

# NUCLEAR WEAPONS AND INTERNATIONAL HUMANITARIAN LAW

SREOSHI SINHA



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# FOREWORD

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Since the only use of nuclear weapons in 1945, the world has wrestled with the issue of how International Humanitarian Law (IHL) applies to such weapons. Nuclear weapons raise a number of concerns, primarily related to the impact these weapons on non-combatant civilians and civilian areas, and to their effects on the environment. Their use in Hiroshima and Nagasaki in 1945 and subsequent studies have shown that nuclear weapons have immediate and long-term consequences due to the heat, blast and radiation generated by the explosion and, in many cases, the distances over which these effects are spread.

IHL, sometimes also called the laws of armed conflict, is a part of international law, and is meant to regulate the conduct of war. It tries to reduce the effects of armed conflict by protecting non-combatants by putting curbs on methods of warfare to mitigate human suffering. There are international agreements like the Geneva Conventions. These are meant to bring balance between humanitarian concerns and military necessity. In the context of nuclear weapons, while the theories like Mutually Assured Destruction (MAD) reduced the risk of war, the improvements of newer technology, the fear of nuclear proliferation have made things more complex. But the debate over nuclear weapons and their legality has continued, and to bring it to a successful conclusion, assessing the present status of nuclear weapons under international law has become a great necessity.

Serious violations of IHL are called war crimes. The law is mandatory for nations bound by the appropriate treaties. There are also other customary unwritten rules of war, but the world has to deal with irregular forces and non-signatories. In ancient India there are records (for example, the Laws of Manu) describing the types of weapons that should not be used: "When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire." One is expected not to strike the enemy "who folds his hands in supplication, nor one

who is asleep, nor one who is disarmed, nor one who looks on without taking part in the fight.”

A section of international law condemns the detonation of nuclear weapons for being contrary to human values and morals. As propagated by the 1949 Geneva Convention, this branch of international law is deeply rooted in conventional treaties, customary law and general principles of law. They are presented in multilateral treaties and in military manuals on the “law of armed conflict.” The basic rules apply universally as a matter of customary international law and, thus, bind all states, regardless of a state’s adherence to a particular treaty. International Humanitarian Law, which applies equally to aggressor and defender states, aims to prevent cruelty and unnecessary suffering.

Disarmament and arms limitation are not only tools to maintain international peace and security or to prevent and end armed conflict, they are also critical in mitigating the impact of armed conflict when it does occur. IHL embodies the principle that military needs can never justify using inhumane or indiscriminate weapons. There has been considerable debate on specifically recording against the use of the Weapons of Mass Destruction (WMD) and terming it as a criminal act against humanity. This exercise is not an easy one. The International Court of Justice (ICJ) has dwelled in the issue at length. Many are of the opinion that all forms of ill effects of most lethal weapons are adequately covered in IHL. The IHL cover both humanity and the environment.

In parallel there are international efforts on disarmament of nuclear weapons. Some countries have unilaterally discarded nuclear weapons and declared nuclear free zones. There is Nuclear Non-proliferation Treaty (NPT). There are other treaties to limit nuclear weapons such as Strategic Arms Limitation Treaty (SALT), Comprehensive Test Ban Treaty (CTBT), and International Convention for the Suppression of Acts of Nuclear Terrorism and the Strategic Arms Reduction Treaties (START), among many others. Limit of nuclear arms and warheads, in itself would reduce the risk of use and in turn benefit the humanitarian aspects. In 2017, 122 States responded to the call by adopting the Treaty on the Prohibition of Nuclear Weapons (TPNW). Its entry into force was a truly historic achievement and a victory for humanity and multilateralism. The treaty sends a clear signal that any use, threat of use or possession of nuclear

weapons is unacceptable in humanitarian, moral and legal terms. Yet many are not ready to be part of the treaty.

The risk of nuclear weapons being used continues to grow. There are increasing international and regional tensions, the modernisation of nuclear arsenals, including the development of smaller tactical nuclear weapons said to be more usable. Network-centric command-and-control makes the systems more susceptible to cyber-attack. This requires greater efforts to reduce the risk of nuclear weapons being used.

With China modernising and expanding its nuclear force, it could begin a new nuclear arms race, requiring reinforcement of risk-reduction commitments. There is perhaps need to bring regulations to keep the nuclear weapons off high-alert status and reducing their role in military doctrines.

Today, the world is facing rapid development and use of new means and methods of warfare following advances in science and technology. Also with the urbanisation of warfare, civilian harm also increases exponentially. New smarter and more accurate weapons can cause profound human suffering. There is increasing use of autonomous weapon systems, with reduced human supervision and capacity for intervention and deactivation would increase the risk. Artificial intelligence (AI) to control the critical functions of applying force is increasingly being explored. Information and communications technologies (ICT) are also being used increasingly for security and warfare. Cyber operations against critical civilian infrastructure risk having “potentially devastating humanitarian consequences”. Technologies enabled by space systems also permeate most aspects of civilian life. The role of space systems in military operations during armed conflict continues to increase, so does the likelihood of them being targeted by kinetic or non-kinetic means. The use of weapons in outer space could therefore have a significant impact on civilians on earth, affecting activities and services that are critical to their safety or essential to their survival. The increasing risk of hostilities in outer space is therefore of serious humanitarian concern. Nuclear terrorism has also to be factored in the IHL.

Nuclear weapons as an important arena of security issues make for a relevant discussion of global security policy and international law. Sreoshi Sinha, the author of this monograph, has looked at the entirety of nuclear weapons, their proliferation, the various treaties, and how they fit in along with the IHL.

She wraps up the monograph covering India's Position on nuclear weapons and International Humanitarian Law. India's nuclear program was not started for the fulfilment of military ambitions. India was at the forefront of nuclear disarmament right since its independence. India proposed "complete and general nuclear disarmament" for a Nuclear Weapons-Free World (NFWF), to the UN General Assembly in the Special Session on Disarmament in 1988. India maintains a policy of No-First Use (NFU) of nuclear weapons.

The monograph on Nuclear Weapons and International Humanitarian Law is a well research and comprehensive document. It will make a great read for researchers and analysts of nuclear issues and International Humanitarian Law, and the complexities there in.



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# INTRODUCTION

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War is not a new phenomenon. Human kind has, for centuries, dwelt on the questions of war and peace. Wars have ranged from being glorious struggles for rectifying wrongs to sometimes being violent, pointless and inhumane struggles, without a rational motive. In most cases in history, wars have also been fought for reasons fuelled by the arms industries. In an effort to limit the horrific consequences of war on mankind and societies, calls for disarmament have been made regularly. Just like war, disarmament also is an old phenomenon. Since ancient times, efforts have been made to promote several forms of disarmament by controlling the use of certain kinds of weapons and reducing them in numbers. History has repeatedly witnessed breakthroughs in these efforts, leading to conclusion of treaties and other legal mechanisms on disarmament and arms control.

The history of disarmament can be traced to medieval Europe where the Roman Catholic Church used its power to limit the severe consequences of war. Again, during the 9th and 10th centuries, local and religious organisations protected the clergy, their properties and the non-combatant population against the adversities of war. In 1139 AD, the Second Lateran Council had banned the use of crossbows against Christians. Further, France and Germany had banned the use of poisonous bullets in 1675.<sup>1</sup>

During the 18th and 19th centuries, several international peace movements emerged across the world. In 1905, a German named Bertha Von Suttner won the Nobel Peace Prize for being the most eminent advocate of peace. The efforts towards universal disarmament gained momentum internationally soon after and international peace conferences were held at the Hague in 1899 and 1907, bringing together the most powerful nations of the world. However, with the failure of these conferences to take a decision towards disarmament and peaceful resolution of international conflicts, global policy-makers and diplomats agreed to standardise behaviour in war that came to be known as “*jus in bello*”<sup>2</sup>. However,

when World War I broke out, not all the signatory states followed these laws to control the conduct of war<sup>3</sup>.

Post the traumas of World War I, the push towards disarmament and arms control gained further momentum. The Geneva Protocol of 1925<sup>4</sup>, which formed the basis of International Humanitarian Law (IHL) or the Law of War, imposed an absolute restriction on the use of poisonous gas and biological weapons. The other Geneva Conventions at that point shaped the establishments for International Humanitarian Law, by setting out standards for the treatment of detainees of war. The first World Disarmament Conference which took place in 1932<sup>5</sup>, united the world leaders in discussions about the complete abolition of offensive weapons. However, these efforts ended in failure as Nazi Germany was once again rearming. In 1933, Hitler removed Germany from the League of Nations, which had been established in 1919, and the world slowly moved towards another world war.

World War II, which witnessed the terrifying bombings of the Japanese cities of Hiroshima and Nagasaki by the US in 1945, heralded the age of nuclear weapons. It was followed by the Cold War between the US and the USSR. This era witnessed bloc confrontation and military build-up. The international community has since then battled with the issue of how the Law of War might be applied to such weapons. Today, the nuclear shadow cast during the Cold War may have vanished, but the nuclear risks have not gone away. The dread of nuclear proliferation remains and the new danger of nuclear technology falling into the hands of terrorists has emerged. On the other hand, states that are already in possession of nuclear weapons continue to modernise and depend on strategies of deterrence. However, Weapons of Mass Destruction (WMDs), given their destructive nature, go against the principles of International Humanitarian Law (IHL) or the Law of War.

Weapons of mass destruction can be categorised into three types. The first category is known as the “Biological Weapons of Mass Destruction,” or the “Biological WMDs”, which were used for the first time in 1763 in the United States, when British officials planned to distribute blankets infected with smallpox. Such endeavours continued during future battles as warriors were undaunted in slaughtering their foes. However, today the use of such weapons has been categorically outlawed by a multilateral treaty known as

the “Biological and Toxin Weapons Convention (BTWC)”, that forbids the “production, development, stockpiling and transfer of such types and quantities of toxins and biological agents that have no justification for peaceful and secured usage<sup>6</sup>.” According to the obligations of this convention, states will coordinate bilaterally or multilaterally to tackle such issues. In the case of a state’s violation of the treaty, other states may submit grievances to the United Nations Security Council (UNSCR). Nevertheless, there is no enforcement body of the BTWC to take into account barefaced infringement by states. Every five years, a review conference is held to survey the implementation of the convention’s obligations, and to set up confidence-building measures.

The second category of WMDs comprises chemical weapons. These go back to as early as 1000 BC, when they were first used by the Chinese in the form of arsenic smoke. They were also widely used during the two World Wars. In 1995, a chemical called sarin was utilised for an assault on a subway train in Tokyo. Also, ricin was found in a room in Las Vegas in 2008. Synthetic weapons include blister agents, blood agents, choking agents, nerve agents, tear gas, vomiting agents and psychiatric compounds. These weapons work either by coming into contact with the skin, or through consumption. Chemical weapons have an immediate impact unlike biological weapons.

To eliminate this category of weapons of mass destruction, “The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention or CWC)”, comprising a Preamble, 24 Articles, and three Annexes, namely, the Annex on Chemicals, the Verification Annex, and the Confidentiality Annex, was adopted. Abiding by the provisions of this convention, the state parties have taken essential steps to disarm by destroying their stockpiles of chemical weapons and to prevent their further development and transfer.

Though the above two categories of WMDs have been outlawed by specific legislations, nuclear weapons, which comprise the third category of WMDs, representing the greatest threat to the world, could not be precluded under the international legal regime. Even though the 1968 Nuclear Non-Proliferation Treaty (NPT) prohibits the possession, production and transfer of nuclear weapons by all non-nuclear weapons states, which are party to the NPT, it neglects to impose a preclusion on nuclear weapons use, thus, making it vague

with regards to nuclear disarmament. Interestingly, the other treaties on weapons of mass destruction deny the ownership, production and transfer of biological and chemical weapons, while obliging the state parties to pulverise all stockpiles within a given time. Despite the catastrophic nature of nuclear weapons, the world's security fabric that has evolved since 1945 (including the close association between nuclear weapons and the five members from the Security Council) has made it hard to dissect nuclear weapons without considering their role in political and security dynamics.

However, International Humanitarian Law (IHL) or the Law of War is a section of international law that condemns the detonation of nuclear weapons for being contrary to human values and morals. As propagated by the 1949 Geneva Convention, this branch of international law is deeply rooted in conventional treaties, customary law and general principles of law. They are presented in multilateral treaties and in military manuals on the "law of armed conflict." The basic rules apply universally as a matter of customary international law and, thus, bind all states, regardless of a state's adherence to a particular treaty. International Humanitarian Law, which applies equally to aggressor and defender states, aims to prevent cruelty and unnecessary suffering and destruction, and to preserve the possibility of establishing a fair and enduring peace.

Thus, keeping in mind the basic principles of IHL, this book endeavours to portray and evaluate the situation of nuclear weapons under the current form of IHL. In spite of the fact that there has been progressing research on the merit of complete annihilation of this non-traditional method of warfare, incredible consideration has been given to the *lex lata*<sup>7</sup> rules that apply to nuclear weapons. The book takes as its starting premise the "International Court of Justice's (ICJ's) 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion)". In any discourse about application of IHL to nuclear weapons, it is crucial to consider the Advisory Opinion of the ICJ as it had provided the premise for applying the guidelines of IHL to nuclear weapons. Aside from that, in this very assessment, the ICJ had recognised the "unique characteristics" of nuclear weapons, rendering nuclear weapons as potentially "catastrophic." It had also highlighted the fact that "[t]he destructive power of nuclear weapons cannot be contained in either space or time."<sup>8</sup>



The second chapter of the book discusses nuclear weapons from various perspectives of international law. It considers the legal advancements that have occurred in the different fields under international law relevant to the “use or threat of use of nuclear weapons”. It also endeavours to comprehend whether these weapons are in direct contradiction with the standards of a global legal order or not. In such a case, what would be the current legal gaps within the global legal apparatus in regards to nuclear disarmament and absolute eradication of this destructive weapon? This chapter additionally proceeds to recommend changes fundamental for a fair world order. It takes into account International Criminal Law (ICL) and discusses the use or threat of use of nuclear weapons as an act of genocide, a war crime or a crime against humanity. The chapter also takes into account International Environmental Law and the disastrous impact of a probable nuclear war on the environment. It discusses the international legal regimes pertaining to the environment and the various aspects of nuclear weapons.

The third chapter of the book deals with the application of IHL to nuclear weapons. The “Law of War” deals with the rules on the conduct of hostilities, including distinction and proportionality, and the restrictions on the means of warfare that can cause superfluous injury and unnecessary suffering in regards to nuclear weapons. The concept of whether the “use or threat of use of nuclear weapons” constitutes a violation of humanitarian law or not is elaborated upon in this chapter.

Though the humanitarian initiative towards nuclear weapons gathered some momentum after the passing of the Advisory Opinion on the “use or threat of nuclear weapons” by the ICJ in 1996, in the following years, no serious progress towards nuclear disarmament was made. Rather, the strategic endeavours to address this existential threat were vigorously impacted by national security interests, and progress was minimal. However, the tide reversed in 2017 when 122 nations adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW). Though according to many nations, it comprised concrete and comprehensive advancement towards the abolition of nuclear weapons and a fresh approach towards disarmament, there were nuclear weapon possessors and umbrella states that rejected the treaty. Keeping the above points in view, the fourth chapter of this book analyses the emergence of this treaty, the prospects and possibilities

for its implementation, the challenges associated with its entry into force, the role of both civil society and governments, and the treaty's wider implications in addressing regional and global nuclear threats. It also delves into the reasons behind the abstention of a few nations from voting.

Finally, the last chapter focusses on the contributions India has made to enrich and intensify efforts towards disarmament. After the 1998 nuclear test when India declared itself a nuclear weapons state, it laid the framework for 'no first use' of nuclear weapons in its doctrine. Indian leaders completely dismissed the idea of initiating nuclear weapons use in any conflict situation. New Delhi chose the nuclear option only in retaliation. Since then, for almost twenty years now, 'no first use' has remained the main principle of India's nuclear deterrence. India's doctrine of nuclear deterrence, therefore, is premised on creating the maximum chance of non-use of nuclear weapons through the conscious enunciation of two doctrinal attributes: one, by restricting the role of the weapons solely to deterrence purposes; and second, by eschewing pre-emption. Further, in deference to its commitment to IHL, India has continued its pursuit for a Nuclear Weapons Free World (NWFV).

The book closes with a discussion on the situation with nuclear weapons under the "Law of Armed Conflict".

# 1. THE 1996 ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

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## **Introduction**

Wars have been a consistent phenomenon in human history, and the rules of war are presumably pretty much as old as war itself. Since war has been an unavoidable reality throughout human existence, an overall need for some sort of guidelines to restrict the sufferings of both soldiers and civilians during an episode of armed conflict was felt. In the conflicts battled around the world during the ancient eras, there were fascinating traditions and concurrences with “humanitarian” components in them. These were rules ensuring protection to the survivors of armed conflicts as well as guidelines that denied, and inferred limitations on, the methods and strategies of warfare. Such limitations on warfare had been through ad hoc mechanisms until the mid-19th century, when the states endorsed the first Geneva Convention of 1864<sup>1</sup>, containing ten Articles which were drafted to protect every warrior of the conflicting parties who was wounded on the battlefield, so that they could be protected without any discrimination, on the sincere persuasion of the “International Committee of the Red Cross (ICRC)”<sup>2</sup>, a new organisation back then, that was formed on February 17, 1863.

What later emerged as International Humanitarian Law (IHL), or the Law of Armed Conflict (LoAC) or simply the Law of War, as contained in the four Geneva Conventions of August 12, 1949<sup>3</sup>, and the three Additional Protocols, comprises tremendous work of over 600 Articles indicating that :

International Humanitarian Law as a set of rules which seek, for humanitarian reasons, to protect persons who are not, or are no longer, participating in the hostilities and to limit the effects of armed conflict<sup>4</sup>.

IHL is considered to be one of the oldest branches of public international law. This branch of law which is often termed as the Law of Armed Conflict (LoAC) is a framework of laws that define the legal limitations of such means and methods of warfare that do not discriminate between combatants, civilians and other non-combatants. It addresses the behaviour of combatants, the conduct of hostilities and the choice of means and methods of warfare that also include weapons. Therefore, it contains the basic principles and rules which not only govern the choice of weapons by the parties engaged in a conflict, but also prohibit and restrict the employment of certain weapons, to protect civilians and persons who are not, or no longer, taking part in a conflict. It also protects and spares combatants from the extreme effects of warfare and excessive injuries that ultimately serve no military purpose.

IHL includes within its scope various weapons that may have once been used in warfare. Apparently, the implementation of IHL to the use of nuclear weapons is not new. There is a well-recognised doctrine covering this discourse. For instance, the US military manual broadly recognises the advantageous purposes of this body of law, both in terms of strengthening a state's application of its combat operations without unnecessary expenditures on force and in terms of fulfilling what has long been regarded as a fundamental purpose of war, that is, restoring a favourable peace. The US Air Force in its 2009 manual<sup>5</sup> recognises that the use of nuclear weapons is subject to the principles of the Law of War generally. The manual states, in particular,

Under international law, the use of nuclear weapons is based on the same targeting rules applicable to the use of any other lawful weapon, i.e. the counterbalancing principles of military necessity, proportion, distinction, and unnecessary suffering<sup>6</sup>.

Nuclear weapons, however, are devices of terror that can inflict unbearable violence on civilians on an extreme scale. The international community has,

for long, struggled with the problem of how the Law of War might be applicable to such weapons since their first and only use in 1945, when, during the final stages of World War II, the US dropped two atom bombs over the cities of Hiroshima and Nagasaki in Japan, the first on August 6, 1945, and the second on August 9, 1945. The radiation had an impact over a large area that affected public health, agriculture, natural resources and infrastructure for years to come. Yet the international community failed to come up with a global treaty that would explicitly ban the use of nuclear weapons, until recently, with the adoption of the Treaty on the Prohibition of Nuclear Weapons.<sup>7</sup>

Keeping this in mind, this chapter broadly looks at the general principles of International Humanitarian Law in relation to the threat or use of nuclear weapons, followed by a brief background to the 1996 Advisory Opinion of the ICJ. It then delves in detail into the text of the Advisory Opinion and its outcome.

### **Background to the Advisory Opinion**

A general prohibition on the use of force had been implied by Article 2(4) of the 1945 UN Charter that stated:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.<sup>8</sup>

Nevertheless, force has been frequently used, including threats involving nuclear weapons. Though, with the exception of Hiroshima and Nagasaki in 1945, no state till date has used nuclear weapons against any other state, thousands of nuclear weapons, with thousand times greater output in their destructive capabilities than the atomic bombs used in 1945, have been tested, manufactured, deployed and placed on various levels of alert. It is often affirmed that the 1945 nuclear attacks almost forced Japan to hasten its decision to surrender as a deterrent threat. This was the actual value that states armed with nuclear weapons have imposed since World War II.

A few years after the end of the Cold War in 1993, the Centre for Strategic and International Studies Nuclear Strategy Study Group, USA, in its report<sup>9</sup> had stated:

There is no consensus, nor any immediate prospect of one that total and complete disarmament will under any circumstances be a feasible proposition.

According to this report, it would be really unfortunate if the current impetus towards international cooperation for achieving nuclear disarmament just passed by without establishing a stronger nuclear end state with a view to eliminate the risks of use of nuclear weapons from the face of the earth. Furthermore, even the permanent extension of the Non-Proliferation Treaty in 1995, did not ensure a complete commitment towards disarmament which in a way enhanced certainty around the fact that nuclear disarmament was not going to be pursued by the nuclear weapons states in any meaningful way in the foreseeable future.

Apart from that, there were some new voices, who wanted to join the international community in the demand for the complete elimination of the use or threat of use of nuclear weapons. In this context, China had been supporting the total elimination of nuclear weapons and had been seeking a no-first use treaty among the weapons possessing states. While announcing the setting up of the Canberra Commission of experts to work out a plan for total elimination of nuclear weapons, the Australian Prime Minister Mr. Paul Keating mentioned that he believed that a world free of nuclear weapons was now feasible. He further noted that during that time, the international community wanted the nuclear weapons states to carry out their commitments towards the total elimination of their nuclear stockpiles by adopting a systematic process to achieve that result. Hence, the argument that the world would be an unsafe place to live in without the use of nuclear weapons was one of the ways to intensify the narrow self-interest of the nuclear weapons possessing states and their allies.

Hence, with the end of the Cold War, Non-Governmental Organisations (NGOs) such as the International Physicians for the Prevention of Nuclear War or the International Association of Lawyers against Nuclear Arms, had requested the World Health Organisation (WHO) to seek an Advisory Opinion on the

legality of the use or threat of nuclear weapons from the International Court of Justice (ICJ), Hague. Since, the question raised by the WHO didn't fall under the scope of its functions as provided by Article 96(2) of the UN Charter, the ICJ refused to furnish any Advisory Opinion on the same.

Therefore, to arrive at an acceptable conclusion, the UN General Assembly, through its Resolution A/RES/49/75K, adopted on December 15, 1994<sup>10</sup> requested the ICJ to render its Advisory Opinion on the legality of the threat or use of nuclear weapons under the international law on an urgent basis. This resolution was submitted to the ICJ on December 15, 1994, after being adopted by 78 states that voted in favour of it, 43 against it, with 38 abstaining and 26 not voting. Though the voting was initiated by the Non- Aligned Movement or NAM, the voting pattern did not show the integrated position of NAM, but, instead, reflected the post-Cold War international order and actually discerned the national interests of various countries. Apparently, of five legitimate nuclear weapons possessing countries, only China refrained from participating in the voting. After the resolution arrived at the World Court on December 18, 1994, a total of 42 states, including India, had furnished written submissions and taken part in the proceedings and 20 states took part in verbal hearings before the ICJ rendered its final opinion on July 8, 1996. Apart from assessing the legitimacy of the threat or use of nuclear weapons in an armed conflict, the court also discussed the appropriate role of the international judicial bodies, the ICJ's advisory function, IHL (*jus in bello*)<sup>11</sup>, and rules governing the use of force (*jus ad bellum*)<sup>12</sup>.

### **Role of the UN General Assembly**

Through Resolution A/RES/49/75K, adopted on December 15, 1994, the UN General Assembly requested the ICJ to render its Advisory Opinion on the legality of the threat or use of nuclear weapons on an urgent basis. Earlier, in the autumn of 1993, being instigated by NAM, the WHO had asked the court a similar question on the legality of the use nuclear weapons under IHL, but the question was turned down by the ICJ, because it held that the WHO did not have the competence to ask the court that particular question. Initially, it was also suggested that this matter was more within the capacity of the Security

Council rather than that of the General Assembly but the court has shown that the General Assembly is more competent based on Article 10 of the UN Charter that said:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.

And, except as provided in Article 12 of the UN Charter, “the General Assembly may make recommendations to the members of the UN or to the Security Council or to both on any such questions or matters”; Article 11(2) asserts that “the General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the UN, or by the Security Council, or by a state which is not a Member of the United Nations”; and Article 13 allows the General Assembly to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification of the UN Charter.

Again, as Article 96(1) of the UN Charter, allows the General Assembly or the Security Council to request the ICJ to give an Advisory Opinion on any legal question<sup>13</sup>, it was determined by the court that it had the jurisdiction to reply to the General Assembly’s request. Apparently, a total of 42 states, except China, (amongst the declared five nuclear weapons states) had been a part of the written phase of the pleadings, which is said to be the largest number of participants in any proceedings ever before the court. India was the only state amongst the “three threshold” nuclear weapons states that had participated in the proceedings. Other participants including those developing states which had earlier not contributed to the proceedings before the ICJ, have also shown great interest in participating in the international legal proceedings in this “post-colonial” era. Around 22 states including Australia, Egypt, France, Germany, Indonesia, Mexico, Iran, Italy, Japan, Malaysia, New Zealand, Philippines, Qatar, Russian Federation, San Marino, Samoa, Marshall Islands, Solomon Islands, Costa Rica, United Kingdom, United States, Zimbabwe, besides the WHO, participated in the verbal hearings of the court which were held from October 30 to November 15, 1995. During the



hearings, each state was assigned one and a half hours to make its statement. On July 8, 1996, nearly eight months after the completion of the verbal phase, the ICJ finally furnished its opinion<sup>14</sup>.

## Competence of the Court

**Composition of the Court:** The ICJ is composed of 15 judges elected to nine-year terms by the UN General Assembly and the UN Security Council. The court's "Advisory Opinion" can only be requested by specific UN organisations, and is inherently non-binding under the statute of the court. The 15 judges who gave their Advisory Opinion regarding the legality of the threat or use of nuclear weapons were: President Mohammed Bedjaoui from Algeria, Vice-President Stephen M. Schwebel from the United States, Judge Shigeru Oda from Japan, Judge Gilbert Guillaume from France, Judge Mohammed Shahabuddeen from Guyana, Judge Christopher Weeramantry from Sri Lanka, Judge Raymond Ranjeva from Madagascar, Judge Shi Jiuyong from China, Judge Carl-August Fleischhauer from Germany, Judge Abdul G. Koroma from Sierra Leone, Judge Géza Herczegh from Hungary, Judge Vladlen S. Vereshchetin from Russia, Judge Luigi Ferrari Bravo from Italy, Judge Rosalyn Higgins from the United Kingdom, Judge Andrés Aguilar Mawdsley (died before the final decision) from Venezuela, and Registrar Eduardo Valencia-Ospina from Colombia<sup>15</sup>.

Article 65(1) of the Statute of the ICJ allows the court to give an Advisory Opinion on any legal question at the request of whatever body may be authorised by, or in accordance with, the Charter of the UN to make such a request. It was determined by the court that it had the jurisdiction to reply to the request of the General Assembly, since the power of the General Assembly to give an opinion is regulated both by Article 96(1) of the UN Charter, that said "*The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question*" and Article 65(1) of the Statute of the ICJ.

As stated above, these Articles provided that the court may issue an Advisory Opinion on any legal question only when it is requested to do so by the General Assembly and before doing this, the court must also ensure that the body is "authorized by, or in accordance with, the Charter of the UN to make such a request"<sup>16</sup>.

The court also needed to assess whether the request made by the General Assembly related to a legal question falls within the ambit of the Statute of the ICJ and the UN Charter, i.e., the compatibility of the threat or use of nuclear weapons with international law. In this connection, it can be said that the political nature of the motive that gave rise to the request or the political implications of any Advisory Opinion, and any political aspects of the legal question are not that significant while establishing the courts' jurisdiction to give an opinion. However, the jurisdiction of the court instead depends on whether the requesting organ (in this case, it is the General Assembly) has followed the correct procedure and is not acting *ultra vires*<sup>17</sup>, or outside its jurisdiction. Apart from that, the court should also determine the legality of the question raised. Finally, after establishing its competence, the court further considers whether or not to exercise its inherent discretionary power while giving the opinion. The court reaffirms its consistent jurisprudence, according to which any "compelling reason"<sup>18</sup> can lead it to reject a request for an Advisory Opinion. The court also confirms the absolute right of the General Assembly to determine the usefulness of an opinion in the light of its own needs. However, the court does not consider the origin or political narrative of the request made to it, or the distribution of votes underlying the adopted resolution.

While determining the legality or illegality of the threat or use of nuclear weapons, the court came to the conclusion that the provisions of the UN Charter relating to the threat or use of force, the principles and rules of IHL that form part of the law that applies to armed conflict, the law of neutrality, and any other significant treaties on nuclear weapons are the ones that are most significantly applicable to the law that governs the question put up by the General Assembly. In applying this law, the court considered it crucial to take into account certain unique characteristics of nuclear weapons, in particular their destructive capacity, which can cause immense human suffering for the generations to come. The ICJ referred to nuclear weapons as unique because they release immensely powerful blast waves accompanied by intense heat in the form of thermal radiation, and high amounts of ionized radiation. Their detonation also creates residual radioactive particles (so-called nuclear fallout) with the potential to spread over great distances. These features give nuclear weapons the capacity for incredible destructive power and severe

and widespread consequences for human health, civilian structures and the environment. On the basis of these observations, the court had concluded that the 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”<sup>19</sup>. However, the court could not determine completely whether the use of nuclear weapons would be unlawful in all circumstances or not. Hence, whether it is legal to deploy nuclear weapons in an extreme case of self-defence when the very survival of a state would be at stake, is a question that remains unresolved.

### **Overview of the Opinion**

The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons issued by the ICJ on the July 8, 1996, has been one of the landmark legal opinions which stated that there is no such source of customary or treaty law, which specifically outlaws the use or possession of nuclear weapons. The main question around which the opinion centred was “whether the threat or use of nuclear weapons in any circumstance is permitted under international law or not?” This Advisory Opinion is of great importance for the international community for various reasons.

Firstly, because this was for the first time that this supreme judicial body centring the international legal regime addressed the fundamental concern about the legal status of nuclear weapons in international law. Secondly, this opinion not only engaged one of the most debatable political issues of modern international law but was an important example of the court’s judicial independence within the UN system, and the degree to which it might have been vulnerable to political burden from states in a promptly evolving international environment<sup>20</sup>.

The ICJ, on issuing its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, unanimously decided:

- Neither customary law nor conventional international law, authorise the threat or use of nuclear weapons<sup>21</sup>.
- According to Article 2(4) and Article 51 of the UN Charter, the threat or use of nuclear weapons is unlawful<sup>22</sup>.
- A threat or the use of nuclear weapons must be compatible with the requirements of the international law applicable in situations of armed

conflict specifically with the principles and rules of International Humanitarian Law, as well as with obligations under all international mechanisms exclusively dealing with nuclear weapons<sup>23</sup>.

- States are required to conclude in good faith the negotiations that would lead to nuclear disarmament<sup>24</sup>.
- By eleven votes to three, it was found by the court that neither any customary law nor any conventional international law comprises any universal prohibition of the threat or use of nuclear weapons as such<sup>25</sup>.
- Lastly, one of the most debatable parts of the opinion was that by seven votes to seven and with a casting vote of the president, the court held that 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.<sup>26</sup>

However, according to the present state of international law, and of the elements of facts at its disposal, the court could not come to a definite conclusion about the lawfulness of the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.

### ***The Questions Submitted to the Court by the General Assembly***

***Is the threat or use of nuclear weapons in any circumstances permitted under international law?***

Firstly, the court did not reply to this question in the form in which it was submitted by the UN General Assembly, but instead rephrased the question to some extent while keeping in mind the real objective behind the question. Although the court is obliged to answer the question in the form it was submitted to the court by the General Assembly, it was also the duty of the court to “ascertain what are the real legal questions formulated in a request. This duty is based on the responsibility of the court to contribute to the good functioning of the international organizations and to be able to give a reply that is both useful and conforming to the judicial role of the court”. Hence, the newly drafted question that was attempted to be answered by the court was:

*Is the threat or use of nuclear weapons legal or illegal in any circumstances?*

While determining the legality or illegality of the threat or use of nuclear weapons, the court decided that the most directly relevant applicable law governing the General Assembly's question consisted of the provisions of the UN Charter relating to the threat or use of force, the principles and rules of IHL that form part of the law applicable in armed conflict and the law of neutrality, and any relevant specific treaties on nuclear weapons. As has been discussed earlier in this chapter, while applying this law, the court considered it imperative to take into account certain unique characteristics of nuclear weapons, in particular their destructive capacity, which can cause untold human suffering for generations to come.

According to the ICJ, nuclear weapons were “explosive devices whose energy results from the fusion or fission of the atom”<sup>27</sup>. The only two factors that could distinguish nuclear weapons from any other weapon were identified: first, the immense powerful release of heat and energy caused by the fusion or fission of the atom; and, second, the phenomenon of radiation associated with that process. The ICJ mentioned that “such characteristics render the nuclear weapon potentially catastrophic.” The massively disastrous power of nuclear weapons is capable of destroying “*all civilization and the entire ecosystem of the planet.*”<sup>28</sup> The ICJ also mentioned the detrimental impact that radiation has on the current and future state of health, agriculture, the environment, natural resources, and demography. It is worth mentioning here that in most of the disarmament and non-proliferation agreements, there is a lack of a proper definition of nuclear weapons due to the technical complications inherent in the process. Initially, the request for an Advisory Opinion was made for nuclear weapons as weapons of mass destruction, but the court's Advisory Opinion encompassed nuclear weapons that have catastrophic consequences on populations.

*Text of the Opinion*

After finding that it was competent under the terms of Article 96 of the UN Charter to give an Advisory Opinion on a legal question placed by the General Assembly, and that there were no “compelling reasons” for it to refuse providing such an opinion, the court subsequently handed down its Advisory Opinion on July 8, 1996. With a view to explore the existing principles or laws that

might be relevant to the request for an Advisory Opinion on the legality of the threat or use of nuclear weapons, the ICJ carried out a three-part analysis. First, it considered the general rules and principles; then it examined the UN Charter; and, ultimately, it focussed on the regulations relevant in armed conflict situations. These are briefly discussed below.

### **General Rules and Principles**

While trying to answer the enquiry put to it by the General Assembly, the court decided, after consideration of the great corpus of international law norms accessible to it, on what might be the appropriate international law. The court first examined the Right to Life as guaranteed through Article 6, Para 1 of the International Covenant on Civil and Political Rights (ICCPR). In this connection, the court also considered the question of whether a specific death toll, or casualty as a result of the use of a certain weapon in warfare, is to be viewed as an arbitrary deprivation of life or not, in the light of what is noted in Para 1 of Article 6 of the 1966 International Covenant on Civil and Political Rights that stated:

Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of (his) life.

But that treaty is then declared not relevant: although human rights law applies even in war-time, and the right to life cannot be suspended by operation of Article 4 of the covenant under any circumstances, the question of what constitutes an arbitrary deprivation of life can be decided only by reference to the applicable *lex specialis*,<sup>29</sup> namely International Humanitarian Law.<sup>30</sup> Apart from that, the court also attempted to call attention to whether the prohibition of genocide would be applicable in this situation if the decision to use nuclear weapons did indeed necessitate the element of intent, towards a group as such, required by Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide that lists acts “*committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such*”.

After its declared prohibition on genocide to be suitable under the Law of Intent, the court then undertook a detailed examination to find out the relation

between the existing international law and the protection and safeguarding of the environment. As indicated by the court, though international law does not particularly preclude the use of nuclear weapons, in relation to the protection of the environment, it emphasises that important environmental factors should be taken into account in the implementation of IHL. Therefore, it is certain that widespread and long-lasting damage to the environment resulting from their use is a favourable argument in condemning the use of nuclear weapons.

In the last part of the General Rules and Principles or the Applicable Law, the apex court goes on to describe the “unique characteristics of nuclear weapons”. These unique characteristics of nuclear weapons are then examined in relation to the General Rules and Principles or the applicable law, the main components of which, as indicated by the court, are the provisions of the UN Charter relating to the use of force, and IHL. While going on to describe the salient features of nuclear weapons, the court provides that nuclear weapons are particularly disastrous because their capacity “to destroy all civilization and the entire ecosystem of the planet”<sup>31</sup>, can cause untold human suffering, excessive damage to future generations and irreparable damage to the environment.

After analysing the first part of the Advisory Opinion on the General Rules and Principles, the court inferred that the most significant applicable law administering the questions related to the use of force were the ones revered in the UN Charter along with the law applicable in armed conflict (LoAS) which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the court might determine to be applicable.

After examining the unique characteristics of nuclear weapons, the court then addressed the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the UN Charter relating to the threat or use of force. In this context, the court considered the provisions of the UN Charter relating to the threat or use of force. Although Article 2, Paragraph 4 (*generally prohibiting the threat or use of force*), Article 51 (*recognising every state’s inherent right of individual or collective self-defence if an armed attack occurs*) and Article 42 (*authorising the Security Council to take military enforcement measures*)<sup>32</sup> do not refer to specific weapons, the court held that they apply to any use of force, regardless of the type of weapon employed. The court observed

that the UN Charter neither expressly prohibits nor permits the use of any specific weapon, including a nuclear weapon, and that a weapon that is already unlawful by an international treaty or custom does not become lawful by the reason of being used for a legitimate purpose under the UN Charter. Regardless, of the means of force used in self-defence, the dual customary principles of necessity and proportionality and the law applicable in armed conflict apply, including such further considerations as the very nature of nuclear weapons and the profound risks associated with their use. To elaborate a bit more on the proportionality principle, it can be noted that though this principle itself does not exclude the use of nuclear weapons in self-defence in all circumstances, the use of force that is proportionate under the law of self-defence must meet the requirements of the Law of Armed Conflict that comprises principles and rules of humanitarian law, in order to be lawful. The court also points out that the high risks associated with all nuclear weapons due to their very nature should be remembered by the states that believe that they can exercise a nuclear response in self-defence in accordance with the principle of proportionality. Hence, the principle of the UN Charter clearly states that the threat or use of force is prohibited if it is directed against the territorial integrity or political sovereignty of any state, or if it is in any other manner inconsistent with the purposes of the United Nations.

On examining the provisions of the UN Charter relating to the threat or use of force, the court looks at the law that applies during situations of armed conflict. First, it addresses the question regarding the specific rules in international law that regulate the legality or illegality of taking recourse to nuclear weapons and then it examines the principles and rules of IHL applicable in an armed conflict, and the law of neutrality, after which the court concluded:

The Charter neither expressly prohibits nor permits the use of any specific weapon, including nuclear weapons.<sup>33</sup>

It noted that international law does not contain any specific provision that authorises the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, particularly while exercising self-defence. Since self-defence may be the only legitimate basis for taking recourse to



force, hence, the legality or illegality of the use of nuclear weapons will, in the first instance, be established on the basis of conformity with the elements of proportionality, necessity, and the rules of *jus in bello*, especially the principles and rules of humanitarian law with which the use of force in self-defence must comply.

Subsequent to inferring that no customary or conventional rule of general degree could be discovered, particularly precluding the threat or use of weapons, the court swung to the topic of whether the rules and principles of IHL applicable in armed conflict and the law of neutrality would permit the use of nuclear weapons. The Law of War or of Armed Conflict has existed right from the beginning of human civilisation. These rules had, in turn, given rise to a number of prevalent customary laws. To see if the customary laws had provisions or not to prohibit the use or threat of nuclear weapons, the ICJ reviewed a number of historical sources. Then it declared that the Hague Law and the Geneva Law together incorporate the International Humanitarian Law (IHL).

This corpus of law was to be observed by all states irrespective of whether they have ratified or not the conventions that contained them because “*the great majority of [humanitarian law] had already become customary*” when the conventions were ratified. Moreover, despite the references to nuclear weapons during the international law conferences of 1940 and 1977, the court was of the opinion that the principles and rules of humanitarian law were equally applicable to nuclear weapons and, hence, it inferred that the use of nuclear weapons would be incompatible with the humanitarian character of the legal principles laid down under the IHL. The assurance provided by the Martens Clause<sup>34</sup> confirmed the righteousness of the court’s decision. The court further highlighted five key concepts of humanitarian regulations that are applicable during an armed conflict for further dialogue. These are:

- The principle of distinction between combatants and non-combatants.
- The prohibition of indiscriminate weapons.
- The prohibition concerning the use of weapons that give rise to unnecessary human suffering or the principle of humanity.
- The principle limiting the means to wage war.
- The prohibition regarding use of weapons that violate the neutrality of non-participating states.

### *The Principle of Discrimination Between Combatants and Non-Combatants*

According to the court, the primary principle is “geared toward the protection of the civilian population and civilian objects.” It consequently makes a distinction between combatants and non-warring parties. Therefore, under this principle a distinction is made between combatants and non-combatants. The court, in this context, reaffirms the value of this customary rule that has been the object of various instruments including Articles 25 and 27 of the Hague Regulations of 1907, General Assembly Resolution 2444 (XXIII) of December 18, 1968, and Article 48 of Additional Protocol I of 1977.

### *The Prohibition Regarding the Use of Indiscriminate Weapons*

As indicated by the court, states can in no way target civilians as objects of assault, and should, consequently, by no means use weapons which are incapable of distinguishing between combatants and non-combatants. This rule is similar to that enunciated in Article 51, Paragraphs 4 and 5 of Additional Protocol I. It was important that the court confirmed the customary value of the rule because only one instrument expresses this rule and Additional Protocol I has not been ratified by all states. Yet it is not clear what the court meant by “incapable of distinguishing between civilian and military targets” since most of the court’s judges had opposing views on the issue of whether the use of nuclear weapons would have an indiscriminate effect.<sup>35</sup>

### *The Prohibition Regarding Use of Weapons that Cause Unnecessary Suffering or Aggravate Suffering*

As indicated by the court, weapons that cause harm or unnecessarily increase suffering are prohibited. The court’s attention to this principle is worthwhile in the Advisory Opinion. However, there were some doctrinal discrepancies, for example, the court could not provide a standard for assessing whether the “use of a weapon is causing unnecessary suffering or superfluous injury.”<sup>36</sup>

### *The Principle Limiting the Means to Wage War*

In order to talk about the powerful means of addressing the rapid evolution of military technology, the court referred to the Martens Clause;<sup>37</sup> This clause had initially appeared in the Preamble of the 1899 Hague Convention respecting

the Laws and Customs of War on Land (1899 Hague II) and in the Hague Convention of 1907. According to the court, Article 1, Paragraph 2 of Additional Protocol I to the Geneva Convention of 1949, a modern version of the clause provides, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain 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.”<sup>38</sup>

### *The Prohibition Regarding Use of Weapons that Violate the Neutrality of Non-Participating States*

On the principle of the prohibition regarding the use of weapons that violate the neutrality of non-participating states, the court proclaimed that just like the principles of humanitarian law are appropriate in cases of armed conflict, the principle of neutrality,<sup>39</sup> irrespective of the content and similar to the fundamental characters of the international humanitarian law, shall be applicable in any or all international armed conflicts, regardless of the types of weapons used.

Apart from establishing the relevance of the fundamental principles and rules of international humanitarian law that is applicable in all cases of international and non-international armed conflicts, the apex court had also concluded that the use of nuclear weapons by any state (assuming that the use is for the purpose of self-defence) must comply with certain standards established by the court.

### **Response of States**

In a response to the Advisory Opinion furnished by the ICJ, the participating nuclear-armed states essentially stated that no aspect of the opinion requires them to change their policies. The United States further noted that the court “declined to pass on the policy of nuclear deterrence” and both the US and France incorrectly asserted that the “opinion indicates that the use of nuclear weapons in some circumstances would be legal.” But the truth is that the apex court only stated its incapability to decide the matter in certain possible circumstances and stressed that the states must always comply with rules that protect civilians from the inhumane and devastating effects of warfare. The UK commented, “Like the court, we believe that the use of nuclear weapons would be considered only in

*self-defence in extreme circumstances.*” Thereafter, the Government of the UK had planned to renew the only British nuclear weapon, the Trident missile system.<sup>40</sup> On December 19, 2005, it had published a White Paper “*The Future of the United Kingdom’s Nuclear Deterrent*”, by Ravinder Singh QC and Professor Christine Chinkin of Matrix Chambers, where, in relation to the Advisory Opinion of the ICJ, Singh and Chinkin had argued, “The use of the Trident system would breach customary international law, in particular because it would infringe the ‘intransgressible’ [principles of international customary law] requirement that a distinction must be drawn between combatants and non-combatants”.<sup>41</sup> Russia observed that the opinion “reflected a complex, mostly political role of nuclear weapons in the modern world.”<sup>42</sup>

The states of the Non-Aligned Movement (NAM), in particular Indonesia and Malaysia, had led the campaign to obtain a General Assembly majority in favour of asking the court for its opinion. They emphasised on the unanimous conclusion given by the court in the context of the disarmament obligation in a resolution that was put forward by Malaysia during the fall of 1996 and adopted annually. Since then,<sup>43</sup> the General Assembly has highlighted the conclusion and called on all the states to comply with the obligation by immediately commencing multilateral negotiations leading to the early conclusion of a convention prohibiting and eliminating nuclear weapons. The resolution received a considerable number of opposing votes and abstentions, due to the position of states such as Japan that negotiation of that convention was premature. However, when the paragraph welcoming the court’s statement of the disarmament obligation was voted on separately, it was approved by an overwhelming majority, not including France, Israel, Russia, the UK, and the United States.

## **Conclusion**

Despite reaching an agreed decision about the applicability of humanitarian principles on the threat or use of nuclear weapons, there is still a great deal of debate surrounding these conclusions. While some states are of the opinion that the use of low yielding nuclear weapons in areas of sparse population might comply with the humanitarian standards of IHL, other states opine that the use of nuclear weapons under all circumstances is completely incapable of

distinguishing between warriors and non-warriors or civilians and also between civilian objects and military objectives. Furthermore, the attacks will be far from being confined to the military units of a nation; rather the detonations would result in uncontrollable destruction of human life due to the powerful blast waves and heat radiation often accompanying a nuclear explosion. On being hesitant to take an agreed position on the threat or use of nuclear weapons by the states, the apex court reaffirmed, in reference to the core principles of IHL, that any tactics of warfare that fails to distinguish between civilians and military targets, causing unnecessary suffering to combatants and civilians is prohibited. However, the court lacks the ability to prove with certainty that the threat or use of nuclear weapons would necessarily disagree with the fundamental rules and principles of IHL. The ICJ had taken a very conservative approach while furnishing the Advisory Opinion on the threat or use of nuclear weapons that was requested by the General Assembly in 1995.

After analysing all the relevant international mechanisms including the basic principles of IHL and the provisions on self-defence under the UN Charter and establishing humanitarian standards for the threat or use of nuclear weapons to comply with them, the apex court came to the conclusion that a threat or use of nuclear weapons might contradict the principle rules and regulations of IHL or LoAC. However, the court failed to determine with certainty whether the threat or use of nuclear weapons by states would be legal or not in extreme cases of self-defence when the very survival of the state would be at stake.

Nevertheless, keeping aside the demerits of the 1996 Advisory Opinion by the ICJ, it can be safely agreed that this opinion has thrown light on some very relevant points such as: it has been universally accepted since the furnishing of the opinion that the use of nuclear weapons by states is a crime against humanity and, hence, the states in possession of nuclear weapons should gradually proceed towards total disarmament. Secondly, though there is still a lack of an agreed decision on the lawfulness of the threat or deployment of nuclear weapons in extreme cases of self-defence, it is clear from the opinion of the court that the use of nuclear weapons under any circumstances cannot comply with the humanitarian principles of the LoAC. It is also still not clear as to how nuclear weapons can be used without violating the international environmental laws. However, the opinion rendered by the court finally helped in establishing

customary rules under the humanitarian law that would be applicable to any present and future weapon that intends to destroy humanity.

## Notes

1. “The Geneva Convention of 1949”, International Committee of the Red Cross (ICRC), Geneva, August 12, 1949.
2. Ibid.
3. Dr Wg Cdr Jha (Retd) UC, *International Humanitarian Law :The Laws of War* (New Delhi: Vij Books India Pvt Ltd, 2011).
4. Ibid.
5. Christopher Hubbard, “A Critique of the Advisory Opinion of the ICJ,” Edith Cowan University Online Journal, 1997.
6. Charles J. Moxley Jr, and John Burroughs, “Nuclear Weapons and Compliance with International Law,” *Fordham International Law Journal* (The Berkeley Electronic Press), 34, no. 4, 2011.
7. The Geneva Conference (1932) was a global attempt at disarmament that took place between 1932 and 1934.
8. United Nations, 2021, *UN Charter | United Nations*. [online] United Nations. Available at <<https://www.un.org/en/about-us/un-charter>>. Accessed June 25, 2021.
9. *Toward A Nuclear Peace: The Future of Nuclear Weapons in US Foreign and Defence Policy* (Washington D.C.: CSIS Nuclear Strategy Study Group Centre for Strategic and International Studies, 1993), 67.
10. Hubbard, n. 5.
11. International Humanitarian Law, or *jus in bello*, is the law that governs the way in which warfare is conducted.
12. *Jus ad bellum* is a set of criteria that are to be consulted before engaging in war in order to determine whether entering into war is permissible, that is, whether it is a just war or not, (ICRC).
13. n. 8.
14. Laurence Boisson de Chazournes, and Philippe Sands, *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999).
15. ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226
16. Ibid.
17. *Ultra vires* is a Latin phrase meaning “beyond the powers”.
18. The court reaffirms its consistent jurisprudence, according to which any “compelling reason” can lead it to reject a request for an Advisory Opinion.
19. n. 15.

20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid.
29. *Lex specialis*, in legal theory and practice, is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts (ICRC).
30. Stefaan Smis and Kim Van der Borgh, *The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 27 Ga. J. Int'l & Comp. L. 345, 1999.
31. Ibid.
32. n. 8.
33. Smis and Van der Borgh, n. 30.
34. Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict." International Committee of the Red Cross, April 30, 1997. <https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm>. Accessed August 2018.
35. Louise Donald 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*, INT'L REV. RED CROSS 38-39 (1997).
36. Robin M Coupland, surgeon, "Abhorrent Weapons and Superfluous Injury or Unnecessary Suffering: From Field Surgery to Law," *the bmj*, November 29, 1997. <https://www.bmj.com/content/315/7120/1450>.
37. The text of the Martens Clause in the Hague Convention IV reads as follows: "Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule 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".
38. Treaties, States Parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977-1 - General principles and scope of application, 2021.
39. The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: 1) "the territory of neutral powers is inviolable." Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 1; 2) "belligerents are bound to respect the sovereign rights

of neutral powers...” Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, art. 1; 3) “neutral states have equal interest in having their rights respected by belligerents...” Convention on Marine Neutrality, Feb. 20, 1928. Clearly, the “principle of neutrality applies with equal force to trans-border incursions of armed forces and to the trans-border damage caused to a neutral state by the use of a weapon in a belligerent State.”

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## 2. NUCLEAR WEAPONS AND INTERNATIONAL LAW

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### **Introduction**

World War II that engulfed the globe from 1939 to 1945 had sowed the seeds of scientific advancement along with technological weapons. With the dramatic entry of nuclear weapons, the world entered the nuclear age. During the Cold War, nuclear weapons assumed a significant role in the conduct of states and their relations with each other. Soon the possession of these weapons became a matter of pride for many countries and also an expression of their sovereignty. Today, though the nuclear shadow cast during the Cold War has gone, the danger remains. The fear of nuclear proliferation is still prominent and the new danger of nuclear technology coming into the possession of non-state actors poses a great fear to the international community.

Keeping these points in view, this chapter takes into account the legal developments that have taken place in the various fields under international law that are applicable to the “use or threat of use of nuclear weapons” and it would also strive to understand whether these weapons conflict directly with the principles of an international legal order or not. And if yes, then what are the existing gaps in the international legal regime in relation to nuclear disarmament and total elimination of these deadly weapons.

### **International Law: History and Evolution**

#### *Definition and Scope*

International law, unlike other areas of law, “does not have a definite governing body, but instead constitutes such a set of standards, traditions and understandings which oversee effect, and manage the legitimate associations amongst various countries, their administrations, organizations and associations, to incorporate their rights and duties in such dealings”.<sup>1</sup>

This diverse body of law includes worldwide traditions; agreements, accords, treaties and international contracts (for example, the UN Charter); tribunals; protocols; memorandums; legal precedents of the International Court of Justice (otherwise known as the World Court), etc. Without an extraordinary administration, and implementing entity, international law is to a great extent a consensual undertaking, whereas the intensity of enforcement only exists when the parties agree to abide by the agreements.<sup>2</sup>

In other words, when sovereign states enter into binding and enforceable agreements, it is called international law. Nations come together to make rules that they think might help their citizens, and promote justice, peace, and common interests.

International law is not the same as a state-driven legal structure as it is essentially applicable to nations instead of individual citizens. National law ends up being international law when treaties allow national jurisdiction to supranational tribunals<sup>3</sup>, such as the European Court of Human Rights or the International Criminal Court. Treaties, for example, the Geneva Conventions may require national law to comply with the respective parts. International law is also mostly consent-based governance because if a state disagrees with any particular international legal mechanism, it might choose to not abide by that international mechanism. This is an issue of state sovereignty.<sup>4</sup>

### ***History and Evolution***

Though the modern discourse of international law began during the 19th century, its origin goes back to at least the 16th century. The basic components of international law are the treaties that go back to the ancient or prehistoric era. Traces of the nascent form of international law can be found in ancient Eurasia portrayed by intense networks of tiny independent states sharing a common religious and value system. Other places where international law can trace its inception are Mesopotamia, Northern India during the Vedic period (1600 BCE) and Classical Greece. It is in these places that we find earlier examples of treaties which were basically agreements between the rulers of the city-states.

These states were mostly a blend of political fragmentation and social solidarity requiring a development of fair and standard practices that would

help the inter-state relations to have a firm establishment. These fair practices soon became visible in the areas of diplomatic relations, treaty-making, and the conduct of war, and extended across deeper cultural lines as well.

International trade also played an important role in the evolution of the code of conduct between states, without which elaborate interactions would not provide the guarantee of safety and protection to the merchants who were involved in them. Hence, economic self-interest also hastened the process of evolution of international law. With the increasing complexities and involvement in international trade, international customs and practices became a sheer necessity. The Hanseatic League of more than 150 entities was a good example of this. Apart from this, the Italian city-states created discretionary standards, as they started sending envoys to foreign capitals. Settlements between governments turned into a helpful apparatus to ensure trade. The dread of the Thirty Years' War, in the meantime, raised the need for principles of battle that would secure civilian populations.<sup>5</sup>

### ***Hugo Grotius***

Hugo Grotius, remembered as the “father of international law”, was the first proponent of international law. His work *De Jure Belli Ac Pacis Libri Tres*,<sup>6</sup> is viewed as the starting premises of modern international law. He defined his own thoughts on the law of nations that he saw as an arrangement of shared lawful restraints, in view of the conviction that the law radiated both from human reason, or common law, and from custom. In his work *De Jure Belli Ac Pacis Libri Tres*, he gave a rational angle to international humanitarian law.

Apart from that, the Treaties of Westphalia in 1648 were the pioneering sources for the establishment of the idea of state sovereignty which had in turn laid the major foundation for an international order. However, back in the earlier 16th century, the first attempt to develop autonomous theories of international law was made in Spain by the early theorists who were the Roman Catholic theologians Francisco de Vitoria and Francisco Suárez. Suárez distinguished between *ius inter gentes*<sup>7</sup> and *ius intra gentes* which he derived from *ius gentium*<sup>8</sup> (the rights of peoples) that refers to modern international law.

During the last length of the 18th century, a move towards positivism in international law took place and amid this time, the sole reason for international law to keep the peace was challenged by the emerging political strains between the European great powers (France, Prussia, Great Britain, Russia and Austria). This tension was reflected in Emer de Vattel's *Du Droit des Gens* (1758)<sup>9</sup>.

Immanuel Kant believed that though international law could legitimise war, it would not serve the purpose of peace and subsequently contented in *Perpetual Peace (Zum Ewigen Frieden, 1795)* and the *Metaphysics of Morals (Metaphysik der Sitten, 1797)* for the creation of a new kind of international law.<sup>10</sup>

Soon after World War 1 and the Thirty Years War, the world needed an international agreement that would curb invasions and establish peace across the globe. There was also a requirement for an international court that could peacefully settle disputes within nations without allowing them to escalate into war. Hence, the League of Nations and the International Court of Justice were, thus, created. But the ongoing international crises gave an impression that nations were not ready to commit to the idea of international authorities having a say in their sovereignty. For example, the hostilities going on in Germany, Italy and Japan were still uncontrollable by international law, and it took World War II to end them.

Soon after World War II, there was a strong demand for not repeating the horrors of World War I, so the League of Nations was reformed into a new treaty organisation now known as the United Nations Organisation.

Therefore, international law is about the conduct of war, on the one hand, and about the conduct of civilians in peace-time in the areas of trade, shipping, and air travel, on the other. These rules and obligations are mostly followed by nations, to make the lives of their citizens easier.

In the context of nuclear weapons, it can be said that though the nuclear shadow cast during the Cold War has diminished, the danger has remained. With the improvements of newer technology, the fear of nuclear proliferation has escalated. But the debate over nuclear weapons and their legality has continued, and to bring it to a successful conclusion, assessing the present status of nuclear weapons under international law has become a great necessity.

## Treatment of Nuclear Weapons Under the International Legal Regime

### *International Criminal Law*

Since the end of World War II which saw the use of nuclear weapons for the first time, it has often been suggested that a legal mechanism that can distinctively criminalise the use of nuclear weapons should be adopted so that it can strengthen the already existing norms restricting the use of nuclear weapons. The suggestion to impose restrictions on nuclear weapons use by establishing liability came up many times in the international community. Additionally, it was realised that such restrictions on the use of nuclear weapons could reinforce the humanitarian perspective of the nuclear weapons debate and the derogation associated with the use of nuclear weapons. This would also make the possession of nuclear weapons less desirable, and that would be an impetus towards the ultimate goal of complete nuclear disarmament. Hence, it was suggested by the advocates of nuclear disarmament that criminalisation of the use of nuclear weapons was only possible by amending the Statutes of the International Criminal Court (ICC) or to incorporate the use of nuclear weapons under the definition of war crimes in the Rome Statute.<sup>11</sup>

Whether or not to include Weapons of Mass Destruction (WMDs) within the purview of illegal weapons under the Rome Statute was frequently discussed since the inception of the ICC negotiations. In 1998, during the concluding rounds of negotiations of the Rome Statute, it was stated that though the use of chemical and biological weapons was already prohibited under international law, use of nuclear weapons was considered contrary to the rules of international law by the ICJ in 1996. This was opposed by many states and NGOs and as a result, the idea of inclusion of WMDs under the Rome Statute failed. At that point, the ICC started functioning in 2002 and the primary Review Conference of the Statute was held in Kampala, Uganda, in 2010. During the arrangements for the Review Conference, the nuclear weapons issue reemerged, and at the eighth session of the Assembly of States Parties, in November 2009, Mexico presented a proposition for a revision to the statute, by forbidding the use or threat use of nuclear weapons, and including it under the rubric of war crimes under Article 8 of the statute. Nevertheless, Mexico's proposition received only minimal support

from the start and it pulled back the draft as it became evident that agreement would not be reached.<sup>12</sup>

However, the International Criminal Law (ICL) is a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, international terrorism) and to make the persons or states engaged in such crimes criminally liable. To do this, the ICL draws on customary and conventional international humanitarian law, human rights law and other domestic laws, thus, making it a hybrid branch of law. For any crime to be considered an international crime, there must be a culpable act or *actus reus*, along with the frame of mind to commit such act, better known as *mens rea*<sup>13</sup>. And for a crime to be judged a crime against humanity, the *actus reus* and *mens rea* must occur as part of a widespread and systematic attack on the civilian population, whether at the time of conflict or during peace-time.

#### *A. Use of Nuclear Weapons as an Act of Genocide*

The term genocide, also known as the crime of crimes, was first coined in 1944 by Raphael Lemkin in his book *Axis Rule in Occupied Europe*<sup>14</sup>. In 1946, genocide was proclaimed as a crime under international law by the UN General Assembly Resolution 96(1). There was a formal prohibition of this crime in the form of the 1948 Genocide Convention. This prohibition was recognised as a general principle of law in 1951 and attained the status of a norm of *jus cogens*.<sup>15</sup>

Coming to the case of nuclear weapons, in the 1996 ICJ Nuclear Weapons Advisory Opinion, the ICJ remarked that the 1948 Genocide Convention is a “relevant rule of customary international law which the court must apply.” The court mentioned the definition of ‘crime’ under Article 2 of the Genocide Convention which has attained the status of customary law. The Article said<sup>16</sup>:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;

- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.<sup>17</sup>

In the context of *actus reus*<sup>18</sup> of the crime of genocide, the main consequences of a nuclear attack are widespread death and injury, as per the acts prescribed under point (a) and (b) in the Article, but the radioactive fallout provoked by a nuclear strike can also be covered under point (c). The elements of crimes of the Rome Statute of the ICC interpret the term ‘conditions of life’ to include such deprivation of resources that are required to live a healthy life. Hence, the ICC elements for crime in each point (a) and (c) state that the conduct must have manifested against a group and resulted in destruction. The second part of this requirement covers situations where a nuclear or biological weapon is used without the pattern of a similar conduct. Thus, a nuclear attack can be termed as a genocide as per the Rome Statute of the ICC.

### *B. Use of Nuclear Weapons as a Crime Against Humanity*

According to Cryer et al., many acts which do not constitute genocide will constitute crimes against humanity.<sup>19</sup> In its 1991 resolution, the UN General Assembly ‘reaffirmed’ in an introductory statement that “the use of nuclear weapons...would be a crime against humanity.”<sup>20</sup> As per Antonio Cassese,<sup>21</sup> crimes against humanity comprise crimes that have shaken humanity and are said to have occurred under the Rome Statute, when “certain acts are undertaken as part of a widespread or systematic attack against a civilian population where the perpetrator has the knowledge of the attack.”<sup>22</sup> To be recognised as a crime against humanity under international criminal law, certain elements are to be considered:

- There must be one or more attacks;
- The acts of the perpetrators must be part of the attack;
- The attacks must be widespread and systematic and directed against any civilian population;
- The perpetrators must know that their acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.

According to the ICC, the term ‘widespread’ has been defined as all-encompassing or the “large scale nature of an attack which is massive, frequent and carried out collectively, with considerable seriousness and directed against a multiplicity of victims.” Hence, with relevance to an isolated use of a nuclear weapon against a civilian population, the ICC asserted, “Accordingly, a widespread attack may be the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>23</sup> Thus, a nuclear weapon attack is definitely a “crime against humanity” according to the provisions laid down by the International Criminal Court.

### *C. Use of Nuclear Weapons as a War Crime*

A war crime is generally defined as a serious violation of international humanitarian law. For any crime to be qualified as a war crime there must be an armed conflict in progress [International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC)], the relevant conduct of indiscriminate violence, and it must have a connection with the ongoing conflict. Apparently, there are several possible uses of a nuclear weapon that constitute a war crime, because the nature of this weapon itself is necessarily indiscriminate, causing superfluous injury and unwanted suffering. Apart from this, use of a nuclear weapon can be termed as a war crime because it is also directed against the civilian population, thereby violating the rule of distinction. Hence, during an ongoing armed conflict, if a state uses overwhelming force against another state by employing nuclear weapons, then it is actually constrained under *jus in bello* and, thus, commits a war crime, even if the latter state is unwilling to respond.

### ***International Environmental Law***

Nuclear weapons are possibly the most ruinous weapons made. The results of such a massive explosion won't just obliterate humanity but also have an immense impact on nature. The inconceivable effect of the use of nuclear weapons on humankind and condition was first perceived by the ICJ in its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons.<sup>24</sup> The ICJ rendered nuclear weapons as potentially catastrophic, whose destructive power cannot be contained in either space or time. These weapons, as the ICJ quoted, have the potential to destroy all civilisation and the entire ecosystem of the planet, since



the radiation released by their explosion is destructive enough to affect health, agriculture, natural resources and demography over very wide areas. The use of nuclear weapons would also be a serious danger to future generations, as it may damage the environment, food and marine ecosystem, causing genetic defects in future generations. As indicated by the court, though international law does not particularly preclude the use of nuclear weapons, in relation to the protection of the environment, it emphasises that important environmental factors should be taken into account while assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Therefore, it is certain that widespread and long-lasting damage to the environment resulting from the use of nuclear weapons is a forceful argument in condemning the use of nuclear weapons.

To view the environmental consequences of the use of nuclear weapons, the following rules of public international law in this area should be considered.

#### *A. Protection of the Environment under Treaty Law*

The protection of the environment under the law of armed conflict is specifically regulated under four treaties. These are the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques better known as the Environmental Modification (ENMOD) Convention; the 1977 Additional Protocol 1 to the 1949 Geneva Convention; Protocol III to the 1980 Convention on Certain Conventional Weapons; and the 1998 Rome Statute of the International Criminal Court<sup>25</sup>.

- ENMOD: This convention is not very relevant in this context because its Article 1 prohibits use of environmental modification techniques as such, irrespective of any use of nuclear weapons.
- The 1980 Convention on Certain Conventional Weapons or the Incendiary Weapons Protocol is also not very relevant for the discussion as it does not include nuclear weapons within its scope of incendiary weapons.
- The ICC Statute leads to individual criminal responsibility rather than state responsibility and is, therefore, not relevant here.
- The 1977 Additional Protocol 1 to the 1949 Geneva Convention: The Additional Protocol 1 to the 1949 Geneva Convention was negotiated in Geneva between 1974 and 1977 to develop and reaffirm International Humanitarian Law. Amongst the 102 Articles of the Protocol, two provisions

specifically govern environmental protection during international armed conflict. These are Article 35(3) and Article 55. According to Article 35(3)<sup>26</sup>:

It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 55 (protection of the natural environment) states<sup>27</sup>:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Both provisions aim to protect the natural environment during an armed conflict in different ways. While Article 35(3) intends to protect the intrinsic value of the environment by laying down a basic rule on the means and methods of warfare, Article 55 aims to protect the environment as a civilian object due to its significance in the health and survival of the population.

To answer the question of whether both these Articles specifically apply to the use of nuclear weapons or not, it can be noted that since the text of the Protocol is of a general character and does not refer to any specific weapon, it might as well be assumed that it applies to any kind of weapon as such. Further states parties to the Protocol are divided on whether this Protocol applies to nuclear weapons or not. While some states opine that Article 35(3) applies to all weapons, including nuclear weapons, others hold that these new rules do not apply to the use of nuclear weapons.<sup>28</sup> To end this confusion, the court elaborated on the question of the applicability of Additional Protocol 1 of 1977, to nuclear weapons. It observed:

The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.<sup>29</sup>

Additional Protocol 1 of 1977 in no way replaces the customary rules that are applicable to all means and methods of combat, including nuclear weapons. Thus, according to the court, the provisions of the Protocol apply equally to all states, which, when adopted, were merely the expressions of the pre-existing provisions of the customary law such as the Martens Clause, reaffirmed in the first article of the Additional Protocol 1. Thus, going by these customary provisions, it can be affirmed that the use of nuclear weapons is also against international environmental law.

*B. Protection of Environment During Armed Conflict under Customary International Law*

Apart from Article 35(3) and Article 55, there are other three rules of customary international law that too protect the environment. These are Rules 43, 44 and 45 of the ICRC's 2005 Customary International Humanitarian Law Study (CIHL Study).<sup>30</sup>

**Rule 43:** "The general principles on the conduct of hostilities apply to the natural environment:

- "No part of the natural environment may be attacked, unless it is a military objective.
- "Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
- "Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited (IAC and NIAC)."

**Rule 44:** "Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions (IAC/ arguably NIAC)."

**Rule 45:** “The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon (IAC/arguably NIAC)”.

Hence, both Articles of the 1977 Additional Protocol 1 forbid the use of methods and means of warfare that might cause widespread, long-term and unaccountable damage to the environment. Both rules should be considered by those nuclear weapons states that have become party to the 1977 Additional Protocol 1, including France and the UK. Keeping in mind the destructive effects of nuclear weapons, it can be said that the use of a nuclear weapon during an armed conflict will cause widespread, long-term and severe damage to the environment and will, hence, be contrary to the provisions stated under Article 35(3) and Article 55. Apart from that, Rules 43 and 44 of the ICRC’s 2005 Customary International Humanitarian Law Study should also be considered by all nuclear states during an armed conflict. Since both rules provide partial protection to the environment, any intention of use of nuclear weapons must be assessed against these customary rules.

The rules of law of armed conflict protecting the environment during an ongoing armed conflict provide important restrictions for a nuclear weapon state on employing nuclear weapons. In the last few decades, escalating concerns for the protection of the environment have materialised. This concern for protection should be in the interest of not only states but all mankind in general, as the environment is the only practical sphere where creation resides, be it the perpetrating states or the victims. So, keeping in mind the importance of the environment as a living space that influences the quality of life and health of all species in this world, living or unborn, all of us across the globe should unite in eradicating this devastating menace from the face of the earth.

## **International Disarmament Law and Nuclear Weapons**

### ***Nuclear Weapons Free Zones***

The most important legal disarmament obligations applicable on nuclear weapons are those that establish Nuclear Weapons Free Zones (NWFZ). These zones, that cover large geographical areas and a number of states, often represent

an underestimated legal and political dynamics with regards to disarmament as well as non-proliferation. In this context, it can be stated that Article VII of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has supported the establishment of NWFZs as a regional component of the non-proliferation regime. According to the UN General Assembly, an NWFZ is an agreement which a group of states has freely established by treaty or convention that bans the use, development, or deployment of nuclear weapons in a given area, that has mechanisms of verification and control to enforce its obligations that is recognised as such by the UN General Assembly (UNGA)<sup>31</sup>. Hence, the most essential elements of an NWFZ are, first, the complete absence of nuclear weapons; and, second, the presence of an international verification and control machinery.<sup>32</sup> Till now, five treaties, establishing NWFZs have been concluded<sup>33</sup>:

- The 1967 Treaty of Tlatelolco for Prohibition in Latin America and the Caribbean.
- The 1985 Treaty of Rarotonga on the South Pacific NWFZ.
- The 1995 Bangkok Treaty on the Southeast Asia NWFZ.
- The 1996 Pelindaba Treaty on the African NWFZ.
- The 2006 Semipalatinsk Treaty on an NWFZ in Central Asia.

All these five treaties have entered into force. Mongolia has also unilaterally declared itself a nuclear weapons free state<sup>34</sup> and Antarctica a WMD free state as a result of the 1959 Washington Treaty that demilitarised the continent and moved it towards peaceful processes. Together, these zones cover the entire southern hemisphere, with an unstable region in the northern hemisphere. As a powerful mechanism of disarmament in an unstable region, a probable WMD free zone in West Asia would serve a vital purpose if ever it was adopted.

### *NPT*

The other most relevant legal instrument that specifically deals with nuclear weapons is the NPT. However, it can be said that though the NPT has served the very important purpose of nuclear non-proliferation in the non-nuclear weapons states since its inception in 1968, it has not been effective with regard to nuclear disarmament by the nuclear weapons states, in spite of the fact that the disarmament obligations with the NPT were not mere political aspirations

but rather legally binding, but to which the nuclear weapons states were not compliant. Further, the NPT doesn't contain any rule that would totally prohibit or eliminate the use of nuclear weapons.

### **Armed Non-State Actors and the Use of Nuclear Weapons, i.e. Nuclear Terrorism and International Law and International Humanitarian Law**

On the other hand, coming to the subject of non-state actors and nuclear terrorism, it can be safely stated that there exists an extensive and detailed framework that can prevent and outlaw to a considerable extent, nuclear material from falling into the hands of non-state actors, thus, preventing nuclear terrorism.

In this context, the treaty regime that addresses nuclear terrorism includes UN Security Council Resolution 1540 and other related Security Council resolutions, and a series of treaties that address the threat from nuclear terrorism. The most comprehensive treaty is the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism also known as the Nuclear Terrorism Convention. This entered into force on July 7, 2007, in accordance with its Article 25 (1), and as of September 2018, the convention had 115 signatories and 114 state parties, including the nuclear powers China, France, India, Russia, the United Kingdom, and the United States. Most recently, Benin ratified the convention on November 2, 2017<sup>35</sup>.

Today, as we know it, IHL also directly applies to non-state armed actors by Article 3, common to the four Geneva Conventions of August 12, 1949, and by the two Protocols to the conventions, and other customary and conventional rules governing the conduct of hostilities.

Protocol 1 makes the law concerning international conflicts applicable to conflicts fought for self-determination against alien occupation and against colonialist and racist regimes.

This Protocol came as a product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that ended on June 10, 1977. The Protocol is remarkable in the sense that it has brought under the ambit of jurisdiction of the Law of Armed Conflict, the irregular forces like the non-state actors. Along with it,

Protocol 2, also additional to the Geneva Conventions, is concerned with the protection of victims during a non-international armed conflict.

Another approach of IHL to nuclear terrorism also states that customary IHL binds armed actors who are party to the armed conflict, since the common Article 3 is asserted as customary international law and, hence, applies to any entity involved in the conflict. Furthermore, the doctrine of legislative jurisdiction also states that the rules of IHL legally bind any private individuals, including armed groups, by implementing such rules into national legislation.

Lastly, it can also be considered that when non-state armed groups exercise effective power and operate within the territory of a state, they are bound by the obligations of the state but, at the same time, it can also be argued that contrary to the 1977 Additional Protocol II to the Geneva Conventions, there is no need of state control for applicability since every non-state group doesn't always seek to replace the state.<sup>36</sup>

Hence, in the context of non-state actors' access to nuclear materials, it can be asserted that although IHL cannot provide direct answers to most questions raised by terrorism simply because the applicability of IHL over anything outside armed conflict is still debatable, yet the vast expanse of the prevalent treaties and UNSC Resolutions forms a broad framework that can prohibit non-state actors' access to nuclear material. Nevertheless, along with the existing legal mechanisms, an efficient government policy, political will and international cooperation might help to get rid of this extremely fearful menace.

*International Human Rights Law and International Humanitarian Law*  
International Human Rights Law (IHRL) came into being with the adoption of the Universal Declaration of Human Rights (UDHR) by the UN General Assembly on December 10, 1948.<sup>37</sup> It is generally believed to be the foundation of modern IHRL, which is a body of international law promoting human rights across borders on social, regional and domestic levels. This branch of law is made up of treaties, international agreements between sovereign states, customary laws and non-binding mechanisms such as declarations.

There is an innate relationship between IHL, which is often debated by scholars and practitioners of international law, where the pluralist scholars believe that IHRL is distinct from IHL, and the constitutionalists believe

that IHL is a fragment of IHRL. Hence, according to those believing in the separation between the two sets of laws, IHL is that part of the IHRL that is applicable during an armed conflict.

Hence, though the possible use of nuclear weapons is mostly discussed under IHL and disarmament and arms control law, it can be stated without doubt, that IHRL is also very relevant here since a possible threat or use of a nuclear weapon not only impinges on the right to life, which is the most fundamental of all human rights, but also undermines the right of mankind to live with dignity. Most states across the world have included international human rights standards in their Constitutions and national legislations. All human rights treaty texts require states to ensure that violations do not take place, including positive preventive measures. Human rights violations are scrutinised by the UN General Assembly, Human Rights Council and Security Council as well as by other regional bodies. So, it is necessary to analyse the possible effects of nuclear weapons on the environment and populations in the light of IHRL.

#### *A. Applicability of IHRL to Nuclear Weapons*

It is now an undisputed fact that IHRL and IHL both apply during an armed conflict in terms of treaties, agreements and UN Resolutions that go along with this issue. Though a few states opine that only IHL applies in armed conflict, their approach in many conditions has been inconsistent when they have openly supported resolutions insisting that other countries respect human rights during an ongoing conflict. Hence, the relationship between IHL and IHRL becomes clear from what the ICJ states in its 1996 nuclear Advisory, Opinion wherein it emphasises the fact that since the International Convention on Civil and Political Rights (ICCPR) does not cease even in times of war, the right not to be arbitrarily deprived of one's life also applies during hostilities. But what is considered an arbitrary deprivation of life during an ongoing conflict is determined by the application of the *lex specialis*, which is the law applicable in armed conflict, better known as IHL. Thus, whether a particular loss of life can be considered an arbitrary deprivation of life or not can be decided in reference to IHL, and not directly from the provisions under the HRL Treaty. Hence, the ICJ stated that when there are situations of matters exclusively falling under either of the



above-mentioned branches of law, then the court takes into consideration both the branches of law to arrive at a proper conclusion. Therefore, it can be safely stated that HRL applies at any given time and has the scope to intervene with any possible threat or use of nuclear weapons.

### *B. Violations of Human Rights by a Possible Use of Nuclear Weapons*

As Louise Doswald-Beck<sup>38</sup> has observed, “[t]he enormous destructive effect of a nuclear detonation, as well as the long-term radioactive effects, are likely to result in the finding of a violation of some or all” of a range of human rights.<sup>39</sup> In this regard, she cites *inter alia* the rights to life, to humane treatment, to a healthy environment and to the highest attainable standard of health.<sup>40</sup>

- **The Right to Life**

The right to life which is often described as “a fundamental human right; a right without which all other rights would be devoid of meaning” should be respected under human rights treaties and meaning, as the ICJ had also observed in 1996. This right, as recognised by the ICCPR, is both a treaty and a customary norm, and at its core may even amount to a peremptory norm of international law.

While the main opinion of the ICJ comprised considering IHL as a means to interpret the right to life, Judge Weeramantry, in his dissenting opinion decided to address the issue of the right to life within the ambit of Human Rights Law instead of looking at the details of what constitutes a deprivation of life during an armed conflict. He remarked, that “*when a weapon has the ability to kill billions of lives as per the WHO, the value of human life is reduced to a level of worthlessness that totally belies human dignity as understood in any culture*”<sup>41</sup>. Hence, such an act by a state is in complete contradiction with its recognition of the basic human right and dignity on which world peace dwells, and the respect for which is assumed by the UN.

Since the right to life is a fundamental charter law that is also enshrined in the very Preamble to the UN Charter, the Human Rights Committee has raised a concern on whether or not a possible use of nuclear weapons is at all compatible with the right to life and peaceful living. In this context the General Comment 6 of Article VI of the ICCPR states that it is the supreme duty of states to prevent conflicts, acts of genocide and other acts

of mass violence that cause arbitrary loss of life. Their effort to prevent the danger of war and to strengthen international peace and security would constitute the most important condition and guarantee for safeguarding the right to life.<sup>42</sup>

The right to life also has significant procedural elements associated with it. The European Court of Human Rights (ECtHR) has held that this right includes a duty on the state to investigate alleged violations of the right to life: the obligation to protect the right to life under Article 2, read in conjunction with the state's general duty under Article 1 of the European Convention on Human Rights to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the state, and all states have the fundamental duty to take appropriate steps to protect the right to life and to investigate arbitrary or unlawful killings and punish offenders. The governments of states under this law are required to enact laws that criminalise unlawful killings and that the laws must be supported by the law enforcement machinery for the prevention, investigation and punishment of breaches of the criminal law. The right to life is mentioned in the ICJ 1996 Nuclear Weapons Advisory Opinion, where it is observed that the protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the covenant whereby certain provisions may be derogated from in a time of national emergency. But respect for the right to life is not, however, such a provision. Accordingly, therefore, the court has accepted that, in principle, human rights law also forms part of the *jus in bello*, the law applicable in armed conflict. Thus, all the provisions of the ICCPR will potentially apply during armed conflict, subject to the possibility of derogation from full observance of some in a time of grave national emergency. In a recent development, on this exclusive right, the UN Human Rights Committee (UNHRC) adopted the new General Comment No. 36 (2018) on Article 6 of the ICCPR, on the right to life, on October 30, 2018, that stated that the threat or use of nuclear weapons is "incompatible with respect for the right to life" and "may amount to a crime under international law"<sup>43</sup>. Paragraph 3 of this General

Comment emphasises that the right to life as mentioned in Article 6 of the ICCPR is an entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.<sup>44</sup>

- **The Right to Humane Treatment**

Apart from the right to life, a possible nuclear explosion might also adversely impact the right to freedom from cruel, inhumane or degrading treatment, as set out in the 1966 ICCPR, the 1984 Convention Against Torture, and the three main continental human rights treaties. Though the scope of this right is not similar to that of the prohibition against the use of means or methods of warfare of a nature likely to cause superfluous injury or unnecessary suffering granted by the customary and conventional IHL, it certainly implies a major violation of human rights.

According to Doswald-Beck<sup>45</sup>, the radiation from a nuclear bomb is extremely adverse because apart from causing innumerable deaths, it also damages the human immune system and prolongs human suffering. The detonation might also make people blind just from looking at the initial flash and often render unending suffering to populations who are not killed immediately. Severe burns can result from a nuclear explosion which might go beyond third-degree burns, in which all layers of the skin are destroyed, to fourth-degree burns, in which the injury extends into both muscle and bone. Both can be fatal. Burns place a huge burden on medical resources, often requiring specialist treatment. These are all inevitable and, therefore, entirely predictable consequences from the use of a nuclear weapon. In most instances, such use will amount to a violation of the right to humane treatment.

- **The Right to a Healthy Environment**

As discussed in the earlier section of this chapter, nuclear explosions may have a devastating impact on the natural environment and its species, apart from causing direct harm to the civilian population. Beside the ICJ's mention in its 1996 nuclear Advisory Opinion about the potential of the nuclear weapons to destroy the entire ecosystem, there are two other regional human rights treaties that set out the right to a healthy environment directly. Moreover, the right to the highest attainable standard of health is specified

in many human rights treaties, including the International Covenant on Social, Economic and Cultural Rights (ICESCR). But to what extent such provisions might apply to any use of nuclear weapons (as opposed, for instance, to their testing) is still unclear. However, this treaty specifies the states parties refrain from using or testing nuclear weapons, if such testing results in the release of harmful gases and substances that are dangerous to human health.<sup>46</sup> The disruption of health services will be worse in the case of a nuclear fallout in comparison to attacks by conventional weapons and provision of medical health will be difficult. In an ICRC report, it was pointed out that the scale of destruction and injuries, as well as the need for decontamination, will quickly overwhelm the available emergency response capacities. Again, there is also the very real problem of the exposure of assistance providers to radiation that will prevent or limit the aid they could give. Hence, there is no way in which a possible threat or use of nuclear weapons is at all compatible with the basic human rights in the international or regional arena.

### *C. Human Rights Law Rules on the Use of Force*

Human rights law's regulation of the use of force encompasses two core rules. First, any force used must be only the minimum necessary (the principle of necessity). Second, force used must be proportionate to the threat (the principle of proportionality)<sup>47</sup>

These rules are cumulative, and violation of either means that human rights (in particular the right to life and/or the right to freedom from inhuman treatment) have been violated. Their application must, however, be "realistic", indeed, human rights jurisprudence has shown that a "margin of appreciation" may be allowed to a state in exceptional circumstances, such as when it is confronting a terrorist attack, and must effectively balance protection and security. Nonetheless, the rules are specific and clear both in their normative content and in their practical application. They are not mere aspirations.

### *D. Application of Human Rights Law to the Conduct of Hostilities*

There are potentially two significant obstacles to the application of human rights law to the conduct of hostilities that must be addressed before

the substantive content of the law is assessed: the first is the geographical limitations on the jurisdiction of human rights law; and the second is the material scope of its application.

- **Geographical Limitations on the Jurisdiction of Human Rights Law**

The main issue in applying human rights law to the use of weapons, including nuclear weapons, in armed conflict situations, is the idea that physical geography limits the jurisdictional reach of that law. The US has been a major proponent of this idea, stating with respect to the International Covenant on Civil and Political Rights (ICCPR) in particular, that the duty accepted by each state party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized” (Ritchie, 2012) which means that only persons on its territory may formally enjoy the protection of human rights. The Human Rights Committee has explicitly rejected this position, both generally and with regard to the United States specifically (Fourth Periodic Report of the United States of America, 2014).<sup>48</sup>

- **Scope of Application of Human Rights Law**

The ICJ observed in its 1996 Nuclear Weapons Advisory Opinion, that some have contended that a leading human rights treaty, the 1966 International Covenant on Civil and Political Rights, “was directed to the protection of human rights in peace-time, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (Casey, 2014). The court observed that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right to not be arbitrarily deprived of one’s life applies also in hostilities. Accordingly, therefore, the court has accepted that, in principle, human rights law forms part of the *jus in bello*, the law applicable in armed conflict. Thus, all the provisions of the ICCPR will potentially apply during an armed conflict, subject to the possibility of derogation from full observance of some in a time of grave national emergency.<sup>49</sup>

### ***International Humanitarian Law and Nuclear Weapons***

While drawing an inference from the 1996 Advisory Opinion of the ICJ on the legality of use or threat of nuclear weapons, it can be stated that the rules of proportionality and necessity apply equally to all uses of force, irrespective of the type of weapon, though no particular restrictions are imposed on nuclear weapons as such. This assumption might also apply to the debate on the threat or use of force by nuclear weapons by the same legal framework as the general threats of the use of force in general. At the same time, it is also relevant to state that the rules of IHL governing the conduct of hostilities when an armed conflict takes place, are applicable and highly relevant for the potential use of nuclear weapons in an armed conflict. This is mostly true in particular for the rules on distinction, proportionality and precautions in attacks as well as the prohibition on the means of warfare of a nature causing superfluous injury and unnecessary suffering. Even in the cases of Tactical Nuclear Weapons (TNWs) which are of smaller yield, the impact is known to be actually strategic. In this regard, the late Air Commodore Jasjit Singh had once stated,

Any nuclear weapon of any quality, mode of delivery or yield, used against any type of target, will result in a strategic impact to which the logical response would be the use of nuclear weapons, more often than not on an overwhelming scale.<sup>50</sup>

Therefore, even if TNWs are used against a purely military target in a conflict in future, the effect would be strategic and it would surpass the limitations set by the principles of necessity and proportionality under IHL. However, the response to such a use would be nuclear weapons only. It is also not necessary for the second strike to be a TNW aimed at a military target. Thus, the result would not be in compliance with humanitarian law. Hence, IHL places heavy restrictions on any perceived use, and would in most foreseeable scenarios, in fact, prohibit such use. Finally, in discussing the potential use of nuclear weapons as a belligerent reprisal under IHL, it can be safely assumed that it would be impossible to imagine circumstances where the use of nuclear weapons against civilians could meet the requirements of a lawful reprisal. More elaboration on the adoption of humanitarian law and its detailed application on the usage

or threat of nuclear weapons is given in the next chapter, solely dedicated to humanitarian law and nuclear weapons.

## **Conclusion**

Nuclear weapons as an important arena of security issues make for a relevant discussion of global security policy and international law. Though there is an argument that supports the claim that possession of nuclear weapons assures that they are solely for the purpose of self-defence and that they will never be used, there can be no denial of the fact that the production, maintenance and stockpiling of nuclear weapons are still prevalent in most parts of the world. Hence, to save humanity and the environment from their possible use, legal regulations remain an utmost necessity because a possible attack might result in massive devastation and unending suffering for all the species of the world.

Keeping this in mind, this chapter has tried to analyse the existing regime of international law, in order to understand the extent to which nuclear weapons are restricted or not under the relevant legal regimes. It is found after a thorough analysis that there is a vast set of prevalent laws that might, even if not directly, apply to nuclear weapons. While attempting to gauge the status of nuclear weapons under these laws it was found that heavy restrictions have been imposed on the use of nuclear weapons by the international legal regime, though there is no absolute and specific rule that directly prohibits such use. Apart from that, there are also relevant regulatory rules regarding the production, maintenance and stockpiling of nuclear weapons. These rules have also, to a large extent, prevented nuclear proliferation.

But in spite of such extensive legal mechanisms to prevent a possible nuclear explosion, it must be remembered that the success of these international mechanisms to move a step ahead towards nuclear disarmament depends not only on the ratification and implementation of the treaties and conventions but also on the efficacy of the big states of the world to comply with the provisions of such legal mechanisms. Therefore, it is essential for all states to unite for this common cause. To materialise this commitment, all states need to work towards replacing the inefficient political systems that operate within their territories. A new form of world politics will need to be introduced. Preventing

nuclear use and complete eradication of WMDs must thus be seen as a part of an even larger strategy, one that is geared to the prevention of all forms of international violence. The international community should focus its attention not only on the elimination of nuclear terror but also on the larger aim of eliminating international violence. Only this step can help in eliminating the fear of an atomic catastrophe. It should be understood that amidst the play of global power politics, the capabilities of states to prevent either a nuclear use or an incident of nuclear terrorism will be futile unless and until world leaders put in enormous efforts to restrain their lure of superiority and primacy, and instead focus their entire attention on the emergence of a new sense of global obligation. For this to materialise, a universal nuclear regime is needed, with an inclusive understanding wherein all states, and all men will be seen as one essential body and one community. This idea of oneness should not be based on the fanciful and mythical theories of universal brotherhood but rather on the idea that no matter how much individual states hate each other, they need to be tied together to pursue the quest of survival. This state of peace, not utopia, of course, can be achieved only if policy-makers and world leaders do away with their individual interest in pursuit of the larger goal of common good.

## Notes

1. Jan Klabbers, *International Law* (Cambridge University Press, 2013).
2. Ibid.
3. "A supranational union is a type of multinational political union where negotiated power is delegated to an authority by governments of member states".
4. David J. Bederman, *International Law in Antiquity* (Cambridge University Press, 2001).
5. H.S. Bhatia, *Society, Law and Administration in Ancient India* (Deep & Deep Publishing, 2001).
6. H Bull, B Kingsbury, and Adam Roberts, *Hugo Grotius and International Law* (New York: Oxford Scholarship Online, 1992).
7. "*Jus inter gentes*, is the body of treaties, U.N. conventions, and other international agreements. Originally a Roman law concept, it later became a major part of public international law. The other major part is *jus gentium*, the Law of Nations (municipal law)"
8. T. Britannica, *Editors of Encyclopaedia, "Jus gentium."* *Encyclopedia Britannica*, <https://www.britannica.com/topic/jus-gentium-Roman-law>, April 12, 2018.



9. Emer de Vattel, *The Law of Nations Or Principles of the Law of Nature* (1797).
10. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795).
11. Gro Nystuen, Stuart Casey Maslen, and Annie Golden Bersagel, *Nuclear Weapons Under International Law* (Cambridge: Cambridge University Press, 2014).
12. Elihu Lauterpacht, *International Law Reports*. (United Kingdom: Cambridge University Press, 2002).
13. The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.
14. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (United States: Lawbook Exchange Limited, 2008).
15. *Jus cogens* (from Latin: compelling law; from English: peremptory norm) refers to certain fundamental, overriding principles of international law.
16. United Nations, *United Nations Office on Genocide Prevention and the Responsibility to Protect* (1949).
17. Nystuen, et. al., n. 11.
18. Action or conduct which is a constituent element of a crime, disproportionate to the mental state of the accused.
19. Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010).
20. UN General Assembly Resolution 46/37D, adopted on December 6, 1991, by 122 votes to 16, with 22 abstentions, eighth preambular paragraph.
21. Antonio Cassese was an Italian jurist and a pioneering figure of public international law.
22. Such acts include murder, extermination, enslavement, forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced sterilisation, sexual violence, persecution, enforced disappearance, apartheid, and other inhuman acts. The Rome Statute of the ICC, Rome, July 17, 1998, in force July 1, 2002, 2187 UNTS 90, Art 7 (1) (a-k) (hereafter, Rome Statute).
23. Elihu Lauterpacht, *International Law Reports* (United Kingdom: Cambridge University Press, 2002).
24. ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports* (1996).
25. Nystuen, et. al., n. 11.
26. OHCHR, *Protocol Additional to the Geneva Conventions* of August 12, 1949, 2021.
27. *Ibid.*
28. *Ibid.*
29. n. 24, para 84
30. International Review of the Red Cross, Geneva. International Committee of the Red Cross, 1961. Accessed June 26, 2021.

31. UNGA *Resolution 3472 (XXX)B, UN Doc. A/RES/3472 (XXX) B*, December 11, 1975.
32. *Ibid.*
33. M. Lito, *Treaty on the Prohibition of Nuclear Weapons: International Legal Materials*, 57(2), (2018). pp. 347-357.
34. Nystuen et. al., n. 11.
35. Treaties.un.org. 2021. [online] Available at: <<https://treaties.un.org/doc/db/Terrorism/english-18-15.pdf>> Accessed June 26, 2021.
36. UN, *Protocols to 1949 Geneva Convention* (1977).
37. UN, *Universal Declaration Of Human Rights* (1948).
38. Louise Doswald-Beck, LL.M. (London), is the deputy head of the ICRC Legal Division.
39. “The Use of Nuclear Weapons and Human Rights,” in Stuart-Casey-Maslen, *The Human Cost of Nuclear Weapon* (ICRC, 2016), pp. 663-680.
40. *Ibid.*
41. n. 24.
42. OHCHR, *International Covenant on Civil and Political Rights (Excerpts)*, (1969).
43. Alyn Ware, “The UN Human Rights Committee Concludes that the Threat or Use of Nuclear Weapons Violates the Right to Life”, November 23, 2018.
44. *Ibid.*
45. Louise Doswald-Beck, “Nuclear Detonation: Weapons, Improvised Nuclear Devices: Categories of Medical Effects”, US Department of Health and Human Services, Radiation Emergency Medical Management, available at: [www.remm.nlm.gov/nuclearexplosion](http://www.remm.nlm.gov/nuclearexplosion).
46. OHCHR, *International Covenant on Economic, Social and Cultural Rights*, (1966).
47. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, UN Doc. A/HRC/26/36, April 1, 2014.
48. Fourth Periodic Report of the United States of America, 2014.
49. ICJ, *Advisory Opinion on Legal Consequences of the Construction of A Wall In The Occupied Palestinian Territory*, (2004).
50. Brig Gurmeet Kanwal, “Tactical Nuclear Weapons: Lessons For India and Pakistan”, June, 4, 2013.

# 3. NUCLEAR WEAPONS AND INTERNATIONAL HUMANITARIAN LAW

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## **Introduction**

The subsequent studies since the very first use in Hiroshima and Nagasaki of nuclear weapons in 1945 have revealed the enormous environmental impact such weapons have due to their explosive qualities. A one megaton device is around multiple times the ruinous limit of the comparatively smaller bomb that had destroyed Hiroshima. To give an idea of its effect on humanity, Charles Pelligrino in his book, *The Last Train from Hiroshima*<sup>1</sup>, has referred to the survivors as “non-walking alligators,” as they had become eyeless and faceless or whose faces had transformed into blackened alligator hides displaying red holes indicating mouths. He continued, “The alligator people did not scream. Their mouths could not form sounds. The noise they made was worse than screaming. They uttered continuous murmurs, like locusts on a midsummer night. One man, staggering on charred stumps of legs, was carrying a dead baby upside down.”<sup>2</sup>

Based on this knowledge, during the last few years, heightened attention has been given to the humanitarian consequences of nuclear weapons and the accompanying implications of the principles of International Humanitarian Law (IHL) that governs the conduct of hostilities applicable to the use or threat of nuclear weapons. Whether the use of such horrendous weapons can be consistent with the decree of human conscience and with IHL or not has been kept as the primary focal point of this chapter. After a thorough analysis of the implications of IHL on the use of nuclear weapons, it can be asserted that even in 1945, the use of nuclear weapons in the two most densely populated urban areas in Japan amounted to an indiscriminate

attack under the provisions of the IHL. Keeping this in mind, this chapter attempts to define, and elaborate on, the concept of IHL, its relevance in the context of nuclear weapons, the historical evolution of this body of law, and the principles governing the threat or use of nuclear weapons in the current international context.<sup>3</sup>

Apparently, law is the means of “controlling, directing and constraining potential actions.”<sup>4</sup> To have universal relevance, law as a body must apply to crucial issues of international relevance. In order to remain civilised, a war cannot be fought without abiding by the laws of war. The issue of nuclear weapons is important as the survival of all mankind depends on how the threats posed by nuclear weapons are addressed by the international community at large, but the readiness of the great powers to deter each other with the threat of nuclear possession largely places us all “under a cloud that could burst and, within a few hours, end everything we value”<sup>5</sup>.

Science, with its excessive military advancement, has placed human existence in grave danger. If law is to have any significance, it should definitively address this danger. In this light, the International Court of Justice (ICJ), in its landmark “1996 Nuclear Weapons Advisory Opinion, addressed the legality of the threat or use of nuclear weapons”, and confirmed the application of IHL to nuclear weapons. When the parties to the NPT met in May 2010, they collectively reaffirmed “the need for all states, at all times, to comply with applicable international law, including international humanitarian law.”<sup>6</sup> This potential political commitment was obtained through laborious negotiations. Thus, this chapter focusses on stating, and elaborating on the fundamental principles and requirements of IHL that are relevant to the threat or use of nuclear weapons. To ascertain the relevance of IHL in the context of nuclear weapons, a thorough study of the law of war or IHL becomes indispensable. This chapter would be broadly divided into four sections, of which the first section will define IHL and describe in detail its evolution and provisions and the relevance of studying IHL in relation to nuclear weapons. The next section focusses on the provisions of IHL and their relation to *jus in bello* and *jus ad bellum*. The third part of the chapter deals with the provisions of IHL that are applicable to nuclear weapons and the current state practices, after which the chapter comes to a conclusion.

## **International Humanitarian Law**

### ***Definition and Evolution***

The law that later came to be known as “International Humanitarian Law (IHL), or the Law of Armed Conflict (LoAC) or simply the Law of War”, as contained in the four Geneva Conventions of August 12, 1949, and the three Additional Protocols, comprises a monumental work of over 600 Articles implying:

International Humanitarian Law is a set of rules which seek, for humanitarian reasons, to protect persons who are not, or are no longer, participating in hostilities and to limit the effects of armed conflict.<sup>7</sup>

Due to the evolution of this particular branch of law in the past few years, it can now meet the contemporary developments and challenges in warfare and includes within its ambit, the limitations on various weapons used during any given warfare. Apparently, the implementation of IHL to the use of nuclear weapons is not something new.

However, the application of IHL became officially relevant to the threat or use of nuclear weapons only after the International Court of Justice (ICJ) in its “1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons” affirmed the application of IHL to nuclear weapons. Given that no definite conclusion was rendered by the ICJ about the use of nuclear weapons by states, it can be asserted that apart from being disgraceful and a crime against humanity, the use of such destructive devices cannot comply with the fundamental provisions of International Humanitarian Law. Thus, the states in possession of nuclear weapons should gradually proceed towards total disarmament. The ICJ in its nuclear weapons Advisory Opinion has also elaborately referred to the history and evolution of IHL into its current form. This body of law refers to the rules concerning the conduct of warfare and has a long history. Seemingly, the Law of War has always existed to restrict the destruction caused by war. The ancients, the knights of the medieval times, the jurists of the early modern period all vouched for the record of this concern. Though not universal, every culture and every religion had its own set of rules

that regulated the conduct of warfare. But despite this universal concern, the attempts to limit war-time sufferings faced serious setbacks. Hence, there was a need for a universal and uniform code of law. It wasn't until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born. While the Lieber Code that was written to govern the conduct of the "Union forces during the American Civil War" is considered as the first instance of codification of the laws of war by the international lawyers, the battle of Solferino is considered the most crucial point in the history of modern international humanitarian law, as following this bloody battle the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the foundation for IHL, was laid down in 1864. This convention came to be known as the first Geneva Convention<sup>8</sup>.

For the first time, in his *Un Souvenir de Solferino [A Memory of Solferino]* published in 1862, Henry Dunant mentioned the need for all countries to form relief societies to care for the injured in war-time. This set out the establishment for the Geneva Conventions and prompted the foundation of the International Red Cross<sup>9</sup>. On August 22, 1864, 12 countries signed the principal Geneva Convention, consenting to ensure impartiality to medical personnel, to speed up provisions for their utilisation, and to embrace an exceptionally distinguishing emblem.

The Geneva Conventions and the Hague Convention were established by nations to govern the conduct of war. Various international treaties which emerged from the Hague Peace Conferences in 1899 and 1907, make up the Hague Convention. During these conferences, impediments on weapons such as air bombs and on chemical warfare, along with the development of the military were proposed. The two conventions established a framework for multilateral meetings to frame international laws, and, in this manner, influenced the formation of the League of Nations in 1919.

Despite not being drafted in the Hague, the Geneva Protocol is still viewed as an expansion to the Hague Convention. On entering into force from February 8, 1928, the Geneva Protocol<sup>10</sup> permanently prohibited the use of all forms of chemical and biological warfare. This Protocol was drafted following the use of mustard gas and similar agents in World War I, and the fear that future warfare of such a kind could prompt horrendous consequences. Since then, the Protocol

has been amended by the “Biological Weapons Convention in 1972” and the “Chemical Weapons Convention in 1993”. The Hague Convention and Geneva Conventions are contrary to each other. Whereas, the Geneva Conventions are all about the treatment of personnel and civilians, the former mainly deals with the permitted conduct for war. The Geneva Conventions which were adopted before 1949 mainly dealt with the treatment of soldiers but following the events of World War II, it was perceived that a convention for the protection of civilians in war-time was also critical. Thus, the Geneva Convention of 1949 was adopted by all governments keeping intact the previous conventions and adding the guarantee of protecting those civilians who were under the control of the enemy. Finally, in 1977, after a lot of groundwork and persuasion from the ICRC, the governments of states adopted additional Protocols I and II to the Geneva Conventions that integrated the elements from both the Hague and Geneva laws.

Among other provisions, the Protocols comprise provisions to protect civilians from the effects of hostilities, such as “outlawing attacks that could affect civilians indiscriminately”<sup>11</sup>. Protocol I deals with international armed conflicts and Protocol II deals with conflicts of a non-international nature. The Geneva Conventions of 1949 have been adopted by every country in the world; the Protocols have very broad acceptance and their provisions are considered as customary law. In 2010, at the Review Conference of the Nuclear Non-Proliferation Treaty, states parties reaffirmed in the Final Document “the need for all states at all times to comply with applicable international law including international humanitarian law”<sup>12</sup>.

## **Principles of International Humanitarian Law**

### ***The Rule of Distinction and Implementation on Nuclear Weapons***

The rule of distinction is a fundamental rule of IHL that “prohibits the use of a weapon that cannot discriminate in its effects between military targets and noncombatant persons and objects”<sup>13</sup>. It obliges parties in conflict to direct their attacks only against lawful military objectives, whether persons or objects of military value, and renders the use of such weapons whose effects are incapable of being controlled, as unlawful. This rule is formulated as the fundamental one

in providing “general protection” to the civilian population against the effects of hostilities in international armed conflict, in the 1977 Additional Protocol I, that states:

In order to ensure respect for, and protection of, the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The rule of distinction, also referred to as the principle of discrimination, is declaratory of customary international law and is applicable on both international and non-international armed conflict (IAC and NIAC). Apparently, the rule of distinction governs all military operations, whether defensive or offensive in nature, and, thus, any weapon that is incapable of distinguishing between civilian and military targets is unlawful to use. In this light, the ICJ, in its 1996 Advisory Opinion on the threat or use of nuclear weapons, has described this as a “cardinal principle” affirming that as a fundamental rule, this principle must be observed by all states whether or not they have ratified the convention that contains them, because this principle falls under the “*intransgressible principles*”<sup>14</sup> of international customary law.

#### *A. Indiscriminate Weapons*

In its study of Customary International Humanitarian Law, published in 2005, the ICRC concluded that the use of weapons which are indiscriminate in nature is prohibited. It also affirmed that state practice has established the rule as a norm of customary international law applicable in both NIAC and IAC. In response to this, the United States, in its written statement, pleaded to the ICJ that nuclear weapons can be directed at a military objective and can be used in a discriminate manner and are, therefore, not inherently indiscriminate. On the other hand, the United Kingdom formulated this rule as one that prohibits use of such weapons which cannot be directed at a specific military target or the effects of which cannot be limited as per the provisions of Additional Protocol I and, thus, are of a nature to strike military objectives and civilians or civilian



objects without distinction. The response of the other nuclear or non-nuclear nations is not known.

### *B. Inherently Indiscriminate Weapon*

Now the question that arises is, what is considered to be an inherently indiscriminate weapon? The answer to this might be any weapon that doesn't have a specific target or which itself cannot be targeted. It is any weapon with an unreliable and rudimentary guidance system and no specific target to land. For instance, a long-range rocket or missile can be categorised as inherently indiscriminate and, therefore, its use is unlawful. Other examples might include V1 or V2 rockets or Scud missiles. Nevertheless, there are exceptions to this case. Weapons which are not indiscriminate in nature might also be used indiscriminately if they are aimed at targets from a distance that represents the high end of their effective operational range. Apart from that, there are also certain other weapons which are more prone to be used indiscriminately in comparison to other weapons, which is why there are treaties that have been adopted to outlaw these weapons such as anti-personnel mines and cluster munitions, such as, in the judgement of the Martić case before the International Criminal Tribunal for the former Yugoslavia (ICTY) concerning the firing of cluster munitions against Zagreb in May 1995, the ICTY's Trial Chamber had noted:

... that the weapon was fired from the extreme of its range. Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. Thus, the Trial Chamber concluded that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. Hence, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties.

### *C. Effects of Indiscriminate Weapons*

Talking about the effects of such weapons, the US Air Force's 1976 Manual on International Law "defines indiscriminate weapons as those incapable of

being controlled, through design and function such that with any degree of certainty, they cannot be directed at military objectives”. Such weapons with their “uncontrolled effects”, that by their very nature or design, cannot possibly maintain the distinction in any set of circumstances, fall within the test of inherently indiscriminate weapons. According to the 1976 US Air Force Manual on International Law,<sup>15</sup> biological weapons might come under the universally agreed illustration of an indiscriminate weapon as the uncontrollable effects from such weapons “may include injury to the civilian population of other states and also to an enemy’s civilian population”. Schmitt, in a 1999 article, has referred to biological weapons which, when unchecked by an antidote, can spread contagious diseases far and wide, with no capability to sanitise civilians.

### ***The Principle of Proportion and Implementation on Nuclear Weapons***

According to Article 51(5)(b) of Additional Protocol I, and repeated in Article 57[1], of IHL, the rule of proportionality constrains and reduces the potential harm that may be caused to civilians during an ongoing conflict, and notes that the harm caused during a conflict must be directly proportional to the military advantage of the conflict. This Article completely prohibits attacks where the damage caused to either the military or to civilians is in excess in comparison to the military advantage sought. Thus, the rule of proportionality obliges a state using a weapon to be able to control the effects of the weapon so that it can ensure that the collateral effects of the attack will be proportional to the anticipated military advantage.

The principle cannot be used to override specific protections, or create exceptions to rules where the text itself does not provide for one. The principle of proportionality is to be found within the rules of IHL. For example, direct attacks against civilians are prohibited and, hence, a proportionality assessment is not a relevant legal assessment, as any direct attack against even a single civilian who is not taking part in hostilities is a clear violation of IHL. Proportionality is only applied when a strike is made against a lawful military target. This principle of proportionality in attack is also mentioned in Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons. In addition, under the Statute of the International Criminal Court, “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury

to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated constitutes a war crime in international armed conflicts.”<sup>16</sup>

In their submissions to the International Court of Justice in the nuclear weapons case, states, including the ones not, or not at the time, party to Additional Protocol I, conjured the principle of proportionality in their evaluations of whether an attack with nuclear weapons would abuse international humanitarian law. In its Advisory Opinion, the court acknowledged the applicability of the principle of proportionality, stating that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.

Going by the language of the Protocol, the ICRC had noted:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.<sup>17</sup>

Coming to the question of what is proportionate and what is excessive, the ICRC observed “that the disproportion caused between the losses and damages caused and military advantages anticipated raises a delicate problem.” In such situations, the interest of the civilian population should prevail. According to Yoram Dinstein, “the damage is excessive when the disproportion is not in doubt.” In this light, the ICRC had claimed that even if there is very high civilian casualty, the collateral damage caused may be justified only if the military advantage at stake is of greater importance. However, such a claim is contrary to the fundamental principles laid down in the Protocol as the Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Yoram Dinstein,<sup>18</sup> however, claims that extensive civilian casualties are not a necessity in the light of the concrete and direct military advantage expected from an attack.

In the case of nuclear weapons, the ICJ in its 1996 Advisory Opinion, did not discuss the rule of proportionality in attacks, even though the nuclear weapons states had raised the issue. The UK, in its written statement to the ICJ, had

asserted that the application of the rule of proportionality to nuclear weapons is not such as to render their use as inherently unlawful. Similarly, the US referring to the argument “that the use of nuclear weapons would be unlawful because it would cause collateral injury or damage to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attacks,”<sup>19</sup> has affirmed that a determination as to whether an attack with nuclear weapons would be disproportionate or not would depend absolutely on the circumstances “including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device and the magnitude of the risk to civilians”. The US concluded that nuclear weapons are not inherently disproportionate. However, those states which have opposed the illegality of the use of nuclear weapons were unable to give precise examples of where such use would meet all the provisions under IHL.

### ***Rule of Necessity and Implementation on Nuclear Weapons***

Just like the principle of proportionality, the rule of necessity or military necessity is a very essential component under IHL. The “principle of military necessity provides such measures for a state to use, only if such a level of force is imperatively necessary to accomplish a legitimate military purpose given that such an intensity of force is not prohibited under IHL”.<sup>20</sup> In the case of an armed conflict, the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict. Any additional level of force outside the prescribed limitation is considered unlawful. Since any military necessity contradicts any humanitarian initiatives, humanitarian law is there to strike a balance between military necessity and humanitarian exigencies.

The use of nuclear weapons by one state against another, or against the military targets of another state would require enough reasons for the nuclear recourse to satisfy the provisions of the law of armed conflict. The provisions laid down under the law of armed conflict (IHL) that regulate the conduct of hostilities and the inter-state use of force, would comply with the use of force only if it is necessary for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources. So even if a state justifies its use of a nuclear weapon against another, then, under the provisions of IHL, it may do so only if such use complies with the other principles of this

body of law and is used in self-defence for the sake of survival. To do so, the law would judge the necessity for use of force and whether the force that was actually used was proportionate to the aim of repelling the attack.

Necessity *ad bellum* or simply the rule of necessity under IHL concerns the circumstances in which the state exercising its right of self-defence may lawfully use force only in the absence of a second option. In its verdict in the Oil Platforms case<sup>21</sup>, the International Court of Justice had considered the necessity as *ad bellum* or the rule of necessity to require a firm and committed belief by the state exercising the right of self-defence that a necessity of the particular use of nuclear force exists. The absence of such a belief negated the law of necessity and renders the threat or use of that specific force as unlawful. The rule of necessity was considered to be both “cardinal” and “intransgressible”<sup>22</sup> by the International Court of Justice, in its 1996 Advisory Opinion on the threat or use of nuclear weapons. Under the rule of necessity, the sub-category of the concept of prohibition from causing superfluous injury or unnecessary suffering is recognised. This is also a norm of customary international law and its precise content is as follows:

The concept of superfluous injury or unnecessary suffering, its objective effect on the victim (severity of the injury, intensity of suffering), and its relation to military necessity are not interpreted in a consistent and generally accepted manner. This concept continues to be the basis on which judgement is formed, but debates have shown its relative and imprecise character.

Thus, according to the court, any suffering that constituted harm greater than that which is unavoidable to achieve legitimate military objectives, can be referred to as “unnecessary suffering” and is rendered unlawful. However, the court did not mention clearly if this particular rule under IHL also includes nuclear weapons under its category of prohibited weapons or not<sup>23</sup>.

The modern notion of the unnecessary suffering rule can be traced back to the 19th century. It appeared for the first time in the Lieber Code after its author Francis Lieber included three provisions addressing the rule of military necessity. Amongst these three provisions, two illustrate the essence of the unnecessary suffering rule. According to Article 14 of the Lieber Code:

“Military necessity as understood by modern civilized nations consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usage of war.” Again, Article 15 of the Lieber Code acknowledges that “such military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contest of war.” However, Article 16 of this code clarifies that the code does not admit of cruelty, that is suffering just for the sake of suffering. If the Lieber Code is said to have laid the foundations for the construction of the modern law of war, then the 1868 St. Petersburg Declaration, that is known to have been negotiated by military representatives from 17 states, ushered it into the corpus of international weapons law. This declaration is a small instrument that prohibits a particular type of weaponry (materially limited to the use of explosive projectiles under 400 grams that are either explosive or charged with fulminating or inflammable substances), and articulates the argument in the following terms:

That the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; 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<sup>24</sup>.

While referring to the phrase “uselessly aggravate the sufferings of disabled men”,<sup>25</sup> the declaration articulates that the greatest objective during a war is to render “*hors de combat*” the highest number of enemy soldiers to “weaken” the forces of the enemy. But to fulfill that purpose, if the sufferings of the enemy men are aggravated more than necessary or if the enemy men are forced to death unnecessarily, then that will be incompatible with the laws of humanity. The sentiments expressed within the St. Petersburg Declaration paved the way for the 1899 Hague Declaration, prohibiting the use of asphyxiating gases and the 1899 Hague Declaration, prohibiting the use of expanding bullets. Apart from these three declarations, prohibiting particular weapons, Article 23 of the Hague Regulations generally prohibits employment of arms, projectiles or material of

a nature to cause superfluous injury. Adopted in the subsequent Hague Peace Conference in 1907, the 1907 Hague Regulations reiterated Article 23 of their 1899 predecessor, in a more erroneous formulation. The 1868 St. Petersburg Declaration used the term “suffering” which appeared in the 1907 Hague Regulations despite the difficulty in defining this term.

Again, during the decade preceding the adoption in 1977 of the first two optional Protocols to the Geneva Conventions, significant efforts were rendered to formulate general and specific rules governing the use of weapons during armed conflict. During the second session of the conference on the Government Experts on the Reaffirmation and Development of International Law Applicable in Armed Conflict in 1972, the ICRC introduced its first draft of Article 30 in which it elaborated on the provisions on the “Means of Combat”<sup>26</sup>. These provisions focussed around the combatants’ choice on the means of combat and the prohibitions on the use of weapons that cause unnecessary suffering to mankind.

Apart from that, the significant number of soldiers being permanently or seriously injured as a result of poisoned gas after World War I initiated the adoption of the 1925 Gas Protocol, which was replaced decades later with the 1972 “Biological Weapons Convention” and reinforced by the “Chemical Weapons Convention in 1992”. All these legal instruments prohibit unnecessary suffering to the core. The unnecessary suffering rule also has a mention under the International Criminal Law. Article 3 of the International Criminal Tribunal for the former Yugoslavia (ICTY) included it in its list of violations of the laws and customs calculated to cause unnecessary suffering as a crime within its jurisdiction.

Apparently, the United States, in its 2009 Air Force Manual characterises the limitations of military necessity both as customary international law and as ratified in the Hague Convention, which forbids a belligerent “to destroy or seize the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.” Referencing the Hague Convention’s Preamble, the manual states<sup>27</sup>:

Military necessity does not authorize all acts in war that are not expressly prohibited. Codification of the law of war into specific prohibitions to anticipate

every situation is neither possible nor desirable. As a result, commanders and others responsible for making decisions must make those decisions in a manner consistent with the spirit and intent of the law of war.

The manual also emphasises that the rule of necessity involves a balancing test:

In determining whether a means or method of warfare causes unnecessary suffering, a balancing test is applied between lawful force dictated by military necessity to achieve a military objective and the injury or damage that may be considered superfluous to achievement of the stated or intended objective. Unnecessary suffering is used in an objective rather than subjective sense. That is, the measurement is not that of the victim affected by the means, but rather in the sense of the design of a particular weapon or in the employment of weapons.

Additionally, in the US Army's Operational Law Handbook<sup>28</sup>, "the principle of military necessity is explicitly codified in Article 23, Paragraph (g) of the Annex to Hague IV, which forbids a belligerent to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Again, according to the Naval Commander's Handbook, the purpose of the law of armed conflict is to direct the violence of hostilities towards the war efforts of the enemies and not to unnecessarily cause mental and physical destruction of mankind. Thus, it can be asserted that the rule of necessity or the unnecessary suffering rule can be applied to the use of nuclear weapons. Since a nuclear detonation might result in lethal doses of radiation with a likelihood of instant mass casualties, and an increased risk of cancer mortality throughout the lives of the survivors, it can be correctly contended that the rule of necessity or unnecessary suffering must be applied to the use of nuclear weapons.

### ***Precaution in Attacks/Corollary Requirement of Controllability in Attacks***

Apparently, there might sometimes arise such extreme circumstances where the use of nuclear weapons might possibly satisfy the provisions laid down under



humanitarian law. However, in such cases, the state parties involved in combat are supposed to take precautions in accordance with the customary law. This obligation to take precautions in attack was first codified in Article 57 of the 1977 Additional Protocol 1. Para I of this provision stated<sup>29</sup>:

In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

Under the provisions of IHL, the parties involved in armed conflicts are expected to constantly be aware of the fact that civilian populations and civilian objects are to be spared from being harmed in military operations. These specific safety measures required by IHL in the context of attacks include doing everything possible to verify that targets are solely military objectives and taking all “attainable precautions in the choice of means and methods of warfare with a view to avoiding, or, in any event, minimizing, incidental civilian casualties and damage to civilian objects”<sup>30</sup>. Even if a state decides to attack, it would need to review “everything feasible” to verify that the objects to be attacked are neither civilians nor civilian objects, and are not subject to any kind of special protection under the IHL.

In order to prevent civilian casualties and damage, states are required to take all necessary precautions which are related to their choice of means of warfare. This would require the party planning an attack to assess factors such as the significance of the target, the available weapon systems and the foreseeable impact of those weapons on civilians. Although IHL does not have the jurisdiction to dictate the choice of weapons that are to be used in attacking particular targets, it is an undisputed fact that if there is a choice of weaponry that could accomplish the same military task, the rule would necessitate the use of such weapons that would lead to lower civilian casualties and damage when it is practically possible.

In the light of what is known about the severe humanitarian impacts from a potential nuclear attack and the requirement to take constant care to spare civilians and civilian objects, the situations where nuclear weapons could be the weapons of choice would seem to be very limited. The application of the rule on precautions in attack would prohibit the use of nuclear weapons in civilian

territories and would require a less ruinous and harmful means of warfare. According to some commentators, in the light of recent arms developments in conventional weapons innovations, “for all intents and purposes any military target for which [low-yield, ‘strategic’ nuclear] weapons may be used could likewise be tended to by regular weapons”.

## **Conclusion**

This chapter outlines the fundamental provisions under IHL that might apply to the threat or use of nuclear weapons. These provisions must be taken into account if a state that is a party to an armed conflict ever thinks of employing nuclear weapons against another. It points out the humanitarian consequences that arise from the severe and extensive impact of nuclear energy on citizens, civilian objects and combatants. As pointed out by the ICJ in its Nuclear Weapons Advisory Opinion, the combination and power of the blast, thermal heat and radiation forces that result from the explosion make nuclear weapons unique. Very few existing means of warfare have effects that impact so significantly across such a wide range of IHL rules. Due to these factors the International Red Cross and Red Crescent Movement have declared that they “find it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality”<sup>31</sup>. After a thorough analysis of all the fundamental principles of IHL and their impact on the use of nuclear weapons, it can be asserted that in its Advisory Opinion, the ICJ confirmed the applicability of IHL on the threat or use of nuclear weapons, and that the use of such weapons constitutes a violation of any given principle under humanitarian law. Though IHL in general doesn’t regulate threats, its provisions clearly demonstrate contradiction with the use of injurious weapons such as nuclear. Thus, the rules of IHL that govern the conduct of hostilities during an armed conflict are absolutely applicable and extremely significant for the potential use of nuclear weapons in an armed conflict. This assertion holds true for the rules of distinction, proportion, necessity, precautions or controllability in attacks as well as prohibition of such kinds of weapons or means of attack that cause superfluous injury and unnecessary suffering to mankind. The critical question is whether it is at all possible to imagine a situation where the use of

nuclear weapons would not violate international law. The answer is that such a situation can never arise. IHL poses extreme restrictions on any perceived use and would, in the most foreseeable future, probably prohibit it. Not only IHL, other branches of international law also prohibit and condemn the use of nuclear weapons. International criminal law needs a mention in this case. Under international criminal law, the use of nuclear weapons, under any circumstance, would definitely constitute genocide, a crime against humanity and war crime.

Apart from that, the extremely hazardous impact of the use of nuclear weapons on the environment cannot be ruled out. A number of international laws and mechanisms relevant to the environment apply to the use of nuclear weapons. The rules under IHL that protect the environment constitute serious impediments on any use of nuclear weapons and would, in any situation and context, outlaw such a use. Additionally, apart from the use of nuclear weapons and their impact on the environment, we also need to consider the environmental impact of nuclear testing. However, it can be asserted that although the international environmental law framework applicable to nuclear weapons is more extensive than commonly assumed, it remains inadequate in relation to the threats posed.

Along with the above-mentioned regimes of international law, another category of law that can be applied to the threat and use of nuclear weapons is that of the International Human Rights Law. It can be argued that relevant human rights laws such as the right to life, right to health, right to a peaceful environment, etc. are all violated by the use of nuclear weapons. Thus, even if a right to remedy is allowed to a survivor of a nuclear explosion, the fact is that the fundamental human rights of both the victims and the survivors will have been denied.

Keeping in mind that not a single legal regime renders the use of nuclear weapons as lawful, an extensive debate over the legality of nuclear weapons has cropped up over the past few decades. One party to the debate is of the opinion that nuclear weapons' use isn't illegitimate while the other side feels that even the possession of such murderous weapons is in total violation of international law.

Nevertheless, it is a known fact that nuclear weapons have always played a very significant role in global security debates where a devastating nuclear war

has been considered a realistic possibility. With the rise of security threats such as cross-border terrorism and organised crime, along with hostile state relations, the risk of a probable nuclear attack in the future cannot be ruled out. Starting with North Korea's nuclear capable ballistic missile tests to the increasing arms race amongst rivals in South Asia, there is a continuous reminder about the threat posed by nuclear weapons to international security. Apart from this, even the Ban Treaty of 2017, was not successful in channelising the efforts of the major nuclear weapons states towards the goal of total disarmament. Not only the Ban Treaty but even the NPT, that had assumed that "as conditions in the international security environment permitted, progress would be made toward that end and that realization of nonproliferation objectives and success in efforts to stop the arms race would help to create the conditions for disarmament would proceed", did not achieve the success it aimed for in its efforts towards disarmament, since the major nuclear weapons states did not do enough to make it a success. Thus, it is seen that though all the nuclear weapons states have ratified the Geneva Conventions of 1949, that established modern international law, it is observed that these states have not been successful in abiding by the provisions laid down under this regime of international law. In the case of an argument that says that IHL does not outrightly prohibit the use of nuclear weapons but rather regulates their use, or rather the ICJ did not definitively conclude that the use of nuclear weapons is unlawful in an extreme circumstance of self-defence, it can still be claimed that the fact that nuclear weapons deny civilisations their very right to life itself should make their possession undesirable.

However, the recognition of the humanitarian consequences reached its peak with the 1996 ICJ Advisory Opinion on the use of nuclear weapons. The ICJ, however, did not give a clear verdict on the legality of the use of such weapons, thus, keeping the frontlines where they were. Now the situation is such that both sides of the bipolar debate are using the ICJ to justify their positions. This stagnation over the legitimacy of nuclear use has greatly contributed to pacifying the debate but done nothing towards promoting public efforts to diminish the risk of nuclear use. However, a clear picture of how the ICJ Advisory Opinion has contributed towards awakening human conscience regarding nuclear possession by great powers remains to be seen.

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# 4. THE BAN TREATY: TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

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## **Introduction**

Negotiations to draft a “legally binding instrument to prohibit nuclear weapons”, which would lead to their absolute elimination, were initiated at the United Nations on March 27, 2017. Finally, after a series of negotiations, the legal instrument to restrict and completely eliminate nuclear weapons from use, finally took shape on July 7, 2017, in the form of the “Treaty on the Prohibition of Nuclear Weapons (TPNW)”, colloquially known as the “Nuclear Weapons Ban Treaty”. Initially, during the voting on the treaty text, 122 countries at the UN voted in approval of the text of the proposed international treaty, while one opted to vote against it, i.e., Netherland, and one abstained from voting (Singapore). According to its provisions, the treaty was officially opened for signature in September of the same year. In order for the treaty to become a legally binding instrument, 50 countries needed to ratify it within a span of 90 days and only after the 50th country had submitted its ratification would the treaty enter into force.<sup>1</sup> Finally, on October 24, 2020, the 50th ratification was received from Honduras. The treaty entered into force on January 22, 2021. It seeks to render nuclear weapons, the most dangerous weapons of mass destruction, as illegal under international law<sup>2</sup>.

Without doubt, it was a landmark victory for the UN. It took almost 75 years after the nuclear attacks on Hiroshima and Nagasaki in 1945, to achieve this unconditional prohibition on any use or threat of use of nuclear weapons in the shape of a treaty concluded under the patronage of the United Nations. The primary commitment of states that move towards becoming parties to this multilateral agreement is clear. It disallows the “possession, deployment testing, exchange, stockpiling, and manufacturing of nuclear weapons”.<sup>3</sup>

Keeping in mind, the significance of this multilateral treaty in completely eliminating nuclear weapons as a part of a humanitarian initiative, this chapter analyses the emergence of this treaty, the prospects and possibilities for its implementation, the challenges associated with the entry into force of the new agreement, the role of both civil society and governments, and the treaty's wider implications in addressing regional and global nuclear threats.

## **Genesis**

### ***Birth of the Humanitarian Initiative***

"The Humanitarian Initiative was a group of states that evolved within the framework of the Nuclear Non-Proliferation Treaty (NPT) and nuclear weapons diplomacy more widely. 159 states subscribed to the last iteration of the initiative's Joint Statement in 2015. Since 2013, it led to a series of conferences exploring the Humanitarian Impact of Nuclear Weapons, culminating in the Humanitarian Pledge, issued by the Austrian government, to fill the legal gap for the prohibition and elimination of nuclear weapons"<sup>4</sup>. As of June 1, 2015, this pledge had been approved by 108 governments. The Humanitarian Initiative was seen as a direct answer to the lack of progress in nuclear disarmament.<sup>5</sup>

The NPT which is said to be the cornerstone of the current nuclear world order, was negotiated in 1968. Based on its three pillars of "non-proliferation, peaceful use of nuclear energy and, most importantly, disarmament", the NPT had somehow provided the legal and political basis to eventually limit proliferation to the "five Nuclear Weapons States" (NWS). To its credit, it has also largely managed to check proliferation and only four countries outside the NPT have additionally acquired nuclear weapons. However, in terms of disarmament, not much has been achieved so far. Though it has been successful in guaranteeing peaceful use of nuclear energy, in terms of disarmament, mixed results have been achieved. While the NWS have described their nuclear weapons reductions as disarmament, and there is no doubt that though comparatively fewer nuclear weapons exist now than during the Cold War era, the logic of nuclear deterrence continues to play a significant role in security strategies. Hence, without doubt, it can be asserted that nuclear weapons are still being developed and the arsenals of states are being modernised. The risk of nuclear terrorism has also increased.



### **Non-Proliferation Treaty Review Conference: May 2010**

The fears stemming from the risks of nuclear weapons along with the unsatisfactory results of disarmament led to a sense of discontentment. After the disaster of 2005, the formally successful 2010 NPT Review Conference that oversaw 188 state parties, “adopted a consensus document, including language on the catastrophic humanitarian consequences any use of nuclear weapons would have and reaffirmed the need for all states, at all times, to comply with applicable international law, including international humanitarian law.”<sup>6</sup> This was deciphered as an order to progress with the humanitarian perspective on nuclear weapons.

### **First Preparatory Conference and Humanitarian Statement: May 2012**

At the first Preparatory Conference in Vienna in 2012 in preparation for the 2015 “NPT Review Conference” (NPT Rev Con), Switzerland, on behalf of 16 nations, delivered the “Joint Statement on the humanitarian dimension of nuclear disarmament” at the first session. It was originally started as a statement of 16 countries at the 2012 Prep-Com, but later, by April 28, 2015, 159 states had already formed a part of the initiative, which comprised over 80 per cent of the UN membership.

### **Oslo Conference: March 2013**

On March 4 and 5, 2013, the first ever “Conference on the Humanitarian Impact of Nuclear Weapons” was held in Oslo and was attended by about 127 countries. During this conference, researchers introduced new discoveries on the effect of nuclear weapons on the entire humanity and environment. Organisations including the United Nations Development Programme (UNDP), United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and International Committee of the Red Cross (ICRC) clarified that in “case of an atomic explosion, neither would any association on the planet be capable enough to provide sufficient help, nor was it likely that a satisfactory capability could be built.” Discussions pertaining to the humanitarian consequences of nuclear weapons took place in this conference. To continue this discussion on a nuclear ban, Mexico declared a subsequent meeting, to be held in 2014.<sup>7</sup>

### **Nayarit Conference: February 2014**

Around 146 member states attended the following conference that was held in Nayarit, Mexico, in 2014. Notwithstanding the subjects of the Oslo meet, the conference examined the dangers of inadvertent explosions. The chair noted that the “time has come for the launch of a diplomatic process to achieve the objective of negotiating a legally binding instrument to prohibit nuclear weapons which was, according to him, a necessary precondition for achieving elimination”. Requiring this procedure to finish up by the 70th commemoration of the bombings of Hiroshima and Nagasaki, the chair depicted Nayarit as “the final turning point”.<sup>8</sup>

### **Vienna Conference on the Humanitarian Impact of Nuclear Weapons: December 2014**

The Vienna Conference on the “Humanitarian Impact of Nuclear Weapons” was the third conference in the Humanitarian Initiative Series. It was attended by delegates of 158 states, a wide range of worldwide associations from the United Nations framework, the International Red Cross and Red Crescent Movement, as well as science and civil societies. This conference was the most remarkable since the United Nations’ secretary general, the president of the ICRC and Pope Francis attended it. The conference drew attention to the short- and long-term results of the use of nuclear weapons, the ill effects of nuclear testing, the hazard drivers for conscious or accidental nuclear weapons use, inadvertent situations of nuclear use and related challenges as well as existing legal mechanisms pertaining to the humanitarian consequences of such use. The conference also documented scientific discoveries and talks affirming the humanitarian outcomes and dangers related to such use that are far more serious than actually assumed. It also emphasised that they should, therefore, be the focus of worldwide endeavours on nuclear demilitarisation and non-proliferation<sup>9</sup>.

**The Humanitarian Pledge:** This conference ended with the chair’s summary accompanied by the Vienna pledge issued by Austria. This pledge called for the “ban on the production, stockpiling and use of nuclear weapons. This pledge was initially supported by 107 states and was adopted by the UN General Assembly during its 70 session as Resolution 70/48, with 139 out of 168 states voting in its favour”<sup>10</sup>.

The Humanitarian Initiative emphasised on the “humanitarian dimension of nuclear disarmament” that, in turn, centres more on the “humanitarian impact of nuclear weapons” rather than the security dimension that a minority of states attribute to them<sup>11</sup>.” Since all states need to consistently keep up with IHL, the question that arises is whether nuclear weapons can ever be utilised legitimately, in perspective on their unpredictable, indiscriminate or unproportionate impacts or not, and the need to avoid assaults that don’t fit these necessities, in accordance with the standards of precaution. It may be recalled that in 1996, the International Court of Justice had expressed that “it is hard to conceive how any utilization of atomic weapons could be perfect with the necessities of IHL,” yet declined to issue a sentiment on the “approach of prevention” or to reason that a “plan of action to atomic weapons would be illicit in any circumstance.” In the light of the proof accumulated by the “three conferences on the Humanitarian Impact of Nuclear Weapons”, the ICRC has reinforced its position, considering the denial and disposal of nuclear weapons a “humanitarian imperative”.

### **State Positions**

After negotiations from March to July, 2017, the United Nations General Assembly in New York finally adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW) on the July 7, 2017. This was the first multilateral and legally binding instrument, which vowed to prohibit the “development, testing, manufacture, acquisition, transfer, possession and stockpiling of nuclear weapons along with the use or threat of use of nuclear weapons”. Forty- eight countries registered their lack of support for this venture in December 2016, either by voting no or totally abstaining. However, before the negotiations, only 113 countries had voted to make the negotiations happen. During the voting on the treaty text, 122 states voted in favour of the treaty, with one abstention from Singapore and one against, that is, the Netherlands.

Apparently, according to the proponents of this Ban Treaty, a disruptive action was urgently needed to enhance the goal of nuclear disarmament, because “there has been little perceptible progress on the multilateral nuclear disarmament pillar under the NPT,” hence, according to them, “outlawing nuclear weapons was an immediate moral and humanitarian necessity.” Apart from that, the immediate need for a legal mechanism for nuclear disarmament was based on

Article VI of the NPT and the “1996 ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.”<sup>12</sup> The patrons of the prohibition treaty believed that a treaty of this kind might help in exerting international pressure on the NWS and the non-NPT NWS, which rely on “nuclear deterrence” to conform to the new global norms.<sup>13</sup>

But critics are of the opinion that the “dynamics that surrounds the prohibition treaty will deviate the attention and effort from the non-proliferation regime” that has not only prevented a nuclear war since 1945 but has also inhibited nuclear proliferation to other states or extremist organisations. Hence, when proposals for a Ban Treaty first emerged in the 2010 NPT Review Conference, the five NPT recognised NWS, the “United States, Russia, Britain, France and China”<sup>14</sup> had boycotted the calls for the initiation of negotiations on a “comprehensive nuclear weapons convention”. According to them, a world without nuclear deterrence under the foreseeable strategic circumstances was impossible to imagine. Though the response of the non-NPT nuclear weapons states has been to come together in opposition of the treaty, yet, their emphasis on the various points of opposition has differed to a great extent.<sup>15</sup>

The nine nuclear possessing countries namely, “the US, Russia, Britain, China, France, India, Pakistan, North Korea and Israel”, along with the members of the North Atlantic Treaty Organisation (NATO) were notably absent from the negotiations. Moreover, the US, UK and France specifically referred to themselves as the “persistent objectors” to the treaty, making it clear that they, at any cost, “do not intend to sign, ratify or even become party to it.” These three nations specified that the “proposed ban fails to take into account the requisite security considerations and will not eliminate nuclear weapons.” To justify their decision of non-participation, these three major nuclear powers have also stated that instead of enhancing peace and security, the treaty “creates considerably more divisions at a time when the world needs to remain united in the face of escalating dangers.” Russia had also additionally disapproved of the negotiations right from the beginning and called it a “destructive” and “hasty” initiative that would undermine the 1968 NPT. In the case of China, though initially it was relatively calm and welcoming of the goal of an “ultimate and comprehensive ban”, it has currently refuted any compliance to the core prohibitions of the Ban Treaty.<sup>16</sup>

Apart from that, even though Japan had faced the first and the greatest brunt of a nuclear attack in 1945, it was resistant to the Ban Treaty, along with Australia, as it believed that US nuclear weapons enhanced its security. According to Japan, “Efforts to make such a treaty without the involvement of nuclear weapons states will deepen the schism and division between the NWS and the non-NWS.” Apparently, North Korea was the only nuclear state to vote for initiating the ban negotiations.

Hence, it is very clear from the above stated facts that all the five NWS recognised by the NPT have clearly opposed the new treaty and due to the current global strategic scenario, they have also shunned the idea of a world without nuclear deterrence. Apart from that, it was observed that the responses of the non- NPT nuclear armed states were also like those of the five NWS, but each of the nine states had divergent perspectives on the points of opposition. The next section of this chapter shall individually analyse the differences of emphasis on the points of opposition to the treaty by the four non-NPT nuclear armed states.<sup>17</sup>

### **The Ban Treaty and the Non- NPT Nuclear Armed States**

The following paragraphs heavily draw upon an article entitled “The Ban Treaty and Non-NPT Nuclear-Armed States: Can India Make a Difference”, by Dr Manpreet Sethi, which was actually a Policy Brief published by the Asia Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament and Centre for Nuclear Non-Proliferation and Disarmament in 2017.

**India:** Since the beginning, India has played a pioneering role in the universal elimination of nuclear weapons. To enhance the journey towards this target, the country has presented several resolutions and concrete plans in different UN forums. However, the indeterminate extension of the NPT in 1995, has more or less torn apart the hopes of India ever getting to nuclear disarmament, since it was clear that “by agreeing to legitimize the nuclear weapons of the NWS forever, the non- NWS had lost leverage over forcing the surrender of these weapons.” Nevertheless, India’s written nuclear doctrine continues to preserve the hope for a world without nuclear weapons. Keeping this in mind, India was expected to give a positive response towards the Ban Treaty. But the reality was different. India refused to participate in the negotiations and strongly opposed

the treaty at the UN General Assembly. A look at the reasons behind such a refusal by India, reveals that the country was not sufficiently convinced that a measure outlawing nuclear weapons in the absence of any security considerations could actually lead to a nuclear free world.

Apart from that, though initially India had participated in the humanitarian initiative conferences on the humanitarian impact of nuclear weapons held in 2013-14, at a later stage, India, like any other NWS, started to disengage from the process when some non-NWS started “diverting the conversation away from a facts-based discussion over nuclear use and towards reference to ban processes.”<sup>18</sup>

**Pakistan:** Pakistan’s decision regarding the acceptance of treaties relevant to nuclear non-proliferation and disarmament was largely dominated by the Indian position on it, along with India’s assessment of the merits of the treaty in regard to Pakistan’s national interest. So clearly, when India declined to accept the Ban Treaty, Pakistan did so too. Additionally, apart from reiterating its distress over the verification and non-discrimination and compliance with the customary international law, the country also expressed its opposition to the treaty on the grounds that it did not include complementary conventional arms control as well. The country opined that universal nuclear disarmament must also incorporate the burden of conventional arms control. The reason behind its taking such a position being that Pakistan had acquired nuclear weapons in order to achieve strategic parity with India and deny its conventional superiority, which, according to Pakistan, has been a threat to its survival. Pakistan’s nuclear weapons are also supposed to protect against the conventional forces of India, with which the possibility of confrontation arises whenever Pakistan engages in cases of cross-border terrorism against India. Hence, it is assumed that Pakistan can never seriously dedicate itself to nuclear disarmament unless and until it stops patronising terrorism against India, because with every terrorist attack against India, Pakistan’s survival in the face of the huge Indian armed forces shall always be at stake.<sup>19</sup>

**Israel:** In the case of Israel, the country’s continuous policy of nuclear opacity has not allowed it to take any public stance on nuclear disarmament, not to mention the Ban Treaty. Given the threat perceptions and its security concerns, the country has always desired to retain deterrence capability and

has never supported nuclear disarmament. Much before the Ban Treaty negotiations, Israel had been resisting pressure for the negotiations of a Middle East WMD-Free Zone. The country has always been concerned about its security dilemmas with Iran, as, even after the “Joint Comprehensive Plan of Action (JCPOA)”, Israel was not sufficiently convinced that Iran had given up on its nuclear weapons ambitions. This concern of Israel got strengthened when US President Donald Trump openly displayed his contempt for the nuclear deal with Iran. Currently, there appears to be no scope of improvement in Iran-Israel relations, and due to this absence of progress in the Middle East peace process, there is no hope of Israel being in favour of a Ban Treaty. It is evident from its security graph, that even if the other eight nuclear-armed states were to try to take some collective actions in favour of elimination of nuclear weapons, Israel will not join the brigade. Hence, for Israel to favour the TPNW looks like a distant dream.<sup>20</sup>

**North Korea:** From the beginning, North Korea was the only nuclear weapons state that had voted for initiating the treaty negotiations in 2016. This was because probably, for North Korea, this forum might have been the one through which the state’s nuclear weapons could have been legitimised in the international community. Apart from that, nuclear weapons have also provided the greatest security assurances to the Kim regime. Hence, it would be futile to expect the country to agree to nuclear disarmament unless it is a global effort in which all the nuclear armed states agree to eliminate nuclear weapons, given that since 2016 onwards, the state has strengthened its position on nuclear weapons, conducting more missile tests, and two nuclear tests, including a hydrogen weapon test. There are also other geopolitical and psychological reasons for which North Korea might not join the Ban Treaty.

### **UN Member States**

As indicated by the “International Campaign to Abolish Nuclear Weapons (ICAN)”, an alliance of non-governmental associations, the driving advocates of a nuclear weapons ban treaty include “Ireland, Austria, Brazil, Indonesia, Mexico, Nigeria, South Africa and Thailand”<sup>21</sup>. Each of the 54 countries of Africa and all of the 33 countries of Latin America and the Caribbean [as of now in a Nuclear Weapons Free Zone (NWFZ) under the 1967 Treaty of

Tlatelolco<sup>22</sup>] had endorsed the regional positions supporting a ban treaty. The 10 countries of the Association of Southeast Asian Nations (ASEAN), which supported the Southeast Asian Nuclear Weapons-Free Zone Treaty, partook in the negotiations, yet Singapore swore off the vote. Many Pacific island countries were also likewise strongly in favour. A few NATO states published a statement (excluding France, the United States and United Kingdom, the atomic weapon states inside NATO), asserting that the treaty was “insufficient in dispensing with nuclear weapons” and, instead, called for strengthening the “implementation of Article VI of the Non-Proliferation Treaty”<sup>23</sup>.

### **Role of Civil Societies**

Amidst extensive disparities surrounding the prohibition treaty, some major civil society organisations have “viewed the prohibition treaty as a significant challenge to the global nuclear order that was constructed from the cursed Baruch Plan of 1946, through the creation of the International Atomic Energy Agency (IAEA) in 1957, the completion of the NPT in 1968 and the initiation of the nuclear arms control process with the Strategic Arms Limitation Treaty (SALT) in 1972”.<sup>24</sup>

Amongst civil society organisations, the International Campaign to Abolish Nuclear Weapons (ICAN)<sup>25</sup>, a global coalition of non-governmental organisations in over 100 countries has been fundamental in working closely along with the governments to accomplish a solid and successful ban treaty, for which it was awarded the Nobel Peace Prize in 2017. Along with the ICAN, the International Red Cross and Red Crescent Movement<sup>26</sup> have also likewise supported banning and eliminating nuclear weapons, depicting the UN working group recommendation to negotiate a ban in 2017 as “potentially historic”<sup>27</sup>. ICAN started in Australia and was formally propelled in Austria in April 2007. At first, the founding members of ICAN were enthused by the immense achievement of the “International Campaign to Ban Landmines, which had assumed an instrumental role almost a decade earlier in the negotiation of the anti-personnel mine ban convention, or Ottawa Treaty”<sup>28</sup>.

Since its beginning, this organisation has attempted to rouse an incredible groundswell of worldwide public support for the elimination of nuclear



weapons. By connecting with diverse groups and like-minded governments this organisation, along with the International Red Cross and Red Crescent Movement, has contributed considerably towards shaping the discourse on nuclear weapons and enhancing the momentum towards their total elimination. In a July 2017, in open articulation supported by more than 40 Buddhist, Christian, Jewish and Muslim pioneers and gatherings, “such communities concerned about nuclear weapons”, called for widespread appropriation of the treaty. At a prominent Vatican meeting in November 2017, the principal international disarmament gathering following the treaty’s adoption in July, Pope Francis took a position different from that of his ecclesiastical antecedents to denounce the ownership of nuclear weapons and caution that nuclear deterrence policies offer a “false sense of security.”<sup>29</sup>

Following the boycott of the Ban Treaty, Xanthe Hall,<sup>30</sup> co-director and nuclear disarmament campaigner for the International Physicians for the Prevention of Nuclear War’s (IPPNW’s) Germany affiliate, lamented the blacklisting of the treaty by every single nuclear power and their partners because in history, the Mine Ban Treaty or the Convention on Cluster Munitions “have been concluded against the states possessing such weapons, and finally were signed by most states”. The solicitation of a nuclear ban could debilitate the Non-Proliferation Treaty (NPT), with respect to the nuclear powers that were blocking the multi-parallel disarmament negotiations since 1995, rather than arranging modernisation and rearmament. In this manner, they would renounce their duty of demilitarisation, as indicated by the NPT, Article VI. At that point, the peril would develop that in response, different countries would feel more grounded and bound to non-expansion. Conversely, the nuclear weapon Ban Treaty would go for newer disarmament dynamics, and, consequently, would help more than debilitate the NPT.

Again, Michael Rühle in his “The Nuclear Weapons Ban Treaty: Reasons for Skepticism,” showed that as indicated by the defenders, it was planned to reinforce Article VI of the NPT, which requires great confidence endeavours to negotiate constructive measures on nuclear disarmament. But cynics have contended that the Ban Treaty would harm the NPT.

## The Way Ahead

In 2018, the NPT which has been at the centre of the collective security mechanism, celebrated the 50th anniversary of its signing. Though this treaty was not able to prevent a few states from obtaining nuclear weapons, its achievement in promoting the norms of nuclear non-proliferation and disarmament for over half a century, cannot be denied. Today, only nine states possess nuclear weapons, which is far below the estimated range early in the nuclear age. The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) was mediated to reinforce the disarmament initiative of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT). While most of the states under the NPT have agreed not to develop nuclear weapons, five nuclear possessing states had tested nuclear weapons even during the drafting of the treaty. As per Article VI of the NPT, these five states, the United States, Russia, the United Kingdom, France, and the Republic of China have been authorised to sustain their nuclear weapons. Article VI of the NPT calls on all the states to “pursue in ‘good faith’ negotiations toward eventual disarmament.” But the disappointment over the lack of progress towards absolute disarmament remained among many non-nuclear states. This very disappointment initiated the “Humanitarian Initiative” which in turn laid the foundation for the adoption of the TPNW<sup>31</sup>.

With the adoption of this treaty, the majority of the countries of the world might, in the next few years, subscribe to the idea of a legally binding document that will no longer allow them to accept nuclear deterrence as a relevant concept of international relations. Nuclear deterrence has been a concept to legitimise the possession of nuclear weapons by the five nuclear possessing nations. These five nations are of the opinion that nuclear deterrence has till now prevented the outbreak of any major warfare between the leading global powers. But this view has been opposed by many who opine that nuclear deterrence, which was once the key factor for maintaining world peace, has now become unnecessary and dangerous. This is because some are of the view that if nuclear weapons are retained indefinitely, an accident is bound to occur. Hence, a careful step by step approach is necessary to eliminate them. Apart from that, the NPT, in spite of all its flaws, has achieved some measure of the nuclear world order and, hence, should be defended, and extended deterrence, though politically difficult, must not

be removed from the non-nuclear weapons states as that might accelerate nuclear proliferation by their allies. Hence, extended deterrence, however politically challenging, might lead to the path of global nuclear disarmament. But there is a dilemma that persists with regard to the extended deterrence of countries that fall within the so-called nuclear umbrella of the US. For example, Japan, Austria and South Korea: these states tend to be great supporters of disarmament and the ultimate elimination of nuclear weapons, yet, they did not support the concept of a Ban Treaty, because such support would probably be at great cost to them as they look up to the United States for security, specially Japan, given the strong security threat that it faces from North Korea.

Though the nuclear weapons states did not engage in the negotiations of the Ban Treaty, the proponents of the treaty have condemned nuclear weapons as inhumane and criticised their possessors for continuous dependence on them.<sup>32</sup>

Until now, the US, which had the traditional leadership position within the non-proliferation regime, had an unwelcoming approach towards the Ban Treaty. From rejecting the Humanitarian Conferences of 2013, to stigmatising the Ban Treaty proponents, the US has tried every possible way to do away with the treaty. But it has not been able to. The Ban Treaty entered into force on January 22, 2021, rendering nuclear weapons as the most terrifying and inhumane weapons ever invented. The treaty became an integral part of the nuclear disarmament canvas. Declining to engage with the process will not really deny it legitimacy. Hence, the other ingredients of disarmament can actually coexist and in a way help reinforce one another. But for this to happen, a number of legitimate and immensely important concerns should be taken care of. It is high time the new weapons states start taking a constructive and positive approach towards the ban movement, as that would help to improve the relations within the NPT and set out a dream for the eventual fate of the nuclear order. Rather than criticising the proponents of the Ban Treaty, and finding fault with the treaty text, the US could now address the ban movement effectively.

Since the Ban Treaty had been faulted for many reasons like lack of a definition, clarity, systems of verification, as well as lack of a competent authority

to oversee enforcement, etc., the NWS shall probably not be inclined to elaborate on operational details and disarmament. It was anticipated that this would widen the gap between the NWS and the Non-NWS (NNWS). To prevent that from happening, a “meaningful dialogue” amongst all the NWS is of utmost necessity to build trust and confidence in each other, and that can probably lead to global nuclear disarmament. An increase in transparency and the verification system, and fostering interactive discussions between the NWS and NNWS on some of the “hard questions” relating to major security concerns and reduction of threats, are necessary steps for the furtherance of the disarmament initiative.

For the Ban Treaty to be a success in prohibiting nuclear weapons, substantial progress has to be demonstrated through a step by step approach or a building block process towards nuclear disarmament. Thus, there should be increased efforts in “reducing nuclear stockpiles, de-alerting weapons on ‘hair-trigger alert’, shifting nuclear doctrines towards sole purpose or no first-use.”<sup>33</sup> Besides, all the advocates and the critics of the treaty could keep aside their differences and disagreements and shape new ways to work towards the total elimination of nuclear weapons for the sake of humanity by strengthening the non-proliferation and disarmament regime. The supporters and the sceptics of the treaty can come together in several international fora and reinforce their commitment towards absolute elimination of nuclear weapons.

Though the common criticism about the Ban Treaty, that it will not eliminate a single nuclear weapon, is right, it cannot be denied that this criticism misrepresents the strategy of the advocates of a nuclear ban. For the proponents of the treaty, it is just an interim step towards nuclear disarmament through its capacity to delegitimise nuclear weapons and the doctrines of nuclear deterrence and extended deterrence. Such a treaty would be a reminder of the final target of disarmament. If all the nations of the world prioritise this target instead of focussing on security dilemmas and underlying political conflicts, then the goal of disarmament may become a reality some day, and for disarmament to set in, political antagonism between states should be set aside and the welfare of entire humanity should be prioritised. Hence, the adoption of the Ban Treaty will produce a definitive force for the nullification of nuclear weapons and a step forward towards a world free of such weapons.

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# 5. INDIA'S NUCLEAR WEAPONS AND INTERNATIONAL HUMANITARIAN LAW

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## **Introduction**

Emerging from the cinders of World War II and the twin nuclear attacks on Hiroshima and Nagasaki, the United Nations was crafted with the hope that it would not go the way of the League of Nations. The reaffirmation, underlined in the Preamble of its Charter of June 25, 1945, emphasises on the objective to spare “succeeding generations from the scourge of war” and “to rehearse resilience and live respectively in harmony with each other as great neighbours”.<sup>1</sup>

Keeping in mind the goal of achieving global nuclear disarmament, the United Nations General Assembly (UNGA), in its first resolution in 1946, called for the absolute elimination of nuclear weapons. This resolution established the Atomic Energy Commission which was later dissolved in 1952, with an ordinance to frame specific proposals for the control of nuclear energy and the elimination of atomic weapons and all other major weapons capable of mass destruction. Apart from supporting the goal of complete disarmament in 1959, the General Assembly had also, in its first special session on disarmament of 1978, stated that “nuclear disarmament should be the main objective in the field of disarmament.”<sup>2</sup>

The UN General Assembly had also held three Special Sessions on Disarmament (SSoD), known as SSOD-1, SSOD-II and SSOD-III respectively, in the years 1978, 1982 and 1988. However, only the first SSOD held from May 23 to June 30, 1978, was successful in producing a document. According to scholars from both the diplomatic and civil society communities, the SSOD-II that was held from June 7 to July 10, 1982, was a historic failure and disappointment. However, it established a consensus towards nuclear disarmament that was initially lacking. The SSOD-III was held from May

31 to June 26, 1988, at a time when the international diplomatic “climate” for considering disarmament issues was far more favourable than in 1982. Thus, it was termed as “a major event in the world organization’s history of dealing [with disarmament]” by Peter Florin, who was the president of the conference. He termed SSOD-III as “a genuine clearing-house for the international dialogue on disarmament dimensions.” A call for the fourth session of the SSOD has been made by the UNGA since 1995. Four open-ended Working Groups for SSOD-IV were also formed. First, the 2003 working group considered the objectives and agenda and the possible establishment of a preparatory committee, for an SSOD-IV. The 2006 Working Group was to hold its substantive sessions in 2006, but never met officially. The third group met from June 25 to 29, 2007, from July 30 to August 3, 2007 and from August 27 to 31, 2007, under the chairmanship of Ambassador Alfredo Labbé of Chile. Most of the nations of the world supported the convening of the “fourth special session on disarmament (SSOD-IV)” as a method for making essential modifications in the Conference on Disarmament (CD) as well as in the multilateral disarmament machinery. However, the General Assembly adopted decision 63/519 on December 2, 2008, in which it placed the SSOD-IV issue on the agenda for its sixty-fourth session (2009), and decision 64/515 on December 2, 2009, in which it placed the issue on the agenda for its sixty-fifth session (2010). The fourth Working Group was established on December 8, 2010. However, all these open-ended Working Groups were unable to reach a consensus on substantive recommendations to the General Assembly for the formation of SSOD-IV. Thus, they had to again meet in two more substantive sessions of 2016, under the chairmanship of Fernando Luque Marquez of Ecuador, where they considered in general terms the possible scope of an SSOD-IV<sup>3</sup>. However, in section six of nine of SGI President Daisaku Ikeda’s 2019 peace proposal, “Toward a New Era of Peace and Disarmament: A People-Centred Approach,” he recommended that a fourth special session of the General Assembly committed to disarmament (SSOD-IV) be held in 2021 as a development to the 2020 NPT Review Conference. It ought to reconfirm the commitment for multilateral disarmament negotiations and set the essential objectives of significant decreases in atomic armouries and an end to their modernisation. It ought to likewise start multilateral disarmament exchanges toward the 2025 NPT Review Conference.



Also, in 1996, the General Assembly, proposed an annual Nuclear Weapons Convention to achieve the goal of global disarmament. In the same year, acting on the request of the UNGA made in December 1994, the International Court of Justice (ICJ) passed the historical “Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”, which stated “that even though there is no international legal mechanism to explicitly prohibit the use or possession of nuclear weapons, their use must be in conformity with International Humanitarian Law.”<sup>4</sup> Apart from these, numerous other initiatives have been undertaken by the United Nations to underscore the significance of a Nuclear Weapons Free World (NWFW).

Amongst the countries at the forefront of the campaign for universal nuclear disarmament, India has been a strong voice. Soon after its independence, Prime Minister Jawaharlal Nehru had begun to raise concerns about nuclear weapons, their testing and the consequences of their use. He proposed several international measures to address these issues. India's successive prime ministers followed the same path. Though, post its nuclearisation in 1998, for many, it seemed that India's voice in favour of disarmament would be lost, a closer look reveals a different story.

What is India's current stand on disarmament? And what contributions can India make to enrich and intensify its support for disarmament? This chapter seeks to answer these questions, and also looks at India's position on IHL while dealing with the nuclear weapons discourse. The chapter is divided into four parts. The first part focusses on India's position on IHL, and the seriousness of its commitments towards humanitarian law as evident in its relevant domestic legislation. The second part of the chapter looks at the Customary Humanitarian Law practice related to nuclear weapons in India. The third part deals with a short history of India's disarmament policy and the chapter ends with the assessment that, keeping in mind its long-term disarmament goal, India has continued to campaign for a nuclear weapons free world by categorically rejecting the idea of initiating a nuclear weapon attack in any conflict scenario, even after becoming a nuclear weapons state in 1998. India's nuclear doctrine is also premised on creating the maximum chance of non-use of nuclear weapons.

## **India's Position on International Humanitarian Law**

As stated in the earlier chapters, International Humanitarian Law (IHL), which is also known as the 'law of armed conflict' or 'law of war' is a branch of international law, or a set of rules that seek to control the effects and the situations of both international or non-international armed conflict. "The main objective of IHL is to limit the conduct of armed conflict by giving protection to such persons who are not, or are no longer, actively participating in the hostilities. It restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict."<sup>5</sup> The main aim of IHL is to "control the conduct and impacts of armed conflict and to give security to warriors and non-warriors by prescribing certain guiding principles and objective rules to determine what amounts to legitimate behaviour, for instance, how injured soldiers ought to be dealt with."<sup>6</sup> It is essentially epitomised in international treaties such as the 1949 Geneva Conventions, the 1907 Hague Convention and customary international law. While the Geneva Conventions 1949, provides protection to people who are not, or are no longer, participating in hostilities, the Hague Convention establishes exceptional guidelines for the conduct of war anywhere on land, at sea and in the air, and decides as to which enemy should be attacked. On the other hand, customary laws are based on the consistent principles and practices carried out by nations that give a sense of legal obligations. IHL acknowledges the *jus cogens*<sup>7</sup> norms which are also known as "peremptory norms." They are those fundamental international law principles which no nation may ignore or act contrary to them.

## **IHL under the Indian Constitution**

Even though the Indian Constitution doesn't guarantee any specific provision that would oblige the state to implement IHL, Article 253 of the Constitution of India is in conformity with the objective of "fostering respect for international law, and treaty obligations in the dealings of organised people with one another."<sup>8</sup> Apart from that, Entry 14 in the Union List presents to the Parliament special powers to make laws for "entering into treaties, conventions and agreements with foreign countries."<sup>9</sup>

For any international law to be operable in India, it has to be specifically incorporated in domestic law. According to Justice Krishna Iyer, "International

conventional law must go through the process of transformation into municipal law before the international treaty could become an internal law.”<sup>10</sup> The Constitution guarantees fundamental human rights to citizens as well as non-citizens, such as the right to life, right to personal liberty, equality, the right against exploitation, in turn, ensuring protection against crimes against humanity, but excludes ‘war crimes’ or ‘grave breaches’ of the Geneva Conventions. It likewise enables Parliament to make an Act of Indemnity to cover the lawlessness committed by any individual in the administration of the union or of a state or some other individual during the activity of a military law. Military law or martial law is defined as “rule by military authorities imposed upon a civilian population in time of war or when civil authority is considered to be functioning inadequately”. Therefore, the Article “accommodates protecting the members of the armed forces assigned with the work of restoration of civil order inside India for all acts – any sentence passed, discipline incurred relinquishment requested – inside a region where military law is in power. An Act of Indemnity, accordingly passed by Parliament cannot be tested on the ground that it abuses fundamental rights. Thus, through this, a sense about the basic principles of IHL can be determined, as these laws do not confer the armed forces the right to commit “grave breaches” without being penalised. Thus, there are components in the Constitution which are relevant to IHL, starting from the Preamble that assures “dignity of the individual”, which is the basic principle of IHL, to the various fundamental rights prescribed under Articles 12-35 of the Indian Constitution. In this context, Article 21 of the Indian Constitution needs a special mention. It is this Article which guarantees that “no person shall be deprived of his life or personal liberty except according to procedure established by law”, and its violation causes a grave breach of law under IHL. The “right to life” under this Article also provides for the right to “live with dignity”, that can also be applied to a “prisoner of war” who is not supposed to be ill-treated under this provision provided by the Indian Constitution. It guarantees “bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing, interviews with members of his family and friends”, etc<sup>11</sup>. This Article also obliges the state to protect an individual’s right to life by providing adequate medical facilities, and other basic necessities, irrespective

of whether the person is innocent or not. The right to personal liberty covers the right against custodial violence including mental and physical torture, psychic pressure and physical infliction, right against handcuffing and the rights of children in jail to special treatment. Additionally, the right to equality (Article 14) and the right against exploitation (Article 23(1)) prohibiting traffic in human beings and ‘beggars’ and other forms of ‘forced labour’, which are guaranteed to all persons, including non-citizens, are also the reflections of IHL principles in the Indian Constitution. Similarly, the provisions under Article 22 of the Indian Constitution dealing with “protection against arrest and detention”<sup>12</sup> in certain cases are also found in some of the provisions of the Geneva Conventions. Thus, the obligation to enforce the fundamental rights guaranteed under the Indian Constitution directly upholds the principles of IHL as enshrined in the Geneva Conventions.

### ***The Geneva Conventions Act, 1960***

To give effect to the Geneva Conventions at the domestic level, the Geneva Conventions Act of 1960 was passed by the Government of India under Article 253 of the Indian Constitution, alongside Entries 133 and 144 of the Union List as provided under the Seventh Schedule. The Act provides for “punishment for grave breaches of the Geneva Conventions 1949 and regulates legal proceedings with respect to protected persons, including prisoners of war and internees.” India signed the Geneva Conventions on December 16, 1949, and it was ratified on November 9, 1950.

### **Customary Humanitarian Law Practice Related to Nuclear Weapons in India**

In talking about the customary humanitarian law practices in relation to nuclear weapons in India, it is worthy to mention about the written statement which was submitted to the ICJ in the nuclear weapons case in 1995, in which India had concluded, “The use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law because such a use cannot distinguish between combatants and non-combatants.”<sup>13</sup>

In 1996, during a debate in the First Committee of the UN General Assembly, India expressed:<sup>14</sup>

We are aware that there continues to be a refusal by the nuclear-weapons states to engage in any meaningful discussions on the elimination of these weapons. The continued retention of these weapons by a few states which insist that they are essential to their security and that of their allies yet deny that same right to others has led to a situation in which the shadows become a smoke screen, a situation that is not only discriminatory but dangerously unstable. We view this situation with apprehension. We urge our colleagues here to take a closer look at the situation in the clear light of day. This is not a situation that can, or indeed should, be viewed with any sense of self-satisfaction. Nuclear weapons are still in existence. They are still being tested, improved and modernized. Our security and the security of the entire world remains at risk.

India had also called for a “legally binding provision to prohibit the use or threat of use of nuclear weapons,”<sup>15</sup> on behalf of those few non-nuclear nations belonging to the non-aligned groups. According to India, the continuous presence of nuclear weapons till date remains an international concern. This sense of concern has not changed despite the fact that India had to conduct a test of its nuclear weapons two years after the Advisory Opinion was rendered owing to perceived security compulsions.

### **India's Role in the Efforts Towards Disarmament**

Unlike North Korea, Pakistan or Iran, India's nuclear programme was not started for the fulfilment of military ambitions, but for peaceful purposes. India's position on nuclear weapons has been constant since the beginning. During the inception of the nuclear era, the Indian leaders were profoundly uncomfortable with the development of the bomb. Mahatma Gandhi dismissed nuclear weapons as ethically unacceptable. Prime Minister Jawaharlal Nehru too, while well aware of the dual nature of nuclear technology, kept the focus of the Indian nuclear programme on civilian use of the atom while campaigning for nuclear disarmament to address India's security concerns. Thus, India was in the forefront of nuclear disarmament right since its independence.

In 1948, India restricted the use of nuclear energy to peaceful purposes only and proposed a disposal of nuclear weapons from the national stockpiles. In 1950, India proposed the formation of the UN Peace Fund for reduction

of arms and directing the sum released towards development purposes. India advocated the cause of the Comprehensive Test Ban Treaty (CTBT) in 1954 and became the first nation to become a party to the Partial Test Ban Treaty (PTBT) in 1963. In 1964, India initiated the 'non-proliferation of weapons' on the UN agenda. However, India's dream of global disarmament was shattered by 1968, when the NPT was concluded as a treaty with different responsibilities for nuclear and non-nuclear weapons states.

India as a part of the Non-Aligned Movement (NAM) has throughout been an advocate of disarmament. The NAM had been pushing to put an end to the nuclear arms race and eliminate nuclear weapons altogether from the face of the world. The basic principle of non-alignment was to strive for the national security of its member nations through non-participation in military partnerships. It also dismissed "force" as an important tool of diplomacy. The principle of non-alignment also rejects military alliances and division of the world into two internationally hostile blocs. Working as a third power, outside the alliances, non-alignment pushed for autonomy of strategic moves. It supported stable "great power relations", looked for greater egalitarianism by supporting anti-colonial, anti-racial and anti-imperialist developments while advocating the North-South issues. Thus, non-alignment looked for national security through an empowering international strategy. Since its inception, the NAM had been an ardent supporter of nuclear disarmament. During the first conference at Belgrade, the non-aligned powers of the world had condemned war as "an anachronism and a crime against humanity."<sup>16</sup> According to them, safeguarding world peace was the obligation of all the nations across the globe. War then ceased to be treated as a major aspect of politics. The NAM has been one of the pioneers in paving the way to end any sort of authoritarian or extremist ideology and has been promoting several initiatives for the world to adopt the principles of disarmament. Given the massive devastation that a possible nuclear war can cause, the NAM member states have always vouched for nuclear disarmament and an absolute elimination of nuclear weapons as they consider nuclear weapons to be the greatest threat to the survival of mankind and a great hindrance to world peace and security.

Thus, in keeping with of the spirit of the movement all the while, India maintained has a policy of the No-First Use (NFU) of nuclear weapons against

the nuclear have-nots. By following this policy, India reflected a firm conviction that its nuclear stockpiles were meant only for the purpose of deterrence. Thus, the policy of “credible minimum deterrence” and the “no-first use policy” deemed India a responsible nuclear power, contrary to the other nuclear powers of the world. These traits of India as a nuclear weapons state, reemphasised the rejection of force as a diplomatic tool by the NAM and glorified disarmament as a desired weapon of foreign policy<sup>17</sup>.

In 1974, Prime Minister Indira Gandhi authorised a nuclear test. It was criticised by nations as it violated the peaceful-use agreements underlying US and Canadian-supplied nuclear technology and material transfers, and was a major contributing factor for the formation of the Nuclear Suppliers Group (NSG)<sup>18</sup>. The claim that it was a “peaceful” blast was also met with incredulity though it cannot be dismissed that the IAEA had been running programmes in support of Peaceful Nuclear Explosions (PNEs) at the time. However, after this test, India did not pursue any efforts towards weaponisation and Mrs. Gandhi continued efforts towards disarmament.

In 1978, India called for negotiations for an international treaty<sup>19</sup> that would prohibit the use or threat of use of nuclear weapons. In 1984, India initiated a Six-Nation Five-Continent Peace Initiative along with Argentina, Greece, Mexico, Sweden and Tanzania. After four years, in a joint declaration issued on the occasion of the visit of President Gorbachev of the Soviet Union, the then Prime Minister, Rajiv Gandhi presented an action plan for the elimination of nuclear weapons despite the oblique nuclear threats issued by Pakistan in 1987<sup>20</sup>. He presented a proposition for “complete and general nuclear disarmament” for a Nuclear Weapons-Free World (NWFWorld), to the UN General Assembly in the Special Session on Disarmament in 1988, which came to be known as the Rajiv Gandhi Action Plan<sup>21</sup>. The Action Plan envisioned an obligatory commitment by all countries towards eliminations of nuclear weapons in stages by 2010. Rajiv Gandhi described nuclear deterrence as an “ultimate expression of the philosophy of terrorism, holding humanity hostage to the presumed security needs of a few.” Along with this, he proposed a three-phase cycle of complete disarmament, with an additional emphasis on a system that was “global, universal and non-discriminatory.”<sup>22</sup> India also became the original signatory to the Chemical Weapons Convention, signed it on January 14, 1993,

and was among the initial 65 nations to have ratified the treaty. In 1993, India also supported the resolution on a comprehensive test ban alongside the US within the general framework of progressing towards nuclear disarmament. India was troubled when the last form of the CTBT was raced through without agreement as it completely ignored to address the security reasons of India. It emerged as an instrument of non-proliferation that sought to freeze countries' nuclear capabilities. However, the CTBT, along with the indefinite extension of the NPT, rekindled the domestic pressure to conduct further tests.

Though non-dichotomously it had sought disarmament as a preferred option for its nuclear security, in order to meet its short-term nuclear deterrence compulsions, India finally conducted its nuclear tests on May 11/13, 1998, ending the country's three-decade-old, self-imposed restraint on acquisition of nuclear weapons. It conducted the five underground nuclear tests in the Pokhran desert of Rajasthan, 24 years after its first nuclear test known as Pokhran-1 in 1974. This series of nuclear tests came to be known as "Operation Shakti", also called Pokhran-II. A new phase in India's security calculus, therefore, began. However, the possession of weapons has not diverted India from its long-term disarmament aspirations. The Preamble of India's draft nuclear doctrine maintains that the "use of nuclear weapons and other weapons of mass destruction accounts for the gravest threats to humanity and to international peace and security."<sup>23</sup>

### **India's Disarmament Initiative Remains Firm**

Following the 1998 tests, India imposed an embargo on further testing and reaffirmed its promise to disarmament. Both these points were reflected in the Indian nuclear doctrine that was released in 2003. Despite becoming a nuclear power, India continued to pursue its long-term disarmament initiative, and stated in its draft nuclear doctrine of 1999 that "global, verifiable and non-discriminatory nuclear disarmament would be its national security objective with its continuing efforts towards a nuclear weapons free world, till it is achieved." Accepting an NFU policy itself, India has also campaigned for its acceptance by others as a way of achieving global disarmament.

The objectives, as stated in the draft doctrine of 1999<sup>24</sup>, focussed on how in the absence of a "global nuclear disarmament, India's strategic interests require



effective, credible nuclear deterrence and adequate retaliatory capability, should deterrence fail. This is consistent with the UN Charter, which sanctions the right of self-defence.”<sup>25</sup> It has also clearly stated that the real purpose of strengthening India’s nuclear capabilities is to deter adversaries or any other state from using nuclear weapons against India and its forces. At the same time, while India shall not initiate a nuclear strike, it will respond with punitive retaliation if deterrence fails. Further, it shall not resort to the use or even threat of use of nuclear weapons against any state that does not possess nuclear weapons or is not aligned to nuclear powers.

India’s efforts towards nuclear disarmament after the turn of the millennium can be seen across many fora. For instance, at the “Fourth Summit of the India-Brazil-South Africa (IBSA) Dialogue Forum” in 2003, that was held in Brasília, the leaders reaffirmed their commitment to the goal of complete elimination of nuclear weapons in a comprehensive, universal, non-discriminatory and verifiable manner, and expressed concern over the lack of progress in the realisation of that goal. They underlined the need for reducing the role of nuclear weapons in strategic doctrines and expressed their support for effective international agreements to assure non-nuclear weapons states against the use or threat of use of nuclear weapons. The leaders expressed support for an International Convention Prohibiting the Development, Production, Stockpiling and Use of Nuclear Weapons, leading to their destruction. They reiterated that nuclear disarmament and nuclear non-proliferation are mutually reinforcing processes, requiring continuous irreversible progress on both fronts.

Subsequently, a proposal for the adoption of a “Nuclear Weapons Convention” was made by India in 2006. The country presented to the UN General Assembly’s First Committee, a working paper on nuclear disarmament, which highlighted that “progress towards the goal of nuclear disarmament will require a climate of mutual confidence in the international community to conclude universal, non-discriminatory and verifiable prohibition of nuclear weapons leading to their complete elimination.” Following this, a seven-point agenda for nuclear disarmament was submitted in March 2008 by Hamid Ali Rao, who was the Indian ambassador to the Conference on Disarmament (CD). This called for:

- Unequivocal commitment to the goal of total elimination of nuclear weapons;

- Reduction in the salience of nuclear weapons in security doctrines;
- A no first use agreement among all nuclear-armed states;
- An agreement not to use nuclear weapons against non-nuclear armed states;
- A convention prohibiting the use or threat of use of nuclear weapons;
- A convention proscribing the development, production and stockpiling of nuclear weapons; and
- Verifiable and non-discriminatory elimination of all nuclear weapons.<sup>26</sup>

In the same year, on the twentieth anniversary of the “Rajiv Gandhi Action Plan” the then Prime Minister Manmohan Singh, pitched for global nuclear disarmament by hosting an international conference in New Delhi<sup>27</sup>, reemphasising India’s commitment towards nuclear disarmament. Subsequently, in 2007, the “four horsemen”, George Schultz, William Perry, Henry Kissinger and Sam Nunn, through an article in the *Wall Street Journal*, publicly advocated for disarmament<sup>28</sup>, which was welcomed by the then Defence Minister, A. K. Anthony, who hoped that it would lead to a “universal commitment to disarmament.” However, some prominent Indian figures such as Shyam Saran, former foreign secretary and later special envoy of India’s prime minister, were of the opinion that “the four horsemen did not go far enough: in contrast with their perception of disarmament as a very distant goal, the need of the hour is to bring it down into plain sight.” Academic R. Rajaraman, known for his pro-disarmament stand, was also critical of the view put out by the four horsemen, that said that “the new nuclear states may not be able to achieve the stability of the Cold War era by replicating mutually assured destruction.” He further noted that their “emphasis on nuclear terrorism as the main reason for disarmament may not be universally shared and that some non-nuclear weapons states might view the existing state-owned arsenals as a bigger threat.”

In 2010, in a speech at the National Defence College on the topic, “The Role of Force in Strategic Affairs”<sup>29</sup>, the National Security Advisor (NSA) stated “The Indian nuclear doctrine ... reflects this strategic culture, with its emphasis on minimal deterrence, no first use against non-nuclear weapons states and its direct linkage to nuclear disarmament. We have made it clear that while we need nuclear weapons for our own security, it is our goal to work for a world free of

nuclear weapons, and that we are ready to undertake the necessary obligations to achieve that goal in a time-bound programme agreed to, and implemented by, all nuclear weapon and other states.”<sup>30</sup>

In a 2013 statement by the permanent representative of India before the First Committee of the UN General Assembly, it was stated, “India has been unwavering in its support for universal and non-discriminatory nuclear disarmament and the complete elimination of nuclear weapons and other weapons of mass destruction. Our policy is consistent with the highest priority to the goal of nuclear disarmament enshrined in the Final Document of the First Special Session of the UN General Assembly on Disarmament and the Rajiv Gandhi Action Plan of 1988 for a Nuclear Weapon Free and Non-Violent World Order. Speaking at the 68th session of the UNGA, on 28th September 2013, Prime Minister Dr Manmohan Singh voiced India’s support for time-bound, universal, non-discriminatory, phased and verifiable nuclear disarmament. India remains convinced that its security would be strengthened in a nuclear weapon free and non-violent world order. ...”<sup>31</sup>

Apparently, in October 2017, more than 120 nations decided on a UN General Assembly goal to hold a conference to arrange a lawfully restricting deal to forbid nuclear weapons, driving towards their absolute elimination. England, France, Israel, Russia and the US voted no, while China, India and Pakistan abstained from it.

India refrained from participating in the very first UN conference on the ban of nuclear weapons globally, as it believed “that the proposed conference could address the longstanding expectation of the international community for a comprehensive instrument on nuclear disarmament.”<sup>32</sup> Along with that, it also maintained that the “Geneva-based Conference on Disarmament (CD) is the single multilateral disarmament negotiation forum.”<sup>33</sup> However, as per India, it supported the negotiations in the CD on a more “Comprehensive Nuclear Weapons Convention” that would include within itself “verification” besides elimination and prohibition. According to India, international verification was essential to the global elimination of nuclear weapons and it felt that the current process did not adequately include the aspect of verification. India remained firm in its support for “global, non-discriminatory, verifiable nuclear disarmament” in a time-bound manner<sup>34</sup>.

In a speech at Mexico City on February 16, 2017, during the fiftieth Anniversary of the Treaty of Tlatelolco, the Joint Secretary of the Disarmament and International Security Affairs (D&ISA) Division at the Ministry of External Affairs (MEA), Pankaj Sharma, had noted, “Nuclear disarmament can be achieved by a step-by-step process underwritten by a universal commitment and an agreed multilateral framework that is global and non-discriminatory”.<sup>35</sup> He added, “India’s support for global, non-discriminatory, verifiable nuclear disarmament in a time-bound manner remains firm, and reducing the salience of nuclear weapons in international affairs and security doctrines, with the aim of increasing restraints on the use of nuclear weapons can be an essential first step.”<sup>36</sup> He further stated, “India’s initiatives in the UN General Assembly as well as the Conference on Disarmament reflect its sincerity in seeking peace and security through the pursuit of a world without weapons of mass destruction. India also hopes that the Conference on Disarmament will be an appropriate forum for negotiations on nuclear disarmament that can commence work towards this goal as soon as possible.” He also said that a nuclear technology possessing nation like India which had also been the founder member of the IAEA, believed in the fact that “predictable access to nuclear energy would be critical to promote global economic development and combat climate change.”<sup>37</sup> India had officially declared that it would not participate in the multilateral negotiations for a nuclear weapons ban which began at the United Nations in New York from March 27-31, 2017, with Indian officials expressing doubts about whether the endeavours can prompt nuclear disarmament in the absence of “an agreed multilateral framework”<sup>38</sup>. Returning to history, he observed that while having to choose a way in 1961 for a system to manage the danger posed by nuclear weapons, the international community selected to limit the expansion of nuclear weapons to a modest bunch of states rather than disallowing their utilisation by all. “It chose to focus on restraints on the possession of nuclear weapons rather than restraints on their use, for the primary purpose of stabilising nuclear deterrence, rather than finding a replacement,” he said.

Thus, India’s journey from being a nuclear reluctant state to being a nuclear weapons state has been an interesting one. Though India has always supported disarmament post-independence, the nation was compelled to exercise its nuclear option due to security constraints from its immediate neighbourhood.

However, the disarmament journey explained above reveals that though India had to give in to nuclear weapons due to strategic reasons, its efforts towards disarming reflect its humanitarian considerations towards the use of these weapons. Keeping in mind the uncertain strategic environment, India seeks a formal commitment to disarm from the other nations.

## **Conclusion**

A nation's nuclear doctrine states the way in which a nuclear weapons state would utilise its nuclear weapons during both peace and war. By signalling to the adversary its expressed intentions and resolve, such doctrines help states to deter the enemy, and if deterrence comes up short, it directs the state's response during war. After the 1998 nuclear test, when India pronounced itself a nuclear weapons state, it articulated a principle of 'no first use' of nuclear weapons in its doctrine. Put simply, Indian decision-makers categorically rejected the idea of initiating the use of nuclear weapons in any conflict scenario. New Delhi would use the nuclear option only in case it was attacked first. Since then, for almost two decades, 'no first use' has remained a core organising principle of India's nuclear deterrence.

In the case of a nuclear attack, India's nuclear doctrine promises massive retaliation. The question that arises is whether inflicting massive damage through the use of nuclear weapons would be in compliance with IHL. As has already been explained earlier in this chapter, the 1996 ICJ Advisory Opinion did not take a clear stand on the use of nuclear weapons and left it to the nations to make the judgement on whether they needed to use it in self-defence. Given that the nuclear weapon is a weapon of mass destruction, it is clear that it will result in indiscriminate damage, not being able to distinguish between combatants and non-combatants. That is the very nature of the weapon. India's doctrine of nuclear deterrence, therefore, is premised on creating the maximum chance of non-use of nuclear weapons through the conscious enunciation of two doctrinal attributes: one, by restricting the role of the weapons solely to deterrence of nuclear weapons; and two, by eschewing preemption. Further, in deference to its commitment to IHL, India has continued its pursuit for a nuclear weapons free world. The guarantee that the weapon is never used can only come from its elimination. According to the WHO's report of 1948,

“Nuclear weapons constitute the greatest immediate threat to the health and welfare of mankind,” It further claimed, “It is obvious that no health service in any area of the world would be capable of dealing adequately with the hundreds of thousands of people seriously injured by blast, heat or radiation from even a single one-megaton bomb. Whatever remained of the medical services in the world could not alleviate the disaster in any significant way.”<sup>39</sup> And, moreover, the impact of a nuclear war on healthcare facilities would not be confined to only one generation or one geographical territory. For instance, the Japanese Red Cross hospitals till today continue to treat numerous victims of cancers and chronic diseases caused by radiation exposure from the 1945 bombings of Hiroshima and Nagasaki. Apart from these impacts, the climate and food supply chains would also be affected heavily if a nuclear war were to break out. Thus, looking at the multi-dimensional disaster and destruction a nuclear attack or a limited war can cause, it is advisable that the nations of the world join hands in efforts towards absolute disarmament. One immediate way of ensuring this can be by establishing the global NFU commitments. This might be an important step towards the attainment of a nuclear weapons free world, by reducing the strategic value of nuclear weapons in the eyes of military planners, and by negotiations towards nuclear disarmament. The ongoing pandemic has demonstrated what a global disaster looks like. Nuclear use in any part of the world would be a humanitarian disaster beyond human imagination. Thus, it is high time that all the countries of the world take lessons from this global pandemic, introspect and come together in good faith to eliminate the fear of a nuclear catastrophe from the face of this world.

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# CAPS 'NON-RESIDENT FELLOWSHIP' PROGRAMME ON NATIONAL SECURITY

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With a view to reach out to university students, younger defence officers, and professionals (media/academic) interested in research on strategic and defence issues, but not physically based in New Delhi, CAPS has launched a Non-Resident Fellowship Programme focused broadly on National Security issues.

This programme is in keeping with the four core objectives of the Centre:

- Conduct future-oriented, policy-related research on defence and strategic issues to contribute inputs for better understanding of key challenges, their implications, and India's possible responses
- Analyse past, present and future trends in areas of interest to prepare the country as an emerging power in the coming decades.
- Promote a strategic outlook amongst the widest possible populace through publications and seminars
- Spread awareness to stimulate public debate on strategic and security concerns in order to strengthen the country's intellectual capital.

The duration of the fellowship would normally be 9 months and can start at any time of the year. The scholar will be expected to complete a monograph of approximately 30,000 words during the fellowship while working at home/present location. Applications for fellowship must include a CV and a project proposal (not exceeding 800 words) along with Chapterisation. The final manuscript will be reviewed by an independent reviewer for its fitness for publication. If the manuscript is accepted for publication, the research Fellow will be paid a small honorarium and a certificate from CAPS. For queries and details write to the Centre (e-mail: [capsnetdroff@gmail.com](mailto:capsnetdroff@gmail.com)) or by letter to following address:

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