

ILPI



Nuclear weapons and their third parties

Legal remedies for addressing the indirect consequences of nuclear weapons

Background

- Legal scholarship on nuclear weapons has thus far concentrated mainly on the direct impact of a nuclear weapons attack
- This approach **ignores the legal implications** arising from the indirect impact of nuclear weapons accruing to third states not party to the conflict
- If predicted physical outcomes of a nuclear weapons detonation occur, **what would be the legal remedies for affected third party states?**
- Existing conventional and customary international law rules provide insufficient avenues for third party states negatively impacted by a nuclear weapons attack to seek redress

Law of State Responsibility

- First requirement for state responsibility is that there has to **be a violation of an international obligation**
- Attributing a non-state actor's conduct to a state requires application of the '**effective control**' test (acting under instructions, direction or control of a State)
- ICJ judgment in *the Military and Paramilitary Activities in and Against Nicaragua*, test was whether the 'State had effective control of the military or paramilitary op. in the course of which the alleged violations were committed'
- Provided the act of launching a nuclear weapons attack can be attributed to a state, the duty to make reparation flows from general principles of international law
- Likely to involve compensation and potentially accountability measures

Treaty Environmental Law

- A threshold question concerns whether an environmental treaty remains in effect during armed conflict
- General rule: if a treaty addresses its application during armed conflict specifically, those provisions apply
- For environmental treaties, in the absence of any provisions regarding application during armed conflict, it is **presumed to remain in effect**
- Applicable to nuclear use: Convention on Long-Range Transboundary Air Pollution (LRTAP), not a single party from the Asian or African continents
- Possibly relevant conventions include Convention on Biological Diversity, World Heritage Convention and the UN Convention on the Law of the Sea

Customary Environmental Law

- Trail Smelter case: extension of the principles contained in the law of state responsibility to the field of environmental law
- ICJ expressed support for this in the *Nuclear Weapons Advisory Opinion*
- ‘Soft law’ instruments: principles 21 and 22 of the 1972 Stockholm Declaration, and principles 2 and 13 of the 1992 Rio Declaration – additional evidence of customary international law
- **International law Commission (ICL) Draft Articles** – relevant to the health and environmental impact of a nuclear attack

IHL Law of Neutrality

- Directly applicable IHL to the environment: **Article 35 (3) of Additional Protocol I** to the Geneva Conventions
- General rule: between a state party to an armed conflict and a state party that is not party to the armed conflict, **the laws of peacetime** presumed to apply
- A third party state harmed by a nuclear weapons attack – appropriate subset of IHL rules in relation to neutrality codified in Hague Convention (V)
- Michael Bothe: the negative impact of a nuclear weapons attack on a neutral state is an example of a **violation of the law of neutrality**

UN Charter

- A question is whether the indirect health and environmental effects of a nuclear weapons attack could be a violation of the **prohibition on the use of force** contained in Article 2 (4) of the UN Charter
- Could an attack that results in radioactive fallout over a third state be classified as use of force?
- General consensus that 2 (4) refers to **armed force**
- Would apply to the direct attack on the state targeted, but of less utility when looking to avenues for redress for states indirectly affected
- A more likely alternative is to view the indirect effects of a nuclear weapons attacks as a threat to international peace and security, addressed through UN Security Council intervention

Human Rights Law

- Potential violations could be the right to life, embodied under the International Covenant on Civil and Political Rights (ICCPR), and the rights to health and food under the Covenant on Economic, Social and Cultural Rights (ICESCR)
- ICESCR contains no limit on **extraterritorial application** (same has been suggested for the ICCPR)
- Inter-American Commission on Human Rights: upheld jurisdiction over a state for an extraterritorial attack, on the grounds that the attack itself places the victim under the attacking state's effective control
- The primary consideration would likely involve determining whether the health and environmental effects were sufficiently closely connected to the attack and did not depend on intervening factors

International Court of Justice (ICJ)

- Would have jurisdiction over a dispute between states if both states have accepted compulsory jurisdiction, submitted the dispute through a special agreement, or if it is established by virtue of a treaty provision
- **1973 Nuclear Tests cases:** New Zealand challenged French nuclear testing in the South Pacific region
- The ICJ may issue declaratory judgments and may determine the amount of reparations owed for a state's wrongful act
- Third party states could petition the court for a declaratory judgment
- Any compensation received would accrue to the state – individual victims or NGOs could not bring a compensation case to the ICJ

Human Rights treaty bodies

- Article 28 of the ICCPR establishes the Human Rights Committee (HRC), which receives communications from States Parties on their progress in implementation and provides concluding observations
- Only states parties that grant the Committee the authority to handle complaints submitted against them are permitted to submit complaints regarding any other state party
- State parties to the Optional Protocol also grant the HRC competence to receive complaints from individuals against a state party to the Optional Protocol
- Parties submitting a complaint must have exhausted all available domestic remedies first
- The Committee on Economic, Social and Cultural Rights (CESCR) follows a similar approach (only twelve states are party to the Optional Protocol)

International Criminal Tribunals

- Recourse to an international criminal tribunal assumes, at a minimum, that responsibility for a nuclear weapons detonation can be traced to one or more individuals
- The only nuclear-armed states parties to the Rome Statute of the ICC are the United Kingdom and France
- UNSC may refer a potential case to the ICC prosecutor
- The ICC has jurisdiction over war crimes, crimes against humanity, genocide and aggression
- Rome Statute does not criminalise the use of nuclear weapons per se
- The codification of the rule of proportionality would be especially relevant to a nuclear weapons attack – where long-term damage to the environment distinguishes nuclear weapons from conventional weapons

UN Security Council Resolution

- Under Chapter VII of the UN Charter, the Security Council can address the impact of a nuclear weapons attack in the context of a **threat to international peace and security**
- Could establish a compensation commission to provide individuals harmed with reparation
- Following the Iraqi invasion of Kuwait, Security Council Resolution 687 established a claims resolution council to process claims from individuals harmed by the Iraqi invasion
- Security Council action in establishing a claims commission in response to a nuclear weapons attack would allow for greater flexibility and permit tailoring to specific types of damage
- Would depend upon a favourable constellation of political interests among the permanent UNSC members

Ad Hoc Forum

- An alternative forum to seek remedy is through an ***ad hoc tribunal*** established by treaty for that purpose
- *Marshall Islands Nuclear Claims Tribunal* was developed through a bilateral treaty between the US and the Marshall Islands (1983) to compensate residents of the Marshall Islands who were harmed by US nuclear testing
- Marshall Islands tribunal accepted claims based on damage to life, health and property
- To be a viable option, the state responsible for the attack and the state(s) harmed would have to come to an agreement
- If a more favourable compensation mechanism could be established through UNSC action, this avenue would be preferable

Conclusion

- The nature of nuclear weapons harm, in terms of its scope and threat to life, health and the environment, **challenges traditional international law notions** of transboundary harm
- Seeking legal redress is far from straightforward
- The challenges of establishing a chain of causality would depend on a resource-intensive fact-finding process
- For the poorest states, this type of evidence gathering could be prohibitively expensive
- Not only are the humanitarian consequences of nuclear weapons use unacceptable, but the existing means of remediation available are insufficient