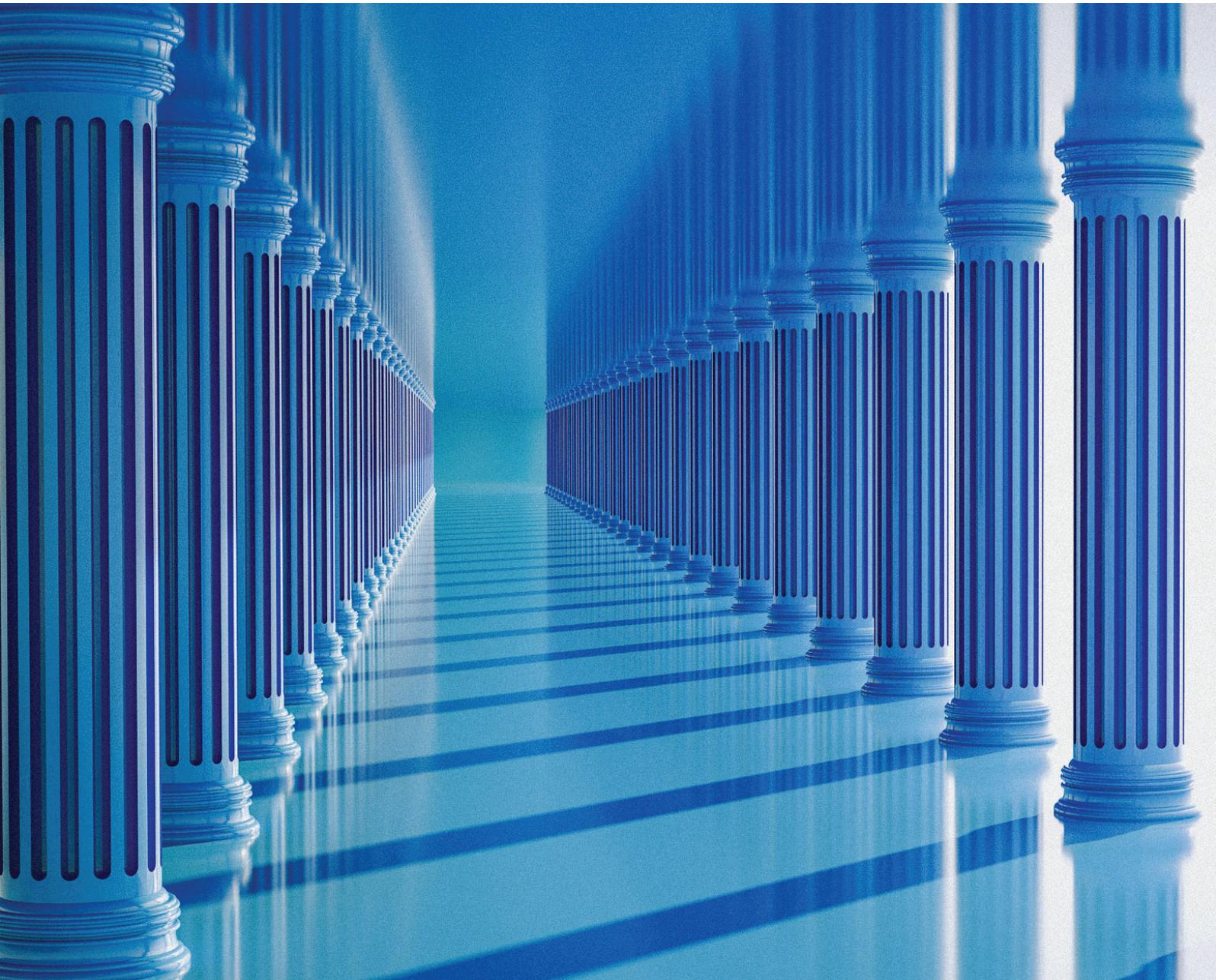


THE LEGALITY OF NUCLEAR WEAPONS – REVISITING THE 1996 ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

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INTRODUCTION

In January 2022 the five NPT nuclear-weapon states affirmed¹ the Reagan-Gorbachev Principle that “A nuclear war cannot be won and must never be fought.”² They also affirmed “... that nuclear weapons—for as long as they continue to exist—should serve defensive purposes, deter aggression, and prevent war.” Shockingly, only two months later, Russia is threatening use of nuclear weapons to deter interference with its aggression against Ukraine.

Mr Putin’s threats highlight that, more than 30 years after the end of the Cold War, nuclear weapons remain an existential threat to the world. While public attention is focused on climate change as the greatest global threat to human civilisation, nuclear war is a danger that is greater and more immediate. In addition to devastation on an unimaginable scale, nuclear war could trigger climate consequences leading to the deaths of billions, even human extinction.

The world still faces the danger of nuclear war because the nuclear-weapon states are not trying to pursue nuclear disarmament. At best it seems they don’t believe that nuclear disarmament is achievable. At worst, it seems nuclear weapons are considered indispensable to national – and for some leaders, personal – identity and power. The situation is exacerbated by nuclear “modernisation” programs, increasing nuclear arsenals, and now nuclear threats. The world cannot afford to ignore this danger any longer, there is an urgent need to recognise the insanity of basing national security on mutually assured destruction (aptly named MAD). We must do everything we can to

persuade the leaders of the NPT nuclear-weapon states, and the other nuclear-armed states, to commit to a process of reducing the risks of nuclear war and eliminating these abhorrent weapons.

The greatest pressure for changing mindsets on nuclear weapons should come from the imperative for human survival – more awareness is needed of the danger of nuclear war and the urgency for risk reduction steps. Knowledge of the international law relating to these weapons might also help to change attitudes, delegitimising nuclear weapons. “Realists” might consider that international law is of secondary concern where issues of national security are at stake, but law is a means of establishing rules of conduct to mitigate existential dangers. These rules can reduce the risk of war through establishing predictability, and can help to frame moral and ethical thinking about nuclear weapons – reinforcing the “taboo” against using these weapons.

In discussing the legal aspects of nuclear weapons, the focus of this paper is the 1996 advisory opinion of the International Court of Justice (ICJ) on the question, “Is the threat or use of nuclear weapons in any circumstances permitted under international law?” This advisory opinion needs to be better known by political leaders, policymakers and the public – it is an essential point of reference in considering the direction that international action on nuclear weapons and nuclear disarmament should take.

The advisory opinion drew heavily on international humanitarian law, so before discussing the opinion it will be helpful to briefly review humanitarian law relating to nuclear weapons.

INTERNATIONAL HUMANITARIAN LAW

International humanitarian law – also known as the law of war or the law of armed conflict – is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict by restricting the means and methods of

¹ Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races, 3 January 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races/>

² Joint statement on the 1985 Geneva Summit, <https://www.reaganlibrary.gov/archives/speech/joint-soviet-united-states-statement-summit-meeting-geneva>

warfare. International humanitarian law is expressed through customary international law and a number of agreements, the principal agreements being the Geneva Conventions of 1949 and the two 1977 Protocols additional to these conventions. The Geneva Conventions, with 196 states parties, are practically universal. The great majority of states are also party to the two Protocols.³

The basic humanitarian principles relating to the legal use of force in an armed conflict include:

- military necessity – use of armed force must be aimed at achieving a legitimate military objective;
- distinction – the belligerents must distinguish between combatants and civilians, and only target combatants. States must never make civilians the object of attack and must never use weapons that are incapable of distinguishing between civilian and military targets; and
- proportionality – a belligerent may apply only the amount and kind of force necessary to defeat the enemy. Every feasible precaution must be taken to avoid civilian casualties. The harm caused to civilians must be proportional and not excessive in relation to the anticipated military advantage.

Protocol I to the Geneva Conventions prohibits indiscriminate attacks on civilian populations, including use of technology whose scope of destruction cannot be limited. Therefore, a war in its totality that does not distinguish between civilian and military targets would be in violation of international humanitarian law. Protocol I also prohibits means of warfare that “cause widespread,

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long-term, and severe damage to the natural environment.”

In addition to international humanitarian law, the principle of neutrality also applies – belligerent forces must not intrude into neutral territory or cause transborder damage to a neutral state due to use of a weapon in a belligerent state.

In considering whether the use of nuclear weapons – the ultimate weapon of mass destruction – could ever be consistent with these principles, relevant factors include:

- the destructive power of even “small” nuclear weapons;
- the deliberate targeting of cities (which are described in military jargon as “countervalue” targets);
- the inevitable spread of radioactive contamination; and
- the prospect of catastrophic environmental damage, leading to climate change (**nuclear winter**).

Nuclear winter describes a situation where dust and soot particles in the upper atmosphere, arising from nuclear explosions and large-scale fires, block sunlight, causing severely cold weather and failures in agricultural production over an extended period. Studies suggest that even a “limited” regional war, say between India and Pakistan each using 50 nuclear weapons, would have severe global consequences.⁴ Nuclear winter could lead to the deaths of many millions, possibly even human extinction.

ICJ ADVISORY OPINION

Considerations such as those outlined above led the UN General Assembly in 1994 to seek an advisory opinion from the ICJ on

⁴ On nuclear winter, see A. Witze, “How a small nuclear war would transform the entire planet”, *Nature*, 16 March 2020, <https://www.nature.com/articles/d41586-020-00794-y>, and G. D. Hess, “The impact of a regional nuclear conflict between India and Pakistan: Two Views”, *Journal for Peace and Nuclear Disarmament*, May 2021, <https://www.tandfonline.com/doi/full/10.1080/25751654.2021.1882772>. See also R. Wolfson and F. Dalnoki-Veress, “The Devastating Effects of Nuclear Weapons”, *MIT Reader*, 2 March 2022, <https://thereader.mitpress.mit.edu/devastating-effects-of-nuclear-weapons-war/>

the legality of the threat or use of nuclear weapons. The Court delivered its opinion in 1996.⁵

The ICJ found

*There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such ...*⁶

but it also affirmed that international humanitarian law applies in cases of use, or threat of use, of nuclear weapons. The Court concluded that the indiscriminatory nature, destructive force and environmental consequences of nuclear weapons were such that:

*... the use of nuclear weapons would generally be contrary to the rules of international law ... and in particular the principles and rules of humanitarian law.*⁷

The Court noted that

The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. ... it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

The Court commented further that

In view of the unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for [the principles and rules of law applicable in armed conflict].

It was argued to the Court that use of low-yield weapons against targets in remote

locations, such as warships on the high seas, where there might be comparatively few civilian casualties, could be lawful. The Court considered the proponents for this argument had not adequately explained the circumstances justifying such use. Most importantly, the Court was concerned that such limited use could escalate into the all-out use of high yield nuclear weapons. The Court considered therefore that it had insufficient basis to determine that such use could be legal. A further point is that the majority of nuclear weapons are not low-yield and clearly are not intended for the scenario put to the Court.

The Court was asked to consider whether nuclear deterrence constitutes a threat to use nuclear weapons, and is therefore unlawful. Nuclear deterrence necessarily implies nuclear retaliation – an aggressor is deterred from using nuclear weapons by the fear that the attacked state will retaliate in kind. Proponents of nuclear deterrence point out that if deterrence is effective no attack will occur, so the need for retaliation will not arise. The Court noted the strong adherence by nuclear-weapon states to the practice of deterrence, but declined to pronounce on the legality of deterrence. Rather, the Court addressed deterrence indirectly through its consideration of the right of self-defence.

On self-defence, the Court referred to

... the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

However, the Court emphasised that any

*... 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 ...*⁸

⁵ <https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

⁶ Conclusion B.

⁷ Conclusion E.

⁸ Conclusion D.

This led to a much misunderstood conclusion, that:

... 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-defence, in which the very survival of a State would be at stake.⁹

This does not, as some have argued, amount to a conclusion that in some circumstances use of nuclear weapons would be legal. Rather, the Court considered it was unable to rule on the policies of nuclear deterrence and retaliation in the context of the right to self-defence. The Court recognised the irreconcilable conundrum here – that a state might wish to resort to nuclear weapons in an extreme circumstance of self-defence where its very survival was at stake, but any use of such weapons must comply with international law, a requirement that seems impossible to meet – and stated:

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

This led the Court to conclude

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.¹⁰

NUCLEAR DETERRANCE

Nuclear deterrence, being based on the

⁹ Conclusion E.

¹⁰ Conclusion F.

preparedness to retaliate with nuclear weapons, is deeply problematic. Just as a nuclear attack would inevitably violate international humanitarian law, so too would nuclear retaliation. If retaliation cannot meet the principles of necessity, distinction and proportionality, and cannot avoid widespread, long-term, and severe damage to the environment, then it will violate international law.

However, the inescapable reality is that in the absence of nuclear deterrence an aggressor may have little inhibition against using nuclear weapons. Proponents of nuclear deterrence maintain it has been successful (so far) in preventing nuclear war. So, regardless of the legal and moral issues with nuclear retaliation, while nuclear weapons continue to exist nuclear deterrence will continue to have a vital place in national security policies. As the ICJ concluded, the only sure way to resolve this conundrum is to eliminate nuclear weapons.

TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW)

Any discussion of the legality of nuclear weapons must include the TPNW. The proponents hope the TPNW will establish the prohibition of nuclear weapons as a legal norm. However, a declaratory treaty will not achieve this, a treaty binds only those states that accept it. Whether the principles set out in the treaty could in time express a norm of customary international law, applicable to all states, would depend on state practice; more particularly, on the practice of the states that currently have nuclear weapons.

A norm on the prohibition of nuclear weapons would require that most, if not all, the nuclear-armed states consider that a prohibition applies and take action to eliminate nuclear weapons. What is needed – what we all should be working towards – is for states to act consistently with the obligations they already have under international law. If they did so, this would help to reduce the risk of nuclear war, and would set in train a process leading to nuclear disarmament.

REFLECTING INTERNATIONAL LEGAL OBLIGATIONS IN NATIONAL POLICIES AND DOCTRINES

International humanitarian law principles should be reflected in national military policies, practices and doctrines. With respect to nuclear weapons, this is clearly not the situation. The range and numbers of nuclear weapons deployed, the plans for using these weapons in war-fighting, the development of new weapon types, increases in weapon numbers – all of this is incompatible with the fact that use of nuclear weapons will inevitably be unlawful. Furthermore, it is incompatible with the NPT obligation to cease the nuclear arms race and pursue nuclear disarmament.

A national position reflecting international legal obligations would be broadly along these lines:

- **Commitment to a policy of no first use or sole purpose – namely, the sole purpose of nuclear weapons is to deter the use of nuclear weapons by others. As a consequence:**
 - » Nuclear weapon numbers and types would be capped; there would be no “modernisation”, no new weapon systems, and no additional weapons produced.
 - » A realistic minimum credible deterrent would be determined, with the commitment to withdraw from service and eliminate nuclear weapons in excess of this deterrent.
- **Risk reduction steps would be taken as a matter of urgency. These include:**
 - » Establishment of hotlines and other communications channels for resolving urgent questions regarding military actions possibly involving nuclear weapons.
 - » De-alerting – removing nuclear weapons from launch-on-warning readiness.
 - » Strengthening checks on launch authority. It is simply too dangerous to have the power to initiate nuclear war in the hands of one person, or a group dominated by one person.

- A process of strategic dialogue would be established, involving all nuclear-armed states, to resolve major differences by diplomatic means, ensure clarification of nuclear doctrines, discuss force sizes and other specifics of nuclear deterrence, and so on.
- In addition, a process for arms control negotiation would be established, to reach agreement on phased reductions and related verification, transparency and confidence-building measures.

The risk reduction measures referred to above are interrelated. A commitment to no first use would obviate a launch-on-warning posture, thereby enabling de-alerting. This would also help address concerns about launch authority (there would be no need for the rapid reaction required for launch-on-warning). Launch-on-warning is particularly dangerous; historically there have been several “near-misses”, where mistaken belief that a nuclear attack was in progress nearly led to nuclear missiles being launched.

No first use/sole purpose declarations, possibly leading to a treaty, are an obvious follow-on from the statement of 3 January 2022 by the nuclear-weapon states that a nuclear war cannot be won and must never be fought. Critics question how a no first use declaration can be trusted – but verifiable indicators can be established to demonstrate that nuclear deployments have been altered consistent with such a declaration. In addition, each nuclear-armed state would retain nuclear deterrence, which should give some reassurance that the others would meet their no first use commitments.

Regarding a minimum credible deterrent, current nuclear weapon numbers are many times in excess of what is needed. This is not only inherently dangerous – if a nuclear war starts there is no way of knowing whether escalation could be stopped or would continue until all weapons have been used – but having more weapons than necessary could increase the risk of unauthorized use or seizure, and maintaining a large arsenal incurs very substantial costs.

A study during the Cold War showed that a relatively small number of nuclear weapons could inflict unacceptable damage on a state, hence would be an effective deterrent. This study of a “limited” nuclear war, published in 1979¹¹ but still a landmark study today, showed the catastrophic effects of a scenario in which the US and the Soviet Union each used 80 warheads targeting petroleum and transport centres. The consequences would clearly exceed any definition of “acceptable” damage. To quote just two findings:

Nobody knows how to estimate the likelihood that industrial civilization might collapse in the areas attacked; additionally, the possibility of significant long-term ecological damage cannot be excluded.

The uncertainties are such that no government could predict with any confidence what the results of a limited attack or counterattack would be even if there was no further escalation.

The study did not take into full account the potential effects of a nuclear winter because this concept was fairly new at the time.

If 80 nuclear weapons can provide an effective deterrent, it makes absolutely no sense to have hundreds, let alone thousands of weapons. A strategic dialogue process is very important here, because nuclear weapon numbers are driven by a number of factors, including the effect of defensive systems on deterrence. A deterrent is calculated on the assumption that all weapons reach their target – defence systems against missiles, or against missile-carrying submarines, affect this calculation, and can be destabilising. Nuclear deterrence depends on mutual vulnerability; if a state believes its deterrent has been rendered ineffective it will fear a pre-emptive strike. This will prompt a major increase in weapons, to overwhelm defences. In a worst case a state feeling under threat may itself act pre-emptively. To ensure strategic stability, comprehensive dialogue will be needed to

resolve a range of issues, including defensive systems.

These issues were studied in depth by the International Commission on Nuclear Non-Proliferation and Disarmament, which reported in 2009.¹² Unfortunately little has changed since then, and this report remains highly relevant today. The Commission set out a two-phase process, focusing in the short and medium terms on reaching a “minimization point”, characterized by substantial nuclear weapon reductions, agreed no first use doctrine, and force deployments and alert status reflecting that doctrine, followed by a process leading to elimination.

The suggested minimization point was a total of 500 nuclear warheads each for the US and Russian arsenals, and no more than 1,000 warheads in total for the other nuclear-armed states. Clearly moving below these numbers would be challenging, but the process of working together to reach the minimization point would help to build the high degree of confidence and trust needed.

CONCLUSION

Nuclear weapons are simply too dangerous to use. While they exist, however, there is the risk they will be used, by a rogue leader, through mistake or misunderstanding, by unauthorized action or by accident. Nuclear weapons present an existential threat both to their possessors and to the world as a whole. Current events highlight that it is a vital national interest of every state to reduce the danger of nuclear war. The realization that “a nuclear war cannot be won and must never be fought” must be taken seriously and acted upon. Delegitimization of nuclear weapons is an important part of this. With respect to nuclear weapons, international law expresses not only what is legally and morally right but what is essential for human survival.

11 The Effects of Nuclear War, US Office of Technology Assessment, May 1979, <http://atomicarchive.com/Docs/pdfs/7906.pdf>

12 Eliminating Nuclear Threats, icnnd.org/reference/reports/ent/pdf/icnnd_report-eliminatingnuclearthreats.pdf

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ABOUT APLN

The Asia-Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament (APLN) is a network of political, military, and diplomatic leaders from countries across the Asia-Pacific tackling security and defence challenges with a particular focus on addressing and eliminating nuclear weapon risks.



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