

## Humanitarian Law or Nuclear Weapons: Choose One

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In its landmark resolution 1653 of 1961, “Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons,” the General Assembly declared that the use of nuclear weapons “would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity”. The resolution was adopted by a contested vote, with 55 in favor, 20 opposed, including the Western nuclear powers and China, and 26 abstaining. But a clear normative statement had been made.

Nearly fifty years later, in an innovation in the nuclear Non-Proliferation Treaty (NPT) context, in its [Final Document](#) the 2010 Review 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.” The provision marks a resurgence of emphasis on the humanitarian dimension of nuclear weapons, spearheaded by Switzerland and Norway and by the International Committee of the Red Cross (ICRC).

In an April 20, 2010 [statement](#), ICRC President Jakob Kellenberger cited a recent ICRC study finding that there is “little” capacity to aid victims of a use of nuclear weapons. He also said that “the ICRC finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.” The ICRC’s critique of nuclear weapons began early. As Kellenberger noted: “Already on 5 September 1945 the ICRC publicly expressed the wish that nuclear weapons be banned... In a communication to States party to the Geneva Conventions in 1950, the ICRC stated that before the atomic age: ‘[W]ar still presupposed certain restrictive rules; above all ... it presuppose[d] discrimination between combatants and non-combatants. With atomic bombs and non-directed missiles, discrimination became impossible. Such arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple...’” After several decades of reticence on the matter due to the resistance of nuclear weapon states to specifically addressing nuclear weapons within the international humanitarian law (IHL) context, notably in negotiation of the Protocol I to the Geneva Conventions, the ICRC’s reassertion of its original position is an important contribution to the ongoing delegitimization of nuclear weapons.

In assessing the significance of the Review Conference statement, it must first be noted that several of the NPT nuclear weapon states have previously acknowledged that IHL applies to nuclear weapons. In 1995 hearings before the International Court of Justice (ICJ), the US, UK, and Russia accepted that IHL applies to nuclear weapons as it does to other weapons, though they contended implausibly that nuclear use could be compatible with IHL depending upon the circumstances. In contrast, in its idiosyncratic [argument](#) to the ICJ, France remained silent on the application of IHL, arguing instead that absent an express prohibition, use of nuclear weapons is “authorized” in self-defence. Now all the NPT nuclear weapons states, and their allies, are on record, and are accountable for meeting the IHL obligation within the NPT review process.

Also important is that the provision advances the 1996 ICJ advisory [opinion](#). The Court explained that the principles of IHL protecting civilians and combatants are “fundamental” and “intransgressible,” and that “methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited.” It found that “[i]n view of the unique characteristics of nuclear weapons, ... the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.” However, given the facts and law available to it, the Court felt that it could go only so far as stating that threat or use of nuclear weapons would “generally be contrary” to international law, and could not reach a conclusion, one way or the other, regarding an “extreme circumstance of self-defence, in which the very survival of a State is at stake.” That outcome was voted for by seven of the Court’s then 14 members, and carried by the casting vote of the President, Mohammed Bedjaoui. Three judges dissented on the ground that threat or use is categorically contrary to international law.

In contrast to the ICJ’s indecision, the Conference’s reference to the catastrophic humanitarian consequences of “any” use of nuclear weapons, directly coupled with the call for compliance with law “at all times,” implies that use of nuclear weapons is unlawful in all circumstances. Since there is no

doubt that IHL applies to armed conflict, the insistence on compliance with applicable international law “at all times” weighs against any suggestion that IHL bends or wavers depending upon the circumstances. That includes the “extreme circumstance” referred to by the ICJ, self-defence cited by France, or second use in “reprisal” intended to discourage further attacks.

The truth is that compliance with IHL requirements is impossible due to the uncontrollable collateral effects of nuclear weapons, as the Lawyers Committee on Nuclear Policy has [explained](#). A major ICRC study published in 2005, [Customary Humanitarian International Law](#), is an authoritative statement of the requirements. One does not have to be a specialist in nuclear warfare or IHL to see that use of nuclear weapons is incompatible with the rules laid out by the ICRC. *Indiscriminate attacks* are defined as those which are of a nature to strike military objectives and civilians or civilian objects without distinction. *Proportionality in attack* prohibits launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. *Due regard for the environment* imposes a similar requirement of proportionality in attack with respect to damage to the environment, and prohibits attacks which may be expected to cause widespread, long-term and severe damage to the environment.

In light of the foregoing, the IHL provision adopted by the Review Conference without question develops the norm of non-use of nuclear weapons. The welcome US statement in its [Nuclear Posture Review](#) is also relevant here: “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.” The ICJ declined to recognize a customary legal obligation of non-use based on the record of non-use and resolution 1653 and subsequent General Assembly resolutions, citing the continuing assertion of doctrines of “deterrence”. With the Review Conference statement, the world is moving closer to the day when it can be said that the practice of non-use has become a *custom* of non-use recognized by law.

The most fundamental implication of the Review Conference statement is the imperative of humanitarian disarmament through fulfillment of NPT Article VI. The ICRC has recognized that implication, stating that “preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally-binding international treaty”. The ICJ also effectively recognized the implication when it unanimously declared the obligation to bring to a conclusion negotiations on nuclear disarmament.

A second implication is that the NPT nuclear weapon states and members of nuclear alliance must come to grips with the inconsistencies of doctrines and deployments with the requirements of IHL. In action 5 of the Final Document, the nuclear weapon states agreed to “promptly engage” regarding, *inter alia*, further diminishing the role of nuclear weapons. IHL could not be more relevant to this task! At the end—or preferably at the beginning—of the day, the nuclear weapon states need to acknowledge the basic incompatibility of threat or use of nuclear weapons with IHL, and to change their policies accordingly. One way to formalize such an acknowledgement would be by a Security Council resolution.

Non-nuclear weapon states can also seriously explore what they can do to entrench the norm of non-use in compliance with IHL, regardless of the current attitude of nuclear weapon states and their allies. One strategy would be to amend the Rome Statute of the International Criminal Court (ICC) to make use of nuclear weapons a specific international crime, as proposed by Mexico. This would codify what is already implicit in the Rome Statute’s general provisions on IHL and crimes against humanity, and build upon the Review Conference IHL statement. The ICC Assembly of States Parties will form a working group on amendments in December.

Another option would be to adopt a simple, categorical non-use treaty, designed so that it could be joined by nuclear weapon states and members of nuclear alliances when they accept their IHL obligations. The agreement could provide for prosecution or extradition of persons involved in possession, threat or use of nuclear weapons. Non-nuclear weapon states can also adopt national legislation along the same lines.

In his [declaration](#) accompanying the ICJ's opinion, President Bedjaoui stated: "Atomic warfare and humanitarian law therefore appear to be mutually exclusive, the existence of the one automatically implying the non-existence of the other." The Review Conference chose humanitarian law.

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