

## Universal Security Assurances: Preventing the use of nuclear weapons

President Obama's 2010 Nuclear Posture Review (NPR) noted that the threat of global nuclear war has gone down, but "the risk of nuclear attack has increased". In an effort to reduce the role of nuclear weapons, the NPR updated the US 'negative security assurance' by declaring that "the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations". Though widely welcomed as narrowing the circumstances in which the United States would contemplate using nuclear weapons, this assurance does little to reduce general nuclear dangers or deter nuclear weapon attacks. It further embeds the justifications used by other nuclear-armed states for retaining their arsenals in perpetuity ("just in case"), and it does little to address the insecurities and motivations that drive proliferation. It is time to reassess the role of security assurances and reformulate the requirements to provide a more effective barrier against the threat and use of nuclear weapons.

When the Non-Proliferation Treaty (NPT) was negotiated in the 1960s, security assurances were deemed very important, especially for states that were not part of military alliances in which one or other nuclear power provided military guarantees. What they wanted, either in the NPT or through a separate agreement, was 'negative security assurances' (NSA) that the nuclear weapon states (NWS) would not attack or threaten them with nuclear weapons and 'positive security assurances' (PSA) that the nuclear powers would come to their assistance if they were to be threatened or attacked with such weapons.

Fearing that to extend such assurances to all NPT states parties would undermine their own nuclear alliances and doctrines, the United States and Soviet Union refused both options. Instead, together with the United Kingdom, they made unilateral statements with heavily conditioned assurances, which were given UN Security Council authority by means of Resolution 255, adopted on 19 June 1968 by 10 votes. Five Council members, however, abstained: Algeria, Brazil, France, India and Pakistan.

In 1995, the NWS gave updated unilateral statements on security assurances to the Conference on Disarmament (CD). These were enshrined in Security Council Resolution 984 (11 April 1995), adopted unanimously just before the 1995 NPT Review and Extension Conference. In a sign of the times, the text of the qualified assurances given by Russia, as well as France, the UK, and the United States had been essentially harmonized, affirming that they would "not use nuclear weapons against non-nuclear weapon states Parties to the [NPT] except in the case of an invasion or any other attack on [our country], its dependent territories, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State". The US statement additionally emphasized that NPT parties "must be in compliance with [their treaty undertakings] in order to be eligible for any benefits of adherence to the Treaty."

China, by contrast, promised unconditional security assurances to states that did not have nuclear weapons and a pledge not to use nuclear weapons first: "China undertakes not to use or threaten to use nuclear weapons against non-nuclear weapon States or nuclear-weapon-free zones at any time or under any circumstances." China has long promoted an agreement among the NWS on no first use "pending the complete prohibition and thorough destruction of nuclear weapons".

The Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted by the 1995 NPT Review and Extension Conference called for "further steps" on security assurances. The 2000 Review Conference recognised the importance of the issue and called for recommendations to be made to the 2005 Review Conference, which in turn failed to agree on any substantive measures to strengthen the NPT.

Many non-aligned states continue to call for multilaterally-negotiated, legally-binding security assurances. Some want these to be negotiated in the CD, while others argue for an NPT-based agreement, such as a protocol. Understandable though such demands are, they are unlikely ever to succeed. In fact, in view of the changed threat environment relating to nuclear weapons since the end of the cold war, they miss their objective and have been overtaken by events. It is time to rethink the approach to security assurances and build a universal, non-discriminatory regime to prevent and deter the use and threat of use of nuclear weapons pending their total abolition. This briefing argues for a new approach to security assurances that takes into account the different kinds of nuclear threat faced by all of us and the responsibility we all share in preventing the use of nuclear weapons whomsoever is the target of such threats or attacks.

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## **Everyone needs Security Assurances against Nuclear Attacks**

Efforts to expand and strengthen security assurances go to the heart of nuclear doctrines and policies. But the traditional approaches are trapped in the Cold War. They treat the five NPT-recognized NWS as primary threats and primary sources of assurance and assistance, despite the fact that there are now eight, possibly nine, states that possess nuclear weapons and a potential threat of nuclear terrorism if non-state actors are able to acquire nuclear materials or weapons through theft or black market purchase. Similarly, the traditional approach results in futile arguments about whether to negotiate legally binding assurances in the CD, which includes all the nuclear-armed states, or in some NPT forum, leaving out India, Israel, Pakistan and the Democratic People's Republic of Korea (DPRK).

The challenge today is to strengthen confidence in mechanisms to prevent and deter the use of nuclear weapons by non-state as well as state actors, and to make the security assurances regime apply to states outside the NPT without appearing to confer any privileges or status. There needs to be a universal approach to security assurances that will provide genuine confidence and greater security to people living in nuclear-armed states as well as countries that have renounced nuclear weapons. The security assurances regime for the 21st century needs to be one that stigmatizes and, in effect, outlaws the use of nuclear weapons for everyone. In other words, pending the total elimination of nuclear weapons, we need to construct a regime that covers everyone, with specific and shared rights, obligations and responsibilities, including legally-imposed penalties for anyone who threatens or attacks others with nuclear weapons.

## **Declaratory policy as an important confidence-building measure**

Security assurances are part of what is known as 'declaratory policy'. It has been customary for some analysts to sneer that declaratory policy isn't worth the paper it is written on because it can be reversed. But of course most policies and agreements can be reversed or withdrawn from if necessary. In history and practice, declaratory policies, which might include 'no first use' or 'no use', as well as security assurances, depend for their effectiveness on whether they are accepted and embedded in customary law, norms and practice. Though considered binding, there is the de facto fallback that as long as some nuclear weapons exist physically, everyone knows that they might be used, despite any nuclear taboo or declaration. That fact would not undermine the general authority and relevance of laws prohibiting the use of nuclear weapons, but might act as a comfort blanket for some NWS as they wean themselves away from nuclear reliance.

It will take time to reduce and eliminate the existing arsenals, and while this is being pursued through unilateral reductions, bilateral agreements and negotiations on multilateral treaties, the existence of physical weapons in storage in one or a few countries might continue to offer some form of existential deterrence (to the extent that some need to believe in the concept of nuclear deterrence during the transition to nuclear-free security). During the transition period prior to conclusion of a nuclear weapons convention, the role of nuclear capabilities in the military policies of nuclear possessor states and their allies need to be diminished until security policies become to all intents and purposes non-nuclear, enabling the countries concerned to develop and gain confidence in all the other tools that contribute to actual deterrence and security in the real world.

Declaratory policies can act as a downpayment in confidence, enabling the NWS to take nuclear weapons out of deployment. Even if the warheads and components remain in reserve pending conclusion of a nuclear prohibition treaty, their minimization in active doctrines would help lay the groundwork for nuclear disarmament. By contrast, the current "insurance policy" deterrence arguments may purport to reduce the role of nuclear weapons, but are used to justify acquiring further generations of nuclear weapons, maintaining continuous deployments and prompt launch configurations, and retaining significant arsenals just in case of future uncertainty.

## **Closing an insidious loophole**

Unlike the regimes prohibiting biological and chemical weapons, the NPT contained no provision regarding the use of nuclear weapons. Responding to requests from the United Nations and World Health Organisation, the International Court of Justice (ICJ) deliberated on this question. In its landmark Advisory Opinion of July 1996, the ICJ concluded that the principles of distinction and proportionality found in international humanitarian law apply to nuclear weapons and are "intransgressible". Consequently, "the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law". The Court could not, however, agree on whether the extreme circumstance of a state's survival might justify using nuclear weapons or not, so left that question undecided. But what does this mean in practice?

The nuclear-weapon states have increasingly chosen to employ concepts of extreme circumstances and national survival to underpin their nuclear deterrence policies, while ignoring the destabilising effect of such arguments on regional and international security, where recent history might prompt other leaders to think that nuclear capabilities could stave off threats to their own regimes. Moreover, using nuclear weapons in extreme circumstances would be more likely to bring about annihilation than guarantee survival, so such a threat lacks credibility while also providing an argument that can be equally deployed by any nuclear-armed government or proliferator. It should be recalled that the DPRK withdrew from the NPT in 2003 citing "extraordinary events" that "jeopardized its supreme interests" and proceeded to make and test nuclear bombs. Having successfully jumped that hurdle, Kim Jong-il could theoretically make use of the NWS' justification by bombing Seoul (or Tokyo or San Francisco) and claiming immunity from the law by arguing that it believed the DPRK's survival was at stake. Of course, any such nuclear attacks on others would surely be regarded as crimes – war crimes or crimes against humanity, depending on whether a recognised state of war existed.



Nagasaki 1945

In international law, if a particular act is illegal, then to threaten to do it is also against the law. Therefore, outlawing the use of nuclear weapons would simultaneously make threats to use nuclear weapons unlawful. This would have profound implications for doctrines of nuclear deterrence, but if leaders are serious about wanting to create the conditions for security in a world free of nuclear weapons, then they need to confront the role of nuclear deterrence doctrines in upholding, legitimising and driving the continued possession and deployment of nuclear arsenals.

## War Crimes and Crimes Against Humanity

Instead of requesting the nuclear-armed states to give security assurances that cannot be enforced, achieving legal recognition that attacks with nuclear weapons would be treated as war crimes and crimes against humanity would provide a universal negative security assurance against the use of nuclear weapons. This approach would diminish the role of nuclear weapons in the doctrines and policies of the nuclear-armed states and provide the international community with far more effective tools for deterrence, denial and non-proliferation. This would strengthen the NPT far more than the current approach and help to create the conditions for eliminating nuclear weapons.

In conjunction with giving legal recognition to what is already a widespread normative understanding – that the use of nuclear weapons would be a war crime and crime against humanity – non-nuclear deterrence and security would be strengthened by mandating a positive security obligation on all states and people to render assistance to a state that is threatened or attacked with nuclear weapons and also to apprehend and bring to justice those responsible for any threat or use of nuclear weapons. If you want to deter nuclear attacks and make it difficult for terrorists and ‘rogue’ states to acquire nuclear weapons, as advocates of nuclear deterrence claim, one of the most effective ways, consistent with post-Nuremberg accountability and the International Criminal Court (ICC), would be to hold suppliers, traffickers and facilitators of the bomb-makers to account as well as governments and state and non-state decision-makers.

There are precedents for extending legal obligations in this way, not least in UN Security Council Resolution 1540, adopted in 2004 to extend the application of international treaties and laws dealing with weapons of mass destruction to non-state actors. Psychological studies suggest that despots and terrorists may not fear retaliatory harm to their homelands, cities or supporters as much as they would fear and hate the idea that they could be held personally accountable and subjected to public trial and punishment, which many would regard as more humiliating and less bearable than a “martyr’s death”.

Extending the commitments and responsibilities of negative and positive security assurances to everyone, not just the five NPT-recognised nuclear weapon states, would transform how nuclear weapons are perceived. Though Security Council Resolution 984 (1995) advanced beyond 1968 in moving away from the assumption that the NWS should come to countries’ aid with their nuclear capabilities (and in also acknowledging that they were not the only states capable of providing assistance), the traditional approach to security assurances still leaves the impression that the non-nuclear weapon states are supplicants and the NWS are granting favours because their nuclear weapons give them that power.

In the 21st century, when we are trying to devalue nuclear armaments, it is counterproductive to continue to endow these weapons of mass destruction with magical security properties or treat their possessors as having special status with unique rights and responsibilities.

The efforts by states in some regions to develop nuclear-weapon-free zones played an important role in requiring the NPT nuclear powers to provide legally binding security assurances to countries within those zones. Even so, there are loopholes. In addition, under the present approach, there is no way to exact negative or positive security assurances from nuclear-armed states outside the NPT, notably India, Israel, Pakistan and the DPRK. For their neighbours, this is a particularly troubling security gap.

This dangerous loophole can be closed in several ways. One route could be to include the use of nuclear weapons in the definition of ‘crimes against humanity’ in the 1998 Rome Statute that established the ICC. This identifies crimes against humanity as “particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority...” Amending the legal recognition of crimes against humanity to include the use of nuclear weapons would take a positive vote by a two-thirds majority of states party to the Rome Statute.

Another approach worth exploring could be to amend or clarify the 1997 Protocols to the Geneva Conventions which relate both to international and non-international conflict, and outlaw “indiscriminate attacks on civilian populations, and destruction of food, water, and other materials needed for survival”. Since nuclear weapons used on land would wreak “the wanton destruction of cities, towns and villages” far beyond what might be justified by “military or civilian necessity”, their use against countries could be deemed a war crime.

The UN Security Council could also clarify the legal understanding and place binding obligations on all states to assist any country attacked with nuclear weapons and to bring any perpetrators to justice. However, any attempt to get a resolution on nuclear weapons use through the UN Security Council needs to take into account the veto power of the five NWS that are permanent members of the Council. Such a route would require civil society and non-nuclear countries to build pressure for the Council to act on this, and advocates would need to be persistent and tactically astute, as it would be unlikely to get through first time round. However, in an era of heightened concerns about terrorism and a growing surge of support for nuclear weapons to be abolished, no-one should write this idea off as impossible.



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A resolution of this kind would probably require a preamble linking the use of nuclear weapons with threats to international peace and security and quoting from past documents, recognizing that the most effective way to insure against the use or threat of use of nuclear weapons is to accomplish their total elimination and abolition. There would likely need to be something that acknowledges that the resolution does not apply to those responsible for the safe storage and handling of nuclear weapons pending the conclusion of an international instrument or treaty providing for their total prohibition and elimination, but only to procurement, supply and operational activities involving nuclear explosive devices with the intention of using them. Then the resolution would have to set out clearly the obligation on all states – and through, the enactment of national legislation, on all persons – not to use or threaten to use nuclear weapons. This should then be followed by text setting out the obligations and responsibilities on all to prevent the use of nuclear weapons, to assist anyone threatened or attacked with nuclear weapons, and to bring the perpetrators and their suppliers and enablers to justice.

## What needs to be done?

**The Review Conference should reaffirm the right of nations that have renounced nuclear weapons to receive legally binding guarantees that nuclear-armed states will not use nuclear weapons to attack or coerce them.**

**At the same time, there needs to be an international debate on transforming the current system of conditional security assurances conferred by privileged nuclear states into a universal regime based on the legal recognition that any use of nuclear weapons would be a war crime and crime against humanity. Such a recognition would help to build a strong ethical norm, reduce proliferation and terrorist incentives, and foster the conditions for nuclear disarmament to become irreversible.**

**Governments, lawyers and other citizens groups should identify and consider appropriate approaches that might be pursued through the International Criminal Court, International Court of Justice, Geneva Protocols, UN Security Council or other international legal, treaty or institutional means, in order to embed the prohibition against the use of nuclear weapons and universalise positive and negative security assurances, pending negotiations on and conclusion of a nuclear weapons convention.**

## Further reading

Rebecca Johnson, 'Security Assurances for Everyone: a new approach to deterring the use of nuclear weapons', Disarmament Diplomacy 90, Spring 2009.

<http://www.acronym.org.uk/dd/dd90/90sa.htm>

Jean du Preez, The Demise of Nuclear Negative Security Assurances, paper delivered at the Article VI Forum, 28 September, 2006, Ottawa, p 9, available at

[http://cns.miis.edu/programs/ionp/pdfs/visions\\_of\\_fission.pdf](http://cns.miis.edu/programs/ionp/pdfs/visions_of_fission.pdf)

International Court of Justice Reports 1996, p 225. [Reported for July 8, 1996, General List No. 95]. The full decision, documentation and dissenting decisions also formed the Annex to 'Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons', Note by the Secretary-General, United Nations General Assembly A/51/218, October 15, 1996 pp 36-37.

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