

NUCLEAR DISARMAMENT: AN OVERVIEW OF CUSTOMARY INTERNATIONAL LAW

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International law consists of not only treaties but some other imported sources as well. Among the sources of international law, enumerated by Article 38, of the Charter of the International Court of Justice, are international customs, the general principles of law recognized by civilized nations, judicial decisions, and the opinions of outstanding jurists, all of which strongly establish the illegality of nuclear weaponry. The absence of a specific treaty banning the use or manufacture of nuclear weapons means that only one of the sources of international law is absent. All the other – international customs, general principles of law recognized by civilized nations, judicial decisions and juristic writing- can strongly be invoked. The advent of the nuclear bomb and the manufacture of nuclear weaponry in several countries have not displaced this principle. There is also a strong body of international declarations, which, although they do not have the force of law in themselves, yet strongly indicate the sense of the international community on this issue and reinforce the contention that such a principle now forms part of customary international law.

Introduction

It is sometimes argued that nuclear weapons do not come within the scope of laws of war which were formulated before their invention. Specific applications of the general principles of international law arise later when the scope is related. These sources of law would only be in-operative if they had no general principle which would cover the new situation. In case of nuclear weapons these general principles do exist.

The issue of nuclear weapons is too horrible to contemplate it is often been banished from awareness and the institutions, which promote and develop nuclear weapons, underestimate the dangerous consequences of their contribution. There are many countries in the nuclear club. They have differing standards for exchange of weapons-grade materials; their scientists reflect a variety of loyalties. They have shifting alliances with other nations and some have connections with non-governmental military groups. There is a dangerous volatility in a situation in which one irrational action could precipitate a nuclear war with unprecedented destruction.¹

The Hague Peace Conferences of 1899 and 1907 and the formation of the League of Nations and the United Nations had the abolition of war in mind, but failed to deliver due to the vested interests in continuing to use force and to the strongly held notion that force may be necessary in self-defense. Certain acts of war are “inhumane” and not necessary for the purpose of defeating the enemy. Therefore, the development of a body of international

¹ ‘A Position Paper on United Nations Nuclear Weapon Policy’, www.un.org. (Last viewed November 21, 2006)

law termed the humanitarian laws of warfare, which prohibit certain “inhumane” acts during wartime while not prohibiting the inhumane act of war itself has emerged.²

International Humanitarian Law

Humanitarian law is an international body of rules, which, in wartime, protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Its central purpose is to limit and prevent human suffering in times of armed conflict. Two basic rules of humanitarian law are the prohibition of employing weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering (e.g. chemical and/or biological weapons), and the commitment to distinguish between civilian and combatants in times of war.³ It is the law that regulates the conduct of armed conflicts (*jus in bello*). It comprises “the Geneva Conventions and The Hague Conventions, as well as subsequent treaties, case laws, and customary international law.”⁴ It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to protected persons, usually meaning civilians. Serious violations of international humanitarian law are called war crimes. International humanitarian law, *jus in bello* regulates the conduct of forces when engaged in war or armed conflict. It is distinct from *jus ad bellum* which regulates the conduct of engaging in war or armed conflict and includes crimes against peace and of war of aggression. Together the *jus in bello* and *jus ad bellum* comprise the two strands laws of war governing all aspects of international armed conflicts. The law is mandatory nations bound by the appropriate treaties. There are also other customary unwritten rules of war, many of which were explored at the Nuremberg War Trials. By extension, they also define both the permissive rights of these powers as well as prohibitions on their conduct when dealing with irregular forces and non-signatories.

International humanitarian law operates on strict division between rules applicable in international armed conflicts and those relevant to armed conflicts not of an international nature, which is well criticized.⁵ Modern international Humanitarian Law is made up of two historical streams: the law of The Hague referred to in the past as the law of war proper and the law of Geneva or Humanitarian Law.⁶ The Law of The Hague, or the Law of War proper, determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harm.⁷ In particular, it concerns itself with the

² Alyn Ware, ‘Depleted Uranium Weapons and International Law’, International Action Center, New York, 1997, p.1.

³ <http://www.wagingpeace.org/index.htm>. (Last viewed May 28, 2011)

⁴ ICRC, ‘What is International Humanitarian Law?’

⁵ James Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law’, *International Review of the Red Cross*, pp.315-350.

⁶ Jean Pictet (1975), *Humanitarian Law and the Protection of War Victims*, pp.16-17.

⁷ Jean Pictet (1985), *Development and Principles of International Law*.

definition of combatants, establishes rules relating to the means and methods of warfare, and examines the issue of military objectives.⁸

Systematic attempts to limit the savagery of warfare only began to develop in the 19th century. Such concerns were able to build on the changing view of warfare by states influenced by the Age of Enlightenment. The purpose of warfare was to overcome the enemy state and this was obtainable by disabling the enemy combatants. Thus, the distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle.⁹

Geneva Conventions

The Geneva Conventions are the result of a process that developed in a number of stages between 1864 and 1949 which focused on the protection of civilians and those who can no longer fight in an armed conflict. As a result of World War II, all four conventions were revised based on previous revisions and partly on some of the 1907 Hague Conventions and readopted by the international community in 1949. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars. The Geneva Conventions are:

- First Geneva Convention “for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field” (first adopted in 1864, last revision in 1949)
- Second Geneva Convention “Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea” first adopted in 1949, successor of the 1907 Hague Convention X)
- Third Geneva Convention “relative to the Treatment of Prisoners of War” (first adopted in 1929, last revision in 1949)
- Fourth Geneva Convention “relative to the Protection of Civilian Persons in the Time Of War” (first adopted in 1949, based on parts of the 1907 Hague Convention I)

In addition, there are three additional protocols to the Geneva Convention:

- Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.

⁸ Frits Kalshoven and Liesbeth Zegveld, ‘Constraints on the Waging of War: An Introduction to International Humanitarian Law’, *International Committee of Red Cross*, Geneva, March 2001, p. 40.

⁹ Christopher Greenwood and Dieter Fleck ed. (2008), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, U.S.A., p. 20.

- Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
- Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of June 2007 it had been ratified by 17 countries and signed but not yet ratified by an additional 68 countries.

While the Geneva Conventions of 1949 can be seen as the result of a process which began in 1864, today, they have achieved universal participation with 194 parties.” This means that they apply to any armed conflict.¹⁰

Basic Rules of International Humanitarian Law

- Persons outside the combat (hors de combat) and those not taking part in hostilities shall be protected and treated humanely.
- It is forbidden to kill or injure an enemy who surrenders or who is outside the combat (hors de combat).
- The wounded and sick shall be cared for and protected by the party to the conflict which has them in its power. The emblem of the “Red Cross,” or of the “Red Crescent,” shall be required to be respected as the sign of protection.
- Captured combatants and civilians must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
- No one shall be subjected to torture, corporal punishment or cruel degrading treatment.
- Parties to a conflict shall and members of their armed forces do not have an unlimited choice of methods and means of warfare.
- Parties to a conflict shall at all times distinguish between the civilian population and combatants. Attacks shall be directed solely against military objectives.¹¹

The ICJ Advisory Opinion

In July of 1996 the International Court of Justice (ICJ), the principal judicial organ of the United Nations, gave an Advisory Opinion on the Legality of the threat or use of nuclear weapons concluding that the use of nuclear weapons would generally be contrary to the

¹⁰ Christopher Greenwood and Dieter Fleck ed. (2008), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, U.S.A., pp. 27-28.

¹¹ Preux de, *Basic Rules of the Geneva Conventions and Their Additional Protocols*, 2nd edition, Geneva, International Committee of Red Cross, p.1.

principles and rules of international humanitarian law. The ICJ further noted that even “in an extreme circumstance of self-defense,” humanitarian law applies. The ICJ also did not accept the argument that the use of small, precisely targeted tactical nuclear weapons would conform to international law. Although today there is no comprehensive and universal prohibition against nuclear weapons, the ICJ stated that the nuclear weapons states are obligated to negotiate a treaty leading to nuclear disarmament.

In a resolution dated 14 May 1993, the World Health Organization (WHO) asked the ICJ to give an advisory opinion as to whether the use of nuclear weapons by a state during war or armed conflict would constitute a breach of international law.¹² On 14 December 1994 the United Nations General Assembly adopted a resolution in which it sought an Advisory Opinion from the ICJ on the following Question: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’¹³

The ICJ declined to proceed with the WHO request for reasons which do not need to concern us. In July 1996 the Court did, however, deliver a comprehensive opinion pursuant to a request from the United Nations General Assembly.¹⁴

The Court concluded as follows:

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

There is in neither customary nor conventional international law and comprehensive and universal prohibition of the threat or use of nuclear weapons as such; A threat or use of force by means of nuclear weapons that is contrary to Article 2, Paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51 is unlawful; A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

It follows from the above-mentioned requirements 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; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake.¹⁵

¹² A. Roberts and R. Guelff (2000), *Documents on Laws of War*, 3rd edition, p. 639.

¹³ Resolution 49/75 (k) acting under art 96(1) of the UN Charter.

¹⁴ Y. Dinstein (1997), *The Laws of Air, Missile and Nuclear Warfare*, p. 27; *Israel Yearbook on Human Rights* 1, pp. 11-15; R. Muellerson (1997), *Missiles with Non-Conventional Warheads and International Law*, pp. 27.

¹⁵ International Court of Justice, *Nuclear Weapons Case*, Advisory Opinion, 8 July 1996, ICJ Reports 226.

In its statement to the 51st Session of the United Nations General Assembly in response to the Advisory Opinion, the ICRC found it 'difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law.'¹⁶

The question whether nuclear weapons could be lawfully used in an armed conflict is regulated by international law, and in particular the law of armed conflicts and by principles of International Humanitarian Law.

Under international law, use of force is prohibited in international relations. The prohibition contained in Article 2(4) of the UN Charter is as comprehensive and fundamental as to be regarded as *jus cogens* or an obligation of an absolute character. On the basis of this principle it appears clear that any use of nuclear weapons as a measure of use of force to promote national policy objectives would be unlawful.

It is further agreed that any use of force in self-defense has to be proportional to the means and ends involved or to the original wrongful use of force. However, the right of self-defense is to be regarded as a provisional measure or a remedy and hence as soon as other means or measures became available, the resort to self-defense through use of force has to cease. It is even suggested that where one state pre announces an armed attack against another state, a hardly conceivable practice, preventive self-defense would be lawful!

In view of the above and given the strict limitations on the non-use of force and the right of self-defense, it is the view that use of nuclear weapons in any armed conflict as a first attack would be unlawful under international law.

The question then for consideration is whether the use of nuclear weapons would be lawful as a measure of reprisal or retaliation if the same is used by an adversary in the first instance. Reprisals or retaliation under international law are also governed by certain specific principles. First, reprisals to be valid and admissible could only be taken in response to a prior wrongful act by a state. Second, such reprisals must remain within reasonable bounds of proportionality to the effect created by the original wrongful act. However, reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *jus cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of *latae vis major*.¹⁷

In other words, a nuclear weapon could not be used by way of reprisal against another state if that state did not commit any wrongful act involving use of force. Second, when a state commits such a wrongful act, the use of force by way of reprisal would have to be

¹⁶ *International Committee of Red Cross 316*, 1997, pp. 118-119.

¹⁷ G. Fitzmaurice, 'General Principles of International Law', Vol. 92, *Recueil des Cours*, 1957, pp. 119-120.

proportionate and as such if the wrongful act did, not involve the use of a nuclear weapon, the reprisal could also not involve the use of a nuclear weapon.

Third, even where a wrongful act involved the use of a nuclear weapon, the reprisal action cannot involve use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances.

In view of the above, use of nuclear weapons even by way of reprisal or retaliation, appears to be unlawful. In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubts that even in response by way of retaliation states do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction. It is also clear further that any wrongful act not involving use of force at all under international law could not be redressed or attempted to be met with any use of force with or without involving nuclear weapons.

This brings us to the question as to the legality of the use of nuclear weapons in an armed conflict on the ground that it is open as a measure of last resort under limited conditions as a matter of military necessity. Moreover, the very purpose of international humanitarian law is to forbid “indiscriminate attacks” and demand protection of civilians. ‘Indiscriminate attacks’ are generally defined as those that are not directed at any single military objective, those which employ methods or means of combat which cannot be directed at a specific military objective and those with effects which cannot be limited. In other words, indiscriminate attacks are those of a nature to strike a military object and civilians and civilian objects without distinction.

In addition to the above, the relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden.

Keeping the above considerations in view, it is easy to come to the conclusion that 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 the combatants and non-combatants on the one hand and could cause excessive injuries to the combatants making their death inevitable and could even cause widespread and long-term damage which in some cases could even result in what is called a “nuclear winter”.

However, an opposite view was expressed by some that the law of war or the humanitarian law could not be deemed to prohibit the use of nuclear weapons as that law grew up mostly only touching the old and more marginal weapons. They claimed that nuclear weapons being weapons of modern warfare are outside the scope of such a law. It is also their view that recent attempts to outlaw some newer method of warfare by implications did not outlaw the use of nuclear weapons in an armed conflict. Citing that almost all states are urging the conclusion of a convention to outlaw the use of nuclear weapons in an armed

conflict, it is also argued that in the absence of any such convention their use is not prohibited. In the same connection the use of such nuclear weapons on Hiroshima and Nagasaki is also cited as an example of such legitimate use.

On the basis of above arguments, it is contended that international Law does not provide for any blanket prohibition against the use of nuclear weapons and the legality of any specific use could however be appraised only in the total context of such specific use.

The above arguments in favour of the legality of use of nuclear weapons are convincingly contested.

- First, it was pointed out that the development of humanitarian law and the specific principles indicated above which have the status of customary international law do not distinguish between major or minor methods of warfare or between major or marginal weapons.
- Second, some of the earlier opinions regarding the legality of nuclear weapons were not based on information and knowledge now available about the devastating effects of the use of nuclear weapons and their incompatibility with the fundamental norms of humanitarian law.
- Third, more recent efforts which reiterated the customary law developed on the basis of the earlier declarations or conventions also did not make any distinction between various weapons or methods of warfare.
- Fourth, the international community often engaged in further clarification, codification and progressive development of the law even when the principals involved in such an exercise are already regarded as well-established in international law. Examples of this kind of exercise are many and by way of illustration the 1982 UN Convention on the Law of the Sea, various declarations and treaties concluded reiterating the UN Charter principles and the international humanitarian law itself could be mentioned.
- Fifth, the use of nuclear weapons over Hiroshima and Nagasaki does not make that use lawful if their use is otherwise prohibited in law. On the contrary, the use of chemical weapons in World War I led to the negotiation of the Geneva Protocol outlawing their further use. The same should apply to nuclear weapons. Violations of international law like any law would only highlight the importance of complying with such law and do not make legal what is otherwise illegal.

The use of nuclear weapons in response to attack by a conventional weapon would patently violate the principle of proportionality, but also a nuclear response to nuclear attack, would violate the Principle of discrimination, humanity, environmental security and probably the principle of neutrality as such an attack would not distinguish between combatants and non-combatants—causing civilian casualties, ravaging the natural environment and contaminating the territory of neighboring and distant neutral countries. Nuclear

deterrence had been considered to be abhorrent to human sentiment since it implies that a state if required to defend its own existence will act with pitiless disregard for the consequences to its own and adversary's people.

Another question which arises in relation to the theory of deterrence is whether the keeping of peace or the prevention of war is to be made dependent on the threat of horrific indiscriminate destruction which justifies the stockpiling of such weapons at an enormous expense, in the hope that they will merely act as a deterrent but will not in fact be used. However, those who do not have such weapons would all the time be racing to build them and those who already have nuclear weapons would continue to develop even more destructive weapons to maintain the superiority, necessary for deterrence and this would keep humanity in the perpetual fear of total destruction.

A better and saner way to secure everlasting peace would be to ensure that not only are such weapons ever used but also not made. The security of all nations would best be safeguarded by a nuclear weapon free world. If peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence.

The consideration of question of legality of use of nuclear weapons is incomplete without consideration of the manufacture, production and stockpiling of nuclear weapons.

Since the production and manufacture of nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself its illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted. Besides, the manufacture and stockpiling of nuclear weapons would constitute as a threat of their eventual use.

In this connection, reference may be made to the Conventions on Biological Weapons and on Chemical Weapons which recognizing the need to exclude completely the possibility of the use of such weapons, prohibiting states parties to develop, produce, stockpile or otherwise acquire or retain the prohibited weapons. Those conventions clearly recognize and provide that the only effective way to prevent under any circumstances the use of a prohibited weapon is to ensure that no state undertakes the production or manufacture or retains such weapons. Accordingly, where states are in possession of chemical or biological weapons they are required to dismantle or destroy them under an elaborate procedure specified therein with built-in safeguards of international inspection. The need for these conventions was felt because a number of states had made declarations/reservations to the 1925 Geneva Protocol to the effect that they could use the prohibited gases, poisons etc., in case they were subjected to an attack by such weapons.

The Chemical Weapons Convention and the Biological Weapons Convention by prohibiting the production, manufacture etc., of such weapons under any circumstances preclude their use even by way of retaliation in cases where they have been used by one party to a conflict. Thus the use of nuclear weapons which is otherwise contrary to

international law could only be effectively prevented by eliminating completely their production, manufacture and by ensuring the dismantling of existing nuclear weapons.

The production of weapons which have the capacity to destroy all mankind cannot in any manner be considered to be justified or permitted under international law.

It is also argued that declaring the threat or use of nuclear weapons as illegal or unlawful would be a greater deterrent against any irresponsible use than treating such a use as legal; and further where such illegal use is still resorted to, the international community would at least have at its disposal the right to condemn the user and demand cessation of the wrongful act and attach such other legal consequences as are prescribed in the law of state responsibility. In view of the above, it is submitted that the threat or use of nuclear weapons in any circumstance, whether as a means or method of warfare or otherwise, is illegal or unlawful under international law.¹⁸

Conclusion

There have been many procedures for the settlement of disputes concerning Nuclear Arms Control and other matters crucial to the security interests of States which are unsatisfactory. The importance of the generally accepted principles of International Law applicable to the Nuclear Control is alluded to in U.N. There is lack of wide personal discretion that must fall to judges of the International Court of Justice or to any other adjudicators who may be called upon to apply that body of law. Usually very few cases are referred to the Court and when a Nuclear Arms Control case was brought to the International Court of Justice, the majority of Judges avoided handling down an Opinion on the merits because they evidently deemed that it would be unacceptable to the international community for them to do so. The deficiencies of the Court should be sufficient compensated by the other organs of the U.N.

International law provides an alternative to the use of force in settling disputes by relying on compromise, cooperation, mutual legal obligations, and common ends. Rapid conclusion and strict observance of treaties to neutralize areas of most acute and imminent conflicts are needed for minimizing the immediate dangers occasioned by the stockpiles of nuclear weapons. In today's world of increasingly interdependent nations and economies, the resolution of conflicts without violence is more essential than ever. So, methods should be adopted which can make a check and balance on the upcoming threat of nuclear arsenals and nations should jointly come forward to use the nuclear power for social purposes, other than being a part of the rat race to acquire more nuclear power and nuclear stocks.

¹⁸ *Indian Journal of International Law*, Vol. 37, 1997, pp. 244-249.