

UNITED STATES OF AMERICA: US NUCLEAR WEAPONS POLICY VIOLATES THE RIGHT TO LIFE

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Founded in 1981, LCNP is a non-profit educational association of lawyers and legal scholars that engages in research and advocacy in support of the global elimination of nuclear weapons and a more just and peaceful world through respect for domestic and international law.

Joining in this submission:

WESTERN STATES LEGAL FOUNDATION

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Founded in 1982, WSLF is a nonprofit organization that seeks to abolish nuclear weapons as an essential step in making possible a more secure, just, and environmentally sustainable world. Grounded in commitments to nonviolence and international law, WSLF provides independent information and analysis to a wide range of audiences.

SWISS LAWYERS FOR NUCLEAR DISARMAMENT

www.safna.org

Founded in 2014, SLND encourages all efforts towards general and complete disarmament, in particular nuclear disarmament.

A. Threat or Use of Nuclear Weapons

1. In paragraph 66 of General Comment No. 36¹ on the right to life set out in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee stated in part: “The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.” Under the ICCPR, Article 4, the right to life is non-derogable, to be observed in all circumstances, even in the event of a “public emergency which threatens the life of the nation.” The United States of America is a state party to the ICCPR.

2. United States doctrine regarding use of nuclear weapons is not in conformity with the ICCPR right to life as applied by the committee.

3. The most recent US Nuclear Posture Review (NPR), released in February 2018, states: “There now exists an unprecedented range and mix of threat, including major conventional, chemical, biological, nuclear, space, and cyber threats, and violent nonstate actors.”² And it says: “Potential adversaries must recognize that across the emerging range of threats and contexts: 1) the United States is able to identify them and hold them accountable for acts of aggression, including new forms of aggression; 2) we will defeat non-nuclear strategic attacks ... [T]he United States will maintain the range of flexible nuclear capabilities needed to ensure that nuclear or non-nuclear aggression ... will fail to achieve its objectives and carry with it the credible risk of intolerable consequences for potential adversaries now and in the future.”³

4. The NPR thus underlines and expands the role of nuclear weapons beyond that of possible response to a nuclear attack by affirmatively identifying circumstances in which they could be used, namely in response to “non-nuclear strategic attacks.” This change increases the risks of nuclear war. For example, hard-to-attribute apparent cyber attacks will be considered a possible reason to resort to nuclear weapons, a change that will be all the more risky if other nuclear powers emulate US policy.

5. Signals that the United States will or may resort to nuclear weapons in certain circumstances are not confined to doctrinal statements. In a speech at the United Nations on 19 September 2017, US President Donald Trump stated: “The United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea.”⁴ The reference to total destruction, like President Trump’s earlier reference to unleashing “fire and fury like the world has never seen”,⁵ signals the possibility of use of nuclear arms.

6. The NPR asserts in passing that the “conduct of nuclear operations would adhere to the law of armed conflict.”⁶ A 2013 Pentagon Report on Nuclear Employment Strategy stated that all plans for use of nuclear weapons must “for instance, apply the principles of distinction and proportionality and seek to minimize the collateral damage to civilian populations and civilian objects.”⁷ In public appearances in November 2017, the present and preceding commanders of Strategic Command stated that orders to use nuclear weapons in violation of the law of armed

conflict would be refused.⁸ The truth is that nuclear weapons cannot be used in compliance with that law, above all because their massive indiscriminate effects make it impossible to distinguish between military targets and civilian populations and infrastructure. That includes a circumstance of response to a prior nuclear attack.

7. That truth was recognized by the UN Human Rights Committee in its General Comment. It was also recognized by the Treaty on the Prohibition of Nuclear Weapons adopted at the United Nations by 122 states on 7 July 2017 (not yet entered into force).⁹ The treaty's preamble reaffirms the need for all states to comply with applicable international law, including international humanitarian law and international human rights law. It recites rules and principles of international humanitarian law, and states: "Considering that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law." The preamble also reaffirms that "any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience" – factors with legal as well as moral value.

B. The Obligation to Negotiate Nuclear Disarmament

8. The General Comment, para. 66, also states in part that states parties to the ICPPR must "respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control." A footnote cites "Human Rights Committee, general comment No. 14, para. 7; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 of the International Court of Justice."

9. Again, US policy is not in conformity. The United States opposes commencement of multilateral negotiations on the elimination of nuclear weapons in the Conference on Disarmament or other venue. It opposed the initiation of negotiations of the Treaty on the Prohibition of Nuclear Weapons; did not participate in the negotiations; and since the adoption of the treaty has continued to oppose it.¹⁰

10. Regarding arms control measures, the Nuclear Posture Review says vaguely that the United States remains open to "prudent," "verifiable," and "enforceable" measures and to dialogue, but nothing concrete is offered.¹¹ As to multilateral measures, the NPR says the United States will not ratify the Comprehensive Nuclear-Test-Ban Treaty;¹² negotiations on a Fissile Materials Cut-off Treaty are not mentioned; and no other plurilateral or multilateral measure is identified as worth pursuing.

11. Concerning US-Russian bilateral arms control measures, the United States, followed by Russia, withdrew from the Intermediate-Range Nuclear Forces (INF) Treaty, effective in August 2018. The only remaining treaty limiting US and Russian nuclear forces, New START, which regulates long-range forces, expires in February 2021; at that time, pursuant to the treaty's terms, it could be extended for five years. The United States has not committed to extension of New START, which Russia supports. While there is occasional US reference to the possibility of a new arms control arrangement, perhaps including China, it appears that no serious effort is underway to reach agreement on extension of New START, and/or to replace and build upon the limits established by the INF Treaty and New START.

12. Regardless of geopolitical circumstances, the United States is legally obligated under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) “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.” According to a unanimous conclusion of the International Court of Justice in 1996, cited by the General Comment, the obligation requires states “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.”¹³ The obligation was reinforced by a 2000 NPT Review Conference “unequivocal undertaking ... to accomplish the total elimination” of nuclear arsenals.¹⁴ It was to be implemented in part through fulfilment of another Review Conference commitment, a “diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination.”¹⁵

13. The United States emphatically is not pursuing in good faith effective measures relating to cessation of the nuclear arms race and nuclear disarmament. On the contrary, the United States is reviving nuclear arms racing. The previous NPR, issued in 2010, emphasized existing and proposed US actions to reduce the number and role of nuclear weapons.¹⁶ However, nothing of the kind is found in the 2018 NPR. To the contrary, it states that a “need for flexibility to tailor US capabilities and strategies to meet future requirements and unanticipated developments runs contrary to a rigid, continuing policy of ‘no new nuclear capabilities’.”¹⁷

14. In contrast to its virtual silence on the pursuit of nuclear arms control and disarmament, the NPR sets forth in some detail plans to maintain, upgrade, and diversify the US nuclear arsenal. It carries forward existing plans for the replacement and upgrading of submarine-based, land-based, and air-based nuclear forces (gravity bombs and cruise missiles), while adding a new element, a sea-based cruise missile, a previous version of which had been eliminated. It also calls for near-term deployment of some low-yield warheads on currently deployed submarine-launched ballistic missiles. Since the NPR was released, the Trump administration has pursued those plans, although the plan for deployment of low-yield warheads has met with some resistance in Congress (the outcome is not known at this time).

15. In its entirety this program, which projects US reliance on extensive and diversified nuclear forces for decades to come, is an anti-disarmament program. It betrays a lack of good faith in relation to the legal obligation to negotiate nuclear disarmament, and in certain respects violates the commitment made in NPT review conferences to diminish the role of nuclear weapons.

C. Conclusion and Recommendations

16. US nuclear weapons policy is not in conformity with the right to life set out in the International Covenant on Civil and Political Rights. US doctrine envisions the use of nuclear weapons in a wide range of circumstances, yet the threat or use of nuclear weapons is incompatible with the right to life. Further, the United States is not pursuing negotiations to achieve nuclear disarmament, as mandated by the right to life; indeed, it is undermining arms control measures and resuming nuclear arms racing.

17. Lawyers Committee on Nuclear Policy, Western States Legal Foundation, and Swiss Lawyers for Nuclear Disarmament recommend that to come into conformity with the right to life, the United States should:

- Refrain from announcing its readiness to use nuclear weapons in a wide range of circumstances, and from preparing to do so;
- Refrain from nuclear arms racing and reduce the role of nuclear weapons in its security policy;
- Adopt a policy of non-use of nuclear weapons;
- Ratify the Comprehensive Nuclear-Test-Ban Treaty;
- Vigorously pursue negotiations on nuclear arms control and the global elimination of nuclear weapons.

¹ CCPR/C/GC/36, 3 September 2019. For commentary, see Dr. Daniel Rietiker, “The Right to Life and Nuclear Weapons,” Side-Event, NPT PrepCom, United Nations, New York City, 1 May 2019, <http://lcnp.org/RietikerMay12019.pdf>; Professor Roger Clark, “The Human Rights Committee, the Right to Life and Nuclear Weapons: The Committee’s General Comment No. 36 on Article 6 of the Covenant on Civil and Political Rights,” Public Event, Baha’i UN Office, New York City, 10 December 2018, <http://lcnp.org/RogerClarkRighttoLifeNuclearWeapons.pdf>.

² Office of the Secretary of Defense, *Nuclear Posture Review*, February 2018 (“2018 NPR”), p. V.

³ *Id.* at pp. VII - VIII.

⁴ Remarks by President Trump to the 72nd Session of the United Nations General Assembly, 19 September 2017, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>.

⁵ “Trump Threatens ‘Fire and Fury’ Against North Korea if It Endangers U.S.,” *New York Times*, 8 August 2017, which reports: “‘North Korea best not make any more threats to the United States,’ Mr. Trump told reporters ‘They will be met with fire and fury like the world has never seen.’”

⁶ 2018 NPR, p. 23.

⁷ Secretary of Defense, “Report on Nuclear Employment Strategy,” 12 June 2013, at <http://www.dtic.mil/dtic/tr/fulltext/u2/a590745.pdf>.

⁸ “Top general says he’d push back against ‘illegal’ nuclear strike order,” *CNN*, 20 November 2017 at <https://www.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html>; Gen. (ret’d) Robert Kehler, Testimony at Senate Foreign Relations Committee Hearing on Authority to Order the Use of Nuclear Weapons, 14 November 2017, at <https://www.foreign.senate.gov/download/kebler-testimony-111417>.

⁹ A/CONF.229/2017/8, 7 July 2017.

¹⁰ *E.g.*, General Debate Statement by the United States of America, General Assembly Seventy-Third Session, First Committee, Andrea L. Thompson, Under Secretary for Arms Control and International Security, U.S. Department of State, 10 October 2018, pp. 2-3. Available at http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com18/statements/10Oct_US.pdf.

¹¹ 2018 NPR, pp. 72-74.

¹² *Id.* at p. 72.

¹³ Para. 105(2)F.

¹⁴ 2000 Review Conference of the Parties to the Treaty on the Nonproliferation of Nuclear Weapons, Final Document, p. 14, NPT/CONF. 2000/28 (Vol. I, Pt. I) (2000). The commitment was reiterated by the 2010 NPT Review Conference Final Document.

¹⁵ *Id.* at p. 15. The commitment was reiterated by the 2010 NPT Review Conference Final Document.

¹⁶ See US Department of Defense, *Nuclear Posture Review Report*, April 2010, pp. 15 et. seq.

¹⁷ 2018 NPR, p. 27.