries of armed conflict and adversely impact populations in neutral States, the natural environment necessary to sustain human life, future generations, and possibly even the future of civilization. Threat or use of nuclear weapons therefore violates the right to life in fundamental ways not reducible to law intended to govern the conduct of warfare. In this light, fulfillment of the universal legal obligation to pursue in good faith and conclude negotiations on nuclear disarmament is all the more imperative.

²⁵ Report and Summary of Findings of the Conference presented under the sole responsibility of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 to 9 December 2014, http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf.

²⁶ A/RES/70/47, December 7, 2015, adopted by a vote of 144 to 18 with 22 abstentions.

²⁷ Chemical Weapons Convention (CWC, 1993).

²⁸ Ottawa Convention (1997).

²⁹ Oslo Convention (2008).

We would like to conclude our submissions by a reference to Judge Christopher Weeramantry, President Emeritus of IALANA, who underscored the connection between nuclear weapons and the right to life and the obligation to respect human dignity in his dissenting opinion in the 1996 Advisory Opinion:

“No weapon ever invented in the long history of man’s inhumanity to man has so negated the dignity and worth of the human person as has the nuclear bomb.”³⁰

In view of the foregoing comments, we propose the above mentioned amendment to the draft General Comment No. 36. We remain gladly at your disposal for further clarifications, including a possible oral discussion.

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³⁰ Dissenting Opinion of Judge Weeramantry, Nuclear Weapons Advisory Opinion, p. 507.

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Appendix
Vancouver Declaration, February 11, 2011³⁵
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.

³⁵ 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 to Vancouver Declaration: 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.