

REPORTS AND DOCUMENTS

The ICRC's legal and policy position on nuclear weapons

.....

I. Introduction

The International Committee of the Red Cross (ICRC) first called for the abolishment of nuclear weapons in September 1945.¹ The call came in the aftermath of the atomic bombing of Hiroshima, where ICRC delegates had witnessed the catastrophic effects of nuclear weapons while working alongside the Japanese Red Cross to care for tens of thousands of wounded and dying civilians. The experience had a profound impact on the ICRC and on the International Red Cross and Red Crescent Movement (the Movement) as a whole. During the following decades, the Movement continued to regularly call for the “absolute prohibition” of nuclear weapons²—one of the most abhorrent and inhumane types of weapon ever created. To date, the ICRC and the National Red Cross and Red Crescent Societies have made a significant contribution towards nuclear disarmament by influencing debates, state policy and practice, and international law on nuclear weapons.

The debate around nuclear weapons had traditionally been dominated by geopolitical arguments and national defence theories. Nuclear weapons were viewed as a tool to ensure national and regional security and to maintain geostrategic balance. On 20 April 2010, in what would prove to be a pivotal moment, the president of the ICRC made a historic appeal to states to view nuclear weapons through the lens of humanity and international humanitarian law (IHL). He called on governments to fulfil existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty, and to bring the era of nuclear weapons to an end.³ The opening paragraphs of his statement read as follows:

The International Committee of the Red Cross firmly believes that the debate about nuclear weapons must be conducted not only on the basis of military doctrines and power politics. The existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity, the capacity of our species to master the technology it creates, the reach of international humanitarian law, and the extent of human suffering we are willing to inflict, or to permit, in warfare.

The ICRC president's statement served as a catalyst for efforts to reframe the debate on nuclear weapons in humanitarian terms, beyond the blinkered arguments focusing on military/security issues that had prevailed until that point. It brought to the fore the notion of *human security*—a concept encompassing individual and collective health and well-being, as well as environmental, food security and climate concerns. Indeed, *human security* relates to the very future of the planet and of humankind as a whole, given that the continued existence of nuclear weapons poses a grave, universal threat.

Subsequently, the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT Review Conference) expressed for the first time “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed “the need for all states at all times to comply with applicable international law, including international humanitarian law”.⁴

In late 2011, the Movement adopted a momentous resolution on nuclear weapons, calling on states to negotiate a legally binding international agreement to prohibit the use of and completely eliminate nuclear weapons, based on existing international obligations and commitments.⁵ The Movement's position further galvanized international efforts to advance nuclear disarmament on humanitarian grounds. These efforts took the form, *inter alia*, of a series of three intergovernmental conferences on the humanitarian impacts of nuclear weapons,

- 1 ICRC, “The end of hostilities and the future tasks of the Red Cross”, Circular Letter No. 370 to the Central Committees of the Red Cross Societies, 5 September 1945; ICRC, *Report of the International Committee of the Red Cross on its activities during the Second World War*, ICRC, Geneva, May 1948, Vol. I, pp. 688–690.
- 2 See the following resolutions of the International Conference of the Red Cross and Red Crescent: Resolution 24 of the 17th International Conference of the Red Cross and Red Crescent, Stockholm, 1948; Resolution 18 of the 18th International Conference of the Red Cross and Red Crescent, Toronto, 1952; Resolution 18 of the 19th International Conference of the Red Cross and Red Crescent, New Delhi, 1957; Resolution 28 of the 20th International Conference of the Red Cross and Red Crescent, Vienna, 1965; Resolution 14 of the 21st International Conference of the Red Cross and Red Crescent, Istanbul, 1969; Resolution 14 of the 22nd International Conference of the Red Cross and Red Crescent, Tehran, 1973; Resolution 12 of the 23rd Conference, Bucharest, 1977; and Resolution 13 of the 24th International Conference of the Red Cross and Red Crescent, Manila, 1981.
- 3 Statement by Jakob Kellenberger, president of the ICRC, to the Geneva diplomatic corps, Geneva, 20 April 2010, available at <https://www.icrc.org/en/doc/resources/documents/statement/nuclear-weapons-statement-200410.htm>.
- 4 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50, Vol. I, Conclusions and recommendations for follow-on actions, section I(A)(v), p. 19.
- 5 Council of Delegates, Resolution 1, “Working towards the elimination of nuclear weapons”, CD/11/R1, ICRC, 2011.

hosted by Norway in 2013, and by Mexico and Austria in 2014. The ICRC, National Red Cross and Red Crescent Societies and the International Federation of Red Cross and Red Crescent Societies (IFRC) played an active part in these conferences.

The tide was turning. A new, state-led humanitarian initiative aimed at “taking forward multilateral nuclear disarmament negotiations” resulted in a large majority of states at the 2016 session of the United Nations General Assembly agreeing to convene a conference to negotiate a legally binding instrument to prohibit nuclear weapons.⁶ The ICRC was closely involved in these negotiations and submitted its views on aspects of the draft treaty within its scope of expertise.⁷

On 7 July 2017, 122 states adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW).⁸ The Treaty comprehensively prohibits nuclear weapons. This prohibition, explicitly based on the principles and rules of IHL, constitutes an essential and long-awaited step towards a world free of nuclear weapons. The treaty entered into force on 22 January 2021, building further momentum towards achieving that goal.

The ICRC's legal and policy position on nuclear weapons⁹ has evolved over the years in step with international developments in policy, medicine, science and law. Its most recent views, expressed below, are based on new evidence and data on the humanitarian impact of nuclear weapons on human health and on the environment. They further reflect the ICRC's legal analysis, as well as the key findings of the International Court of Justice's 1996 advisory opinion on the legality of the threat or use of nuclear weapons.¹⁰ These views are framed by the Movement's policy on nuclear weapons, set out in the above-mentioned resolutions. The ICRC's position is structured around six main points, listed below, followed by a commentary in part III of this document.

6 United Nations General Assembly, Resolution 71/258, “Taking forward multilateral nuclear disarmament negotiations”, A/RES/71/258, 23 December 2016.

7 See “Elements of a treaty to prohibit nuclear weapons”, A/CONF.229/2017/WP.2, and “Comments of the International Committee of the Red Cross on key provisions of the Draft Convention on the Prohibition of Nuclear Weapons”, A/CONF.229/2017/CRP.2, submitted by the ICRC to the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 31 March 2017 and 14 June 2017 respectively.

8 Treaty on the Prohibition of Nuclear Weapons (A/CONF.229/2017/8), adopted at the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, New York, 7 July 2017.

9 The term “nuclear weapons” is used here to designate any explosive device triggered by nuclear fission or fusion. It does not apply to weapons or ammunition that contain radioactive components but do not bring about a process of fission or fusion, such as a “dirty bomb”. (“A “dirty bomb” is a type of “radiological dispersal device” that combines a conventional explosive, such as dynamite, with radioactive material”; see US Nuclear Regulatory Commission Backgrounder on Dirty Bombs, February 2020).

10 ICRC, “The Effects of Nuclear Weapons on Human Health”, Information Note no. 1, 2013; see also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 2015, 32IC/15/11, pp. 56–59, available at <https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf> (subsequent references to this report will cite it as the *IHL Challenges Report* 2015); and L. Maresca & E. Mitchell, “The human costs and legal consequences of nuclear weapons under international humanitarian law”, *International Review of the Red Cross*, Vol. 97, No. 899, July 2016, pp. 621–645. Regarding new evidence about the humanitarian impacts of nuclear weapons, see ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, August 2020.

II. Summary

1. Non-use, prohibition and elimination of nuclear weapons, in view of their catastrophic humanitarian consequences

- 1.1. Nuclear weapons release immense quantities of heat and kinetic energy, and prolonged radiation. They have massive destructive power which is impossible to contain in space and time. Their use would cause incalculable human suffering, especially in or near populated areas. There is no adequate humanitarian response capacity in case of use of nuclear weapons. Any use would involve a risk of escalation. A nuclear conflict would have catastrophic effects on people and societies around the globe, on human health, the environment, the climate, food production and socio-economic development. It would cause irreversible harm to future generations and threaten the very survival of humanity.
- 1.2. In view of the catastrophic humanitarian consequences of any use of nuclear weapons, it is a humanitarian imperative for States to ensure that they are never again used and to prohibit and eliminate them, regardless of their views on the legality of nuclear weapons under international humanitarian law.

2. Prevention of use through risk reduction and non-proliferation

- 2.1 Pending their complete elimination, it is a humanitarian imperative for States to urgently take effective measures to reduce the risk of use of nuclear weapons.
- 2.2 States must also take effective measures to prevent the proliferation of nuclear weapons, in accordance with their international obligations and commitments.

3. Adherence to and faithful implementation of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

- 3.1 The ICRC calls on all States to promptly sign and ratify or accede to the TPNW, and to faithfully implement it.
- 3.2 The TPNW provides a comprehensive prohibition of nuclear weapons, which is an essential step towards their elimination. It also reinforces the stigma against their proliferation and use. The treaty is a concrete step towards fulfilling existing nuclear disarmament obligations and commitments, in particular those under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

4. Adherence to and faithful implementation of other international agreements and pursuit of negotiations for the elimination of nuclear weapons

- 4.1 The ICRC calls on States that have not yet done so to ratify or accede to the NPT, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and

regional treaties establishing nuclear-weapon-free zones (NWFZ) and calls on all States Parties to fulfil their obligations and commitments under these treaties.

4.2 All States must pursue negotiations with a view to achieving the complete elimination of nuclear weapons, pursuant to their obligations under international law.

5. Incompatibility of nuclear weapons with the principles and rules of international humanitarian law (IHL)

5.1 In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of IHL.

5.2 The principles and rules of international humanitarian law applicable to all means and methods of warfare apply to nuclear weapons, even in situations of national self-defence. These include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the principle of distinction, the prohibition of indiscriminate and disproportionate attacks, the principle of precaution, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment.

5.3 Directing nuclear weapons against civilian populations or civilian objects, such as entire cities or other concentrations of civilians and civilian objects, or otherwise not directing a nuclear weapon against a specific military objective, would violate the principle of distinction.

5.4 Using nuclear weapons against military objectives located in or near populated areas would violate the prohibitions of indiscriminate and disproportionate attacks.

5.5 Even if used far away from populated areas, the suffering to combatants caused by radiation exposure, and the radiological contamination of the environment and risk of spread of radiation to populated areas, make it extremely doubtful that nuclear weapons could ever be used in accordance with the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment and the civilian population. In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of IHL.

6. Use of and threat to use nuclear weapons is abhorrent to the principles of humanity and dictates of public conscience

6.1 Any use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience.

6.2 Any threat to use nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience.

III. Commentary

1. Non-use, prohibition and elimination of nuclear weapons, in view of their catastrophic humanitarian consequences

1.1 Nuclear weapons release immense quantities of heat and kinetic energy, and prolonged radiation. They have massive destructive power which is impossible to contain in space and time. Their use would cause incalculable human suffering, especially in or near populated areas. There is no adequate humanitarian response capacity in case of use of nuclear weapons. Any use would involve a risk of escalation. A nuclear conflict would have catastrophic effects on people and societies around the globe, on human health, the environment, the climate, food production and socio-economic development. It would cause irreversible harm to future generations and threaten the very survival of humanity.

This position is based on science, including medical studies, research and other evidence. It is informed by the Movement's resolutions on nuclear weapons of 2011, 2013 and 2017, as well as the factual findings of the International Court of Justice in its 1996 advisory opinion.¹¹ The ICRC's conclusion that it would not be possible to provide adequate humanitarian assistance in the aftermath of a nuclear blast is based mainly on its own studies.¹² The range of humanitarian consequences of the use of nuclear weapons, as referred to in point 1.1 of the summary, has been documented in various ICRC publications, most recently the report of a workshop hosted by the ICRC and the IFRC on recent research and findings on the humanitarian impacts and risks of use of nuclear weapons, submitted in 2021 as a working paper to the 10th NPT Review Conference. As referenced in that report, these consequences have also been extensively documented by other organizations and at the international conferences on the humanitarian impacts of nuclear weapons held in Oslo, Nayarit and Vienna in 2013 and 2014.¹³

11 See International Court of Justice, "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons", ICJ, 8 July 1996, paragraph 35.

12 As reported in R. Coupland and D. Loye, "Who will assist the victims of use of nuclear, radiological, biological or chemical weapons – and how?", *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 329–344, and R. Coupland and D. Loye, "International assistance for victims of use of nuclear, radiological, biological and chemical weapons: time for a reality check?", *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, pp. 329–340. The ICRC has concluded in particular that an effective means of assisting a substantial portion of survivors of a nuclear detonation, while adequately protecting those delivering assistance, is not currently available at national level and not feasible at international level. It has also concluded that it is highly unlikely that the immense investment required to develop such capacity will ever be made, and even if it were made, it would likely remain insufficient. See ICRC president Peter Maurer's 2013 statement to the Oslo Conference on the Humanitarian Impacts of Nuclear Weapons, March 2013, and the interview of 4 March 2013 with Gregor Malich, head of the ICRC's Chemical, Biological, Radiological and Nuclear Response Operational Response Project, "No way to deliver assistance in the event of a nuclear explosion".

1.2 In view of the catastrophic humanitarian consequences of any use of nuclear weapons, it is a humanitarian imperative for States to ensure that they are never again used and to prohibit and eliminate them, regardless of their views on the legality of nuclear weapons under international humanitarian law.

This represents the baseline position applicable to *all* states, regardless of their views on the legality of nuclear weapons. In this respect, the ICRC's position distinguishes between a position based on law (see point 5 below), and a position based on ethics and the principles of humanity (points 1 and 6).

The ICRC president's 2010 appeal and the Movement's 2011 resolution both emphasized the difficulty of envisaging how any use of nuclear weapons could be compatible with the principles and rules of IHL, and called on all states "to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations."¹⁴ The appeal to prevent the use of nuclear weapons and prohibit and eliminate them was primarily framed as a humanitarian imperative. Given the catastrophic humanitarian consequences that any use of nuclear weapons would entail, nuclear disarmament is an urgent humanitarian imperative.

2. Prevention of use through risk reduction and non-proliferation

2.1 Pending their complete elimination, it is a humanitarian imperative for States to urgently take effective measures to reduce the risk of use of nuclear weapons.

While the entry into force of the Treaty on the Prohibition of Nuclear Weapons marks a historic turning point, the risk of the use of these weapons—whether with intent, through miscalculation or by accident—has increased in recent years to the highest level since the Cold War. Risk is defined as the consequence of an event multiplied by the probability of that event occurring.¹⁵ The deployment of nuclear weapons would have catastrophic consequences, while the likelihood of their use has increased as a result of: growing tensions between nuclear-armed states and their allies; the development of new types of nuclear weapons that are

13 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, paragraphs 3–8.

14 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 1, CD/11/R1, 2011, OP3. The "existing international obligations" essentially refer to the obligation to negotiate nuclear disarmament under Article VI of the NPT and customary law.

15 Cf J. Borrie, T. Caughley and W. Wan (eds), *Understanding Nuclear Weapon Risks*, UNIDIR, 2017, p. 11.

more powerful or more “usable”; new or expanded roles of nuclear weapons in military plans and doctrine; and the vulnerability of nuclear command and control systems to cyber attacks.¹⁶

These concerns were highlighted by the president of the ICRC in April 2018, when he appealed to states to urgently reduce nuclear risks through a range of specific actions.¹⁷ Risk reduction measures include unequivocal commitments never to use nuclear weapons first (“no first use” policies), “de-alerting” nuclear weapon systems – namely removing thousands of nuclear weapons from high-alert, launch-ready status to lengthen time required to deploy them), and progressive steps to reduce the role of nuclear weapons in security policies.

While there is no specific, legally binding instrument requiring states to reduce nuclear risks, there are multiple political commitments to do so, including in the resolutions of the United Nations General Assembly and the action plan adopted by consensus at the 2010 NPT Review Conference.¹⁸

2.2 States must also take effective measures to prevent the proliferation of nuclear weapons, in accordance with their international obligations and commitments.

Nuclear non-proliferation is one of the three pillars of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The 191 states parties to the treaty are obliged to take measures under Articles I–III to prevent the proliferation of nuclear weapons, and have further undertaken to implement a series of measures to this end, by means of the 2010 action plan.¹⁹ Non-proliferation requirements under the treaty include nuclear safeguards established under International Atomic Energy Agency verification, also required under Article 3 of the Treaty on the Prohibition of Nuclear Weapons (TPNW).²⁰ The Movement is firmly committed to promoting non-proliferation;²¹ the ICRC and the National Red

16 ICRC Briefing Note for National Societies, “Reducing the Risk of Nuclear Weapon Use and Accidental Detonation”, September 2016; and ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, section III.

17 Peter Maurer, “Nuclear weapons: Averting a global catastrophe”, appeal by the president of the ICRC, Geneva, 2018.

18 See 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), “Conclusions and recommendations for follow-on actions”, section IA(v), p. 19; also see United Nations General Assembly, Resolution 75/63, A/RES/75/63, 7 December 2020, OP 5, 7, 9 and 10; Resolution 74/46, A/RES/74/46, 12 December 2019, OP 6, 7 and 10; and Resolution 73/60, A/RES/73/60, 5 December 2018, OP 1 and 2.

19 See 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), Actions 23–46. Other instruments require states to take certain nuclear non-proliferation measures, such as United Nations Security Council, Resolution 1540, S/RES/1540, 2004, and export control agreements.

20 ICRC Briefing Note, “Safeguards and the Treaty on the Prohibition of Nuclear Weapons”, October 2018.

21 See Council of Delegates, Resolution 4, “Working towards the elimination of nuclear weapons: 2018–2021 action plan”, CD/17/R4, 2017, paras. 2 and 4.

Cross and Red Crescent Societies continue to urge governments to adhere to and fully implement the provisions of the NPT.²²

3. Adherence to and faithful implementation of the Treaty on the Prohibition of Nuclear Weapons (TPNW)

3.1 *The ICRC calls on all States to promptly sign and ratify or accede to the TPNW, and to faithfully implement it.*

3.2 *The TPNW provides a comprehensive prohibition of nuclear weapons, which is an essential step towards their elimination. It also reinforces the stigma against their proliferation and use. The treaty is a concrete step towards fulfilling existing nuclear disarmament obligations and commitments, in particular those under Article VI of the NPT.*

The Treaty on the Prohibition of Nuclear Weapons is the first universal treaty to prohibit nuclear weapons. It is a humanitarian disarmament instrument based on the principles and rules of IHL, as well as the principles of humanity and the dictates of public conscience. The treaty contains a comprehensive prohibition of nuclear weapons—an essential step towards their elimination. Although this prohibition is only binding on states party to the treaty, it strengthens the taboo against the use of nuclear weapons, thus providing a further disincentive for their proliferation.

Beyond banning nuclear weapons, the TPNW provides pathways for their elimination, and for nuclear-armed states to become party to the treaty and disarm under international verification. As such, the treaty is a concrete step towards fulfilling existing nuclear disarmament obligations, in particular the obligation under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament”. The TPNW is seen by many as an “effective measure” within the meaning of this article.

In addition, by setting out obligations relating to assistance for victims of nuclear weapons use and testing, and for the remediation of contaminated areas, the treaty recognizes states’ duty to care for all life harmed by these weapons.

The ICRC and the Movement are firmly committed to promoting the treaty’s universalization and faithful implementation.²³

22 See Council of Delegates progress report, “Working towards the elimination of nuclear weapons: 2018–2021 action plan (Resolution 4 of the 2017 Council of Delegates)”, CD/19/19, pp. 5–6.

23 Resolution 4 of the Council of Delegates, “Working towards the elimination of nuclear weapons: 2018–2021 action plan”, 2017, CD/17/R4, OP4.

4. Adherence to and faithful implementation of other international agreements and pursuit of negotiations for the elimination of nuclear weapons

4.1 The ICRC calls on States that have not yet done so to ratify or accede to the NPT, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and regional treaties establishing nuclear-weapon-free zones (NWFZ) and calls on all States Parties to fulfil their obligations and commitments under these treaties.

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is part of a broader nuclear disarmament and non-proliferation architecture, which it strengthens and complements. The ICRC and the Movement remain committed to promoting the universalization and full implementation of other existing international agreements relating to nuclear disarmament, in particular the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the **Comprehensive Nuclear-Test-Ban Treaty (CTBT)** and regional treaties establishing nuclear-weapon-free zones.²⁴

The NPT aims to prevent the spread of nuclear weapons, to pave the way for nuclear disarmament, and to promote cooperation for the peaceful use of nuclear energy. At the heart of the treaty is a “grand bargain” or *quid pro quo*: the five states with nuclear weapons would commit to disarm, and in return all other states parties would commit to non-proliferation, i.e. to never develop or acquire nuclear weapons. However, since the treaty was adopted in 1968, there has been little or no progress on its nuclear disarmament pillar. While the treaty remains critically important and is referred to in the preamble of the TPNW as the cornerstone of the nuclear disarmament and non-proliferation regime,²⁵ real progress on its nuclear disarmament obligations and commitments is urgently needed if it is to remain credible.²⁶

The CTBT prohibits all nuclear weapon test explosions. Adopted in 1996, the treaty has been ratified by 170 states to date. However, it has not yet entered into force, as eight of the states listed in Annex 2 of the treaty have yet to ratify the document. The TPNW recognizes the Comprehensive Nuclear-Test-Ban Treaty as a core element of the nuclear disarmament and non-proliferation regime.²⁷

There are five regional treaties establishing nuclear-weapon-free zones in Latin America (Treaty of Tlatelolco, 1967), the South Pacific (Treaty of Rarotonga, 1985), South-East Asia (Treaty of Bangkok, 1995), Africa (Treaty of Pelindaba, 1996) and Central Asia (Treaty of Semipalatinsk, 2006), to which over

²⁴ *Ibid.*

²⁵ Treaty on the Prohibition of Nuclear Weapons, PP18.

²⁶ ICRC president’s speech at the 2018 signing ceremony of the TPNW.

²⁷ PP19 of the TPNW reads “Recognizing the vital importance of the Comprehensive Nuclear Test-Ban Treaty and its verification regime as a core element of the nuclear disarmament and non-proliferation regime”.

100 states are party. States party to each of these treaties have made a commitment not to develop, acquire or test nuclear weapons within the defined zones. Each treaty includes a protocol for the five nuclear-weapon states under the NPT to ratify. In several cases, the states concerned have signed this protocol with reservations.

The Treaty on the Prohibition of Nuclear Weapons does not aim to supersede or replace the above-mentioned instruments, but rather to complement and strengthen them. It advances their object and purpose, including by establishing additional obligations in line with the ultimate goal of nuclear disarmament, such as the prohibition on use and threat of use, the prohibition of possession, and the prohibition of stationing of nuclear weapons on a state party's territory.

4.2 All States must pursue negotiations with a view to achieving the complete elimination of nuclear weapons, pursuant to their obligations under international law.

There have been calls for the elimination of nuclear weapons since they were first developed. In 1946, the first resolution of the United Nations General Assembly sought to urgently identify pathways to eliminate “atomic weapons”.²⁸ Since then, a large number of other United Nations General Assembly resolutions, as well as various instruments outside of the United Nations system, have reaffirmed the need for nuclear disarmament.²⁹

While the comprehensive prohibition contained in the TPNW is a major achievement and an important step towards their complete elimination, nuclear disarmament remains a work in progress. The TPNW sets out pathways for other nuclear-armed states to become party to the treaty and to eliminate their nuclear weapons. These pathways foresee the future negotiation of agreements with new states parties that possess nuclear weapons, in order to verify their disarmament, and – in particular – the adoption of “measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes, including additional protocols to this treaty”.³⁰

28 United Nations General Assembly Resolution, “Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy”, A/RES/1(1), OP 5(b).

29 See, e.g. United Nations General Assembly, Resolution 808 A (IX), A/RES/808(IX), 4 November 1954, Resolution 35/152, A/RES/35/152, D, 12 December 1980, Resolution 51/450, A/RES/51/450, 10 December 1996, Resolution 59/77, A/RES/59/77, 3 December 2004 and Resolution 70/57, A/RES/70/57, 7 December 2015; United Nations Security Council, Resolution 984, S/RES/984, 11 April 1995 and Resolution 2310, S/RES/2310, 23 September 2016; European Parliament Resolution 2016/2936 (RSP), 27 October 2016; Association of Southeast Asian Nations, Plan of Action to Strengthen the Implementation of the Treaty on the South-East Asia Nuclear Weapon-Free Zone (2018–2022), 4 August 2017; Community of Latin American and Caribbean States, Special Declaration of the Community of Latin American and Caribbean States on the Urgent Need for a Nuclear Weapon Free World, 29 January 2015.

30 Treaty on the Prohibition of Nuclear Weapons, Articles 4(2) and 8(1)(b).

In its 1996 advisory opinion, the International Court of Justice concluded that there 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.³¹ In its reasoning, the court referred to the obligation under Article VI of all states party to the Treaty on the Non-Proliferation of Nuclear Weapons to pursue negotiations in good faith on effective measures relating to nuclear disarmament, and interpreted this not as an obligation of means, but of result, requiring that states bring such negotiations to a conclusion.³² While falling short of expressly stating that the obligation to pursue nuclear disarmament also exists under customary law, the court stated that this “remains without any doubt an objective of vital importance to the whole of the international community today”.³³

While the Treaty on the Prohibition of Nuclear Weapons is an effective measure in the implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, these two treaties alone are insufficient to bring about nuclear disarmament. Additional measures will be needed, as well as the involvement of nuclear-armed states and their allies. In this respect, the obligation enshrined in Article VI of the NPT has only been partially fulfilled, and other than the Treaty on the Prohibition of Nuclear Weapons very little progress has been made with regard to the nuclear disarmament pillar of the NPT.

5. Incompatibility of nuclear weapons with the principles and rules of IHL

5.1 In an armed conflict, it is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of international humanitarian law (IHL).

In 2010 and 2011 respectively, the ICRC and the Movement publicly stated that it was “difficult to envisage” how any use of nuclear weapons could be compatible with IHL.³⁴ As of 2014, the ICRC began to express this view in progressively stronger terms, primarily on the basis of new evidence and data on the humanitarian impacts of nuclear weapons.³⁵ This more assertive position on the incompatibility

31 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105(2)(F).

32 *Ibid.*, para. 99.

33 *Ibid.*, para. 103.

34 See Council of Delegates, Resolution 1, “Working towards the elimination of nuclear weapons”, CD/11/R1, 2011, para. 2.

35 In December 2014, at the last of the three “humanitarian impacts” conferences held in Vienna, the director of International Law and Policy at the ICRC stated that “the new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons

with IHL of the use of nuclear weapons also reflects: the gradual shift in states' positions during the last decade, the consensus view expressed by states party to the Treaty on the Non-Proliferation of Nuclear Weapons in 2010 that any use of nuclear weapons would have catastrophic humanitarian consequences; and the large and growing number of states that assert that any use of nuclear weapons would be contrary to IHL. The incompatibility of nuclear weapons with IHL is also explicitly stated in the preamble to the Treaty on the Prohibition of Nuclear Weapons, adopted by a majority of states.³⁶

The principles and rules of IHL apply to all means and methods of warfare, including nuclear weapons. They include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited; the principle of distinction; the prohibition of indiscriminate and disproportionate attacks; the principle of precaution, in particular the obligation to take all feasible precautions in an attack; the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering; and the rules on the protection of the natural environment. The International Court of Justice confirmed the applicability of the principles and rules of IHL to nuclear weapons in its 1996 advisory opinion.³⁷ The applicability of IHL to nuclear weapons was also recognized by states party to the Treaty on the Non-Proliferation of Nuclear Weapons in the final document of the 2010 NPT Review Conference,³⁸ and reaffirmed in the preamble to the Treaty on the Prohibition of Nuclear Weapons.³⁹

could ever be used in accordance with the rules of customary IHL”, a position reaffirmed in the *IHL Challenges Report 2015*. Likewise, in February 2015, the ICRC president stated that new evidence only strengthened existing doubts about the lawfulness of using nuclear weapons. He added: “With every new piece of information, we move further away from any hypothetical scenario where the humanitarian consequences of the use of nuclear weapons could be compatible with international humanitarian law”; see “Nuclear weapons: Ending a threat to humanity”, a speech given by Mr Peter Maurer, president of the International Committee of the Red Cross, to the diplomatic community in Geneva (18 February 2015). In his opening statement to the March 2017 session of the United Nations conference negotiating the TPNW, the ICRC president said that “[e]vidence of the indiscriminate effects and unspeakable suffering caused by nuclear weapons raise significant doubts about their compatibility with IHL”. Subsequently, at the ceremony for the entry into force of the TPNW on 22 January 2021, he stated that it is “extremely doubtful” that nuclear weapons could ever be used in accordance with IHL.

36 PP10 of the TPNW considers that “any use of nuclear weapons” would be contrary to IHL. In its explanation of its vote to adopt the Treaty on 7 July 2017, Sweden stated it did “not subscribe to the language” of this preambular paragraph, and maintained that, in its view, the “generally contrary” language of the 1996 advisory opinion of the International Court of Justice on nuclear weapons was the correct statement of the law.

37 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, paras. 79 and 85–86.

38 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50, Vol. I, Conclusions and recommendations for follow-on actions, section I(A)(v), p. 19.

39 See PP8 and PP9 of the TPNW.

5.2 *The principles and rules of international humanitarian law applicable to all means and methods of warfare apply to nuclear weapons, even in situations of national self-defence. These include the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the principle of distinction, the prohibition of indiscriminate and disproportionate attacks, the principle of precautions, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment.*

The principles and rules of IHL apply to nuclear weapons, even in situations of national self-defence. In its 1996 advisory opinion, the International Court of Justice stated, rather ambiguously, that it was unable to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state was at stake.⁴⁰ The ICRC's position is that the exercise of the right to self-defence – even in an extreme situation where the very survival of a state is at stake – can on no account release that state from its obligations under IHL. Self-defence must be exercised in full compliance with IHL, whatever the circumstances, and never in violation of the very rules intended to mitigate the suffering caused by armed conflict.⁴¹

This clear articulation is crucial to maintaining the full scope of the protection afforded by IHL and its relationship with international law on the use of force (*jus ad bellum*), including the law of self-defence. The assertion “that in certain cases of self-defence humanitarian law no longer applies, is [...] dangerously like an application of the discredited doctrine of *Kriegsraison geht vor Kriegsmanier*. This doctrine, which suggested that in extreme circumstances of danger one could abandon the application of humanitarian law rules in order to meet the danger, was rejected by the Nuremberg Tribunal”.⁴² This has a bearing on the theory of nuclear deterrence, discussed in section 6 below.

40 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105 2(E).

41 ICRC, *IHL Challenges Report* 2015, p. 59.

42 L. Doswald-Beck, “International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons”, *International Review of the Red Cross*, No. 316, 1997, p. 54. Also see Military Tribunal at Nuremberg, Trial of Erhard Milch, 20 December 1946–17 April 1947, summarized in *Law Reports of Trials of War Criminals*, Vol. VII, The United Nations War Crimes Commission, 1948, pp. 27–: (in response to the argument of the defence that the law of war is suspended in a situation of total warfare, the judges stated “[w]ith all its horror modern war still ‘is not a condition of anarchy and lawlessness between the belligerents, but a contention in many respects regulated, restricted, and modified by law.’”); also see Military Tribunal at Nuremberg, Trial of Krupp, 1948, summarized in *Law Reports of Trials of War Criminals*, Vol. X, The United Nations War Crimes Commission, 1949, pp. 138–139 (“the contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected. [...] [T]hese rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency.”).

In the view of the ICRC, there are two scenarios in which the use of nuclear weapons would clearly violate IHL.

5.3 Directing nuclear weapons against civilian populations or civilian objects, such as entire cities or other concentrations of civilians and civilian objects, or otherwise not directing a nuclear weapon against a specific military objective, would violate the principle of distinction.

Firstly, directing nuclear weapons against civilian populations or civilian objects, including entire cities or other concentrations of civilians and civilian objects – or otherwise not directing a nuclear weapon against a specific military objective – would violate the principle of distinction, which prohibits attacks directed against civilians, civilian populations or civilian objects, as well as attacks not directed against a specific military objective.⁴³

This seems uncontroversial. However, it is highly concerning that only one nuclear-armed state appears to have – relatively recently – stated publicly and unequivocally in its nuclear doctrine that nuclear weapons must be directed against military objectives and would not be used to target civilian populations or civilian objects.⁴⁴ Declassified Cold War-era nuclear target lists reveal that, during that period, nuclear doctrine typically involved planning for the “systematic destruction” of major enemy cities – a policy progressively abandoned by the above-mentioned nuclear-armed state since 2003, as it was considered contrary to IHL.⁴⁵ It is believed that most, if not all, other states in possession of nuclear weapons have, at some point, adopted or continue to have in place such a policy, although their views on specific scenarios for the use of nuclear weapons – and whether those scenarios would comply with IHL – remain opaque.⁴⁶

Questions have been raised as to whether nuclear weapons could be used lawfully in belligerent reprisals, a traditional (albeit arguably anachronistic) method of enforcing IHL. A belligerent reprisal consists of “an action that would otherwise be unlawful but that in exceptional cases is considered lawful under

43 Article 51(4)(a) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, and customary IHL (cf ICRC *Customary International Humanitarian Law Study*, p. 43).

44 *Report on Nuclear Employment Strategy of the United States*, Specified in Section 491 of 10 U.S.C., 12 June 2013, pp. 4–5; Office of the Secretary of Defense, *Nuclear Posture Review*, February 2018 (2018 US Nuclear Posture Review), p. 23; and Joint Chiefs of Staff, *Nuclear Operations*, 11 June 2019, pp. 111–114.

45 W. Burr (ed.), *U.S. Cold War Nuclear Target Lists Declassified for First Time*, The Nuclear Vault, National Security Archive, George Washington University, 22 December 2015; A. Mount and P. Vaddi, *Better Informing a President's Decision on Nuclear Use*, *Lawfare*, 9 November 2020.

46 For example, United Kingdom doctrine states that the legality of the use of nuclear weapons “depends upon the application of the general rules of international law including those regulating the use of force and the conduct of hostilities” and “[w]hether the use, or threatened use, of nuclear weapons in a particular case is lawful depends on all the circumstances.” The United Kingdom “would only consider using nuclear weapons in self-defence, including the defence of its NATO allies, and even then only in extreme circumstances”; see *Joint Service Manual of the Law of Armed Conflict* (JSP 383), 2004 edition, p. 117.

international law when used as an enforcement measure in reaction to unlawful acts of an adversary”.⁴⁷ There has been a trend in IHL towards outlawing belligerent reprisals altogether, including attacks against the civilian population by way of reprisals.⁴⁸ Such attacks are expressly prohibited under Article 51(6) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, but the prohibition is not yet considered a rule under customary IHL.⁴⁹

Belligerent reprisals are subject to a number of stringent conditions and limits. In particular, they may be used only in response to serious violations of IHL and for the purpose of bringing the adversary back into compliance with IHL; only as a measure of last resort; and only if proportionate to the violations they aim to stop. In the ICRC’s view, this last criterion alone makes it hard to imagine that the use of nuclear weapons in response to a serious violation of IHL involving solely conventional means of warfare could ever be lawful. Even in response to a nuclear attack directed against the civilian population, it is difficult to see how a similar use of nuclear weapons by way of reprisal would in practice comply with the above-mentioned conditions.⁵⁰ Among others, it is doubtful whether such use would induce an adversary to comply with the law, given the high risk of escalation involving an even greater use of nuclear weapons by both parties, with catastrophic humanitarian consequences of regional and global proportions.⁵¹

5.4 Using nuclear weapons against military objectives located in or near populated areas would violate the prohibitions of indiscriminate and disproportionate attacks.

Another clear-cut scenario where the use of nuclear weapons would be unlawful under IHL involves their deployment against military objectives located in or near populated areas. Such use would violate the prohibitions of indiscriminate and disproportionate attacks.

Indiscriminate attacks include those carried out using a weapon that is either incapable of being directed at a specific military objective, or the effects of which cannot be limited as required by IHL, and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction. Even if a nuclear weapon were aimed at a specific military objective, it would not be

47 ICRC Customary International Humanitarian Law Study, Rule 145: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule145.

48 See for example United Nations General Assembly Resolution 2675 (XXV), which affirmed the principle that “civilian populations, or individual members thereof, should not be the object of reprisals” as a basic principle for the protection of civilian populations in armed conflict (GA/RES/2675 (XXV), OP 7).

49 See ICRC Customary International Humanitarian Law Study, Rule 145, pp. 513, 520–523.

50 For example, the condition of use as a last resort, i.e. use only after all other means (political, diplomatic, economic, etc.) have been exhausted, seems unrealistic since nuclear doctrines call for immediate retaliation to a nuclear attack, this being a key element of the nuclear deterrence theory applied by all nuclear-armed states.

51 For further discussion of the use of nuclear weapons as a belligerent reprisal tool, see L. Maresca & E. Mitchell, at pp. 642–643.

possible to control the force and effects of the nuclear detonation and limit them as required by IHL, meaning that if the military target were located in or near a populated area, the attack would not only strike the military target but also civilians and civilian objects, without distinction.

A nuclear detonation releases a combination of powerful blast waves, intense heat in the form of thermal radiation and high levels of ionized radiation, which is typically dispersed over a wide area.⁵² The heat generated by the blast is likely to trigger intense fires and firestorms, whose impact would be impossible to control. Likewise, the residual radioactive particles (“nuclear fallout”) created by the nuclear blast cannot be contained and would likely disperse far beyond the target area, carried by the wind or other weather phenomena, potentially over great distances and across borders.⁵³

Even the use of a so-called “low-yield” nuclear weapon in or near a populated area would have effects that cannot be limited as required by IHL and would be of a nature to strike military objectives, civilians and civilian objects – without distinction. As the ICRC and the Japanese Red Cross witnessed first-hand in Hiroshima and Nagasaki, the use of a single 10 to 20 kiloton bomb would cause a very high number of civilian casualties and devastating damage and destruction.⁵⁴ Thus, even a much smaller weapon would clearly have indiscriminate effects in such an environment.

The International Court of Justice, in its 1996 advisory opinion, stated that “the destructive power of nuclear weapons cannot be contained in either space or time” and that the use of such weapons “seems scarcely reconcilable with respect for” the prohibition of indiscriminate weapons, among other IHL rules.⁵⁵

In the light of the above, it is clear that the use of a nuclear weapon in or near a populated area would contravene the prohibition of indiscriminate attacks.⁵⁶

Such use would also be contrary to the rule of proportionality,⁵⁷ which prohibits attacks that may be expected to cause incidental civilian casualties and/

52 In its 1996 advisory opinion, the International Court of Justice found that radiation was “peculiar to nuclear weapons”, accounting in part for their “unique characteristics”, and that such radiation “would affect health, agriculture, natural resources and demography over a very wide area” (para. 35).

53 See e.g. Matthew McKinzie *et al.*, “Calculating the Effects of a Nuclear Explosion at a European Military Base”, presentation to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, December 2014. Modern environmental modelling techniques have demonstrated that even a “small-scale” use of some 100 nuclear weapons against urban targets would, in addition to spreading radiation around the world, lead to a cooling of the atmosphere, shorter growing seasons, food shortages and a global famine in which it is estimated over a billion people would perish; see Alan Robock *et al.*, “Global Famine after a Regional Nuclear War: Overview of Recent Research”, presentation to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, December 2014.

54 The heat generated by the explosion can be expected to cause severe burns to exposed skin up to 3 km from the epicentre, and massive destruction of buildings and infrastructure within several kilometres; see the *IHL Challenges Report* 2015, p. 57.

55 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, paras 35 and 95 respectively.

56 The ICRC already drew a similar conclusion in 1950: “Atomic weapons and non-directed missiles: ICRC statement, 5 April 1950”, *International Review of the Red Cross*, Supplement, Vol. 3, No. 4, 1950. See also L. Maresca and E. Mitchell, “The human costs and legal consequences of nuclear weapons under international humanitarian law”, *International Review of the Red Cross*, Vol. 97, No. 899, 2015, p. 632.

57 L. Maresca and E. Mitchell, p. 635.

or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. In assessing the proportionality of an attack, both direct and indirect (or reverberating) effects of the attack must be considered, as soon as they are reasonably foreseeable.⁵⁸

The powerful blast wave, intense thermal heat and radiation released by a nuclear explosion would cause severe, extensive, immediate and long-term incidental civilian casualties, including illnesses and cancers caused by radiation exposure, and damage to civilian objects, including to critical civilian infrastructure and the natural environment. Further death, injury and suffering would be caused by the consequent disruption of services essential to the survival of the civilian population, including health services and the water and electrical supply. These consequences can be anticipated and are entirely foreseeable, given what we know today about the effects of nuclear weapons.⁵⁹

It is very hard to imagine any concrete and direct military advantage that could justify “incidental” direct and indirect civilian harm and destruction on such a colossal scale as that caused by a nuclear explosion in or near a populated area. Moreover, as the ICRC has often stated, the overarching aim of winning a war does not qualify as a concrete and direct military advantage for the purpose of assessing compliance with the principle of proportionality.

Likewise, the extreme circumstance of self-defence, in which the very survival of a state would be at stake and which some states argue would justify the use of nuclear weapons, is too broad and abstract to qualify as a concrete and direct military advantage within the meaning of the IHL rule of proportionality. The rule would become meaningless if used to justify the catastrophic humanitarian consequences of the use of nuclear weapons. It would amount to allowing a political imperative – “self-defence for state survival” – to override the balance between military necessity and humanity which underlies proportionality, and which must be maintained if the rule is to achieve its protective purpose.⁶⁰

5.5 Even if used far away from populated areas, the suffering to combatants caused by radiation exposure, and the radiological contamination of the environment and risk of spread of radiation to populated areas, make it extremely doubtful that nuclear weapons could ever be used in accordance with the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment and the civilian population.

58 ICRC, *International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, ICRC, Geneva, 2019 (IHL Challenges Report 2019), pp. 8–9.

59 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020.

60 Some have interpreted the conclusion put forward by the International Court of Justice as meaning that IHL might not apply in certain extreme cases of self-defence under the *jus ad bellum*. The ICRC has firmly

Some states have argued before the International Court of Justice that nuclear weapons could be used lawfully under certain circumstances, citing examples of the use of a low-yield weapon against warships on the high seas or against troops in a desert. Leaving aside the improbability of these scenarios, as pointed out by the court itself,⁶¹ even if the use of nuclear weapons in remote areas might not have an immediate impact on civilians, it would have horrifying consequences for combatants. Moreover, the risk of the uncontrollable spread of radioactive fallout to civilian areas could not be discounted.

In its 1996 advisory opinion, the court found that, due to their “unique characteristics”, the use of nuclear weapons “seems scarcely reconcilable with respect for” the prohibition of weapons of a nature to cause superfluous injury or unnecessary suffering to combatants.⁶² As interpreted by the court, this refers to weapons “uselessly aggravating their suffering [...] that is to say a harm greater than that unavoidable to achieve legitimate military objectives”.⁶³ Indeed, the detonation of a nuclear weapon generates significant, and often fatal, levels of radiation with devastating immediate and long-term consequences for the health of exposed individuals. These include damage to the central nervous system and the gastrointestinal tract, and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer.⁶⁴ The injuries, illnesses, permanent disability and lifelong suffering caused by radiation exposure make it extremely doubtful whether nuclear weapons could be used in compliance with the IHL rule prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering.

In addition, even if used far away from populated areas, the radiological contamination of the natural environment caused by a nuclear detonation and the likely spread of radioactive particles to populated areas make it extremely doubtful that nuclear weapons could be used in compliance with IHL rules aimed at protecting the natural environment and the civilian population.

Being a civilian object, the natural environment is protected from excessive direct or indirect incidental damage under the customary IHL rule of proportionality. Customary IHL also requires that means and methods of warfare

rejected this, and such an interpretation has been decried by some authors as an application of the discredited doctrine of *Kriegsraison*, as mentioned above (see fn 34).

61 In its 1996 advisory opinion, the International Court of Justice pointed out the weakness of such arguments in the following terms (para. 94): “The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the ‘clean’ use of smaller, low-yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons.”

62 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 95.

63 *Ibid.*, para. 78.

64 ICRC-IFRC, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 5–8; ICRC, *IHL Challenges Report 2015*, p. 58; ICRC, “Long-term Health Consequences of Nuclear Weapons: 70 years on Red Cross Hospitals still treat Thousands of Atomic Bomb Survivors”, Information Note No. 5, July 2015; ICRC, “The Effects of Nuclear Weapons on Human Health”, Information Note No. 1, 2013.

be employed with due regard to the protection and preservation of the natural environment.⁶⁵ We know today that the use of even a single nuclear weapon can cause significant, long-term, widespread environmental damage, due to the dispersion and the impact of dust, soot and radioactive particles on the atmosphere, soil, water, plants and animals.⁶⁶

In any case, it is unrealistic to imagine that nuclear strikes would be limited to areas far removed from population centres, not least given the ever-expanding global population. It is therefore worth recalling that any assessment of the legality of a weapon under IHL must be performed not through an analysis of all possible or hypothetical scenarios, but by examining its “normal or expected use”,⁶⁷ taking into account the realities of warfare. However, states’ nuclear postures remain more or less opaque with regard to specific scenarios of use. What is more, the theories based around “deterrence” and “mutually assured destruction” that continue to underlie nuclear postures are largely predicated on the threat of large-scale nuclear retaliation to a nuclear or conventional attack, particularly against targets located in or near populated areas.

6. Use and threat of use of nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience

6.1 Any use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience.

It would be very hard to argue with this position, given the overwhelming body of evidence of the catastrophic humanitarian consequences of nuclear weapons and the taboo against their use. It is reflected in the preamble to the Treaty on the Prohibition

65 Article 35(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, prohibits the use of methods and means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. This rule, however, has not become part of customary law with regard to nuclear weapons as certain states, notably France, the United Kingdom and the United States, have consistently objected to its application to nuclear weapons; see ICRC, *Guidelines on the Protection of the Environment in Armed Conflict*, Geneva, 2020, at para. 48.

66 ICRC-IFRC, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 5 and 6; ICRC, *IHL Challenges Report 2015*, p. 58; ICRC, “Climate Effects of Nuclear War and Implications for Global Food Production”, Information Note No. 2, 2013. Already in 1996, the International Court of Justice had noted that the ionizing radiation released by a nuclear explosion could “damage the future environment, food and marine ecosystem, and cause genetic defects and illness to future generations” and that nuclear weapons could potentially destroy “the entire ecosystem of the planet”; see International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 35.

67 See the commentary on Article 36 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts in ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, Martinus Nijhoff Publishers, 1987, para. 1469.

of Nuclear Weapons⁶⁸ and is based on the “Martens clause”, a provision found in IHL treaties (notably the 1899 Hague Convention (II) on the laws and customs of war on land, the 1977 Additional Protocols and the 1980 Convention on Certain Conventional Weapons).⁶⁹ The Martens clause states that in cases not covered by existing treaty law – in this case, a situation where there would be no applicable treaty rule prohibiting or limiting the use of nuclear weapons – belligerents remain nonetheless “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”.

The International Court of Justice unanimously affirmed in its 1996 advisory opinion the applicability and importance of the Martens clause, indicating that the clause “had proved to be an effective means of addressing the rapid evolution of military technology”. Indeed, the Martens clause constitutes a moral guideline, namely that certain means or methods of warfare that are not specifically prohibited or limited are nevertheless unacceptable.⁷⁰ The role of the International Red Cross and Red Crescent Movement as the voice of “public conscience” is expressly acknowledged in the preamble to the TPNW.⁷¹ Since 1945, the Movement has repeatedly stated its ethical stance on the unacceptability of nuclear weapons and has been the voice of public conscience by demanding that nuclear weapons be abolished. The concept of “public conscience” is also reflected in public opinion on nuclear weapons; for example, an ICRC survey of the views of over 16,000 “millennials” found that 84% of the young adults surveyed believed that the use of nuclear weapons is never acceptable.⁷²

In addition to prohibiting the use of nuclear weapons, the TPNW clearly underscores their unacceptability in humanitarian and moral terms. This rejection is absolute; as far as the ICRC is concerned, even if nuclear weapons were used as a form of belligerent reprisal, meeting the strict conditions set by proponents of this method, their use would still be contrary to the principles of humanity and the dictates of public conscience.

6.2 Any threat to use nuclear weapons is abhorrent to the principles of humanity and the dictates of public conscience.

68 See Treaty on the Prohibition of Nuclear Weapons, PP11.

69 See also Article 63(3) of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, stipulating that “The denunciation... shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” (replicated in Article 62 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 142 of the Convention (III) relative to the Treatment of Prisoners of War, and Article 158 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War).

70 It has been debated whether the “principles of humanity” and the “dictates of public conscience” are separate, legally binding yardsticks against which a weapon can be measured in law, or whether they are merely moral guidelines. The view of the ICRC is that since “they reflect public conscience; the principles of humanity actually constitute a universal reference point and apply independently of the Protocol.” See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, Geneva, Martinus Nijhoff Publishers, para. 4434.

71 See Treaty on the Prohibition of Nuclear Weapons, PP24.

72 ICRC, *Millennials on War*, ICRC, January 2020.

The Martens clause applies to both the use and the threat of use of nuclear weapons. By implying the possibility of actually deploying nuclear weapons, any threat to use them is also abhorrent to the principles of humanity and the dictates of public conscience. This refers to both general and specific threats and is particularly pertinent, given that leaders of certain nuclear-armed states have in recent years made explicit threats to use nuclear weapons against their adversaries.

From a legal perspective, the International Court of Justice unanimously stated in its 1996 advisory opinion 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”,⁷³ though it did not indicate the basis for this statement.⁷⁴ Today, the threat to use nuclear weapons is prohibited under any circumstances for states party to the TPNW.⁷⁵

At the heart of debates on the threat to use nuclear weapons lies the more sensitive issue of the legal and ethical acceptability of the theory of nuclear deterrence and its corollary, the theory of “mutually assured destruction”. Deterrence is defined as the “prevention of action by the existence of a credible threat of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.”⁷⁶ Though deterrence remains the professed position of nuclear-armed states and their allies, the nuclear era has periodically seen shifts towards more aggressive nuclear policies that aim not just to deter attack, but also appear to allow for initiating, fighting and winning a nuclear war.

Although some contend that nuclear deterrence has prevented the use of nuclear weapons since 1945, this premise is highly contested. Over the last 75 years, the world has on several occasions come extremely close to nuclear catastrophe by miscalculation or error, exposing the inherent weakness of the belief that nuclear deterrence theories guarantee security and stability, and the unacceptable risk that such theories actually entail.⁷⁷ As observed in the ICRC-IFRC report published in August 2020 on the humanitarian impacts and risks of

73 International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 78.

74 One state argued in front of the International Court of Justice that threatening to use nuclear weapons would be incompatible with the obligation to comply with and ensure respect for IHL. G. Nystuen, “Threats of use of nuclear weapons and international humanitarian law”, in G. Nystuen, S. Casey-Maslen, A. Golden Bersagel, *Nuclear Weapons Under International Law*, Cambridge University Press, 2014, pp. 161–162. See also International Court of Justice, “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, ICJ, 8 July 1996, para. 105: “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”.

75 See Article 1(1)(d) of the TPNW.

76 United States, *DoD Dictionary of Military and Associated Terms*, December 2020, p. 63.

77 See, for example, Patricia Lewis *et al.*, *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy*, Chatham House, 2014; and J. Borrie *et al.*, *Understanding Nuclear Weapon Risks*, UNIDIR, 30 March 2017.

use of nuclear weapons, “[t]he concepts of “luck” and “vulnerability” may better capture our inability to control and manage the possible use of nuclear weapons and therefore provide a more accurate understanding of the dangers posed by these weapons.”⁷⁸

As a humanitarian organization, the ICRC cannot but reject as contrary to the principles of humanity and the dictates of public conscience any security theories that rely on the threat of mass suffering and destruction. As the president of the ICRC has observed, the pursuit of theories of nuclear deterrence and mutually assured destruction has ultimately created an unstable “balance of fear” that continues to threaten all of humankind.⁷⁹

IV. Concluding remarks

To conclude, in the words of the president of the ICRC:

*nuclear weapons – the use of which, even on a limited scale, would have catastrophic and long-lasting humanitarian consequences – cannot credibly be viewed as instruments of security. Most States today see nuclear weapons as a major source of insecurity for their populations and for future generations. [...] True security can only happen with progress on nuclear disarmament, and this progress is urgently needed.*⁸⁰

The Treaty on the Prohibition of Nuclear Weapons serves as a welcome and powerful reminder that, despite current global tensions, the international community can overcome even the biggest and most entrenched challenges by acting in concert, with foresight and clarity of purpose, in the true spirit of multilateralism. However, the entry into force of the treaty merely marks the beginning, rather than the end, of our efforts. We must ensure that its provisions are faithfully implemented. We are committed to encouraging states to become party to and fully implement the provisions of the treaty, as well as other instruments with similar objectives.

The ICRC will continue to encourage all states – including nuclear-armed states and their allies – to become party to the treaty. In addition, we will continue to call on nuclear-armed states and their allies to urgently take all measures necessary to reduce the risk of nuclear weapons ever being deployed.

We cannot prepare for the catastrophic consequences of a nuclear detonation. That for which we cannot prepare, we must prevent.

78 ICRC-IFRC report, *The humanitarian impacts and risks of the use of nuclear weapons*, ICRC/IFRC, Geneva, August 2020, para. 14, available at <https://www.icrc.org/en/document/humanitarian-impacts-and-risks-use-nuclear-weapons>.

79 Speech by ICRC president Peter Maurer at the TPNW signing and ratification ceremony, 26 September 2019.

80 Speech by ICRC president Peter Maurer at the TPNW signing ceremony, 26 September 2018.