A ‘Legal Gap’? Nuclear Weapons Under International Law

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Over the past five years, the international community has devoted attention to the humanitarian, environmental, and developmental consequences of nuclear weapons detonations.

The final document of the 2010 Nuclear Nonproliferation Treaty (NPT) Review Conference referred for the first time in NPT history to the “catastrophic humanitarian consequences of any use of nuclear weapons” and reaffirmed the need “for all States at all times to comply with applicable international law, including international humanitarian law.”

The inclusion of this language in the 2010 document was perhaps not particularly significant in itself, as it stated the obvious. Rather, its significance lay in the initiative it licensed. Arguing that the humanitarian dimension required increased attention, the Norwegian government invited all interested states and organizations to a conference on the humanitarian impact of nuclear weapons in Oslo in March 2013. The next year, the Mexican and Austrian governments organized follow-up conferences in Nayarit and Vienna, respectively. Attracting more government delegations than the NPT Preparatory Committee meetings in 2013 and 2014, the series of humanitarian impact
conferences appears to have supplied a meeting format that was in demand.

At the conclusion of the third and hitherto last of these conferences, the Austrian hosts submitted a document calling on states and other stakeholders to “fill the legal gap for the prohibition and elimination of nuclear weapons.” A few months later, the Austrian government announced that this “Austrian Pledge” would be called the “Humanitarian Pledge,” thus implying a broader ownership of the document. More than 120 states have now formally endorsed it.

One might ask what exactly this legal gap is. Although some claim that there is a gap that should be filled by a new legal instrument prohibiting the use and possession of nuclear weapons, others argue that there is no legal gap. Some have suggested that the legal gap is not one of substantive law but rather a “compliance gap.”

This article seeks to bring some clarity to the question of a potential legal gap, investigating the legality of the possession and use of nuclear weapons under international humanitarian law and disarmament law. It concludes that there is a substantive legal gap because unlike chemical and biological weapons—the other categories of nonconventional weapons—nuclear weapons are not explicitly and comprehensively prohibited. Given the magnitude of the humanitarian consequences of nuclear weapons, this could be considered a paradox.

**The Use of Force**

The primary objective of the UN Charter is to “save succeeding generations from the scourge of war.” The charter forbids the use of military force against states in general, but makes exceptions for self-defense and for use of force authorized by the Security Council. These rules in the charter apply equally to all use of force against states, irrespective of weapon type. No restrictions are imposed on nuclear weapons as such.

In an advisory opinion in 1996, the International Court of Justice (ICJ) responded to the question of whether the use of nuclear weapons could be permitted under international law. The court did not succeed in giving a clear answer, but concluded that it could not rule out the lawfulness of the use of a nuclear weapon in “extreme circumstances of self defence.” Because every armed conflict is likely to be perceived by states as an “extreme” circumstance of self-defense, it was unclear whether the court implied that the rules governing the justification for the use of armed force in the UN Charter (jus ad bellum) might set aside the rules governing the actual conduct of hostilities (jus in bello). It seems clear that if one makes the applicability of the rules governing the conduct of warfare (international humanitarian law) dependent on whether the use of force in itself is perceived as legitimate, then the former rules will seldom be seen as applicable because states commonly perceive the enemy’s use of force as unjustified. These two regimes are therefore, as a matter of law, distinct, applying independently of each other.

**Conduct of Hostilities**

Regulating the conduct of war, international humanitarian law, sometimes called the laws of war or the laws of armed conflict, is arguably the most important legal regime when considering the legality of the use of nuclear weapons. The key instrument is the 1977 Additional Protocol I to the 1949 Geneva Conventions, in addition to international customary law. Several rules laid down here are of particular importance.
The first is the rule of distinction. According to this rule, parties to a conflict may not “employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.” The terror bombings of Coventry, Dresden, and Tokyo during World War II would not be permissible under this provision. The nuclear bombings of Hiroshima and Nagasaki would equally be ruled out.

Several weapons have been explicitly prohibited, in part or in whole, because they have been deemed impossible or difficult to use without violating the rule of distinction. This is the case with biological weapons and chemical weapons, as well as anti-personnel landmines and cluster munitions. Nuclear weapons, however, are not subject to corresponding prohibitions. Accordingly, their use is generally governed by the rules of international humanitarian law.

The second norm of particular importance is the rule of proportionality. According to this rule, even if an attack is successfully directed against military objectives, the attack might still be considered unlawful if it causes harm to civilians and civilian objects that “would be excessive in relation to the concrete and direct military advantage anticipated.” Due to their fundamental properties, nuclear weapons are difficult to use without causing great collateral harm to civilians and civilian objects. Yet, that does not mean that lawful use is inconceivable. In his dissenting opinion to the ICJ’s 1996 advisory opinion, Judge Stephen Schwebel discussed scenarios in which nuclear weapons might be used lawfully. He came to the conclusion that the use of nuclear weapons “might well be lawful” if used, for example, against a submarine far out at sea.

The third rule deals with “precautions in attack.” In the conduct of military operations, “constant care shall be taken to spare the civilian population, civilians and civilian objects.” For example, according to this rule, one must take “all feasible precautions” with a view to minimizing “incidental loss of civilian life, injury to civilians and damage to civilian objects.” In itself, this requirement does not explicitly rule out use of a nuclear weapon. As the International Committee of the Red Cross (ICRC) points out, the rule of precautions “does not imply any prohibition of specific weapons.”

The fourth rule of international humanitarian law of particular importance is the prohibition on means of warfare of a nature to cause superfluous injury and unnecessary suffering. In contrast to the three rules above, which are designed to protect civilians, this fourth rule protects combatants. The first formulation of the unnecessary-suffering rule in modern international law was expressed in the 1868...
St. Petersburg Declaration, which states that the “only legitimate object” of war is to “weaken the military forces of the enemy” and that this object would be “exceeded” by the use of weapons that “uselessly aggravate the sufferings of disabled men, or render their death inevitable.” The use of such weapons, so it says, would be “contrary to the laws of humanity.”

Nuclear detonations, of course, are more than just big explosions. The resulting ionizing radiation lingers for decades, thus increasing the risk of cancer. The rule on superfluous injury and unnecessary suffering contains an implicit requirement of assessing alternatives to the weapon planned for use. As legal scholar Stuart Casey-Maslen argues, “[S]hould a proposed use of nuclear weapons satisfy both the rule of distinction and the rule of proportionality, a further assessment must be made as to whether alternative, less destructive weapons might adequately fulfill the military task.”

A fifth norm concerns the protection of the natural environment. It is generally prohibited for the warring parties to deploy means of warfare that cause widespread, long-term, and severe damage to the environment, although it is a matter of dispute between states whether this rule applies to nuclear weapons. France and the United Kingdom, as two nuclear-weapon states party to Additional Protocol I, have formulated reservations regarding its application to nuclear weapons.

The rules described in the preceding paragraphs make clear that international humanitarian law would prohibit the use of nuclear weapons in almost all conceivable scenarios. For example, a tactical nuclear strike against a submarine far out at sea may not be a violation of the rule on distinction, but it could be a violation of the prohibition against superfluous suffering. Short of a specific ban on nuclear weapons, however, it is possible to argue that their use could potentially be lawful. It is theoretically possible to argue that nuclear strikes can be justified as long as the damage to civilians is not excessive in relation to the concrete, direct military advantage anticipated and there is no available alternative weapon that is less destructive.

The evidence presented at the conferences in Oslo, Nayarit, and Vienna demonstrated that the humanitarian consequences of nuclear weapons actually are worse than many had thought. As the ICRC and others have pointed out, this must affect how the legality of the use of nuclear weapons under international humanitarian law is assessed.

**Disarmament Law**
Contributing to a nuclear weapon-free world is a prominent aspiration of the treaties establishing nuclear-weapon-free zones. Covering large geographical areas and a large number of states, such zones represent an often underestimated legal and political dynamic with regard to protecting individuals and the environment against nuclear weapons. At present, more than 100 countries worldwide, covering more than 50 percent of the Earth’s surface, are parties to these treaties. In the southern hemisphere, 99 percent of the land area is part of such a zone.

These zones may be separated into three main categories: geographical zones covering uninhabited territory or areas, such as the moon or the seabed; regional zones, consisting of clusters of states or entire continents, including Latin America and the Caribbean, Africa, and subregions of Asia; and single, self-declared, nuclear-weapon-free countries. The treaty regimes on these zones 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 zones’ potential for defusing the risk of regional nuclear arms races and decreasing the risk of nuclear weapons falling into the hands of nonstate actors is an important factor in international efforts to protect individuals and the environment from nuclear weapons.

The NPT is a global disarmament treaty that aims to prevent or at least limit the potential for use of nuclear weapons. The NPT preamble reflects a key driving force behind the treaty’s negotiation by referring to “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.”
Although certain scholars have questioned the importance of the NPT in curbing proliferation, there is general agreement among most governments that the NPT has been an effective brake on the spread of nuclear weapons. The NPT has proven less effective with regard to nuclear disarmament. As Irish Foreign Minister Charles Flanagan pointed out at the 2015 review conference, “[N]ot a single nuclear weapon has been disarmed under the NPT or as part of any multilateral process.”

Often presented as a “grand bargain” between nuclear- and non-nuclear-weapon states, the NPT prohibits states from possessing nuclear weapons, except for the five states that had them by January 1, 1967. In exchange for their special status, these five states, like every other state-party, agreed to “pursue negotiations in good faith on effective measures” for nuclear disarmament (Article VI) and to facilitate the development of nuclear energy for peaceful purposes in non-nuclear-weapon states (Article IV). Yet, in the negotiating history and the subsequent review process of the NPT, disarmament always has played second fiddle to nonproliferation. According to NATO official Michael Rühle, “At the time of the treaty’s signing..., article VI seemed of little significance. The treaty was widely understood as a freeze on the number of existing [nuclear-weapon states], not as a means of disarming them. To put it bluntly, the treaty was supposed to perpetuate nuclear inequality indefinitely (or at least until 1995), and article VI was a way of making this fact a little easier to bear.”

This can no longer be said to be the case. In its 1996 advisory opinion, the ICJ concluded that there exists “an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.” An obligation to disarm, however, does not constitute a prohibition. Thus, although not uncontroversial, the statement of UK Prime Minister Tony Blair that the NPT “makes it absolutely clear” that the UK “has the right to possess nuclear weapons” is legally accurate. Comparing the NPT with the regimes on biological and chemical weapons, the most striking difference is that although the latter two contain categorical prohibitions against possession and use, the former does not. Given the horrific humanitarian consequences of nuclear weapons detonations, this may reasonably be called a legal gap.

On top of this legal gap in substantive law comes a possible compliance gap concerning the lack of nuclear disarmament as mandated by NPT Article VI, the 1995 NPT “extension package,” and the final documents of the 2000 and 2010 review conferences. The 2010 document lays out a 64-point action plan. There is considerable debate on whether, for example, the action plan from 2010 ought to have been undertaken in the five-year review period or whether it was a long-term road map. NPT nuclear-weapon states such as Russia and the United States argue that the stockpile reductions they have undertaken over the last couple of decades are more than enough in terms of Article VI implementation, but others argue that full implementation of Article VI requires negotiation of “effective measures” on nuclear disarmament. Article VI applies to all NPT states-parties, thus indicating that such negotiations of effective measures should be multilateral. At the 2015 NPT Review Conference, the Mexican delegation noted that “more than 40 years after the entry into force of the NPT and 20 years after its indefinite extension, the obligation to conduct multilateral negotiations in good faith to fulfil the goal of disarmament, as provided by Article VI of the NPT, is the only one of its provisions that has not been achieved yet.” The South African delegation argued that the framework for implementing Article VI “must be the product of an open multilateral process.”

In fact, the only relevant measure specifically mentioned in the NPT preamble is a comprehensive nuclear test ban. Accordingly, the lack of agreement on a test ban treaty was a major source of friction at the first four review conferences. The Conference on Disarmament, having failed to reach consensus, could not adopt the Comprehensive Test Ban Treaty (CTBT), and the treaty was therefore subsequently adopted by the UN General Assembly in 1996. It has yet to enter into force, however, as it has not been ratified by several so-called Annex 2 states (the 44 states that possessed a nuclear reactor at the time of the CTBT negotiations and whose ratification, under the terms of the treaty’s Annex 2, is necessary for the treaty to enter into force), including six nuclear-armed states. Accession by the United States arguably would be a critical factor in securing support from the remaining Annex 2 states. Recent signals that the Obama administration is looking into reopening a debate on U.S. accession to the CTBT are welcome news, but it remains doubtful that the U.S. Senate can be swayed and that anything can be done before a new U.S. president takes office in...
Concluding Remarks

A polarized debate over nuclear weapons and their legality has taken place over the past decades. Some states have asserted that international law permits the use of nuclear weapons, whereas others hold that their use constitutes a violation of international law. This debate gathered momentum with the UN General Assembly’s request for an advisory opinion by the ICJ in 1994 and the subsequent court hearings and 1996 publication of the opinion. Because the ICJ did not resolve the issue, the frontlines remained where they were, but now with the added element of each side taking the advisory opinion as evidence that it was right. This stalemate over the legal issues might have contributed to neutralizing the public debate rather than provoking public action to pressure governments for greater efforts to diminish the risk posed by nuclear weapons.

International law clearly places very heavy restrictions on nuclear weapons use. Nevertheless, there is no unequivocal and explicit rule under international law against either use or possession of such weapons. Although the two other categories of nonconventional weapons are explicitly prohibited because their use would conflict with the requirements of international humanitarian law, the use, production, transfer, and possession of nuclear weapons are not explicitly prohibited. This may reasonably be labeled a legal gap.

The reference to this legal gap in the Humanitarian Pledge does not make it clear whether a prohibition should be separated from the process of physical elimination and, if so, which to pursue first. The question of sequencing is significant. Should prohibition precede elimination? Should elimination come first when conditions allow, with prohibition then following? Could they be pursued simultaneously, in the form of a treaty that would resemble the Chemical Weapons Convention? Should the prohibition form part of a negotiated structure of legal instruments—a formal framework that could set out an agreed sequence or foreshadow the need to agree on a sequence at the outset of the initial negotiations?

Four main approaches to nuclear disarmament feature frequently in debates in the UN General Assembly First Committee and the NPT review cycle: (1) a comprehensive nuclear weapons convention in which a single legal instrument would provide for prohibition and elimination and in which elimination would precede a prohibition, (2) a framework agreement in which different prohibitions and other obligations would be pursued independently of each other but within the same
broad frame, (3) a step-by-step or building-block approach in which elimination would precede prohibition, and (4) a stand-alone ban treaty in which prohibition would precede elimination.29

Unsurprisingly, governments have different views on these approaches, depending on the country’s status under the NPT, its membership in other treaty regimes, and its military alliances. At this point, it is not clear which view will prevail. It seems safe to say, however, that the legal gap will continue to be a hotly debated topic in the months and years to come, including in the open-ended working group on “[t]aking forward multilateral nuclear disarmament negotiations” that is meeting in Geneva during 2016.30

ENDNOTES


8. Ibid., art. 51(5)(b).


11. Ibid., art. 57(2)(a)(ii).


15. Of the nuclear-armed states, China, North Korea, and Russia are parties to Additional Protocol I without reservations regarding its application to nuclear weapons. France and the United Kingdom are parties but with reservations on its application to nuclear weapons. The rest of the nuclear-armed states—India, Israel, Pakistan, and the United States—are not parties.


17. Such zones are foreseen in Article VII of the nuclear Nonproliferation Treaty (NPT).


23. The text of the Biological Weapons Convention does not explicitly mention use of biological weapons, but the states-parties have agreed that the treaty shall be interpreted to include a prohibition on use. See Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, “Final Document of the Seventh Review Conference,” BWC/CONF.VII/7, January 13, 2012, art. IV(16) (states-parties reaffirming that “under any circumstances the use, development, production and stockpiling of bacteriological (biological) and toxin weapons is effectively prohibited under Article I of the Convention”).


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