

LEGAL ASPECTS OF NUCLEAR WEAPONS

A 'bird's-eye view' of international law and nuclear weapons

By Dr Gro Nystuen
ILPI-UNIDIR Vienna Conference Series

Paper N° 6 of 6
🐦 #HINW14vienna

- This paper takes a 'bird's-eye view' of international law and nuclear weapons, exploring relevant rules protecting individuals, the environment, as well as disarmament-related law such as nuclear-weapon-free zones and the Non-Proliferation Treaty (NPT).¹
- The paper concludes that the humanitarian consequences approach to nuclear weapons may be conducive to finding ways of fulfilling commitments—express or implied—to protect people and the environment under relevant international legal instruments.
- At present there is no explicit rule or law banning nuclear weapons, unlike biological and chemical weapons.

Introduction

The reality today is that nuclear weapons are being produced, maintained, and stockpiled in many parts of the world. In spite of this fact, a relatively high level of what might be called nuclear weapons complacency still manifests itself in discussions on global security policy. The doctrine of nuclear deterrence, which essentially holds that certain states must have nuclear weapons in order to ensure that they will never be used, has been dominant. It has been matched by a perception among some policy makers that the awfulness of the humanitarian consequences of use of nuclear weapons adds to the safety and sustainability of nuclear deterrence, because those who have them will do whatever needs to be done to avoid nuclear weapon use and its impacts. (The

third paper in this series explores some problems with these perceptions.)²

Meanwhile, the legality of nuclear weapons has been subject to sometimes heated debate for decades. This paper offers a humanitarian approach in looking at how international law is important with regard to nuclear weapons. It takes the perspective of those who would be impacted by their use—both the direct short- and long-term consequences (such as health issues), and the more indirect short- and long-term consequences (such as environmental damage). The actual protection under international law against being subject to nuclear weapons detonations is fundamental to this discussion.

Looking at the law and nuclear weapons from a humanitarian perspective helps to inform the discussions and processes aimed at the total

elimination of nuclear weapons, as expressly set out as a goal in key international instruments such as the NPT.

Law protecting individuals

The United Nations Charter had as its primary objective to ‘save succeeding generations from the scourge of war’.³ The Charter forbids the use of military force in general, with very few exceptions. These rules in the Charter apply equally to all use of force against states irrespective of weapon type, and no particular restrictions are imposed on nuclear weapons as such. The extent, however, to which the use of nuclear weapons could be lawful under the Charter is extremely limited.

The extent to which the use of nuclear weapons could be lawful under the Charter is extremely limited

In its Advisory Opinion from 1996, the International Court of Justice (ICJ) seems to have contributed to confusion with regard to the rules governing the justification for and/or legality of the use of military force on the one hand, and the rules governing the actual conduct of hostilities (and thus, the use of weaponry) on the other.⁴ These regimes are, as a matter of law, distinct, and they apply independently of each other, albeit often also simultaneously. International humanitarian law (IHL) rules must apply irrespective of the justness or legality of the use of force, otherwise they cannot reasonably have any effect.

International humanitarian law regulates the conduct of warfare and is a regime of considerable bearing on the use of nuclear weapons. The key instrument in this context is the 1977 Additional Protocol I (AP-I) to the 1949 Geneva Conventions,⁵ in addition to international customary law. These rules of IHL, governing how to carry out hostilities when an armed conflict takes place, are applicable and highly relevant to the potential use of nuclear weapons in an armed conflict. This is true, in particular, for the rules on *distinction*, *proportionality*, and *precautions in attacks*, aimed at protecting civilians, as well as the prohibition on means of warfare of a nature to cause *superflu-*

ous injury and unnecessary suffering, which aim to protect combatants.

The critical question is whether it is possible to imagine any use of nuclear weapons that would not violate one or more of these IHL rules. There is no doubt that IHL would, in most foreseeable scenarios, prohibit nuclear weapons use. It should, however, be noted that nuclear weapons states that are party to AP-I have made reservations regarding its application to nuclear weapons.⁶

Given that use of nuclear weapons could constitute violations of IHL rules, such acts would potentially also be subject to rules and proceedings under international criminal law. The use of nuclear weapons could, under certain circumstances, constitute genocide, crimes against humanity, and/or war crimes. The lack of explicit International Criminal Court (ICC) jurisdiction with regard to nuclear weapon use in the ICC Statute does not preclude the categorization of such use as an international crime under other legal regimes. The preventive function of international criminal law must be seen as a factor in the overall issue of protection of individuals.

The lack of explicit International Criminal Court jurisdiction with regard to nuclear weapon use in the ICC Statute does not preclude the categorization of such use as an international crime under other legal regimes

When discussing international legal frameworks aimed at protecting individuals from nuclear weapons use, the treaty regimes of international human rights law are also relevant. Key human rights instruments in this context include the International Covenants on Social, Economic and Cultural Rights and on Civil and Political Rights,⁷

as well as the European Convention on Human Rights.⁸ Human rights treaty law regulates the relationship between each state and the persons under its jurisdiction. Human rights, however, do apply in armed conflict, and it has been established that states can have extraterritorial human rights responsibility. Nuclear weapons use by a state outside its own territory can thus constitute violations of human rights.

Human rights do apply in armed conflict, and it has been established that states can have extraterritorial human rights responsibility

Law protecting the environment

The core rules on the protection of the natural environment during armed conflict are partly to be found in AP-I to the Geneva Conventions, and partly in other treaties, as well as in international customary law. Under AP-I, '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'.¹⁰ Moreover, it specifies that 'care shall be taken to protect the environment against widespread, long-term and severe damage'. The 2005 Study by the International Committee of the Red Cross (ICRC) on Customary Law asserts that the prohibition against deploying means of warfare that cause widespread, long-term and severe damage to the environment amounts to a customary norm 'even though some States have persistently maintained that the rule does not apply to nuclear weapons and that they may, therefore, not be bound by it in respect of nuclear weapons'.¹¹ Moreover, the ICRC's study found that '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'.¹² The United Nations International Law Commission is currently conducting a study on the protection of the environment under IHL.¹³

International environmental rules could apply not only to the potential use of nuclear weapons

In particular, the right to life and the prohibition against inhumane treatment, and the right to health and to a healthy environment are relevant in this context.

International health regulations aim to protect individuals. Historically, the International Health Regulations (IHR) were established to eradicate 'quarantinable diseases' such as cholera and yellow fever. Since their latest revision in 2005, the IHR have been expanded to cover: 'illness or medical condition, *irrespective of origin or source*, that presents or could present significant harm to humans' (emphasis added).⁹ Thus, one might ask whether the Regulations would cover health consequences resulting from nuclear detonations, including radioactive fallout from accidents with nuclear power plants, as well as disease stemming from nuclear weapons detonation events.

in an attack, but also to their testing and to the release of pollutants at various stages of the weapons production cycle. Environmental treaties not designed specifically with nuclear weapons in mind may nevertheless regulate nuclear by-products (such as harmful radioactive isotopes) as pollutants. For example, international instruments such as the Convention on Long-range Transboundary Air Pollution¹⁴ may apply to fallout from nuclear weapons detonations. How and to what extent this is the case concerning nuclear weapons use depends, *inter alia*, on whether the treaty in question continues to apply in armed conflict.¹⁵

...international instruments such as the Convention on Long-range Transboundary Air Pollution may apply to fall-out from nuclear weapons detonations

The environmental impact of nuclear weapons has been demonstrated through nuclear weapons testing. In particular atmospheric tests have had severe environmental as well as health consequences (see the second paper in this series).¹⁶



The entrance to the Palais des Nations in Geneva (Photo: Tim Caughley / UNIDIR).

Meanwhile, even though the 1996 Comprehensive Test Ban Treaty²⁷ was adopted by the United Nations General Assembly and many states have ratified it, this treaty has not entered into force because some nuclear weapons states decline to

become parties to it. However, one might assume that atmospheric testing of nuclear weapons is now prohibited under international customary law, although such a norm may not necessarily extend to underground testing.

Disarmament law: nuclear-weapon-free zones

Protection of both individuals and the environment are prominent aspirations in the treaties establishing nuclear-weapon-free zones (NWFZ). Covering large geographical areas and many states, such zones represent an often underestimated legal and political dynamic with regard to protecting individuals and the environment against nuclear weapons detonations. At present, over 100 countries worldwide are parties to an NWFZ treaty, representing over 50 per cent of the Earth's surface. In the southern hemisphere, the impact of NWFZs is even more substantial: 99 per cent of all southern land areas are included within a NWFZ.

Nuclear-weapon-free zones may be separated into three main categories: *geographical zones* covering uninhabited territory or areas, such as the moon or the sea-bed, *regional zones*, consisting of clusters of states or entire continents, including Latin-America and the Caribbean, Africa and large parts of Asia, as well as *single, self-declared, countries*. The treaty regimes on NWFZ explicitly or implicitly generally prohibit production, receipt, storage, testing or use of nuclear weapons, and several also contain a prohibition on dumping radioactive matter at sea or elsewhere. The NWFZs' potential in defusing the risk of regional nuclear arms races and decreasing the risk of nu-

clear weapons falling into the hands of non-state actors are also increasingly important factors in

the international efforts to protect individuals and the environment from nuclear weapons.¹⁸

Disarmament law: the NPT

The NPT is another treaty aiming at preventing or at least limiting the potential for use of nuclear weapons. The NPT's preamble reflects a key driving force behind the treaty's negotiation:

'Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples'.¹⁹

Since its inception in 1968, the NPT has served the important purpose of largely preventing nuclear proliferation. But the NPT has proven less effective with regard to nuclear disarmament by its five nuclear-weapon states (China, France, Russia, the United Kingdom and the United States). Meanwhile, four other states (India, Israel, Pa-

kistan and the Democratic People's Republic of Korea) have also obtained nuclear weapons. Comparing the NPT with the two other weapons of mass destruction (WMD) regimes—on biological and chemical weapons—the most striking difference is that the latter two contain prohibitions against use of the weapons in question. There is no escaping the fact that of the three kinds of WMD, nuclear weapons have potential for the most devastating impact from a humanitarian point of view. The NPT member states recognized the particular threat posed by nuclear weapons in the final document of the Review Conference in 2010, in which they expressed their 'deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons' (see the first paper in this series for commentary).²⁰

Conclusions

A strongly polarized debate over nuclear weapons and their legality has taken place over the past decades. It has been asserted by some that use of nuclear weapons is permitted under international law, whereas others have held that use, and even possession, of nuclear weapons constitutes a violation of international law. This debate peaked with the proceedings around the 1996 ICJ Advisory Opinion on the legality of nuclear weapons. Since the ICJ did not resolve the issue, the frontlines remained where they were, but now with the added element of both 'sides' taking the Advisory Opinion as evidence that they were right. This stalemate over the legal issues may have contributed to neutralizing the public debate, rather than provoking the public's active involvement to pressure governments for greater efforts to diminish the risk of nuclear weapons use. The international initiative on the humanitarian impacts of nuclear weapons has created an opportunity to discuss the legality of nuclear weapons from new angles.

It is clear that various international legal regimes place heavy restrictions on use of nuclear weapons. However, there is no unequivocal and explicit rule under international law against such use. With regard to possession, production, and stockpiling of nuclear weapons, a number of regimes constitute important regulatory frameworks that to a large degree have prevented nuclear proliferation. Disarmament obligations on the nuclear weapons states remain contested, and continue to be challenging to enforce. While other legal regimes have banned the two other categories of WMD because their use would be in conflict with IHL requirements, nuclear weapon use, production, transfer, and possession have yet to be explicitly prohibited.

Endnotes

- 1 See also G. Nystuen, S. Casey-Maslen and A. Golden Bersagel, *Nuclear Weapons Under International Law*, Cambridge University Press, 2014.
- 2 J. Borrie, 'A limit to safety: risk, 'normal accidents', and nuclear weapons', ILPI-UNIDIR Paper no. 3, December 2014.
- 3 <http://www.un.org/en/documents/charter/>.
- 4 <http://www.icj-cij.org/docket/files/95/7497.pdf>.
- 5 <https://www.icrc.org/ihl/INTRO/470>.
- 6 See the International Committee of the Red Cross IHL database: https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.
- 7 <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.
- 8 <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.
- 9 World Health Organization (WHO), *International Health Regulations (2005)*, 2nd edition, WHO, 2008, p. 1.
- 10 Article 35 of 1977 Protocol I Additional to the 1949 Geneva Conventions.
- 11 J.-M. Henckaerts, 'Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict', *International Review of the Red Cross*, vol. 87 no. 857, 2005, pp. 175-197, p. 191
- 12 *Ibid*, p. 192.
- 13 United Nations General Assembly document A/CN.4/674 (30 May 2014): <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/415/89/PDF/N1441589.pdf?OpenElement>.
- 14 http://www.unece.org/env/lrtap/lrtap_h1.html.
- 15 United Nations General Assembly document A/66/10, *International Law Commission Report on the Work of its 63rd session: Chapter VI on Effects of Armed Conflict on Treaties*, 2011, pp. 173-178: <http://legal.un.org/ilc/reports/2011/2011report.htm>.
- 16 J. Borrie, 'A harmful legacy: the lingering humanitarian impacts of nuclear weapons testing', ILPI-UNIDIR Paper no. 2, December 2014.
- 17 <http://www.ctbto.org/the-treaty/treaty-text/>.
- 18 ILPI, *Nuclear Weapons Project Nutshell Paper No. 1: Nuclear-Weapon-Free Zones*, ILPI, 2013: <http://nwp.ilpi.org/?p=1182>.
- 19 <http://www.un.org/en/conf/npt/2005/npt-treaty.html>.
- 20 N. Ritchie, 'The story so far: The humanitarian initiative on the impacts of nuclear weapons', ILPI-UNIDIR Paper no. 1, December 2014.

TITLES IN THIS 'VIENNA PAPERS' SERIES

The International Law and Policy Institute (ILPI) and the United Nations Institute for Disarmament Research (UNIDIR) produced this series of papers for the third conference on the humanitarian impacts of nuclear weapons (HINW) in Vienna, Austria, from 8 to 9 December 2014:

1. NICK RITCHIE, *The story so far: the humanitarian initiative on the impacts of nuclear weapons*.
2. JOHN BORRIE, *A harmful legacy: the lingering humanitarian impacts of nuclear weapons testing*.
3. JOHN BORRIE, *A limit to safety: risk, 'normal accidents', and nuclear weapons*.
4. SIMON BAGSHAW, *Population displacement: displacement in the aftermath of nuclear weapon detonation events*.
5. ANNE GURO DIMMEN, *Gendered impacts: the humanitarian impacts of nuclear weapons from a gender perspective*.
6. GRO NYSTUEN, *Legal aspects of nuclear weapons: a 'birds-eye view' of international law and nuclear weapons*.

The papers were edited by John Borrie (jborrie@unog.ch) and Tim Caughley (tcaughley@unog.ch) of UNIDIR, and Torbjørn Graff Hugo (tgh@ilpi.org) of ILPI. Production of this paper series was made possible thanks to the support of the Governments of Norway and Ireland.

Electronic copies of these papers can be downloaded for free from www.unidir.org and www.ilpi.org.

For more information, including commentary and news about international developments related to the humanitarian initiative on nuclear weapons, visit unidir.ilpi.org.