

4 March 2016

Sen. the Hon. Marise Payne
Minister for Defence
PO Box 6100
Parliament House
Canberra ACT 2600

Open Letter on Nuclear Weapons

Dear Minister,

This year a subsidiary body of the United Nations General Assembly will meet in Geneva to discuss new “legal measures, legal provisions and norms” for achieving and maintaining a nuclear-weapon-free world. Despite the unparalleled power of nuclear weapons, they remain the only weapons of mass destruction not yet prohibited under international law in a comprehensive and universal manner. Over the past year, more than 120 States have pledged to co-operate in efforts to fill this unacceptable “legal gap”. It is deeply regrettable that Australia is not among them.

At a series of intergovernmental conferences in 2013 and 2014, experts laid bare the catastrophic humanitarian and environmental consequences that would result from any use of nuclear weapons, and the inability of the international community to provide effective humanitarian relief in the aftermath of a nuclear attack. Although Australia attended all three conferences, it has been unwilling to accept the widely endorsed conclusion that nuclear weapons should be prohibited in the same manner as chemical and biological weapons, anti-personnel landmines and cluster munitions.

The doctrine of “extended nuclear deterrence”, which has featured in Defence white papers since the early 1990s, appears to be the primary reason for Australia’s opposition to the near-term prohibition of nuclear weapons. According to this doctrine, United States nuclear forces would, in certain circumstances, be employed on Australia’s behalf. Signing and ratifying a future treaty prohibiting nuclear weapons would no doubt compel Australia to renounce this doctrine.

We write to encourage the Australian Government to review its support for extended nuclear deterrence in light of the growing international movement to prohibit nuclear weapons on humanitarian grounds. Moreover, we urge the Government to assess whether this doctrine is hampering implementation of Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons* of 1968, which obliges all States parties to pursue negotiations in good faith on effective measures for nuclear disarmament.

Notwithstanding the absence of a comprehensive and universal treaty-based prohibition on nuclear weapons, it is difficult to envisage how such weapons could ever be used in conformity with existing rules of international law. As the International Court of Justice (ICJ) advised in 1996, “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”.

We believe that Australia should cease its reliance on weapons whose use would almost certainly violate international law, given the uncontrollability of their blast, heat and radiological effects. As the ICJ also observed, the “radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area” and “has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations”.

Well-established and universally accepted rules of international humanitarian law prohibit the use of weapons that are incapable of distinguishing between civilian and military targets; that cause superfluous and unnecessary suffering; that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment; or whose effects cannot be contained within the territories of contending parties to a conflict. Such rules also prohibit the use of force that is excessive in relation to the concrete and direct military advantage anticipated, or the use of force that is greater than necessary to achieve a military objective.

Some States, including Australia, have asserted that there are certain circumstances in which the use of nuclear weapons could be lawful, for example, in an extreme circumstance of self-defence. The negotiation of a treaty prohibiting nuclear weapons would clarify the illegality of the use of these ultimate weapons of mass destruction *under all circumstances*. It would also render illegal their development, production, testing, acquisition, stockpiling, transfer and deployment.

As international lawyers, we wish to add our voices to the mounting calls for Australia to abandon the doctrine of extended nuclear deterrence and to join the overwhelming majority of States in pursuing a treaty that outlaws nuclear weapons. These weapons are an affront to the entire framework of international law, and are incompatible with elementary considerations of humanity.

Signed,

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