

The Legality of Nuclear Weapons: A Complex Debate in International Law

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Abstract

This article examines the long-standing debate on the legality of nuclear weapons within the framework of international law. Although nuclear weapons are not directly prohibited by the United Nations Charter, the principles of the peaceful settlement of disputes and the prohibition of the use of force have raised questions about the legality of nuclear weapons. The article explores the main legal perspectives, including the 1996 advisory opinion of the International Court of Justice (ICJ) and the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW). By examining these sources, the article addresses arguments for and against the possession and use of nuclear weapons, highlighting the humanitarian and environmental consequences of nuclear weapons.

Keywords

Nuclear Weapons; International Law; UN Charter.

1. Introduction

The issue of the legality of nuclear weapons have long been a subject of intense debate in the context of international law. The United Nation (UN) Charter, adopted in 1945, serves as the foundational document of international law and sets out the principles and norms that govern the conduct of states. At the same time, as a source of law directly referred to in the statement in question, its content should be examined first. A thorough reading of the UN Charter reveals that there is no textual reference to nuclear weapons in any of its provisions. Therefore, it does not seem to be textually correct to say that the possession, use or threat to use of nuclear weapons by a State is in violation of the UN Charter. Although the UN Charter itself does not contain clear provisions on the relevant content of nuclear weapons, its provisions on the obligation to settle disputes peacefully and the prohibition of the use of force are two principles that cannot be ignored when discussing the legitimacy of nuclear weapons. It is around these two principles that some opponents of nuclear weapons have reasonably questioned the legitimacy of nuclear weapons in the context of the UN Charter. In other words, the rationality of the statement in question may derive from these two principles. In addition, the Treaty on the Prohibition of Nuclear Weapons (TPNW), which was adopted in 2017 and comes into force in 2021, appears to provide opponents of nuclear weapons with an new international legal source to support their views. However, since none of the world's nine nuclear-weapon States has signed the treaty, the effectiveness of TPNW itself is also controversial.

This article will discuss the legality of nuclear weapons in the context of international law in two parts, using the adoption of TPNW as a boundary. The first part of this article will focus on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice (ICJ) Reports 1996, which has discussed the legality of the possession, use and threat of use nuclear weapons in the context of international law. Then, this article will look at TPNW itself and the potential role of the TPNW in illegitimizing nuclear weapons in the future.

2. The 1996 Advisory Opinion of ICJ

In response to the then growing international division on the legality of the use of nuclear weapons, the International Court of Justice, at the request of the General Assembly of the United Nations, issued an advisory opinion on 8 July 1996. In this opinion, the ICJ has discussed the legality of use or threaten to use nuclear weapons. One of the advisory has stated 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.” From this conclusion, it is clear that the view that International Humanitarian Law (IHL) rules apply to nuclear weapons was upheld by the ICJ. As an important component of the IHL, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) have clearly established restrictions on weapons of war in article 35 and establishes the principles of distinction and proportionality through Article 51, 52 and 57. These contents are the most relevant to determining the legality of the use of nuclear weapons. To be specific, paragraph 1 of the article 35 clarifies that in any armed conflict, the parties' choice of methods or means of warfare should be limited. Paragraph 2 of the article then prohibits the use of weapons that cause superfluous injury or suffering, and paragraph 3 prohibits the use of methods or means of warfare that cause widespread and long-term environmental damage. In addition to this, the principle of distinction established in articles 51 and 52 of the Protocol 1 means that the military operations may be directed only against military objectives of the parties to the conflict and not against civilians or civilian objects; the principle of proportionality established in articles 51 and 57 is intended to prohibits States from using force in such a way as to causes civilian casualties disproportionate to the military advantage. These are also important in determining whether nuclear weapons have been used in violation of IHL. Nuclear weapons are characterised by their destructive power that is difficult to control and the dangers that persist long after their use. Given the difficulty of precisely controlling the use of nuclear weapons in space and time, the use of nuclear weapons would inevitably cause immeasurable harm to the civilian population in the target area, which means that the use of nuclear weapons would violate the principles of distinction and proportionality. Based on the above provisions and the characteristics of nuclear weapons, the use of nuclear weapons in any armed conflict would be a violation of humanitarian law. This is the main basis on which most opponents of nuclear weapons argue that the States use or threat to use nuclear weapons are violating the international law.

However, the second half of this opinion gives the proponents of nuclear weapons a legal argument in favour of their point of view, which recorded that “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-defence, in which the very survival of a State would be at stake”. In addition to this, Article 51 on the right to self-defence also give a provides a source of law for the use of nuclear weapons in specific circumstances. The definition of the right to self-defence is similarly debated in the international community, so there is no uniform conclusion as to whether the use or threat to use nuclear weapons is a violation of the UN Charter.

As to the legality of the possession of nuclear weapons, although at the end of the opinion, the ICJ expressed its support for nuclear disarmament, which underscores the legal obligation in Article VI of the Nuclear Non-Proliferation Treaty (NPT) to eliminate nuclear weapons. Behind these provisions for the elimination of nuclear weapons seems to be a questioning and rejection of the act of possessing nuclear weapons. However, in the absence of a specific time limits on nuclear disarmament, these articles could hardly be used to prove the illegality of the possession of nuclear weapons.

3. The Treaty on the Prohibition of Nuclear Weapons

The United Nation General Assembly (UNGA) adopted the TPNW on July 7, 2017, with 122 voted in favour. Motivated by frustration and dissatisfaction with the reality of the slow pace of achieving nuclear disarmament, a number of non-nuclear-weapon States and the International Campaign to Abolish Nuclear Weapons (ICAN) came together to promote the formation of the TPNW. In other words, TPNW reflects the great concern of the international community over the potentially devastating consequences of nuclear weapons, as well as the deep anxiety over the current stagnation of the nuclear disarmament process. According to the content of TPNW, this treaty directly forbids the possession, use and threat of use of nuclear weapons. However, as previously stated, the treaty has not been accepted by the nuclear-weapon States as has the NPT. The effectiveness of the treaty is therefore in question. According to the Vienna Convention on the Law of Treaties, TPNW meets the definition of a treaty and therefore constitutes a binding international law. However, the Vienna Convention on the Law of Treaties makes explicit the general rule that "A treaty does not create either obligations or rights for a third State without its consent", which means that the treaty will not produce legal obligation on States that have not signed it. Since the Treaty had been rejected by all States that currently possessed nuclear weapons, it was not binding on the nuclear-armed States. This means that, although the Treaty contains detailed provisions on the illegality of nuclear weapons, since it has no legal effect on States possessing nuclear weapons, it could not negate the legality of the possession, use or threat of use of nuclear weapons by those States.

Nevertheless, the promoters of TPNW argue that it is not intended to be directly binding the nuclear-weapons States. The idea behind the TPNW is that it will strengthen the rules against the use and possession of nuclear weapons by stigmatising them, rather than expecting that the treaty's entry into force will automatically eliminating these weapons. Moreover, the exist of TPNW would have the potential to stimulate debate on the issue of legitimacy of nuclear weapons within the nuclear-armed States, thus contributing to the process of elimination of nuclear weapons. As Beatrice Fihn said, the States take their international profile in a serious position, and the stigmatisation of nuclear weapons through the ban treaties may create the perception that this kind of weapons is unacceptable, which may have negative impact on the image that a nuclear-possessor State wishes to present to the international community. In other words, a prohibitive treaty such as the TPNW could directly challenge the level of acceptance of the possession and use of nuclear weapons by any state under any circumstances, thus providing further motivation for the development of treaties, laws and norms for elimination of nuclear weapons.

The internal logic of TPNW proponents is that through the act of stigmatising nuclear weapons it can accelerate the establishment of prohibitive norms for nuclear weapons, which could have the binding force on the States, thus contributing to the global elimination of nuclear weapons. The crucial point of this logical is whether the prohibitive norm would be in force for all States. Taking the example of the restrictive role of prohibitive norms in the measures of war, it seems that such norm could indeed have a significant influence on the States. The theory of nuclear taboo has detailed clarified this influence. The nuclear taboo theory holds that the norms prohibiting the use of nuclear weapons, although not yet complete, stigmatise nuclear weapons as an unacceptable weapon of mass destruction, thus preventing nuclear-armed states from making decisions on the use of nuclear weapons in their choice of warfare. In addition to this, in the context of the prohibition of the use of chemical weapons, stigmatisation of chemical weapons is an important factor influencing the non-use of chemical weapons in a war. The combination of stigmatisation and other factors made chemical weapons politically and militarily unacceptable to States, and ultimately prevented their use on the main battlefields of the World War II. Thus, the stigmatisation of a certain type of weapon and the consequent

establishment of prohibitive norms could indeed limit the use of that type of weapon in warfare. This demonstrates that once the international norms prohibiting nuclear weapons were shaped, it could begin to influence the international community. In other words, whether a State accedes to the text behind the norm, it will be guided and even constrained by it.

4. Conclusion

In conclusion, the legality of nuclear weapons under the UN Charter is a complex and controversial issue. While the UN Charter does not explicitly ban nuclear weapons, their possession and use may potentially violate the principles of non-aggression and peaceful settlement of conflicts. On the other hand, the interpretation of the right to national security and self-defence plays a significant role in determining the legality of nuclear weapons. However, the threat posed by these weapons undermines the fundamental goals of the UN Charter, which are to maintain international peace and security. The adoption of TPNW is the response to this situation. The TPNW has had a profound influence on global nuclear politics, challenging the established nuclear order, reframing the narrative surrounding nuclear weapons, and emphasizing the humanitarian consequences of their use. It represents a significant legal-normative challenge to the legitimacy of nuclear weapons and has the potential to set new standards under international law. As such, further discussions, and efforts like TPNW should be made to address this issue and promote disarmament to ensure a safer and more peaceful world.

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