

Can international humanitarian law protect us from the atomic bomb?

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Provocative as it is, the author's question is all the more relevant at a time when the war in Ukraine has once again raised the spectre of the use of nuclear weapons. Patrice Bouveret takes us through the dilemmas of international humanitarian law which has enabled a treaty banning the use of nuclear weapons to be adopted but cannot force the States possessing them to sign up to it.

Intuitively, we all have good reason for believing that international humanitarian law (IHL) and the atomic bomb – and more broadly the nuclear deterrence strategy based on this weapon – are, by definition, contradictory. In many ways, the very nature of nuclear weapons completely undermines the concept of IHL. The question still stands, however, given the new international agreement adopted by the United Nations (UN) on 7 July 2017 and which came into force on 22 January 2021. It was in fact on the very basis of IHL that the Treaty on the Prohibition of Nuclear Weapons (TPNW) was born, after decades of being blocked at the UN.

An extraordinary weapon

Nuclear weapons were developed during the Second World War by the United States, which is the only country to have used them, when the Japanese cities of Hiroshima and Nagasaki were bombed on 6 and 9 August 1945. Their capacity for destruction, unparalleled by other types of weapons, immediately prompted the international community to consider them to be of a radically different and specific nature. As Albert Camus summarised in an editorial published on 8 August 1945 in the daily newspaper *Combat* of which he was the then editor:

“Our technical civilisation has just reached its greatest level of savagery. [...] Before the terrifying prospects now available to humanity, we see even more clearly that peace is the only battle worth waging. This is no longer a prayer but a demand to be made by all peoples to their governments – a demand to choose definitively between hell and reason”.

Nuclear weapons are in fact outside the scope of IHL which applies when conflicts break out with a view to limiting, as much as possible, the suffering and destruction inherent in war. Their destructive power should have disqualified them from the outset, at their very conception, for reasons of non-compliance with the principles of the law of war, which are based on the distinction between civilian and military populations and infrastructure, as well as on the proportionality of a response to an attack. There is one more feature of the atomic bomb that must not be forgotten: its consequences

also affect future generations. Consider the children and grandchildren of the *hibakusha*, the Japanese term used to describe the survivors of the bombings on Hiroshima and Nagasaki: having inherited genes modified by radiation, they suffer from various radiation-induced conditions. This trans-generational problem also concerns the victims of the more than 2,000 nuclear tests carried out for the purposes of developing these weapons, including 210 by France in the Sahara and Polynesia.¹

Confiscation by the permanent members of the Security Council

Well aware of the “extraordinary” nature of this new weapon, which he nevertheless ordered to be dropped on Japan, US president Harry Truman proposed the Baruch Plan in June 1946. This plan provided for the gradual transfer of possession of American nuclear weapons to an ad-hoc UN commission with the aim of countering nuclear proliferation. It was thus a response to the first resolution of the first UN General Assembly, adopted on 24 January 1946, which established “a Commission to deal with the problems raised by the discovery of atomic energy”.² In the process of developing their own arsenal, the Soviets rejected the American plan and came up with a counter-proposal that was just as unlikely to be accepted by the United States: they suggested establishing an international treaty outlawing nuclear war, which would have involved the destruction of all American weapons.

The failure of this first attempt by the victors of the Second World War to control nuclear weapons marked the beginning of the Cold War and the nuclear arms race. The USSR detonated its first bomb in 1949, followed a few years later by the United Kingdom (1952), France (1960) and China (1964). The military and the politicians then developed various concepts to justify the development of these weapons, including the strategy of the balance of terror, or mutually assured destruction. This extreme form of deterrence argues that the benefits of an attack would be outweighed by the losses, since each of the belligerents would be destroyed thanks to being permanently on alert to the possibility of a second strike, even if the first country hit were destroyed.

After going through various stages, this “confiscation” of nuclear-weapons control by the permanent members of the Security Council led to the adoption of the Non-Proliferation Treaty (NPT) at the UN in 1968. Mainly at the initiative of the United States and the United Kingdom, this treaty was established to counter the risk of other countries – some thirty at the time – mastering this technology, and therefore the possibility of possessing it, which would undoubtedly have increased the risk of its use. Let us not forget that six years earlier, in 1962, the Cuban Missile Crisis had brought the world to the brink of nuclear war.

Opposition unites

In its preamble, the NPT solemnly refers 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

¹ Christian Sueur, *Les Conséquences Génétiques des Essais Nucléaires français dans le Pacifique, chez les petits-enfants des Vétérans du CEP, et des habitants des Tuamotu Gambiers*, janvier 2018. This report is available on the website of the *Observatoire des armements*, « Conséquences génétiques des essais nucléaires : l'étude accablante du docteur Christian Sueur en Polynésie », 21 janvier 2018, <https://www.obsarm.info/spip.php?article300>

² ONU : *Résolutions adoptées par l'Assemblée générale au cours de sa première session*, <https://www.un.org/french/documents/ga/res/1/fres1.shtml>

take measures to safeguard the security of peoples”.³ For its proponents, however, the NPT “is the cornerstone of the global nuclear non-proliferation regime”, as reaffirmed on 19 May 2023 at the G7 Summit of heads of state and government in Hiroshima.⁴ In other words, the world’s leading powers want to be able to retain their nuclear weapons whilst preventing other countries from having them. To put it yet another way (and fifty-five years before this G7 summit held in a city eminently symbolic for our subject), for the first time in international law, this treaty introduced a status of inequality between its members. The NPT is based on three pillars:

1. a State that has conducted a nuclear test is deemed to be a “nuclear-weapon State Party” and undertakes not to transfer nuclear weapons and related technologies;
2. all other signatories to the treaty – designated as “non-nuclear-weapon States Parties” – undertake not to manufacture or acquire these weapons, in exchange for which they will have access to civilian nuclear power;
3. as stated in Article VI: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” As this Article does not contain an obligation of results or a timetable, it therefore offers the opportunity for nuclear-weapon States Parties to retain nuclear weapons “legally” on the pretext that as long as there are countries that want to obtain these weapons, the security conditions have not been met to allow disarmament.

The Treaty came into force in 1970 for a period of twenty-five years and was renewed indefinitely in 1995, thus “legalising” the nuclear powers’ lack of political will to achieve nuclear disarmament, to which they had nevertheless committed themselves under Article VI. This Treaty is almost universal, as only three countries that wanted to obtain nuclear weapons at the time (Israel, India and Pakistan) did not sign it, whilst a fourth, North Korea, withdrew from it in 2003, just before conducting its first tests. Every five years, an NPT Review Conference brings to the fore all the contradictions regarding these weapons. On the one hand, the permanent members of the Security Council – the nuclear-weapon States Parties – and their allies reaffirm the position explained above; on the other, the majority of the non-nuclear-weapon States Parties call for progress towards nuclear disarmament, spurred on by civil society organisations which advocate for it. Let us not forget that the campaign against these weapons, which began in the early 1950s, was based on the “never again” principle in reference to the aftermath of the bombing of Hiroshima and Nagasaki. The International Committee of the Red Cross, the “guardian of international humanitarian law”, sums it up perfectly:

“Nuclear weapons are the most terrifying weapon ever invented: no weapon is more destructive; no weapon causes such unspeakable human suffering; and there is no way to control how far the radioactive fallout will spread or how long the effects will last. [...] In addition to the immense short-term loss of life, a nuclear war could cause long-term damage to our planet. It could severely disrupt

³ Full text of the treaty (in French): ONU : *Conférence des Parties chargées d’examiner le Traité sur la Non-prolifération des armes nucléaires*, 3-28 mai 2010, <https://www.un.org/fr/conf/npt/2010/npttext.shtml>

⁴ L’Élysée, *Vision des chefs d’État et de gouvernement du G7 de Hiroshima sur le désarmement nucléaire*, lettre d’information du 19 mai 2023, <https://www.elysee.fr/emmanuel-macron/2023/05/19/vision-des-chefs-detat-et-de-gouvernement-du-g7-de-hiroshima-sur-le-desarmement-nucleaire>

HUMANITARIAN ALTERNATIVES

the Earth’s ecosystem and reduce global temperatures, resulting in food shortages around the world.”⁵

By basing the issue of nuclear weapons solely on the theme of proliferation, the nuclear powers have effectively limited it, whilst locking down the debate to their own advantage. Insofar as they are weapons of mass destruction whose effects are indiscriminate, however, nuclear weapons should have been banned from the outset, under both the Geneva Conventions of 1949 and the prohibition contained in Additional Protocol I of 1977, and removed from the military arsenal of States on the very basis of international humanitarian law.

This has never happened because the countries possessing nuclear weapons have always wanted – and still want – to preserve the extraordinary nature of these weapons to their own advantage, basing their argument precisely on that extraordinary nature. Those who have signed and ratified the texts on which international humanitarian law is based, including Additional Protocol I of 1977, have at the same time expressed certain reservations about their interpretation. This is the case of France, for example:

“the Government of the French Republic continues to consider that the provisions of the Protocol relate exclusively to conventional weapons, and that they can neither regulate nor prohibit the use of nuclear weapons, nor prejudice other rules of international law applicable to other weapons necessary for France to exercise its inherent right of self-defence.”⁶

The annual General Assembly of the United Nations reflects this permanent tension between the two dynamics: on the one hand there are States which, for reasons of power, want to retain these weapons, which in turn allows them to lock down the international system to their advantage; and, on the other, there are States and populations which want to eliminate these weapons. Any State using such weapons, indeed, “is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization”, as highlighted in Resolution 1653 (XVI) adopted by the UN General Assembly on 24 November 1961. Resolutions calling for the abolition of nuclear weapons are adopted every year, but they remain unheeded, blocked at the Security Council where the nuclear powers have the right of veto.

In a case referred to it in 1994, the International Court of Justice delivered an advisory opinion on 8 July 1996 which reflects the contradictions between the bomb and IHL: after intense debates, the Court noted that “in view of the unique characteristics of nuclear weapons, the use of such weapons seemed scarcely reconcilable with respect for the requirements of the law applicable in armed conflict”. But “in view of the current state of international law and of the elements of fact at its disposal, [it] cannot conclude definitively whether the threat or use of nuclear weapons would be

⁵ Comité international de la Croix-Rouge, *Armes nucléaires – une menace intolérable pour l’humanité !*, 7 août 2018, <https://www.icrc.org/fr/document/armes-nucleaires-une-menace-intolerable-pour-lhumanite>

⁶ « Décret n°2001-565 du 25 juin 2001 portant publication du protocole additionnel aux conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (protocole I) (ensemble deux annexes), adopté à Genève le 8 juin 1977 » [“Decree No. 2001-565 of 25 June 2001 regarding the Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) (with two appendices), adopted in Geneva on 8 June 1977”], *Journal officiel de la République française* n°0150 du 30 juin 2001, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000215403>

lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.⁷

From illegitimacy to illegality

To break the deadlock, many civil society organisations decided to come together in 2007 to form the International Campaign to Abolish Nuclear Weapons (ICAN) and overcome the problems created within the UN. With its reasoning based on the risk of nuclear proliferation, the coalition focuses on IHL and the catastrophic consequences of the use of nuclear weapons and the inability of humanitarian organisations to cope with them. In the space of ten years, this IHL-based approach, with the involvement of the Red Cross and Red Crescent movements, has managed to create the conditions for a majority coalition of non-nuclear-weapon States Parties within the United Nations General Assembly to begin a process of negotiating a legally binding instrument to ban nuclear weapons with a view to their elimination.

The nuclear powers and their allies have brought all their weight to bear but failed to block this new humanitarian dynamic modelled on the campaigns that, a few years previously, had led to a ban on anti-personnel mines and cluster bombs.

After four weeks of intense negotiations at UN headquarters, a treaty was drawn up and adopted on 7 July 2017 by 122 States. Unlike the NPT, this Treaty on the Prohibition of Nuclear Weapons (TPNW) is based on the rights and principles of international humanitarian law. Opened for signature on 20 September 2017, it entered into force on 22 January 2021, ninety days after the fiftieth ratification. By the end of May 2023, ninety-two countries had signed it, sixty-eight of which had ratified it. The manufacture of these weapons, their trade and the threat to use them (*i.e.* nuclear deterrence) are prohibited. Assistance for victims and remediation of nuclear damage are also included in the TPNW. This was undeniably a victory which culminated in ICAN being awarded the 2017 Nobel Peace Prize.⁸ And brought hope for the abolition of these weapons before any new catastrophic use.

Like any other treaty, however, it only applies to the States that have ratified it, which the nine nuclear powers and their allies stubbornly refuse to do. The debate on the elimination of nuclear weapons has thus been revived in the international community. The situation is once again facing deadlock, however, despite the fact that recourse to IHL has made it possible to obtain a ban on these weapons. Are we not faced here with the limits of the humanitarian approach or, to use the title of this issue, with a major step backwards for IHL?

Translated from the French by Derek Scoins

⁷ Cour internationale de justice, *Licéité de la menace ou de l'emploi d'armes nucléaires*, avis consultatif du 8 juillet 1996, <https://www.icj-cij.org/fr/affaire/95>

⁸ To learn more about ICAN and its work in France see: <https://icanfrance.org>

Biography

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