Criminalising Nuclear Weapons Under International Law

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Abstract

The Treaty on the Prohibition of Nuclear Weapons (TPNW) entered into force on 22 January 2021. It is the right step in the direction to eliminate nuclear weapon possession and deployment. However, the fear remains that this is merely a symbolic step. The tangible and concrete legal consequences of TPNW for nuclear power states remain negligible. No nuclear state or NATO member has ratified the treaty and it seems very unlikely that they will do so in the future. This paper aims to address the illegality of nuclear weapons and argues that the concept existed throughout international law, even before the TPNW was ratified. The examples of various other treaties, of which the nuclear power states are signatories, highlight the already existing illegality of such weapons. Their refusal to sign the treaty can be viewed as nothing more than a hesitancy to give up indiscriminate power. The nuclear power states cannot, legally or in good conscience, refrain from becoming signatories.

Keywords: *Nuclear weapons, disarmament, non-proliferation, NPT, TPNW, laws of war, deterrence, self-defence, reprisals, St. Petersburg Declaration, Hague Conventions, Geneva Protocol, Nuremberg Principles, ICJ*

Introduction

The nuclear attacks on Hiroshima and Nagasaki brought the Second World War to a close. It was the first time a nuclear bomb had been used as a means of warfare[1] and the world bore witness to a catastrophe that had previously been unimaginable. The bombings caused more than 120,000 immediate deaths[2] and the unprecedented nuclear destructive power shocked the world. Nuclear weapons can annihilate populations and cause extensive damage to the ecosystem.

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A soldier may be able to differentiate between a civilian and a combatant but long-range missiles cannot do so. In the wake of a nuclear attack, the civilian population will suffer the most due to the indiscriminate nature of the bombs.

Nonetheless, legal voices have remained largely silent on this problem since 1945.[3] The Allies were so elated at their victory that the issue of the legality of an atomic attack was not even discussed. The use of an atomic weapon was considered a necessary lifesaving act.[4] During the cold war, possession of nuclear weapons was perceived as a necessary counterweight in the precarious balance between the two superpowers. The concepts of 'deterrence' and 'Mutual Assured Destruction (MAD)' were developed to explain and justify the possession of nuclear weapons.

Ever since the invention and the first use of nuclear weapons, there has been a secret trade of nuclear weapons and their related technologies. Considering the specific characteristics of such weapons and how they could completely violate the principles of humanity, it was suggested that nuclear weapons should be openly termed as illegal. To this effect, according to the Treaty on the Prohibition of Nuclear Weapons[5] (TPNW) which entered into force on 22 January 2021, the possession and ownership of nuclear weapons has been deemed illegal by the United Nations (UNGA, 2006).[6] However, very significantly, none of the states with nuclear weapons or nuclear capability has signed the treaty, none of the NATO members is signatory nor any state that currently has a nuclear umbrella agreement.[7] Conversely, the United States actually sent a letter through diplomatic channels to a significant number of states urging them not to join the TPNW. It even stated that the countries that have signed and ratified the treaty, should ideally withdraw their support. The letter further stated that the TPNW was dangerously counterproductive to the Nuclear Non-Proliferation Treaty (NPT).[8] According to Thomas Hajnoczi, Austrian Foreign Ministry Director for

Disarmament, Arms Control, and Non-proliferation, "The TPNW did not create a parallel universe to the traditional one founded on the NPT…on the contrary; it makes the existing universe of legal instruments around the NPT stronger."[9]

In the preceding two decades, the threats of nuclear proliferation have mainly emanated from smaller countries, whose ambitions can be controlled or restricted. However, a relatively new threat reflects a scenario where the economic and diplomatic giants might try to consolidate their dominance via this method. That threat would be much harder to counter for the world. Nuclear proliferation may not be a chain reaction but it has the potential to be contagious. It is also apparent that nuclear powers have not upheld their commitments under the NPT. According to the International Campaign to Abolish Nuclear Weapons (ICAN), the nine nuclear power countries have collectively spent $72 billion on nuclear weapons.

Nuclear Weapons

These devices are in the possession of the five permanent members of the UN Security Council, i.e., China, France, Russia, the United Kingdom, and the United States of America. Along with these countries, India, Israel, Pakistan, and North Korea also possess nuclear weapons.[10] The International Court of Justice (ICJ) has stated that the great damage caused by the heat and energy emitted by these bombs is greater than any other weapon. There are also a lot of radiation emissions which render the weapons potentially catastrophic. The radiations lead to genetic mutations and damage to the ecosystem and environment. These weapons can destroy the entire civilization and ecosystem of this planet.[11]

Cause of Destruction

The 1986 Chernobyl disaster proves that even if the explosion is unintentional, the accidental emission of nuclear radiation can and does lead to the same amount of environmental damage and

radiation pollution as a nuclear attack.[12] Roughly 130,000 people were displaced by the nuclear reactor disaster and the levels of cancer and birth defects have increased exponentially. In light of the risk of even unintentional release of radiation, the storage, transportation, and even possession of these weapons should have a high level of attention and criminal culpability.[13]

Distinct from Conventional Weapons

Nuclear weapons cannot be characterised as conventional weapons. Though the purpose of both is to kill, the nuclear explosion causes greater damage to the geography, ecosystem, and the sustainability of life in the area. They alter the chemical makeup of all living things and leave long term genetic repercussions. This means that they are not just more destructive than conventional weapons, but also lead to long term destructive effects.

Nuclear Weapons and the Laws of War

The laws of war are applied in conditions of armed and military conflict, regardless of whether the conflict is officially declared or acknowledged as a war. Any conflict or warfare has specific laws of war that apply to it. The international military tribunal constituted at Nuremberg stated that the laws of war comprised of treaties, accepted state customs and practices, and the general principles of justice which are applied by jurists. [14]

Treaties on Nuclear Weapons

The application, production, and even storage of most other WMD have been declared illegal by various conventions. Due to the long-term adverse effects and the great devastation caused by such weapons, they should be held as even more dangerous and illegal than other biological weapons. There are treaties that control nuclear testing,[15] ban nuclear weapons in certain locations, and treaties prohibiting the proliferation of these weapons,[16] and now a treaty that

unambiguously disallows the production and possession of nuclear weapons.

On 7 July 2017, the TPNW was adopted at a UN General Assembly Conference. Some of the provisions that it addressed included the banning of "developing, testing, producing, manufacturing, otherwise acquiring, and possessing, stockpiling, transferring, and receiving nuclear weapons, bars states from assisting, encouraging or inducing anyone to engage in any activity prohibited by the treaty, and seeking or receiving any assistance, in any way, from anyone to engage in activity prohibited under the treaty. The treaty also prohibits states parties from allowing another state to station, install, or deploy nuclear weapons in its territory. Most notably, the treaty completely bans using or threatening to use nuclear weapons. Simply put, the treaty seeks the total elimination of nuclear weapons to ensure they are never used again."[17]

"TPNW plugs a huge gap in international law, and its entry into force must be met with a change of course by those states who still support, in any form, the use of nuclear weapons […]. Ending the threat of nuclear weapons is the responsibility of all governments in accordance with their obligation to ensure respect for international humanitarian and human rights law", said Verity Coyle, Amnesty International's Senior Adviser on Military, Security and Policing.[18] This treaty seemed to solidify the fact that nuclear weapons are considered by a majority of countries as immoral, dangerous, and unstable. This is a fact that the nuclear powers and their allies sometimes choose to ignore.

It must be stated, at this point, that the United States and other nuclear powers have publicly adopted the deterrence theory and policy. Some of these states have also vowed to adhere to the 'no first use' policy. Furthermore, it has been more than 70 years since any state actually deployed a nuclear weapon which appears to signal that this policy is working. However, the nuclear power states have all

shown a willingness and acceptance to deploy nuclear weapons in the rare case where deterrence fails to work. Thus, the fact that nuclear weapons have not been used cannot be seen as the emergence of state practice leading to prohibition, simply because countries continue to possess and acquire these weapons and also repeatedly state that they will use them under certain circumstances.

It must also be highlighted that the United States has expressed their right to deploy nuclear weapons in certain conditions or circumstances to protect and defend its interests and the interests of its allies. The same sentiments were expressed by other countries, such as the United Kingdom, China, Russia, and France. It is concerning that none of the states currently possessing nuclear weapons has ratified the TPNW or even seem likely to do so in the near future. Even though nuclear weapons have not been used since World War II, this should not be taken as a sign that a Customary International Law rule has emerged.

The illegality of Nuclear Weapons

The technological developments of military arms and weaponry necessitated conventions and declarations that could optimally cater to the adverse consequences and effects of war. These conventions and declarations stress the prevention of callous warfare and the safeguarding of rights of non-combatants and states that remain neutral.

St. Petersburg Declaration

The 1868 Declaration of St. Petersburg prohibited the use of weapons which caused excessive suffering and undiscriminating assaults. It stated;

"Considering that the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war: That the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity."[19]

According to the principles mentioned in this Declaration, there is a clear precedent as to why the UN has explicitly prohibited nuclear weapons. Firstly, the necessities of war cannot trump the permissible scope of devastation and suffering. Secondly, state sovereignty in times of war is not absolute, so they cannot do whatever they want just because a treaty does not specifically ban the said activity. Thirdly, human security should be given more value than state security.[20]

Hague Conventions

The prohibition on causing unnecessary misery can be seen reasserted and reinforced in various other treaties, declarations, and conventions throughout UN history, such as the Hague Convention of 1899 and its Regulations of 1907, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare of 1925 (herein after the 1925 Geneva Protocol), the Nuremberg Charter of 1949, and the four Geneva Conventions. Article 23(e) states that "to employ arms, projectiles, or material calculated to cause unnecessary suffering" is forbidden. [21] Thus, nuclear weapons cannot be considered a legal means of warfare due to their inhumane and horrible characteristics.

1925 Geneva Protocol

38 countries signed the 1925 Geneva Protocol declaring "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" as a means of warfare.[22] The prohibitions are general and loosely defined to cover all the threats from the production, usage, and emission of poisonous substances. This protocol is customary international law and is binding on all states, including the non-participatory ones.

Uranium, being an exceedingly toxic chemical, comes under the category of poisonous materials. The protocol particularly prohibits substances based on their poisonous nature rather than the harm caused. So, even if more people are dying from the explosion rather than the radioactive effects, it does not have any effect on its legality under the Protocol.

The 1949 Geneva Conventions and the 1977 Protocol 1

The main concern of the four Geneva Conventions is the protection of the victims of war. These conventions also occupy the place of customary law.[23] The fourth Geneva Convention talks about the difference between civilians and combatants. This is the very basis of the laws of humanity and laws of war. It has also been termed Geneva Law. The 1977 Protocol I to the Geneva Conventions classifies a humanitarian principle barring indiscriminate attacks. It stipulates that the goal of war should not and cannot be the complete annihilation of the enemy.

The bombings of Hiroshima and Nagasaki very clearly reflect that nuclear bombs are indiscriminate in their effects. They do not distinguish between civilians and combatants. It may be possible to target specific military locations: However, the range of destruction caused by the bombs and their radioactive fallout will be potentially catastrophic. Thus, logic implies that the Geneva Convention also categorises nuclear weapons as illegal.

Nuremberg Principles

After World War II, in a determining judgement, Nuremberg Tribunal looked at problems with the application of the laws of war; the doctrines that came out from those deliberations and verdicts are declared as the Nuremberg Principles. "The law embodied in the 1945 Nuremberg Charter had become part of customary international law; some of the Nuremberg Principles were incorporated in the statutes of the International Criminal Tribunals for the former Yugoslavia and

Rwanda, and in the Rome Statute of the International Criminal Court."[24]

The Nuremberg Charter declares three crimes in Article 6 [25] i.e., "(1) crimes against peace namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international law; (2) war crimes namely, violation of the laws or customs of war, such violation shall include, but not be limited to murder of civilian population, wanton destruction of cities, or devastation not justified by military necessity; (3) crimes against humanity namely, murder, extermination and other inhumane acts committed against any civilian population, before or during the war."

Use or even the threat of using nuclear weapons can be argued as a threat to humanity and a crime against peace and humanity, according to the principles outlined in the Nuremberg Charter. Since the damage caused by nuclear weapons is foreseeable and predictable, possession and deployment of nuclear weapons is a crime against humanity under the Nuremberg Charter, the Genocide Convention, and the Geneva Protocol I.[26]

Opinion of the International Court of Justice

In 1996, the UN General Assembly requested the ICJ to come up with an opinion regarding the legality of nuclear weapons. The advisory opinion of the court held that there is no clear prohibition or authorisation on the possession and usage of nuclear weapons, however, their use is in opposition to the UN charter and humanitarian laws.

Theories Supporting Non-Compliance with TPNW

Self-defence

Self-defence is a fundamental right that is granted to states and is accepted by all aspects of international law. However, it is not unrestricted and should be asserted in line with the general principles of law. The nature of weapons used and the damage inflicted must be

in proportion to the level of the attack. States cannot act howsoever they choose citing self-defence. The conditions of indiscrimination and disproportionality render it unlawful to deploy nuclear weapons in situations of self-defence under UN charter and humanitarian laws.

Reprisals

These are actions taken which may be characterised as illegal but which are deemed lawful when undertaken in the response to illegal steps/actions from the other party. Reprisals must be taken to make the enemy stop their violations of the law but they must also be proportionate to the violations. Deploying nuclear weapons can result in reprisals that are indiscriminate in nature. They would inflict damage on civilians as well as military personnel. Hence, the use of nuclear weapons, even for the purpose of reprisals, must be deemed illegal.

Deterrence

Deterrence, as cited by the nuclear power states and their allies, can be considered as a political justification and certainly not a legal justification. As stated by Judge Weeramantry in his dissenting opinion,[27] deterrence is not a reasonable argument: Some states argued that nuclear weapons have had a very important role in maintaining international security since the end of World War II. Even if that line of thinking is deemed acceptable, it has little effect on the legal decisions. "The threat of use of a weapon which contravenes the humanitarian laws of war does not cease to contravene those laws of war merely because the overwhelming terror it inspires has the psychological effect of deterring opponents. This Court cannot endorse a pattern of security that rests upon terror."[28]

The purpose of deterrence is to prevent war by subduing the other party with a threat of annihilation. Terrorising others by threat of destruction is a crime according to the Nuremberg Charter. As a result, if the laws of war are present and followed by states, there has to be a

ban on such weapons of terror and that ban should be considered a rule of law.[29]

The South Asian Challenge

Possessing and developing nuclear weapons creates an unsafe environment globally. Coming to the case of South Asia, it is thought to be "the most dangerous nuclear flashpoint in the world." There is always fear that increasing conflicts and a nuclearised weapons race could lead to a nuclear conflict between India and Pakistan.

What complicates matters even more is that there is a strategic nuclear chain in South Asia where Pakistan is trying to keep up with India; India is trying to balance Pakistan and China, while China competes with the United States. In such environments, de-escalation can only be considered a pipedream. India and Pakistan have both stated categorically that they are not bound by any of the obligations laid down in the TPNW. The Pakistani spokesperson also purported that since the TPNW was negotiated outside the UN disarmament negotiating forums, none of the states possessing nuclear weapons was a part of these negotiations and, as such, it has failed to take into consideration the interests of the stakeholders.

Conclusion

There is a stockpile of more than 13,000 nuclear warheads around the world, 90 per cent of which are in the possession of the United States and Russia. The characteristics of nuclear weapons, their indiscriminate nature, and the massive damage caused, make them illegal under the laws of war and humanity.

However, nuclear arms control agreements are only temporary solutions. The overall goal must always be the one mentioned in Article 6 of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. This article states, "Each of the parties to the treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the arms race at an early date and to nuclear

disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[30] Universal nuclear disarmament is the only legally defensible, morally acceptable, and logical stance to be taken. The declared illegality of nuclear weapons would serve to convince the international community that the weapons are a manifestation of lawlessness and a crime against humanity.

If the German invasion of Belgium was considered a war crime, the employment of nuclear weapons leading to damage to neutral states, is a clear war crime. If the killing of a single civilian is illegal, killing entire cities and attacking entire regions and countries is also illegal. If the use of indiscriminate and disproportionate means of warfare is banned, then these principles cannot be withheld from their application on nuclear weapons. Such weapons are unlawful and it is irrelevant whether they are being employed in lawful or unlawful wars, or for self-defence, reprisals, or deterrence.

It is certainly a celebratory occasion that the TPNW has now come into force, and it is the right step in the direction to eliminate nuclear weapon possession and deployment. However, the fear remains that this is merely a symbolic step rather than a customary prohibition of nuclear weapons entirely. Even though the treaty will enter into force, its tangible and concrete legal consequence for nuclear power states remains negligible. No nuclear state has ratified the treaty and it seems very unlikely that they will do so in the future.

It is necessary to note, though, that the law on the use of force (namely the *jus ad bellum*) would still apply to the use of nuclear weapons under Articles 2(4) and 51 of the UN Charter and their customary international law counterparts. This also includes the prerequisites and conditions of proportionality and necessity. It must also be kept in mind that, similar to the use of any other weapons, the law of armed conflict will be applicable to oversee the conflict,

including proportionality, distinction, and the condition of taking precautions in an attack.

It makes no sense to plan to use weapons or threaten to use them to prevent their use. This makes the world unstable and violates the humanitarian values it is seeking to protect. International humanitarian law is necessary to maintain peace and limit war. Till the time that powerful states are using the threat of nuclear weapons to maintain peace and their national interests, and less influential states are seeking to acquire those weapons to 'balance' the power of the powerful states, there will be a threat to human civilisation.

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